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VOLUME 244

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NORTH CAROLINA REPORTS

VOL. 244

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1956

FALL 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:

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

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2 "	"	6	"
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1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
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5 " "	"	40	"
6 " "	"	41	"
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Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1956—FALL TERM, 1956.

CHIEF JUSTICE:

M. V. BARNHILL.[1]

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICES:

W. A. DEVIN,[3] M. V. BARNHILL.

ATTORNEY-GENERAL:

GEORGE B. PATTON.[4]

ASSISTANT ATTORNEYS-GENERAL:

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

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

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[1]Resigned 21 August, 1956. Succeeded as Chief Justice by J. Wallace Winborne.
[2]Succeeded as Associate Justice by William B. Rodman, Jr.
[3]On recall from 9 April, 1956, through 27 April, 1956, and from 21 May, 1956, to end of term, and for the Fall Term, 1956.
[4]Appointed Attorney-General upon the appointment of Justice Rodman to the Supreme Court.

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.
J. B. CRAVEN, JR.[1]	Morganton.

EMERGENCY JUDGES.

HENRY A. GRADY	New Bern.
JOHN H. CLEMENT[2]	Walkertown.
FELIX E. ALLEY, SR.	Waynesville.
H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.

[1]Appointed Special Judge upon the appointment of Judge Patton as Attorney-General.
[2]Died 20 October, 1956.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
EBNEST 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, FALL TERM, 1956

FIRST DIVISION

FIRST DISTRICT

Judge Bone

Camden—Sept. 24; Nov. 5†.
Chowan—Sept. 10; Nov. 26.
Currituck—Sept. 3; Oct. 8†.
Dare—Oct. 22.
Gates—Oct. 29.
Pasquotank—Sept. 17†; Oct. 15†; Nov. 12*; Dec. 3† (2).
Perquimans—Nov. 19.

SECOND DISTRICT

Judge Frizzelle

Beaufort—Sept. 17*; Oct. 15† (2); Nov. 5*; Dec. 3†.
Hyde—Oct. 8; Oct. 29†.
Martin—Aug. 6†; Sept. 24*; Nov. 19† (2); Dec. 10.
Tyrrell—Oct. 1.
Washington—Sept. 10*; Nov. 12†.

THIRD DISTRICT

Judge Morris

Carteret—Oct. 15†; Nov. 5.
Craven—Sept. 3 (2); Oct. 1† (2); Nov. 12; Nov. 26† (2).
Pamlico—Aug. 6 (2).
Pitt—Aug. 20†; Aug. 27; Sept. 17† (2); Oct. 22 (2); Nov. 19†; Dec. 10.

FOURTH DISTRICT

Judge Paul

Duplin—Aug. 27; Sept. 3†; Oct. 8*; Nov. 5*; Dec. 3† (2).
Jones—Sept. 24; Oct. 29†; Nov. 26.
Onslow—July 16‡ (A); Oct. 1; Nov. 12† (2).
Sampson—Aug. 6 (2); Sept. 10† (2); Oct. 15*; Oct. 22†.

FIFTH DIISTRICT

Judge Bundy

New Hanover—July 30*; Aug. 6†; Aug. 20*; Sept. 10† (2); Oct. 1*; Oct. 8† (2); Oct. 29* (2); Nov. 19† (2); Dec. 3* (2).
Pender—Sept. 3†; Sept. 24; Oct. 22†; Nov. 12.

SIXTH DISTRICT

Judge Stevens

Bertie—Aug. 27; Sept. 3†; Nov. 19 (2).
Halifax—Aug. 13 (2); Oct. 1† (2); Oct. 22*; Dec. 3 (2).
Hertford—July 16 (A); Sept. 10; Sept. 17†, Oct. 15.
Northampton—Aug. 6; Oct. 29 (2).

SEVENTH DISTRICT

Judge Moore

Edgecombe—Sept. 17*; Oct. 8* (2); Nov. 5† (2).
Nash—Aug. 20*; Sept. 10†; Sept. 24† (2); Oct. 22† (2); Nov. 19* (2).
Wilson—July 16*; Aug. 27* (2); Sept. 24† (A) (2); Oct. 22* (2); Dec. 3† (2).

EIGHTH DISTRICT

Judge Parker

Greene—Oct. 8† (A); Oct. 15* (A); Dec. 3.
Lenoir—Aug. 20*; Sept. 10† (2); Oct. 8† (2); Oct. 22* (2); Nov. 19† (2); Dec. 10.
Wayne—Aug. 13*; Aug. 27† (2); Sept. 24† (2); Nov. 5 (2); Dec. 3† (A).

SECOND DIVISION

NINTH DISTRICT

Judge Carr

Franklin—Sept. 17† (2); Oct. 15*; Nov. 26† (2).
Granville—July 23; Oct. 8†; Nov. 12 (2).
Person—Sept. 10; Oct. 1† (A) (2); Oct. 29.
Vance—Oct. 1*; Nov. 5†.
Warren—Sept. 3*; Oct. 22†.

TENTH DISTRICT

Judge Seawell

Wake—July 9* (A) (2); July 23† (A); Aug. 6†; Aug. 27†; Sept. 3* (2); Sept. 3† (A) (2); Sept. 17† (2); Oct. 1*; Oct. 8† (2); Oct. 22† (2); Nov. 5* (2); Nov. 5† (A) (2); Nov. 19† (2); Dec. 3* (2).

ELEVENTH DISTRICT

Judge Hobgood

Harnett—Aug. 13†; Aug. 27* (A); Sept. 10† (A) (2) Oct. 8† (2); Nov. 12* (A) (2).
Johnston—Aug. 20; Sept. 24† (2); Oct. 22; Nov. 5† (2); Dec. 3 (2).
Lee—July 30*; Aug. 6†; Sept. 10† (2); Oct. 29*; Nov. 26† (A).

TWELFTH DISTRICT

Judge Bickett

Cumberland—Aug. 6†; Aug. 27* (2); Sept. 10† (2); Sept. 24* (2); Oct. 8† (2); Nov. 5* (2); Nov. 26† (2); Dec. 10*.
Hoke—Aug. 20; Nov. 19.

THIRTEENTH DISTRICT

Judge Williams

Bladen—Oct. 22*; Nov. 12†.
Brunswick—Sept. 17; Oct. 15†.
Columbus—Sept. 3* (2); Sept. 24† (2); Oct. 8*; Oct. 29† (2); Nov. 19* (2).

FOURTEENTH DISTRICT

Judge Nimocks

Durham—July 9* (A) (2); July 30 (2); Aug. 27*; Sept. 3†; Sept. 10* (2); Oct. 1* (2); Oct. 15† (2); Oct. 29* (2); Nov. 12† (2); Nov. 26 (2); Dec. 10*.

FIFTEENTH DISTRICT

Judge Mallard

Alamance—July 30†; Aug. 13* (2); Sept. 10† (2); Oct. 15* (2); Nov. 12† (2); Dec. 3*.
Chatham—Sept. 3†; Oct. 8; Oct. 29†; Nov. 5†; Nov. 26*.
Orange—Aug. 6*; Sept. 24† (2); Dec. 10.

SIXTEENTH DISTRICT

Judge Hall

Robeson—July 9†; Aug. 13*; Aug. 27†; Sept. 3* (2); Sept. 17† (2); Oct. 8† (2); Oct. 29* (2); Nov. 12† (2); Nov. 26*.
Scotland—Aug. 6; Oct. 1†; Oct. 22†; Dec. 3 (2).

THIRD DIVISION

SEVENTEENTH DISTRICT

Judge Olive

Caswell—Nov. 12† (A); Dec. 3*.
Rockingham—July 23* (2); Sept. 3† (2); Oct. 15†; Oct. 22*; (2); Nov. 19† (2); Dec. 10*.
Stokes—Oct. 1*; Oct. 8†.
Surry—July 9† (2); Sept. 17* (2); Nov. 5† (2); Dec. 3 (A).

EIGHTEENTH DISTRICT

Schedule A—Judge Rousseau

Guilford Gr.—July 9*; July 23*; Aug. 27*; Sept. 3†; Sept. 10* (2); Oct. 1*; Oct. 8* (2); Oct. 22*; Nov. 5*; Nov. 12† (2); Nov. 26*; Dec. 3*.
Guilford H. P.—July 16*; Sept. 24*; Oct. 29*; Dec. 10*.

Schedule B—Judge Gwyn

Guilford Gr.—Sept. 10† (2); Sept. 24† (2); Oct. 8† (2); Oct. 22† (2); Nov. 19† (2).
Guilford H. P.—Sept. 3†; Nov. 5† (2); Dec. 3†.

NINETEENTH DISTRICT

Judge Preyer

Cabarrus—Aug. 20*; Aug. 27†; Oct. 8 (2); Nov. 5† (A) (2).
Montgomery—July 9 (A); Sept. 24†; Oct. 1; Oct. 29 (A).
Randolph—July 16† (A) (2); Sept. 3*; Nov. 5† (2); Nov. 26†; Dec. 3* (2).
Rowan—Sept. 10 (2); Oct. 22† (2); Nov. 19*.

TWENTIETH DISTRICT

Judge Crissman

Anson—Sept. 17*; Sept. 24†; Nov. 19†.
Moore—Aug. 6* (A); Sept. 3† (2); Nov. 12.
Richmond—July 16*; July 23†; Oct. 1*; Oct. 8†; Dec. 3† (2).
Stanly—July 9; Oct. 15† (2); Nov. 26.
Union—Aug. 27; Oct. 29 (2).

TWENTY-FIRST DISTRICT

Judge Armstrong

Forsyth—July 9† (2); July 23 (2); Sept. 3 (2); Sept. 17† (3); Oct. 8 (2); Oct. 22† (2); Nov. 5 (2); Nov. 19† (2); Dec. 3 (2); Dec. 3† (A) (2).

TWENTY-SECOND DISTRICT

Judge Phillips

Alexander—Sept. 24.
Davidson—Aug. 20; Sept. 10† (2); Oct. 8†; Nov. 12 (2); Dec. 10†.
Davie—July 30; Oct. 1†; Nov. 5.
Iredell—Aug. 27; Sept. 3†; Oct. 15†; Oct. 22 (2); Nov. 26† (2).

TWENTY-THIRD DISTRICT

Judge Johnston

Alleghany—Aug. 27; Oct. 1.
Ashe—Sept. 10†; Oct. 22*.
Wilkes—July 30†; Aug. 13 (2); Sept. 17† (2); Oct. 29† (2); Dec. 3 (2).
Yadkin—Sept. 3*; Nov. 12† (2); Nov. 26.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT

Judge Pless

Avery—July 9 (2); Oct. 15 (2).
Madison—July 23*; Aug. 27† (2); Oct. 1*; Oct. 29†; Dec. 3*; Dec. 10†.
Mitchell—July 30† (A); Sept. 10 (2).
Watauga—Sept. 24*; Nov. 5† (2).
Yancey—Aug. 6 (A); Nov. 19 (2).

TWENTY-FIFTH DISTRICT

Judge Moore

Burke—Aug. 13; Oct. 1 (2); Nov. 19.
Caldwell—Aug. 27; Sept. 17† (2); Dec. 3 (2).
Catawba—July 30 (2); Sept. 3† (2); Nov. 5 (2); Nov. 26†.

TWENTY-SIXTH DISTRICT

Schedule A—Judge Huskins

Mecklenburg—July 9* (A) (2); July 30* (2); Aug. 13† (A) (2); Aug. 27† (2); Sept. 10†; Sept. 17† (2); Oct. 1* (2); Oct. 15† Oct. 22† (2); Nov. 5†; Nov. 12† (2); Nov. 26†; Dec. 3* (2).

Schedule B—Judge Rudisill

Mecklenburg—Aug. 13† (3); Sept. 3* (2); Sept. 17† (2); Oct. 1† (2); Oct. 15† (2); Oct. 29* (2); Nov. 12† (2); Nov. 26†; Dec. 3† (2).

TWENTY-SEVENTH DISTRICT

Judge Campbell

Cleveland—July 9 (2); Sept. 24† (2); Oct. 22† (2); Nov. 26.
Gaston—July 23*; Aug. 6† (A) (2); Sept. 17*; Oct. 8† (2); Nov. 12* (2); Dec. 3† (2).
Lincoln—Sept. 3; Sept. 10†.

TWENTY-EIGHTH DISTRICT

Judge Clarkson

Buncombe—July 9* (A) (2); July 23† (A); July 30† (3); Aug. 20† (A); Aug. 20*; Aug. 27† (3); Sept. 17† (A); Sept. 17*; Sept. 24† (3); Oct. 15* (2); Oct. 22† (A); Oct. 29† (3); Nov. 19* (A) (2); Nov. 19†; Nov. 26† (3).

TWENTY-NINTH DISTRICT

Judge Froneberger

Henderson—Oct. 15; Nov. 19† (2).
McDowell—Sept. 3 (2); Oct. 1† (2).
Polk—Aug. 27.
Rutherford—Sept. 17†* (2); Nov. 5*† (2).
Transylvania—Oct. 27† (2); Dec. 3 (2).

THIRTIETH DISTRICT

Judge Nettles

Cherokee—July 23; Nov. 5 (2).
Clay—Oct. 1.
Graham—Sept. 3 (2).
Haywood—July 9; Sept. 17† (2); Nov. 19 (2).
Jackson—Oct. 8 (2).
Macon—July 30; Dec. 3 (2).
Swain—July 16; Oct. 22 (2).

*Indicates criminal term.
†Indicates civil term.
‡Indicates jail and civil term.
No designation indicates mixed term.
(A) Indicates judge to be assigned.
(2) Indicates number of weeks of term; no number indicates one week term.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

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

New Bern, fifth Monday after the second Monday in March and September. MRS. MATILDA H. TURNER, Deputy Clerk, New Bern.

Washington, sixth Monday after the second Monday in March and September. MRS. SALLIE B. EDWARDS, Deputy Clerk, Washington.

Wilson, eighth Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second Monday in March and ninth Monday after second Monday in September. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

JULIAN T. GASKILL, U. S. Attorney, Raleigh, N. C.
SAMUEL A. HOWARD, Assistant U. S. Attorney, Raleigh, N. C.
IRVIN B. TUCKER, JR., Assistant U. S. Attorney, Raleigh, N. C.
LAWRENCE HARRIS, Assistant U. S. Attorney, Raleigh, N. C.
MISS JANE A. PARKER, Assistant U. S. Attorney, Raleigh, N. C.
B. RAY COHOON, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

Durham, fourth Monday in September and fourth Monday in March. HERMAN A. SMITH, Clerk, Greensboro.

Greensboro, first Monday in June and December. HERMAN A. SMITH, 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. HERMAN A. SMITH, Clerk, Greensboro.

Salisbury, third Monday in April and October. HERMAN A. SMITH, Clerk, Greensboro.

Winston-Salem, first Monday in May and November. HERMAN A. SMITH, Clerk, Greensboro.

Wilkesboro, third Monday in May and November. HERMAN A. SMITH, Clerk, Greensboro; SUE LYON BUMGARNER, 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.
HERMAN A. SMITH, 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.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed written examinations of the Board of Law Examiners as of the 11th day of August, 1956:

AGAPION, STAVROS.....Greensboro.
ATKINS, JAMES HARRISON.....Gastonia.

BARNES, ALEXANDER HALL.....Murfreesboro.
BARNES, HENRY THORNTON.....Kannapolis.
BASON, GEORGE FRANCIS, JR. .....Chapel Hill.
BETTS, LOWRY MATTHEWS.....Chapel Hill.
BLAIR, WARREN DONALD.....Charlotte.
BOYCE, GORDON EUGENE.....Raleigh.
BREWER, WILLIAM CLARENCE, JR. .....Jamesville.
BRITT, LOUTEN RHODES.....Lumberton.
BROWN, FLOYD HENRY HARGROVES.....Durham.
BROWN, JOSEPH GEORGE.....Belmont.
BROWN, JOYCE ALBRIGHT.....Belmont.
BURNETT, GILBERT HENRY.....Burgaw.
BYRD, ROBERT GRAY.....Selma.

CAMERON, WILLIAM MCIVER, JR. .....Wilmington.
CAUDLE, LLOYD CAMERON.....Durham.
CHERRY, SOLOMON GILMER.....Roxobel.
CLINARD, DAVID MARION.....Winston-Salem.
COOKE, BENJAMIN HERBERT.....Franklinton.
COOPER, ROBERT EZEKIEL.....Raleigh.
COOPER, ROY ASBERRY, JR. .....Nashville.
CROMARTIE, MARTIN LUTHER, JR. .....Tarboro.
CULBERTSON, JOHN KETNER.....Salisbury.

DODGE, HAROLD THADDEUS.....Burlington.

EGERTON, LAWRENCE, JR. .....Greensboro.
ENOCHS, HERMAN GLENN, JR. .....Greensboro.
EVANS, ANDRE JENNINGS.....Ahoskie.

FALK, HERBERT SEESHOLTZ, JR. .....Greensboro.
FERGUSON, GEORGE WAGONER, JR. .....Charlotte.
FLETCHER, FRANCIS MARION, JR. .....Charlotte.
FOUNTAIN, RICHARD TILLMAN, JR. .....Rocky Mount.
FOWLER, MILES BEATTY.....Clinton.
FREED, MAITLAND GUY.....Greensboro.
FREEMAN, JACK MILLER.....Bostic.

GALIFIANAKIS, NICK.....Durham.
GARDNER, JOHN CHARLES WAYNE.....Dobson.
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TAYLOR, DONALD QUEE ..... Greensboro from Kentucky.

Given over my hand and the seal of the Board of Law Examiners this 26th day of November, 1956.

(Official Seal)

EDWARD L. CANNON, *Secretary,*
Board of Law Examiners,
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CASES REPORTED

A

	PAGE
Advisory Opinion *in re* General Election	748
Akers, Hedrick v.	274
Akers Motor Lines, Cloninger v.	82
Albertson, Cornelius v.	265
Alford v. Washington	132
Allen v. Allen	446
Anson County, Constantian v.	221
Armstrong v. Howard	598
Arthur, S. v.	582
Arthur, S. v.	586
Assurance Corp., Watson v.	696
Atkins v. Daniel	218
Ausband v. Pack	694
Auto Finance Co., Phillips v.	220

B

B. & R. Wilson, Inc., Coats v.	76
Bank, Nuckles v.	398
Bank, Poindexter v.	191
Bank & Trust Co. v. Currin	102
Barfield, S. v.	693
Barham, S. v.	80
Baucom, S. v.	61
Bizzell v. Clements	627
Blalock v. Durham	208
Blanchard v. Ward	142
Bland, Lambert v.	283
Blankenship, Brittain v.	518
Blevins v. France	334
Board of Education, Bradshaw v.	393
Board of Education v. Edgerton	576
Board of Education, Eller v.	529
Board of Education, Joyner v.	164
Board of Education, Stephens v.	481
Board of Education, Williams v.	599
Booth, Clements v.	474
Bradshaw v. Board of Education	393
Brantley, Hammer v.	71
Brantley, Rogers v.	744
Braswell, S. v.	693
Bright, Ridge v.	345
Briley, Harris v.	526
Brittain v. Blankenship	518
Brothers v. Jernigan	441
Brown v. Doby	746
Brown, Housing Authority v.	592
Browning v. Weissinger	471
Bryan v. Sanford	30
Builders Corp., Paris v.	35
Buncombe County Board of Education, Eller v.	529
Burleson's, Inc., Peed v.	437
Burns v. Gardner	602
Burrell v. Transfer Co.	662
Butler, Edwards v.	205
Butler v. Heating Co.	525

C

C. R. Wilks, Inc., v. Dillingham	522
Calvine Cotton Mills, Tillis v.	587
Calypso Veneer Company, Scarborough v.	1
Cannon, S. v.	399
Carolina Builders Corp., Paris v.	35
Carpenter v. Carpenter	286
Cates v. Finance Co.	277
Cauley, S. v.	701
Causby v. Oil Co.	235
Cherry v. Woolard	603
City of Durham, Blalock v.	208
City of Durham Housing Authority, Construction Co. v.	261
City of Greensboro, Utilities Commission v.	247
City of Sanford, Bryan v.	30
City of Sanford v. Oil Co.	388
City of Washington Bd. of Education v. Edgerton	576
City of Wilmington Housing Authority v. Brown	592
Clements, Bizzell v.	627
Clements v. Booth	474
Clements v. Simmons	523
Cloninger v. Motor Lines	82
Coats v. Wilson, Inc.	76
Coble Construction Co. v. Housing Authority	261
Comr. of Revenue, Rubber Co. v.	170
Commissioners of Durham, Fox v.	497
Conner v. Rubber Co.	516
Conner, S. v.	109
Constantian v. Anson County	221
Construction Co. v. Housing Authority	261
Construction Co., Noland Co. v.	50
Constructors Supply Co., Scarborough v.	285
Coppedge, S. v.	590
Corbett, Vincent v.	469

PAGE

Cornelius v. Albertson 265
Cotton Mills, Tillis v. 587
County of Anson, Constantian v. .. 221
County Board of Education, Joyner v. 164
Cox, S. v. 57
Creed, Shinault v. 217
Crisp, S. v. 407
Croft Steel Products, Inc., Harrington v. 675
Crumlin, S. v. 695
Currin, Trust Co. v. 102

D

Daniel, Atkins v. 218
Daniels, S. v. 671
Davis v. Hargett 157
Davis, Harris v. 579
Davis, Price v. 229
Davis, S. v. 621
Davis, Tynes v. 528
Dawson, Hinson v. 23
Dawson, McLamb v. 626
Dayton Rubber Co. v. Shaw, Comr. of Revenue 170
Department of Motor Vehicles, Jenkins v. 560
Department of Motor Vehicles, Lowe v. 353
Dew, Eason v. 571
DeWeld Mica Corp., Hall v. 182
Di Capadarso, Willcox v. 741
Dickson Transfer Co., Burrell v. .. 662
Dillahunt, S. v. 524
Dillingham, Wilks, Inc. v. 522
Doby, Brown v. 746
Dockery, Military Academy v. 427
Duncan, S. v. 374
Durham, Blalock v. 208
Durham, Commissioners of, Fox v. 497
Durham Housing Authority, Construction Co. v. 261

E

Eason v. Dew 571
Edgerton, Board of Education v. 576
Edmundson, S. v. 693
Edwards v. Butler 205
Electric Co., Liles v. 653
Electronics Co. v. Radio Corp. 114
Elizabeth City Freezer Locker, Zimmerman v. 628

PAGE

Eller v. Board of Education 529
Elliott v. Owen 684
Etheridge v. Wescott 637
Everett, S. v. 596

F

Faulkner Neon & Electric Co., Liles v. 653
Fike, Nance v. 368
Finance Co., Cates v. 277
Finance Co., Phillips v. 220
First National Bank, Poindexter v. 191
Fleishel v. Jessup 451
Fleming v. Twiggs 666
Flowers, S. v. 77
Flynn v. Highway Commission 617
Foster, Stanley v. 201
Fox v. Commissioners of Durham 497
France, Blevins v. 334
Freezer Locker, Zimmerman v. 628
Furlough v. Owens 483

G

Gamble, *In re* 149
Garage, Inc., Jeffries v. 745
Gardner, Burns v. 602
Garner, S. v. 79
General Accident Fire & Life Assurance Corp., Watson v. 696
General Election, Advisory Opinion *in re* 748
Gilliam, Long v. 548
Grant v. Toatley 463
Greensboro, Utilities Commission v. 247
Griffin v. Insurance Co. 484
Griffin v. Springer 95
Griffith Finance Co., Cates v. 277

H

Hairr, S. v. 506
Hall v. Mica Corp. 182
Hammer v. Brantley 71
Hardy & Newsome, Inc., v. Whedbee 682
Hargett, Davis v. 157
Harrington v. Steel Products, Inc. 675
Harris v. Briley 526
Harris v. Davis 579
Harris v. Upham 477
Hart v. Motors 84

PAGE

Harvey, S. v. 693
Hassett Mining Co., Phillips v. 17
Hayes v. Ricard 313
Heating Co., Butler v. 525
Hedrick v. Akers 274
Helms, Rankin v. 532
High Penn Oil Co., Causby v. 235
High Point, Thomasville & Denton R. R., Jessup v. 242
Highway Commission, Flynn v. 617
Hill v. Spinning Co. 554
Hill Spinning Co., Hill v. 554
Hinshaw v. McIver 256
Hinson v. Dawson 23
Holcomb, *In re* Will of 391
Housing Authority v. Brown 592
Housing Authority, Construction Co. v. 261
Howard, Armstrong v. 598
Hyder v. McBride 485

I

In re Advisory Opinion 748
In re Gamble 149
In re Will of Holcomb 391
Insurance Agency, Surratt v. 121
Insurance Co., Griffin v. 484
Insurance Co., Jarvis v. 691
Insurance Co., Scarborough v. 502
Insurance Co., Stanley v. 700
Insurance Co., Wright v. 361
Inter-Ocean Insurance Co., Griffin v. 484

J

Jackson County Board of Education, Stephens v. 481
Jarvis v. Insurance Co. 691
Jeffries v. Garage, Inc. 745
Jenkins v. Department of Motor Vehicles 560
Jenkins v. Trantham 422
Jernigan, Brothers v. 441
Jernigan, Skinner v. 441
Jessup, Fleishel v. 451
Jessup v. R. R. 242
Johnston, Travis v. 713
Jones Plumbing & Heating Co., Butler v. 525
Joyner v. Board of Education 164

K

PAGE

Kay, S. v. 117
Kellogg v. Thomas 722
Kindley, Merrell v. 118
King, Veasey v. 216

L

Lambert v. Bland 283
Lambeth Insurance Agency, Surratt v. 121
Lance, S. v. 455
Lawson v. Lawson 689
Laxton Construction Co., Noland Co. v. 50
Ledwell, S. v. 11
Lieb v. Mayer 613
Liles v. Electric Co. 653
Link, S. v. 11
Long v. Gilliam 548
Lowe v. Department of Motor Vehicles 353
Lucas, S. v. 53

Mc

MacFarlane v. Wildlife Resources Com. 385
McBee, Waters v. 540
McBride, Hyder v. 485
McClure, Royal v. 186
McCullough, S. v. 11
McDowell County Board of Education, Joyner v. 164
McIver, Hinshaw v. 256
McLamb v. Dawson 626
McLamb v. Weaver 432
McNair v. Richardson 65
McNeely, S. v. 737

M

Mayer, Lieb v. 613
Mercury Insurance Co., Wright v. 361
Merrell v. Kindley 118
Merritt, S. v. 687
Mica Corp., Hall v. 182
Military Academy v. Dockery 427
Millikan v. Simmons 195
Mills, S. v. 487
Mimidis v. Papoulias 479
Mining Co., Phillips v. 17
Monteith v. Welch 415
Moore, Peel v. 512
Mooring, S. v. 624
Motor Lines, Cloninger v. 82

PAGE

Motor Vehicles, Department of, Jenkins v. ... 560
Motor Vehicles, Department of, Lowe v. ... 353
Motors, Hart v. ... 84

N

Nance v. Fike ... 368
National Bankers Life Ins. Co., Stanley v. ... 700
Neece, Paul v. ... 565
Neill, S. v. ... 252
Neon & Electric Co., Liles v. ... 653
Noland Company v. Construction Co. ... 50
Norfolk Southern Railway Co., Rich v. ... 175
N. C. Dept. of Motor Vehicles, Jenkins v. ... 560
N. C. Dept. of Motor Vehicles, Lowe v. ... 353
N. C. State Bd. of Education v. Williams ... 599
N. C. Wildlife Resources Com., MacFarlane v. ... 385
Nuckles v. Bank ... 398

O

Oil Co., Causby v. ... 235
Oil Co., Sanford v. ... 388
Outlaw, S. v. ... 531
Owen, Elliott v. ... 684
Owens, Furlough v. ... 483

P

Pace v. Pace ... 698
Pack, Ausband v. ... 694
Papoulias, Mimidis v. ... 479
Paris v. Builders Corp. ... 35
Paul v. Neece ... 565
Peed v. Burleson's, Inc. ... 437
Peel v. Moore ... 512
Pegram, Wright v. ... 45
Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., Jarvis v. ... 691
Phillips v. Finance Co. ... 220
Phillips v. Mining Co. ... 17
Plumbing & Heating Co., Butler v. ... 525
Poindexter v. Bank ... 191
Powell, S. v. ... 121
Price v. Davis ... 229

R PAGE

Radio Corp., Electronics Co. v. ... 114
Radio Electronics Co. v. Radio Corp. ... 114
R. R., Jessup v. ... 242
R. R., Rich v. ... 175
Rainey, S. v. ... 120
Rankin v. Helms ... 532
Realty Co., Schoenith v. ... 601
Register, S. v. ... 480
Reynolds, S. v. ... 252
Ricard, Hayes v. ... 313
Rich v. R. R. ... 175
Richardson, McNair v. ... 65
Riddler, S. v. ... 78
Ridge v. Bright ... 345
Robinson v. Thomas ... 732
Rogers v. Brantley ... 744
Rowell, S. v. ... 280
Royal v. McClure ... 186
Rubber Co., Conner v. ... 516
Rubber Co. v. Shaw, Commissioner of Revenue ... 170
Ryals, S. v. ... 75

S

Sanford, Bryan v. ... 30
Sanford v. Oil Co. ... 388
Scarborough v. Insurance Co. ... 502
Scarborough v. Supply Co. ... 285
Scarborough v. Veneer Company ... 1
Schoenith v. Realty Co. ... 601
Security National Bank, Nuckles v. ... 398
Shaver v. Shaver ... 309
Shaver v. Shaver ... 311
Shaw, Comr. of Revenue, Rubber Co. v. ... 170
Sherrer, S. v. ... 488
Shimer v. Traub ... 466
Shinault v. Creed ... 217
Simmons, Clements v. ... 523
Simmons, Millikan v. ... 195
Simpson, S. v. ... 325
Sisk, S. v. ... 252
Skinner v. Jernigan ... 441
Smith, Woolard v. ... 489
Southern Oil Co., Sanford v. ... 388
Sparrow, S. v. ... 81
Sparrow, S. v. ... 623
Spinning Co., Hill v. ... 554
Springer, Griffin v. ... 95
Stanley v. Foster ... 201

	PAGE
Stanley v. Insurance Co.	700
S. v. Arthur	582
S. v. Arthur	586
S. v. Barfield	693
S. v. Barham	80
S. v. Baucom	61
S. v. Braswell	693
S. v. Cannon	399
S. v. Cauley	701
S. v. Conner	109
S. v. Coppedge	590
S. v. Cox	57
S. v. Crisp	407
S. v. Crumlin	695
S. v. Daniels	671
S. v. Davis	621
S. v. Dillahunt	524
S. v. Duncan	374
S. v. Edmundson	693
S. v. Everett	596
S. v. Flowers	77
S. v. Garner	79
S. v. Hairr	506
S. v. Harvey	693
S. v. Kay	117
S. v. Lance	455
S. v. Ledwell	11
S. v. Link	11
S. v. Lucas	53
S. v. McCullough	11
S. v. McNeely	737
S. v. Merritt	687
S. v. Mills	487
S. v. Mooring	624
S. v. Neill	252
S. v. Outlaw	531
S. v. Powell	121
S. v. Rainey	120
S. v. Register	480
S. v. Reynolds	252
S. v. Riddler	78
S. v. Rowell	280
S. v. Ryals	75
S. v. Sherrer	488
S. v. Simpson	325
S. v. Sisk	252
S. v. Sparrow	81
S. v. Sparrow	623
S. v. Stevens	40
S. v. Stephens	380
S. v. Sutton	679
S. v. Thomas	212
S. v. Thompson	282
S. v. Underwood	68
S. v. White	73
S. v. Williams	459
State *ex rel.* Utilities Commission v. Greensboro	247
State Board of Education, Bradshaw v.	393
State Board of Education, Stephens v.	481
State Board of Education, Williams v.	599
State Highway and Public Works Comm., Flynn v.	617
State Trust Co. v. Toms	645
Staunton Military Academy v. Dockery	427
Steel Products, Inc., Harrington v.	675
Stephens v. Board of Education	481
Stephens, S. v.	380
Stevens, S. v.	40
Super Service Garage, Inc., Jeffries v.	745
Supply Co., Scarborough v.	285
Surratt v. Insurance Agency	121
Sutton, S. v.	679

T

Talbert, Tillman v.	270
Thomas, Kellogg v.	722
Thomas, Robinson v.	732
Thomas, S. v.	212
Thomasville Motors, Hart v.	84
Thompson, S. v.	282
Tillis v. Cotton Mills	587
Tillman v. Talbert	270
Toatley, Grant v.	463
Toms, Trust Co. v.	645
Town & Country Realty Co., Schoenith v.	601
Transfer Co., Burrell v.	662
Trantham, Jenkins v.	422
Traub, Shimer v.	466
Travis v. Johnston	713
Trust Co. v. Currin	102
Trust Co. v. Toms	645
Twiggs, Fleming v.	666
Tynes v. Davis	528

U

Underwood, S. v.	68

	PAGE
United States Rubber Co., Conner v.	516
Upham, Harris v.	477
Utilities Commission v. Greensboro	247
V	
Veasey v. King	216
Veneer Company, Scarborough v.	1
Vincent v. Corbett	469
W	
Wachovia Bank & Trust Co. v. Currin	102
Ward, Blanchard v.	142
Warren v. Winfrey	521
Washington, Alford v.	132
Washington City Board of Education v. Edgerton	576
Waters v. McBee	540
Watson v. Assurance Corp.	696
Weaver, McLamb v.	432
Weissinger, Browning v.	471
Welch, Monteith v.	415
Wescott, Etheridge v.	637
Whedbee, Hardy & Newsome, Inc., v.	682
White, S. v.	73
Wildlife Resources Com., MacFarlane v.	385
Wilks, Inc. v. Dillingham	522
Willcox v. Di Capadarso	741
Williams v. Board of Education	599
Williams, S. v.	459
Wilmington Housing Authority v. Brown	592
Wilson, Inc., Coats v.	76
Winfrey, Warren v.	521
Winston-Salem First National Bank, Poindexter v.	191
Woolard, Cherry v.	603
Woolard v. Smith	489
World Insurance Co., Scarborough v.	502
Wright v. Insurance Co.	361
Wright v. Pegram	45
Z	
Zimmerman v. Freezer Locker	628

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Hudson v. R. R., 242 N.C. 650, petition for *certiorari* denied 28 May, 1956.

CASES CITED

A

Abbitt v. Gregory ..... 196 N.C. 9 264
Abell v. Power Co. ..... 159 N.C. 348 476
Adams v. Service Co. ..... 237 N.C. 136 668
Ahoskie v. Moye ..... 200 N.C. 11 259
Aiken v. Sanderford ..... 236 N.C. 760 ..... 311, 368
Air Conditioning Co. v. Douglass 241 N.C. 170 574
Akin v. Bank ..... 227 N.C. 453 493
Aldridge v. Hasty ..... 240 N.C. 353 ..... 67, 279, 727,731
Alford v. Washington ..... 238 N.C. 694 343
Allen v. Allen ..... 209 N.C. 744 ..... 233, 526, 528
Allen v. Allen ..... 213 N.C. 264 233
Allen v. Gooding ..... 173 N.C. 93 568
Allen v. Hewitt ..... 212 N.C. 367 72
Allen v. Parker ..... 187 N.C. 376 ..... 147, 148
Allen v. Salley ..... 179 N.C. 147 558
Allgood v. Trust Co. ..... 242 N.C. 506 431
Amick v. Lancaster ..... 228 N.C. 157 500
Anderson v. Atkinson ..... 235 N.C. 300 ..... 88, 90, 303
Anderson v. Heating Co. ..... 238 N.C. 138 588
Anderson v. McRae ..... 211 N.C. 197 480
Andrews v. Andrews ..... 243 N.C. 779 44
Andrews v. Bruton ..... 242 N.C. 93 573
Andrews v. R. R. ..... 200 N.C. 483 246
Andrews v. Smith ..... 198 N.C. 34 324
Ange v. Ange ..... 235 N.C. 506 ..... 208, 578
Armstrong v. Short ..... 8 N.C. 11 379
Artis v. Artis ..... 228 N.C. 754 ..... 98, 207
Asheboro v. Miller ..... 220 N.C. 298 520
Ashley v. Chevrolet Co. ..... 222 N.C. 25 635
Assignment of School Children,
In re ..... 242 N.C. 500 169
Atkins v. McAden ..... 229 N.C. 752 225
Avery v. Stewart ..... 136 N.C. 426 ..... 465, 568
Aycock v. Cooper ..... 202 N.C. 500 ..... 91, 291
Ayers v. Banks ..... 201 N.C. 811 722
Aylor v. Barnes ..... 242 N.C. 223 91

B

Bagging Co. v. Byrd ..... 185 N.C. 136 684
Bailey v. Bailey ..... 243 N.C. 412 ..... 449, 716
Bailey v. Davis ..... 231 N.C. 86 ..... 179, 180
Bailey v. Michael ..... 231 N.C. 404 49
Bailey v. R. R. ..... 149 N.C. 169 ..... 246, 341
Baker v. Varser ..... 239 N.C. 180 ..... 90, 303
Baker v. Varser ..... 240 N.C. 260 390
Baldwin v. Hinton ..... 243 N.C. 113 320
Ballew v. R. R. ..... 186 N.C. 704 ..... 341, 563, 564
Bank v. Bryan ..... 240 N.C. 610 ..... 26, 106, 107
Bank v. Burns ..... 109 N.C. 105 268
Bank v. Dortch ..... 186 N.C. 510 ..... 72, 73

Bank v. Hall ....201 N.C. 787....466, 493
Bank, *In re*....208 N.C. 509.... 310
Bank v. Insurance Co. ....223 N.C. 390.... 582
Bank v. Newton ....165 N.C. 363....265, 589
Bank v. Sauls ....183 N.C. 165....419, 420
Bank v. Watson ....187 N.C. 107.... 430
Barbee v. Edwards....238 N.C. 215.... 321
Barlow v. Bus Lines....229 N.C. 382.... 582
Barnes v. Saleeby....177 N.C. 256.... 476
Barnette v. Woody....242 N.C. 424....529, 696
Barrett v. Barnes....186 N.C. 154.... 431
Bartlett, *In re* Will of....235 N.C. 489.... 392
Batchelor v. Black....232 N.C. 745.... 49
Batchelor v. Overton....158 N.C. 395.... 652
Batten v. Aycock....224 N.C. 225.... 323
Battle v. Cleave....179 N.C. 112.... 581
Batts v. Sullivan....182 N.C. 129.... 107
Beach v. Patton....208 N.C. 134.... 67
Beam v. Bridgers....111 N.C. 269.... 404
Beam v. Gilkey....225 N.C. 520....102, 145, 207, 613
Beard, *In re* Will of....202 N.C. 661.... 599
Beck v. Bottling Co. ....214 N.C. 566.... 557
Becton v. Dunn....137 N.C. 559.... 181
Belcher v. Grimsley.... 88 N.C. 88.... 575
Belk's Department Store, Inc., v. Guilford County....222 N.C. 441.... 390
Bell v. Bank ....196 N.C. 233.... 264
Bell v. Brown ....227 N.C. 319.... 582
Bell v. Dewey Brothers, Inc. ....236 N.C. 280.... 634
Bell v. McCoin ....184 N.C. 117.... 643
Bell v. Machine Co. ....150 N.C. 111.... 558
Bell v. Nivens ....225 N.C. 35.... 390
Benton v. Lumber Co. ....195 N.C. 363.... 11
Bernhardt v. Brown....118 N.C. 700.... 478
Berry v. Lumber Co. ....183 N.C. 384.... 616
Best v. Best....228 N.C. 9....449, 451
Best v. Mortgage Co. ....131 N.C. 70.... 180
Bitting v. Thaxton.... 72 N.C. 541.... 558
Bladen County v. Breece....214 N.C. 544.... 610
Blake v. Tea Co. ....237 N.C. 730.... 343
Blalock, *In re*....233 N.C. 493....520, 683
Blankenship v. English....222 N.C. 91.... 418
Bledsoe v. Nixon.... 69 N.C. 81.... 313
Blowing Rock v. Gregorie....243 N.C. 364.... 35
Board of Education v. Allen....243 N.C. 520.... 747
Bobbitt v. Haynes....231 N.C. 373.... 49
Bobbitt v. Stanton....120 N.C. 253....430, 431
Boles v. Caudle....133 N.C. 528.... 232
Bolich v. Ins. Co. ....206 N.C. 144.... 131
Bond v. Bond....194 N.C. 448....100, 102, 148
Bonitz v. School Trustees....154 N.C. 375.... 224
Boone v. Sparrow....235 N.C. 396.... 179
Bost v. Metcalfe ....219 N.C. 607.... 22
Bost v. Smith.... 26 N.C. 68.... 272

Bottling Co. v. Shaw, Comr. of Revenue ..... 232 N.C. 307 175
Boyer v. Jarrell ..... 180 N.C. 479 44
Braddy v. Elliott ..... 146 N.C. 578 578
Bradham v. Trucking Co. ..... 243 N.C. 708 ..... 47, 276
Bramham v. Durham ..... 171 N.C. 196 457
Brendle v. R. R. ..... 125 N.C. 474 341
Brett v. Davenport ..... 151 N.C. 56 430
Brigman v. Construction Co. ..... 192 N.C. 791 245
Brinson v. McCotter ..... 181 N.C. 482 515
Briscoe v. Power Co. ..... 148 N.C. 396 245
Brite v. Lynch ..... 235 N.C. 182 320
Brittain v. Blankenship ..... 244 N.C. 518 548
Brooks v. Brooks ..... 226 N.C. 280 ..... 449, 451
Brooks v. Stephens ..... 100 N.C. 297 403
Brown v. Brown ..... 168 N.C. 4 ..... 98, 99
Brown v. Dail ..... 117 N.C. 41 232
Brown v. Mitchell ..... 207 N.C. 132 547
Brown v. Ward ..... 221 N.C. 344 574
Bruce v. Nicholson ..... 109 N.C. 202 184
Bryan v. Lawrence ..... 50 N.C. 337 454
Bryant v. Shields ..... 220 N.C. 628 98
Buchanan v. Buchanan ..... 99 N.C. 308 145
Buchanan v. Highway Com. ..... 217 N.C. 173 91
Buick Co. v. Rhodes ..... 215 N.C. 595 162
Bullington v. Angel ..... 220 N.C. 18 547
Bullock v. Crouch ..... 243 N.C. 40 388
Bumgardner v. Fence Co. ..... 236 N.C. 698 189
Bundy v. Powell ..... 229 N.C. 707 ..... 49, 342
Burnett v. R. R. ..... 120 N.C. 517 154
Burnsville v. Boone ..... 231 N.C. 577 172
Burroughs v. McNeill ..... 22 N.C. 297 88
Burton v. Ins. Co. ..... 198 N.C. 498 368
Bus Co. v. Products Co. ..... 229 N.C. 352 342
Butler v. Fertilizer Works ..... 195 N.C. 409 162
Butner v. Spease ..... 217 N.C. 82 67
Byrd v. Express Co. ..... 139 N.C. 273 67
Byrd v. Southerland ..... 186 N.C. 384 ..... 589, 599
Byrd v. Thompson ..... 243 N.C. 271 716

C

C. T. H. Corp. v. Maxwell, Comr. of Revenue ..... 212 N.C. 803 678
Cahoon v. Everton ..... 187 N.C. 369 179
Caldwell v. Caldwell ..... 189 N.C. 805 179
Cameron v. Cameron ..... 235 N.C. 82 ..... 557, 558, 559
Campbell v. Cronly ..... 148 N.C. 136 515
Campbell v. Cronly ..... 150 N.C. 457 515
Campbell v. McArthur ..... 9 N.C. 33 98
Cannon v. Nowell ..... 51 N.C. 436 ..... 231, 232
Card v. Finch ..... 142 N.C. 140 90
Carlisle v. Carlisle ..... 225 N.C. 462 ..... 465, 471
Carnes v. Carnes ..... 204 N.C. 636 451
Carpenter v. Carpenter ..... 244 N.C. 286 311

Carraway v. Lassiter....139 N.C. 145.... 611
Carson v. Oates.... 64 N.C. 115.... 268
Carter v. Insurance Co. ....242 N.C. 578.... 466
Carter v. Reaves....167 N.C. 131.... 599
Casey v. Barker....219 N.C. 465.... 303
Cathey v. Shoemaker....119 N.C. 424.... 155
Caughron v. Walker....243 N.C. 153.... 444
Cecil v. Lumber Co. ....197 N.C. 81....589, 599
Cedar Works v. Lumber Co. ....161 N.C. 603.... 467
Chadwick v. Dept. of Conservation and Development....219 N.C. 766.... 88
Chambers v. Oil Co. ....199 N.C. 28.... 636
Chambers v. Payne.... 59 N.C. 276.... 102
Chamblee v. Broughton....120 N.C. 170....72, 73
Cherry v. Williams....147 N.C. 452.... 241
Cherry v. Woolard....244 N.C. 603.... 722
Childress v. Lawrence....220 N.C. 195.... 275
Chinnis v. Cobb....210 N.C. 104.... 267
Christmas v. Mitchell.... 38 N.C. 535.... 379
Church v. Refining Co. ....200 N.C. 469.... 578
Clark v. Clark.... 65 N.C. 655.... 154
Clark v. Clark....133 N.C. 28.... 293
Clark v. Homes....189 N.C. 703....90, 304
Clark v. Woolen Mills....204 N.C. 529.... 212
Clay v. Ins. Co. ....174 N.C. 642.... 505
Clement v. Clement....216 N.C. 240.... 520
Clinard v. Brummell....130 N.C. 547.... 436
Cobb v. Edwards....117 N.C. 244.... 568
Cobb v. Morgan.... 83 N.C. 211.... 272
Cofield v. Griffin....238 N.C. 377.... 471
Cohn v. Chapman.... 62 N.C. 92.... 568
Cole v. Trust Co. ....221 N.C. 249.... 427
Collier v. Nevill.... 14 N.C. 30.... 272
Collins v. Davis....132 N.C. 106.... 418
Collins v. Highway Comm. ....237 N.C. 277.... 652
Combes v. Adams....150 N.C. 64.... 313
Commercial Solvents v. Johnson..235 N.C. 237.... 445
Comrs. of Roxboro v. Bumpass....233 N.C. 190.... 291
Conn v. R. R. ....201 N.C. 157.... 413
Conrad v. Foundry Co. ....198 N.C. 723.... 635
Constantian v. Anson County....244 N.C. 221.... 501
Construction Co. v. Housing Authority ....244 N.C. 261.... 589
Construction Co. v. Ice Co. ....190 N.C. 580.... 558
Convent v. Winston-Salem....243 N.C. 316.... 129
Cooper v. Warlick....109 N.C. 672.... 181
Cottle v. Johnson....179 N.C. 426....26, 27
Cotton Co., Inc., v. Reaves....225 N.C. 436.... 268
Coulbourn v. Armstrong....243 N.C. 663.... 716
Coward v. Chastain.... 99 N.C. 443.... 269
Coward v. Coward....216 N.C. 506....233, 234, 324
Cox v. Freight Lines....236 N.C. 72....49, 67
Credit Corp. v. Satterfield....218 N.C. 298.... 520
Creech v. Creech....222 N.C. 656.... 465

Creed v. Marshall....160 N.C. 394....404, 650, 651
Creighton v. Snipes....227 N.C. 90....212, 518
Crotts v. Thomas....226 N.C. 385....642
Crouse v. Vernon....232 N.C. 24....107
Crump v. Morgan....38 N.C. 91....305
Crutchfield v. Thomasville....205 N.C. 709....390
Culbreth v. Britt Corp. ....231 N.C. 76....129
Currie v. Mining Co. ....157 N.C. 209....652, 677
Currier v. Lumber Co. ....150 N.C. 694....553
Cutler v. Winfield....241 N.C. 555....577

D

Daniel v. Bass....193 N.C. 294....73
Daniel v. Gardner....240 N.C. 249....29, 289
D'Armour v. Hardware Co. ....217 N.C. 568....214, 220
Davis v. Bass ....188 N.C. 200....466
Davis v. Frazier ....150 N.C. 447....4, 5, 8
Davis v. Light Co. ....238 N.C. 106....67
Davis v. Shaver ....61 N.C. 18....651
Davis v. Warren ....208 N.C. 174....198
Dawson v. Ennett....151 N.C. 543....145
Deans v. Deans....241 N.C. 1....179
DeHoff v. Black....206 N.C. 687....179
Dellinger v. Bollinger....242 N.C. 696....520
Dellinger v. Clark....234 N.C. 419....291
Denny v. Snow....199 N.C. 773....669
Dependents of Thompson v. Funeral Home....205 N.C. 801....88
Development Co. v. Braxton....239 N.C. 427....500
Distributing Co. v. Burlington....216 N.C. 32....259
Dixie Lines v. Grannick....238 N.C. 552....106
Dobias v. White....240 N.C. 680....450
Donlop v. Snyder....234 N.C. 627....49, 342
Donnell v. Cox....240 N.C. 259....588
Douglass v. Brooks....242 N.C. 178....199
Dowdy v. Dowdy....154 N.C. 556....451
Downing v. White....211 N.C. 40....90, 291
Dudley v. Tyson....167 N.C. 67....611
Duke v. Campbell....233 N.C. 262....208
Dull v. Dull....232 N.C. 482....99
Duncan v. Carpenter....233 N.C. 422....360
Dunlap v. Guaranty Co. ....202 N.C. 651....264, 265, 589
Dunn v. Wilson....210 N.C. 493....304
Dupree v. Dupree....45 N.C. 164....101, 207, 491
Durham v. Cotton Mills....141 N.C. 615....240
Dwiggins v. Bus Co. ....230 N.C. 234....557, 558, 684
Dyche v. Patton....56 N.C. 332....294

E

Early v. Basnight & Co. ....214 N.C. 103....659, 660
Early v. Early....134 N.C. 258....147, 148
Early v. Eley....243 N.C. 295....217
Eason v. Eason....159 N.C. 539....184

Edgerton v. Aycock....123 N.C. 134.... 72
Edwards v. Edwards....235 N.C. 93.... 694
Edwards v. Phillips.... 91 N.C. 355.... 310
Edwards v. Raleigh....240 N.C. 137.... 574
Edwards v. Vaughn....238 N.C. 89.... 47
Electric Co. v. Motor Lines....229 N.C. 86.... 476
Elledge v. Welch....238 N.C. 61.... 436
Elliott v. Board of Equalization..203 N.C. 749....224, 225
Ellis v. Ellis....190 N.C. 418....291, 301
Ellis v. R. R. ....241 N.C. 747.... 589
Emery v. Insurance Co. ....228 N.C. 532.... 582
England v. Garner.... 90 N.C. 197.... 722
Erickson v. Starling....233 N.C. 539.... 166
Evans v. Freeman....142 N.C. 61.... 536
Evans v. Johnson....225 N.C. 238.... 22
Evans v. R. R. ....167 N.C. 415.... 264
Everett v. Receivers....121 N.C. 519.... 341
Ex parte McCown....139 N.C. 95.... 405

F

Faison v. Odom....144 N.C. 107.... 101
Fashion Co. v. Grant....165 N.C. 453.... 116
Feezor v. Siceloff....232 N.C. 563.... 225
Ferguson v. Asheville....213 N.C. 569.... 582
Fertilizer Co. v. Eason....194 N.C. 244.... 536
Fields v. Ogburn....178 N.C. 407.... 736
Finance Co. v. Holder....235 N.C. 96.... 558
Finance Co. v. Trust Co. ....213 N.C. 369.... 269
Fishel v. Browning....145 N.C. 71....467, 468
Fisher v. Ins. Co. ....136 N.C. 217.... 677
Flanner v. Saint Joseph Home....227 N.C. 342.... 264
Fletcher v. Trust Co. ....220 N.C. 148.... 505
Floyd v. Highway Commission....241 N.C. 461.... 562
Food Co. v. Elliott....151 N.C. 393.... 538
Ford v. Blythe Bros. ....242 N.C. 347.... 245
Forsyth County v. Joyce....204 N.C. 734.... 721
Fortune v. Hunt....149 N.C. 358.... 420
Foster v. Allison Corp. ....191 N.C. 166.... 478
Foster v. Hyman....197 N.C. 189.... 341
Foster v. Woodfin.... 65 N.C. 29.... 403
Fowler v. Atlantic Co. ....234 N.C. 542.... 49
Fowler v. Fowler....190 N.C. 536....290, 291, 304
Francis v. Edwards.... 77 N.C. 271.... 558
Francis v. Wood Turning Co. ....204 N.C. 701.... 91
Freeman v. Belfer....173 N.C. 581....466, 492, 494
Freeman v. Rose....192 N.C. 732.... 465
Freeman v. Thompson....216 N.C. 484.... 22
Freshwater v. Baker.... 52 N.C. 404.... 650
Fry v. Utilities Co. ....183 N.C. 281....341, 504
Furst v. Merritt....190 N.C. 397.... 276

G

Gabriel v. Newton....227 N.C. 314.... 212

Gaither v. Hascall-Richards Steam Generator Co. ....121 N.C. 384.... 736
Gallimore v. Thomasville....191 N.C. 648.... 390
Galloway v. Carter....100 N.C. 111.... 145
Galloway v. McKeithen.... 27 N.C. 12....403, 406, 650
Gant v. Crouch....243 N.C. 604.... 212
Garrett v. Kendrick....201 N.C. 388.... 558
Garrett v. Rose....236 N.C. 299.... 557
Garrison v. Cox.... 95 N.C. 353.... 652
Garrison v. Williams....150 N.C. 674.... 311
Gathings v. Williams.... 27 N.C. 487.... 305
Gault v. Lake Waccamaw....200 N.C. 593.... 34
Gaylord v. Gaylord....150 N.C. 222.... 471
Gaylord v. McCoy....161 N.C. 685.... 199
Geddie v. Williams....189 N.C. 333.... 426
Gettys v. Marion....218 N.C. 266.... 276
Gibson v. Insurance Co. ....232 N.C. 712.... 208
Gibson v. Whitton....239 N.C. 11.... 49
Gilchrist v. Kitchen.... 86 N.C. 20.... 180
Gill v. Porter....174 N.C. 569.... 181
Glisson v. Glisson....153 N.C. 185.... 652
Glover v. Dail....199 N.C. 659.... 575
Gore v. Columbus County....232 N.C. 636.... 225
Gossett v. Ins. Co. ....208 N.C. 152.... 617
Gough v. Bell....180 N.C. 268.... 652
Graham v. Floyd....214 N.C. 77....610, 611, 612, 613
Graham v. Gas Co. ....231 N.C. 680.... 615
Grant v. Grant....159 N.C. 528....302, 305, 548
Grantham v. Grantham....205 N.C. 363.... 273
Green v. Rountree.... 88 N.C. 164.... 194
Greene v. Bd. of Education....237 N.C. 336....518, 600
Greene v. Dishman....202 N.C. 811.... 599
Greene v. Spivey....236 N.C. 435.... 518
Greenlee v. McDowell.... 39 N.C. 481.... 269
Greer v. Hayes....221 N.C. 141.... 426
Greer v. Lumber Co. ....161 N.C. 144.... 245
Griffin v. Barnes....242 N.C. 306.... 699
Griffin v. Jones....230 N.C. 612.... 480
Griffin v. Light Co. ....111 N.C. 434....178, 180
Griffin v. Springer....244 N.C. 95....149, 204, 514
Griffin v. Thomas....128 N.C. 310.... 467
Griggs v. Griggs....213 N.C. 624.... 665
Grissom v. Pickett.... 98 N.C. 54.... 574
Gudger v. White....141 N.C. 507.... 98
Guerin v. Guerin....208 N.C. 457....290, 304
Guest v. Iron & Metal Co. ....241 N.C. 448.... 526
Guy v. Harmon....204 N.C. 226.... 721
Gwaltney v. Timber Co. ....115 N.C. 579.... 184
Gwathmey v. Cason.... 74 N.C. 5.... 686

H

Hall v. Misenheimer....137 N.C. 183.... 686
Hall v. Odom....240 N.C. 66....574, 575
Hall v. Quinn....190 N.C. 326.... 578

Hall v. Younts..... 87 N.C. 285..... 439
Ham v. Fuel Co. .....204 N.C. 614..... 67
Hamilton v. Henry.....239 N.C. 664..... 49
Hampton v. Griggs.....184 N.C. 13..... 72
Hancammon v. Carr.....229 N.C. 52..... 558
Hansley v. R. R. .....115 N.C. 602.....27, 28
Hansley v. R. R. .....117 N.C. 565..... 28
Hanson v. Yandle.....235 N.C. 532.....88, 90, 303
Hardison v. Lumber Co. .....136 N.C. 173.....5, 7
Hardware Co. v. Lewis.....173 N.C. 290..... 267
Hare v. Weil.....213 N.C. 484..... 568
Harrell v. Welstead.....206 N.C. 817.....290, 301, 304
Harrill v. Refining Co. .....225 N.C. 421..... 736
Harris v. Board of Education.....216 N.C. 147..... 259
Harris v. Board of Education.....217 N.C. 281..... 665
Harris v. Distributing Co. .....172 N.C. 14..... 493
Harris v. Fairley.....232 N.C. 555..... 313
Harris v. Harris.....178 N.C. 7..... 465
Harris v. R. R. .....220 N.C. 698..... 247
Harrison v. Dill.... .....169 N.C. 542..... 44
Harrison v. Hargrove.....109 N.C. 346..... 652
Harrison v. Hargrove.....120 N.C. 96..... 722
Harrison v. R. R. .....194 N.C. 656..... 276
Hartley v. Smith.....239 N.C. 170..... 444
Hatcher v. Clayton.....242 N.C. 450.....582, 698
Hatley v. Hatley.....202 N.C. 577..... 291
Hayes v. Elon College.....224 N.C. 11..... 91
Hayes v. Wilmington.....239 N.C. 238..... 22
Heath v. Kirkman.....240 N.C. 303..... 556
Heath v. Manufacturing Co. .....242 N.C. 215..... 678
Heath v. Morgan.....117 N.C. 504..... 684
Hedgecock v. Ins. Co. .....212 N.C. 638..... 344
Hegler v. Mills Co. .....224 N.C. 669..... 635
Helsabeck v. Grubbs.....171 N.C. 337..... 476
Henderson v. Henderson.....232 N.C. 1.....293, 294, 301, 304, 652
Henderson v. Henderson.....239 N.C. 487.....190, 727
Herring v. Lumber Co. .....159 N.C. 382..... 426
Hicks v. Manufacturing Co. .....138 N.C. 319..... 277
High v. Pearce.....220 N.C. 266..... 720
High Point v. Clark.....211 N.C. 607..... 390
Highway Com. v. Brann.....243 N.C. 758..... 716
Hill v. Greyhound Corp. .....229 N.C. 728..... 52
Hill v. Hotel Co. .....188 N.C. 586..... 179
Hines v. Moye.....125 N.C. 8..... 320
Hines v. Reynolds.....181 N.C. 343..... 147
Hines v. Williams.....198 N.C. 420.....721, 722
Hinshaw v. Pepper.....210 N.C. 573..... 47
Hinson v. Dawson.....241 N.C. 714.....25, 617
Hinson v. Dawson.....244 N.C. 23..... 563
Hinson v. Shugart.....224 N.C. 207..... 570
Hinton v. Vinson.....180 N.C. 393..... 578
Hobbs v. Drewer.....226 N.C. 146..... 49
Hobbs v. Goodman.....240 N.C. 192..... 22
Hoke v. Greyhound Corp. .....227 N.C. 374.....313, 343, 664, 665

Holland v. Strader....216 N.C. 436.... 67
Holloman v. Holloman....127 N.C. 15....301, 302, 305
Holloway v. Green....167 N.C. 91.... 184
Hollowell v. Dept. of Conservation and Development....206 N.C. 206.... 88
Holmes v. R. R. .... 94 N.C. 318.... 27
Holton v. Lee....173 N.C. 105.... 404
Hood, Comr. of Banks, v. Realty, Inc. .... 211 N.C. 582.... 500
Hood, Comr. of Banks, v. Motor Co. ....209 N.C. 303.... 665
Honeycutt v. Asbestos Co. ....235 N.C. 471.... 658
Hopkins v. Crisp....166 N.C. 97.... 722
Hopkins v. Hopkins....132 N.C. 22....293, 302, 304
Horne v. Edwards....215 N.C. 622....289, 294, 303
Horne v. Smith....105 N.C. 322....454, 455
Horton v. Coach Co. ....216 N.C. 567.... 27
Hospital v. Joint Committee....234 N.C. 673.... 520
House v. House....231 N.C. 218.... 145
Housing Authority, *In re*....235 N.C. 463.... 292
Houston v. Monroe....213 N.C. 788.... 276
Howell v. Credit Corp. ....238 N.C. 442.... 553
Howell v. Harris....220 N.C. 198.... 445
Howell v. Howell....223 N.C. 62.... 451
Howerton v. Sexton....104 N.C. 75.... 652
Howle v. Express, Inc. ....237 N.C. 667.... 547
Hudson v. Silk Co. ....185 N.C. 342.... 736
Hughes v. Hodges.... 94 N.C. 56.... 652
Hughes v. Thayer....229 N.C. 773.... 4
Hunter v. Randolph....128 N.C. 91.... 440
Huskins v. Hospital....238 N.C. 357.... 239
Hutchins v. Davis....230 N.C. 67....162, 163
Hutton v. Horton....178 N.C. 548.... 101
Hyder v. Battery Co., Inc. ....242 N.C. 553.... 392

I

Ice Cream Co. v. Ice Cream Co. ...238 N.C. 317.... 116
In re Assignment of School Children ....242 N.C. 500.... 169
In re Bank ....208 N.C. 509.... 310
In re Blalock ....233 N.C. 493....520, 683
In re Estate of Pitchi....231 N.C. 485.... 652
In re Housing Authority....235 N.C. 463.... 292
In re McGowan ....235 N.C. 404.... 521
In re Powell ....241 N.C. 288.... 255
In re Publishing Co. ....231 N.C. 395.... 272
In re Reynolds ....206 N.C. 276.... 232
In re Stokley ....240 N.C. 658.... 390
In re Utilities Co. ....179 N.C. 151.... 249
In re Westover Canal....230 N.C. 91.... 214
In re Will of Bartlett....235 N.C. 489.... 392
In re Will of Beard....202 N.C. 661.... 599
Ingram v. Easley....227 N.C. 442.... 99
Insurance Co. v. Knox ....220 N.C. 725.... 418

Insurance Co. v. Morehead .....209 N.C. 174..... 536
Insurance Co. v. Reid .....171 N.C. 513..... 107
Insurance Co. v. Wells .....226 N.C. 574..... 368
Investment Co. v. Chemicals
Laboratory .....233 N.C. 294..... 589
Investment Co. v. Pickelsimer.....210 N.C. 541..... 547
Irby v. Wilson..... 21 N.C. 568..... 290
Irvin v. Harris.....182 N.C. 647..... 426
Irwin v. Charlotte.....193 N.C. 109..... 35
Isler v. Brown..... 69 N.C. 125..... 313
Isler v. Murphy..... 71 N.C. 436..... 612

J

Jackson v. Jackson.....105 N.C. 433..... 451
Jackson v. Parks.....220 N.C. 680..... 617
Jackson v. Powell.....225 N.C. 599..... 73
James v. Pretlow.....242 N.C. 102..... 177
Jefferson v. Jefferson.....219 N.C. 333..... 207
Jeffries v. Parker.....236 N.C. 756..... 207
Jenkins v. Duckworth & Shelton,
Inc. .....242 N.C. 748..... 426
Johnson v. Andrews .....132 N.C. 376..... 476
Johnson v. Bell .....234 N.C. 522..... 49
Johnson v. Casualty Co. .....234 N.C. 25..... 368
Johnson v. Cotton Mills.....232 N.C. 321..... 212
Johnson v. Finch ..... 93 N.C. 205.....90, 303
Johnson v. Gill .....235 N.C. 40..... 684
Johnson v. Heath .....240 N.C. 255..... 156
Johnson v. Ins. Co. .....217 N.C. 139..... 379
Johnson v. Johnson .....142 N.C. 462.....302, 305, 310
Johnson v. Kincade ..... 37 N.C. 470.....305, 379
Johnson v. Leavitt .....188 N.C. 682.....466, 492
Johnson v. Lee .....187 N.C. 753.....101, 207
Johnson v. R. R. .....163 N.C. 431..... 617
Johnson v. Smith .....215 N.C. 322..... 558
Jones v. Bland .....182 N.C. 70..... 509
Jones v. Brinson .....231 N.C. 63..... 471
Jones v. Brinson .....238 N.C. 506.....547, 548, 720
Jones v. Fowler .....242 N.C. 162..... 279
Jones v. Jones .....173 N.C. 279..... 449
Jones v. Oil Co. .....202 N.C. 328..... 543
Jones v. R. R. .....199 N.C. 1..... 247
Jones v. Smith .....149 N.C. 318..... 185
Jones v. Whichard .....163 N.C. 241..... 72
Jordan v. Miller.....179 N.C. 73..... 736
Journigan v. Ice Co. .....233 N.C. 180..... 617
Jyachosky v. Wensil.....240 N.C. 217..... 444

K

Kea v. Robeson..... 40 N.C. 373..... 98
Kearns v. Furniture Co. .....222 N.C. 438..... 518
Keith v. Bailey.....185 N.C. 262..... 686
Keith v. Wilder.....241 N.C. 672..... 684

Kendrick v. Ins. Co. ....124 N.C. 315.... 38
Kennedy v. Kennedy....236 N.C. 419.... 207
King v. Powell....220 N.C. 511.... 387
King v. Scoggin.... 92 N.C. 99.... 147
Kinney v. Kinney....149 N.C. 321.... 293
Kinsland v. Adams....172 N.C. 765.... 294
Kirkland v. Mangum.... 50 N.C. 313....403, 650
Kirkley v. Ins. Co. ....232 N.C. 292.... 505
Knight v. Body Co. ....214 N.C. 7.... 38
Knight v. Foster....163 N.C. 329.... 275
Knitting Mills v. Gill, Comr. of Revenue ....228 N.C. 764.... 175
Kornegay v. Miller....137 N.C. 659.... 232

L

Lackey v. R. R. ....219 N.C. 195.... 22
Lamb v. Staples....236 N.C. 179.... 367
Lambert v. Schell....235 N.C. 21.... 677
Lamm v. Crumpler....240 N.C. 35.... 471
Lancaster v. Bland....168 N.C. 377.... 746
Lance v. Cogdill....236 N.C. 134.... 425
Land Bank v. Foster....217 N.C. 415.... 108
Lassiter v. Lassiter.... 92 N.C. 129.... 450
Lassiter v. Jones....215 N.C. 298.... 579
Laughinghouse v. Ins. Co. ....200 N.C. 434.... 367
Lavecchia v. Land Bank....215 N.C. 73.... 441
Lawrence v. Hardy....151 N.C. 123.... 478
Lawrence v. Lawrence....226 N.C. 221....313, 691
Lawrence v. Lawrence....226 N.C. 624.... 449
Leary v. Land Bank....215 N.C. 501.... 388
Ledbetter v. English....166 N.C. 125.... 67
Ledford v. Ledford....229 N.C. 373.... 404
Lee v. Rose's Stores, Inc. ....205 N.C. 310.... 38
Lee v. Stewart....218 N.C. 287.... 186
Lenoir County v. Outlaw....241 N.C. 97.... 431
Lewis v. Archbell....199 N.C. 205.... 116
Lewis v. Ins. Co. ....243 N.C. 55.... 665
Light Co. v. Moss....220 N.C. 200.... 293
Lindsey v. Speight....224 N.C. 453.... 273
Lineberger v. Gastonia....196 N.C. 445.... 22
Lipinsky v. Revell....167 N.C. 508.... 643
Long v. Ins. Co. ....114 N.C. 465.... 478
Lovin v. Hamlet....243 N.C. 399.... 603
Lowe v. Department of Motor Vehicles ....244 N.C. 353.... 564
Lowery v. School Trustees....140 N.C. 33....224, 226, 228
Lumber Co. v. Atkinson ....162 N.C. 298.... 371
Lumber Co. v. Branch ....158 N.C. 251.... 617
Lumber Co. v. Hayworth ....205 N.C. 585.... 38
Lumber Co. v. Herrington ....183 N.C. 85.... 145
Lumber Co. v. Wilson ....222 N.C. 87.... 558
Lunceford v. Association....190 N.C. 314.... 677
Luttrell v. Mineral Company....220 N.C. 782.... 358

Lutz Industries, Inc. v. Dixie Home Stores ....242 N.C. 332....27, 29
Lyerly v. Griffin....237 N.C. 686....47
Lyerly v. Wheeler....34 N.C. 290....420
Lykes v. Grove....201 N.C. 254....131

Mc

MacClure v. Casualty Co. ....229 N.C. 305....344
McCabe v. Cas. Co. ....209 N.C. 577....368
McCall v. Lee....182 N.C. 114....200
McCall v. Webb....125 N.C. 243....543
McCanless v. Ballard....222 N.C. 701....425, 426
McCown, *Ex parte*....139 N.C. 95....405
McCoy v. Justice....199 N.C. 602....289, 294, 303
McCoy v. Wood....70 N.C. 125....574
McCrowell v. R. R. ....221 N.C. 366....359
McCullen v. Durham....229 N.C. 418....426
McDonald v. McDonald....58 N.C. 211....231
McDowell v. Blythe Brothers Co. 236 N.C. 396....557, 558
McDowell v. McDowell....92 N.C. 227....650
McGee v. Ledford....238 N.C. 269....21
McGill v. Lumberton....215 N.C. 752....359, 396, 397
McGowan, *In re*....235 N.C. 404....521
McGowan v. Beach....242 N.C. 73....642
McIntyre v. Murphy....177 N.C. 300....259
McKay v. Cameron....231 N.C. 658....11
McKee v. Lineberger....69 N.C. 217....368
McKeel v. Latham....203 N.C. 246....665
McKethan v. Ray....71 N.C. 165....514, 515
McKinney v. Deneen....231 N.C. 540....22, 23
McKinney v. Patterson....174 N.C. 483....341
McKinnon v. Morrison....104 N.C. 354....716
McLawhon v. Briley....234 N.C. 394....536
McLean v. McLean....233 N.C. 139....294
McMillan v. Baker....92 N.C. 110....181
McMillan v. Butler....218 N.C. 582....49
McNair v. Finance Co. ....191 N.C. 710....131
McPherson v. Bank....240 N.C. 1....102
McPherson v. Williams....205 N.C. 177....184
McQueen v. Graham....183 N.C. 491....641
McQueen v. Trust Co. ....234 N.C. 737....102

M

Machine Co. v. Owings....140 N.C. 503....131, 162, 426
Mackie v. Mackie....230 N.C. 152....207, 208
Malever v. Jewelry Co. ....223 N.C. 148....553
Mallard v. Bohannon....220 N.C. 536....212
Mallard v. Patterson....108 N.C. 255....180
Mangum v. R. R. ....210 N.C. 134....22
Manley v. News Co. ....241 N.C. 455....441, 573
Manufacturing Co. v. Assurance Co. ....110 N.C. 176....367
Manufacturing Co. v. R. R. ....222 N.C. 330....265, 589

Marcom v. Adams....122 N.C. 222.... 373
Marren v. Gamble....237 N.C. 608....33, 35
Marshburn v. Brown....210 N.C. 331.... 225
Marshburn v. Patterson....241 N.C. 441....49, 193
Martin v. Knowles....195 N.C. 427.... 99
Martin v. Martin....130 N.C. 27....302, 305, 451
Mason v. White.... 53 N.C. 421.... 102
Mastin v. Marlow.... 65 N.C. 696....232, 235
Matheny v. Motor Lines....233 N.C. 673....47, 342
Matthews v. Cheatham....210 N.C. 592.... 49
Matthews v. Freight Lines....236 N.C. 72.... 67
Mauldin v. McAden....234 N.C. 501.... 225
May v. Loomis....140 N.C. 350.... 131
May v. Power Co. ....216 N.C. 439.... 553
Mayberry v. Grimsley....208 N.C. 64.... 99
Mayer v. Adrian.... 77 N.C. 83....200, 431, 686
Mayo v. Staton....137 N.C. 670.... 267
Mayo v. Whitson.... 47 N.C. 231....403, 404, 406, 650
Medical College v. Maynard....236 N.C. 506.... 129
Mercantile Co. v. Ins. Co. ....176 N.C. 545.... 198
Mercer v. Williams....210 N.C. 456.... 736
Meroney v. Avery.... 64 N.C. 312.... 324
Merrell v. Kindley....244 N.C. 118.... 668
Merritt v. Dick....169 N.C. 244.... 589
Messick v. Hickory....211 N.C. 531.... 617
Mewborn v. Mewborn....239 N.C. 284.... 99
Midkiff v. Auto Racing, Inc. ....240 N.C. 470.... 341
Midkiff v. Ins. Co. ....197 N.C. 139.... 367
Midkiff v. Ins. Co. ....197 N.C. 144.... 367
Mikeal v. Pendleton....237 N.C. 690....49, 357
Miller v. Roberts....212 N.C. 126....90, 91, 291, 303
Millikan v. Simmons....244 N.C. 195.... 483
Mills v. Moore....219 N.C. 25....540, 616, 669
Mills v. Richardson....240 N.C. 187....181, 664, 665
Mining Co. v. Mills Co. ....181 N.C. 361.... 208
Mintz v. Frink....217 N.C. 101.... 610
Mintz v. Murphy....235 N.C. 304....140, 141, 342
Mion v. Marble & Tile Co. ....217 N.C. 743....656, 659
Mitchell v. Melts....220 N.C. 793.... 669
Mobley v. Griffin....104 N.C. 112....320, 322
Monroe v. Niven....221 N.C. 362....90, 291, 301, 304
Monroe v. R. R. ....151 N.C. 374.... 246
Montague v. Mial.... 89 N.C. 137.... 575
Montgomery v. Blades....222 N.C. 463.... 67
Moody v. Howell....229 N.C. 198.... 179
Moore v. Baker....224 N.C. 133.... 101
Moore v. Boone....231 N.C. 494....342, 344
Moore v. Faison.... 97 N.C. 322.... 575
Moore v. Gulley....144 N.C. 81.... 294
Moore v. Miller....179 N.C. 396.... 322
Moore v. Trust Co. ....178 N.C. 118....492, 494
Moore v. Vallentine.... 77 N.C. 188.... 454
Moore County v. Burns....224 N.C. 700.... 166
Morgan v. Cloth Mills....207 N.C. 317.... 212

Morgan v. Coach Co. ....228 N.C. 280.... 371
Morgan v. Oil Co. ....238 N.C. 185.....185, 186, 238, 239, 240, 241
Morganton v. Hudson....207 N.C. 360.....185, 186
Morris v. Wilkins....241 N.C. 507.... 181
Morrisette v. Boone Co. ....235 N.C. 162.... 47
Mortgage Corp. v. Barco....218 N.C. 154.... 322
Moseley v. Deans....222 N.C. 731.... 520
Moses v. Morganton....192 N.C. 102.... 22
Moss v. Hicks....240 N.C. 788.... 736
Motley v. Whitemore.... 19 N.C. 537.....492, 494
Motor Lines v. Transportation Co. ....225 N.C. 733.... 678
Mottu v. Davis....153 N.C. 160.... 294
Moye v. Petway.... 75 N.C. 165.... 651
Munford v. Construction Co. ....203 N.C. 247.....656, 659, 660
Murchison v. Fogleman....165 N.C. 397.... 465
Murray v. Knitting Co. ....214 N.C. 437.... 89
Murray v. R. R. .... 93 N.C. 92.... 247
Murray v. R. R. ....218 N.C. 392.....727, 729, 731
Myrose v. Swain....172 N.C. 223.... 599

N

NASCAR, Inc. v. Blevins....242 N.C. 282.... 344
Neal v. Marrone....239 N.C. 73.... 536
Nebel v. Nebel....241 N.C. 491.....35, 259
Neill v. Bach....231 N.C. 391.... 145
Nesbitt v. Fairview Farms, Inc. ..239 N.C. 481.....184, 185
Newman v. Comrs. of Vance....208 N.C. 675.... 500
Newsom v. Anderson.... 24 N.C. 42.... 184
Newsom v. Thompson.... 24 N.C. 277.... 101
Nichols v. Goldston....228 N.C. 514.... 49
Nichols v. Nichols....128 N.C. 108.....293, 301, 302, 304
Nixon v. Nixon....215 N.C. 377.... 348
Norman v. Hallsey....132 N.C. 6.... 431
Norris v. R. R. ....152 N.C. 505.....141, 343
Norris v. Stewart....105 N.C. 455.... 324
Norwood v. Carter....242 N.C. 152.... 616

O

O'Connor v. O'Connor....109 N.C. 139.... 451
Oil Co. v. Grocery Co. ....169 N.C. 521.... 543
Oliver v. Highway Commission.. 194 N.C. 380.....403, 650
Oliver v. Oliver....219 N.C. 299.... 301
Ollis v. Ollis....241 N.C. 709.....449, 451
Orange County v. Jenkins....200 N.C. 202.... 721
Orange County v. Wilson....202 N.C. 424.... 721
Ornoff v. Durham....221 N.C. 457.... 260
Osborne v. Coal Co. ....207 N.C. 545.... 67
Outlaw v. Gray....163 N.C. 325.... 11
Owens v. Williams....130 N.C. 165.... 568
Oxford Orphanage v. Kittrell.....223 N.C. 427.... 578

P

Pack v. Auman....220 N.C. 704.... 669
Page v. Page....167 N.C. 346.... 450
Pake v. Morris....230 N.C. 424.... 184
Palin v. Small.... 63 N.C. 484.... 684
Pants Co. v. Smith....125 N.C. 588.... 476
Park, Inc., v. Brinn....223 N.C. 502.... 610, 611
Parker v. Anson County....237 N.C. 78....223, 224, 225
Parker v. Bledsoe.... 87 N.C. 221.... 269
Parker v. Davis.... 53 N.C. 460.... 379
Parker v. Jones.... 58 N.C. 276.... 269
Parker v. Underwood....239 N.C. 308.... 444
Parker v. White....235 N.C. 680.... 131
Parrish v. Manufacturing Co. ....211 N.C. 7.... 445
Parrish v. R. R. ....221 N.C. 292.... 427
Parsons v. Benfield....228 N.C. 651.... 588
Patterson v. Franklin....168 N.C. 75.... 643
Patterson v. McCormick....177 N.C. 448.... 145
Patterson v. Wadsworth.... 89 N.C. 407.... 194
Pearce v. Pearce....225 N.C. 571.... 451
Peed v. Burleson's, Inc. ....242 N.C. 628.... 438
Peek v. Trust Co. ....242 N.C. 1.... 38
Peltz v. Bailey....157 N.C. 166.... 476
Pendleton v. Pendleton.... 47 N.C. 135.... 650
Penny v. Nowell....231 N.C. 154.... 199
Peoples v. Fulk....220 N.C. 635.... 189
Perley v. Paving Co. ....228 N.C. 479.... 91
Perrett v. Bird....152 N.C. 220.... 145
Perry v. Bassenger....219 N.C. 838.... 613
Perry v. Doub....238 N.C. 233.... 166
Perry v. Nowell....231 N.C. 154.... 483
Person v. Doughton....186 N.C. 723.... 35
Person v. Tyson....215 N.C. 127.... 368
Peterson v. Taylor....203 N.C. 673.... 568
Phillips v. Land Co. ....174 N.C. 542.... 323
Phillipse v. Higdon.... 44 N.C. 380....403, 406
Pilley v. Smith....230 N.C. 62.... 207
Pinnix v. Durham....130 N.C. 360.... 276
Pinnix v. Griffin....221 N.C. 348....388, 617
Pitchi, *In re* Estate of....231 N.C. 485.... 652
Pleasants v. Barnes....221 N.C. 173.... 736
Plemmons v. R. R. ....140 N.C. 286.... 652
Plemmons v. White's Service, Inc. ....213 N.C. 148.... 634
Plotkin v. Bank....188 N.C. 711....641, 644
Pollard v. Pollard....221 N.C. 46.... 449
Pope v. Burgess....230 N.C. 323....98, 437
Pope v. Pope....176 N.C. 283.... 323
Potter v. Frosty Morn Meats, Inc. ....242 N.C. 67.... 22
Powell v. Dail....172 N.C. 261.... 611
Powell v. Maxwell, Comr. of Revenue ....210 N.C. 211.... 175

Powell v. Powell....168 N.C. 561....101, 102, 207, 208
Powell v. Turpin....224 N.C. 67....610
Powell, *In re*....241 N.C. 288....255
Power Co. v. Haywood....186 N.C. 313....100, 102, 145, 147
Presnell v. Liner....218 N.C. 152....161, 162
Pressly v. Walker....238 N.C. 732....189, 321, 430
Prevatt v. Harrelson....132 N.C. 250....320
Price v. Griffin....150 N.C. 523....72
Priddy & Co. v. Sanderford....221 N.C. 422....73, 146
Pridgen v. Pridgen....203 N.C. 533....290, 305, 306, 308
Prince v. Barnes....224 N.C. 702....98, 102
Privette v. Privette....230 N.C. 52....427
Pruitt v. Wood....199 N.C. 788....588
Publishing Co., *In re*....231 N.C. 395....272
Puckett v. Dyer....203 N.C. 684....161
Puitt v. Commissioners....94 N.C. 709....226
Purcell v. R. R. ....108 N.C. 414....28

R

Rabil v. Farris....213 N.C. 414....303
Radio Station v. Eitel-McCullough ....232 N.C. 287....677, 678
R. R. v. Reid....187 N.C. 320....228, 403, 404
R. R. v. Thrower....213 N.C. 637....52
Randle v. Grady....228 N.C. 159....130, 131
Rankin v. Helms....244 N.C. 532....616
Ravenal v. Ingram....131 N.C. 549....467
Rawls v. Lupton....193 N.C. 428....44, 716
Ray v. Post....224 N.C. 665....669
Realty Corp. v. Koon....216 N.C. 295....514, 515
Reaves v. Mill Co. ....216 N.C. 462....88, 94
Rees v. Ins. Co. ....216 N.C. 428....212
Rees v. Williams....165 N.C. 201....145
Reeves v. Staley....220 N.C. 573....49
Register v. Power Co. ....165 N.C. 234....599
Reid v. Bristol....241 N.C. 699....303
Rewis v. Ins. Co. ....226 N.C. 325....212, 518, 635
Rexford v. Phillips....159 N.C. 213....721
Reynolds v. Cotton Mills....177 N.C. 412....291
Reynolds v. Earley....241 N.C. 521....612
Reynolds v. Murph....241 N.C. 60....29
Reynolds, *In re*....206 N.C. 276....232
Rhodes v. Raxter....242 N.C. 206....198
Rhyne v. Lipscombe....122 N.C. 650....543
Ricaud v. Alderman....132 N.C. 62....403
Rice v. Chair Co. ....138 N.C. 121....212
Rice v. Jones....103 N.C. 226....268
Rice v. Lumberton....235 N.C. 227....140, 554
Ricks v. Wilson....154 N.C. 282....465
Ridenhour v. Ridenhour....225 N.C. 508....313
Rigsbee v. Perkins....242 N.C. 502....529
Rippy v. Gant....39 N.C. 443....379
Ritchie v. White....225 N.C. 450....699
Rivenbark v. Oil Corp. ....217 N.C. 592....264

Robbins v. Charlotte....241 N.C. 197.... 34
Roberson v. Stokes....181 N.C. 59.... 509
Roberson v. Swain....235 N.C. 50.... 471
Roberts v. Moore....185 N.C. 254.... 52
Robinson v. McAlhaney....214 N.C. 180.... 26
Rodriguez v. Rodriguez....224 N.C. 275....290, 304
Rogers v. Jones....172 N.C. 156.... 599
Rogers v. Moore.... 86 N.C. 86.... 179
Rogerson v. Leggett....145 N.C. 7.... 611
Rountree v. Brinson.... 98 N.C. 107.... 272
Rowe v. Durham....235 N.C. 158.... 34
Rowland v. Rowland.... 93 N.C. 214.... 98
Royal v. Southerland....168 N.C. 405.... 642
Rushing v. R. R. ....149 N.C. 158.... 617
Russ v. Board of Education....232 N.C. 128.... 390
Russell v. Coggin....232 N.C. 674.... 34
Ryan v. Trust Co. ....235 N.C. 585.... 172

S

St. George v. Hanson....239 N.C. 259.... 259
St. George v. Hardie....147 N.C. 88.... 501
Sanderson v. Paul....235 N.C. 56.... 323
Sandlin v. Weaver....240 N.C. 703.... 420
Satterwhite v. Gallagher....173 N.C. 525.... 320
Saunders v. Gilbert....156 N.C. 463.... 372
Saunderson v. Saunderson....195 N.C. 169.... 291
Savage v. McGlawhorn....199 N.C. 427.... 558
Scales v. Lewellyn....172 N.C. 494.... 155
Scott v. Ins. Co. ....208 N.C. 160.... 505
Scott v. Lumber Co. ....232 N.C. 162.... 91
Scott v. Veneer Co. ....240 N.C. 73.... 665
Scott & Co. v. Jones....230 N.C. 74.... 172
Scott Register Co. v. Holton....200 N.C. 478.... 269
Seawell v. Hall....185 N.C. 80.... 98
Sedberry v. Parsons....232 N.C. 707.... 98
Sellers v. Ins. Corp. ....233 N.C. 590.... 166
Setzer v. Setzer.... 97 N.C. 252.... 305
Severt v. Lyall....222 N.C. 533.... 146
Shaffer v. Bank....201 N.C. 415.... 520
Shannonhouse v. Wolfe....191 N.C. 769.... 350
Shaver v. Shaver....244 N.C. 309.... 308
Shaw University v. Ins. Co. ....230 N.C. 526.... 578
Sheets v. Dillon....221 N.C. 426.... 602
Sheets v. Walsh....217 N.C. 32.... 11
Sheldon v. Childers....240 N.C. 449....342, 344
Shepherd v. Shepherd....179 N.C. 121.... 181
Sherrill v. Little....193 N.C. 736....161, 162
Shoe Co. v. Department Store....212 N.C. 75.... 116
Shore v. Holt....185 N.C. 312.... 643
Shuford v. Brady....169 N.C. 224.... 102
Shuford v. Scruggs....201 N.C. 685.... 669
Simmons v. Simmons....228 N.C. 233....290, 304
Simons v. Lebrun....219 N.C. 42....570, 736
Simpson v. Lumber Co. ....193 N.C. 454....200, 686

Singletary v. Nixon....239 N.C. 634....193, 727
Singleton v. Roebuck....178 N.C. 201....641
Skinner v. Coward....197 N.C. 466....431
Skinner v. Evans....243 N.C. 760....190
Sledge v. Reid....73 N.C. 440....439
Small v. Morrison....185 N.C. 577....665
Smith v. Benson....227 N.C. 56....320, 322
Smith v. Buie....243 N.C. 209....49
Smith v. French....141 N.C. 1....644
Smith v. Fuller....152 N.C. 7....420
Smith v. Joyce....214 N.C. 602....200, 686
Smith v. Land Bank....213 N.C. 343....131
Smith v. New Bern....73 N.C. 303....310
Smith v. Paper Co....226 N.C. 47....91
Smith v. Thompson....210 N.C. 672....387
Smith v. Whitley....223 N.C. 534....67
Smith-Douglass Co. v. Honeycutt 204 N.C. 219....52
Smithfield Mills, Inc., v. Stevens..204 N.C. 382....537
Smithwick v. Ward....52 N.C. 64....373
Smoak v. Sockwell....152 N.C. 503....684
Snyder v. Oil Co....235 N.C. 119....387
Sonotone Corp. v. Baldwin....227 N.C. 387....116
Southerland v. Potts....234 N.C. 268....436
Southern v. Cotton Mills Co....200 N.C. 164....212
Spaugh v. Charlotte....239 N.C. 149....90, 303
Speas v. Woodhouse....162 N.C. 66....321
Speight v. Speight....208 N.C. 132....348
Spencer v. Cohoon....18 N.C. 27....652
Springs v. Refining Co....205 N.C. 444....454
Springs v. Schenck....106 N.C. 153....651
Sprinkle v. Reidsville....235 N.C. 140....467
Spruill v. Mfg. Co....130 N.C. 42....493
Spruill v. Nixon....238 N.C. 523....746
Stafford v. Gallops....123 N.C. 19....90, 304
Stanford v. Grocery Co....143 N.C. 427....27
Starnes v. Hill....112 N.C. 1....72
S. v. Anderson....92 N.C. 733....214
S. v. Anderson....162 N.C. 571....256
S. v. Archbell....139 N.C. 537....707
S. v. Arthur....244 N.C. 582....586
S. v. Arthur....244 N.C. 586....585
S. v. Ballangee....191 N.C. 700....59, 60
S. v. Barber....113 N.C. 711....43
S. v. Barber....197 N.C. 554....333
S. v. Barfield....30 N.C. 344....371, 373
S. v. Barksdale....181 N.C. 621....360
S. v. Barrett....243 N.C. 686....283
S. v. Baskerville....141 N.C. 811....543
S. v. Baucom....244 N.C. 61....60
S. v. Baxter....208 N.C. 90....60
S. v. Beal....170 N.C. 764....707
S. v. Beal....199 N.C. 278....44, 688
S. v. Becker....241 N.C. 321....669, 670
S. v. Bell....228 N.C. 659....741

S. v. Bennett ..... 237 N.C. 749 44
S. v. Benson ..... 183 N.C. 795 ..... 410, 412
S. v. Bentley ..... 223 N.C. 563 384
S. v. Best ..... 202 N.C. 9 256
S. v. Birchfield ..... 235 N.C. 410 ..... 44, 712
S. v. Bittings ..... 206 N.C. 798 ..... 599, 716
S. v. Blackwell ..... 162 N.C. 672 ..... 371, 372
S. v. Bohanon ..... 142 N.C. 695 45
S. v. Bovender ..... 233 N.C. 683 412
S. v. Bowen ..... 230 N.C. 710 412
S. v. Bowser ..... 230 N.C. 330 591
S. v. Bradshaw ..... 214 N.C. 5 591
S. v. Brady ..... 237 N.C. 675 255
S. v. Bright ..... 215 N.C. 537 413
S. v. Broom ..... 222 N.C. 324 112
S. v. Bryant ..... 236 N.C. 379 463
S. v. Buchanan ..... 216 N.C. 709 413
S. v. Burke ..... 73 N.C. 83 741
S. v. Burnett ..... 142 N.C. 577 688
S. v. Burton ..... 243 N.C. 277 59
S. v. Byrd ..... 121 N.C. 684 372
S. v. Cagle ..... 209 N.C. 114 45
S. v. Calcutt ..... 219 N.C. 545 457
S. v. Cannon ..... 227 N.C. 336 54
S. v. Cannon ..... 244 N.C. 399 650
S. v. Carraway ..... 181 N.C. 561 372
S. v. Carroll ..... 226 N.C. 237 509
S. v. Carter ..... 204 N.C. 304 333
S. v. Casey ..... 201 N.C. 185 313
S. v. Casey ..... 201 N.C. 620 ..... 462, 746
S. v. Chambers ..... 180 N.C. 705 54
S. v. Chambers ..... 238 N.C. 373 591
S. v. Champion ..... 222 N.C. 160 372
S. v. Chestnutt ..... 241 N.C. 401 344
S. v. Choate ..... 228 N.C. 491 711
S. v. Clarke ..... 220 N.C. 392 591
S. v. Cochran ..... 230 N.C. 523 208
S. v. Coffey ..... 228 N.C. 119 384
S. v. Cole ..... 202 N.C. 592 ..... 58, 60
S. v. Cole ..... 241 N.C. 576 80
S. v. Collins ..... 240 N.C. 128 255
S. v. Conner ..... 241 N.C. 468 113
S. v. Cox ..... 244 N.C. 57 121
S. v. Creech ..... 229 N.C. 662 44
S. v. Davenport ..... 227 N.C. 475 ..... 15, 16
S. v. Davis ..... 223 N.C. 54 591
S. v. Davis ..... 243 N.C. 754 ..... 283, 621, 622
S. v. Deal ..... 92 N.C. 802 60
S. v. Dill ..... 224 N.C. 57 591
S. v. Doughtie ..... 238 N.C. 228 69
S. v. Duncan ..... 244 N.C. 374 384
S. v. Earnhardt ..... 170 N.C. 725 ..... 360, 458
S. v. Eason ..... 242 N.C. 59 60
S. v. Edwards ..... 192 N.C. 321 404

S. v. Edwards ....205 N.C. 661.... 463
S. v. Elmore ....212 N.C. 531.... 372
S. v. Epps ....213 N.C. 709.... 457
S. v. Eunice ....194 N.C. 409.... 509
S. v. Everett ....194 N.C. 442.... 333
S. v. Ewing ....227 N.C. 535.... 384
S. v. Finch ....218 N.C. 511.... 59
S. v. Fleming ....204 N.C. 40.... 476
S. v. Flowers ....109 N.C. 841.... 55
S. v. Folger ....211 N.C. 695.... 681
S. v. Foster ....185 N.C. 674.... 457
S. v. Frizzelle ....243 N.C. 49....412, 413
S. v. Frye ....229 N.C. 581.... 384
S. v. Fulcher ....184 N.C. 663.... 70
S. v. Fulk ....232 N.C. 118.... 384
S. v. Gates ....107 N.C. 832.... 55
S. v. Gibbs ....234 N.C. 259....59, 60
S. v. Gibson ....193 N.C. 487.... 372
S. v. Gilbert ....230 N.C. 64.... 509
S. v. Godwin ....216 N.C. 49.... 44
S. v. Gordon ....241 N.C. 356....214, 215, 333, 410, 697
S. v. Grainger ....238 N.C. 739.... 384
S. v. Greer ....238 N.C. 325....56, 58, 60
S. v. Gregory ....223 N.C. 415.... 58
S. v. Gregory ....203 N.C. 528....411, 412
S. v. Hall ....142 N.C. 710.... 547
S. v. Hall ....240 N.C. 109.... 674
S. v. Hambright ....111 N.C. 707.... 333
S. v. Hare ....243 N.C. 262.... 740
S. v. Harrison ....239 N.C. 659.... 582
S. v. Hart ....116 N.C. 976.... 688
S. v. Hart ....239 N.C. 709....155, 281, 282
S. v. Harvey ....228 N.C. 62....333, 384
S. v. Hedden ....187 N.C. 803.... 70
S. v. Hedrick ....236 N.C. 727....15, 16
S. v. Hefner ....199 N.C. 778.... 712
S. v. Hensley .... 94 N.C.1021.... 372
S. v. Herron ....175 N.C. 754.... 307
S. v. Hill ....223 N.C. 711.... 585
S. v. Hill ....236 N.C. 704.... 674
S. v. Holland ....234 N.C. 354....376, 711
S. v. Holly ....155 N.C. 485.... 332
S. v. Hooker ....243 N.C. 429.... 45
S. v. Hoskins ....236 N.C. 412.... 256
S. v. Howell ....239 N.C. 78.... 410
S. v. Hullen ....133 N.C. 656.... 256
S. v. Humphries ....210 N.C. 406....457, 458
S. v. Huntley .... 91 N.C. 617.... 707
S. v. Ivey ....230 N.C. 172.... 597
S. v. Jackson .... 82 N.C. 565.... 214
S. v. Jackson ....199 N.C. 321.... 740
S. v. Jackson ....218 N.C. 373.... 59
S. v. Jaynes .... 198 N.C. 728.... 694
S. v. Johnson ....199 N.C. 429....383, 384

S. v. Johnson ..... 212 N.C. 566 591
S. v. Johnson ..... 220 N.C. 773 ..... 60, 61, 711
S. v. Johnson ..... 227 N.C. 587 411
S. v. Jones ..... 145 N.C. 460 70
S. v. Jones ..... 222 N.C. 37 411
S. v. Jones ..... 227 N.C. 402 740
S. v. Keller ..... 214 N.C. 447 458
S. v. Kelly ..... 216 N.C. 627 45
S. v. Kimbrell ..... 151 N.C. 702 ..... 372, 373
S. v. King ..... 226 N.C. 241 706
S. v. Kluckhohn ..... 243 N.C. 306 ..... 360, 414
S. v. Larkin ..... 229 N.C. 126 256
S. v. Lea ..... 203 N.C. 316 463
S. v. Limerick ..... 146 N.C. 649 360
S. v. Lippard ..... 183 N.C. 786 256
S. v. Long ..... 143 N.C. 670 60
S. v. Lowe ..... 204 N.C. 572 256
S. v. Lucas ..... 244 N.C. 53 60
S. v. Lueders ..... 214 N.C. 558 501
S. v. Lumber Co. ..... 153 N.C. 610 341
S. v. Lumber Co. ..... 207 N.C. 47 699
S. v. Lytle ..... 138 N.C. 738 70
S. v. McDonald ..... 133 N.C. 680 509
S. v. McIver ..... 125 N.C. 645 372
S. v. McLamb ..... 235 N.C. 251 694
S. v. McLean ..... 234 N.C. 283 357
S. v. McMilliam ..... 243 N.C. 771 74
S. v. McNeill ..... 225 N.C. 560 674
S. v. Marsh ..... 132 N.C. 1000 56
S. v. Matthews ..... 231 N.C. 617 384
S. v. Maynor ..... 226 N.C. 645 403
S. v. Medlin ..... 126 N.C. 1127 333
S. v. Merrick ..... 171 N.C. 788 414
S. v. Miller ..... 231 N.C. 419 59
S. v. Mills ..... 244 N.C. 487 450
S. v. Minton ..... 228 N.C. 518 384
S. v. Minton ..... 234 N.C. 716 376
S. v. Mobley ..... 240 N.C. 476 359
S. v. Moore ..... 210 N.C. 686 390
S. v. Morgan ..... 226 N.C. 414 ..... 59, 597
S. v. Mundy ..... 182 N.C. 907 688
S. v. Murphy ..... 236 N.C. 380 463
S. v. Nash ..... 88 N.C. 618 372
S. v. Neal ..... 222 N.C. 546 112
S. v. Neville ..... 157 N.C. 591 256
S. v. Nichols ..... 215 N.C. 80 597
S. v. Norman ..... 237 N.C. 205 481
S. v. Norris ..... 242 N.C. 47 44
S. v. Norwood ..... 115 N.C. 789 707
S. v. Nowell ..... 156 N.C. 648 709
S. v. O'Neal ..... 187 N.C. 22 45
S. v. Owens ..... 243 N.C. 673 481
S. v. Oxendine ..... 223 N.C. 659 256
S. v. Parker ..... 234 N.C. 236 ..... 15, 674

S. v. Parker ..... 235 N.C. 302 462
S. v. Patterson ..... 24 N.C. 346 ..... 154, 155
S. v. Peacock ..... 236 N.C. 137 688
S. v. Perkins ..... 141 N.C. 797 457
S. v. Perry ..... 122 N.C. 1018 43
S. v. Perry ..... 241 N.C. 119 591
S. v. Peters ..... 107 N.C. 876 55
S. v. Peterson ..... 226 N.C. 255 674
S. v. Phelps ..... 65 N.C. 450 59
S. v. Phelps ..... 242 N.C. 540 ..... 333, 625
S. v. Phillips ..... 240 N.C. 516 112
S. v. Plemmons ..... 230 N.C. 56 712
S. v. Poolos ..... 241 N.C. 382 156
S. v. Puckett ..... 211 N.C. 66 688
S. v. Quick ..... 150 N.C. 820 413
S. v. Rawley ..... 237 N.C. 233 372
S. v. Rawls ..... 202 N.C. 397 509
S. v. Raynor ..... 235 N.C. 184 59
S. v. Reagan ..... 185 N.C. 710 256
S. v. Reavis ..... 228 N.C. 18 674
S. v. Record ..... 151 N.C. 695 256
S. v. Reddick ..... 222 N.C. 520 45
S. v. Revels ..... 227 N.C. 34 708
S. v. Rhinehart ..... 209 N.C. 150 585
S. v. Rich ..... 231 N.C. 696 706
S. v. Riddler ..... 244 N.C. 78 215
S. v. Roberson ..... 215 N.C. 784 ..... 154, 155
S. v. Robertson ..... 210 N.C. 266 384
S. v. Robinson ..... 229 N.C. 647 331
S. v. Robinson ..... 236 N.C. 408 591
S. v. Rodgers ..... 217 N.C. 622 463
S. v. Roy ..... 233 N.C. 558 384
S. v. Sailor ..... 240 N.C. 113 ..... 54, 55, 215, 584, 585
S. v. Satterfield ..... 198 N.C. 682 333
S. v. Sauls ..... 190 N.C. 810 45
S. v. Scates ..... 50 N.C. 420 333
S. v. Scott ..... 237 N.C. 432 379
S. v. Scott ..... 241 N.C. 178 58
S. v. Seahorn ..... 166 N.C. 373 709
S. v. Sigman ..... 106 N.C. 728 356
S. v. Simmons ..... 240 N.C. 780 ..... 383, 384
S. v. Simpson ..... 244 N.C. 325 384
S. v. Sizemore ..... 199 N.C. 687 673
S. v. Smith ..... 223 N.C. 457 688
S. v. Smith ..... 230 N.C. 198 ..... 55, 584
S. v. Smith ..... 240 N.C. 99 688
S. v. Smith ..... 240 N.C. 631 412
S. v. Snipes ..... 185 N.C. 743 740
S. v. Spain ..... 201 N.C. 571 740
S. v. Sparrow ..... 244 N.C. 81 623
S. v. Spivey ..... 213 N.C. 45 740
S. v. Spivey ..... 230 N.C. 375 215
S. v. Stephens ..... 244 N.C. 380 332
S. v. Stiles ..... 228 N.C. 137 591

S. v. Stiwinter ....211 N.C. 278....376, 384
S. v. Stonestreet ....243 N.C. 28.... 56
S. v. Street ....241 N.C. 689.... 410
S. v. Strickland ....229 N.C. 201....44, 384
S. v. Strickland ....243 N.C. 100....56, 59, 60, 65
S. v. Stroupe ....238 N.C. 34....509, 511
S. v. Suddreth ....230 N.C. 754.... 463
S. v. Summerlin ....232 N.C. 333.... 15
S. v. Sumner ....130 N.C. 718.... 372
S. v. Surles ....230 N.C. 272....740, 741
S. v. Tackett .... 8 N.C. 210.... 372
S. v. Taylor ....240 N.C. 117.... 696
S. v. Thomas ....227 N.C. 71.... 463
S. v. Thomas ....236 N.C. 454....69, 70
S. v. Thompson ....233 N.C. 345.... 591
S. v. Thorne ....238 N.C. 392....56, 59
S. v. Thornton ....136 N.C. 610.... 70
S. v. Tola ....222 N.C. 403....403, 404
S. v. Tolbert ....240 N.C. 445.... 624
S. v. Trollinger ....162 N.C. 618.... 360
S. v. Turner ....220 N.C. 437.... 70
S. v. Turpin .... 77 N.C. 473....371, 372
S. v. Wallace ....203 N.C. 284.... 44
S. v. Warren ....236 N.C. 358.... 525
S. v. Watkins ....101 N.C. 702....56, 60
S. v. Watkins ....200 N.C. 692.... 707
S. v. Webb ....228 N.C. 304.... 585
S. v. Whedbee ....152 N.C. 770.... 60
S. v. Whitener .... 93 N.C. 590.... 341
S. v. Whiteside ....204 N.C. 710....15, 16
S. v. Whitfield ....206 N.C. 696.... 44
S. v. Whitley ....208 N.C. 661.... 740
S. v. Wilcox ....118 N.C.1131.... 413
S. v. Williams .... 65 N.C. 398.... 709
S. v. Williams ....151 N.C. 660.... 70
S. v. Williams ....219 N.C. 365.... 256
S. v. Williams ....220 N.C. 445.... 290
S. v. Williams ....224 N.C. 183.... 307
S. v. Williams ....244 N.C. 459.... 623
S. v. Wilson ....205 N.C. 376.... 710
S. v. Wilson ....218 N.C. 769.... 60
S. v. Wolf ....122 N.C.1079.... 509
S. v. Woolard ....119 N.C. 779.... 458
S. v. Wrenn ....198 N.C. 260....15, 16
S. v. Yow ....227 N.C. 585.... 256
Steelman v. Benfield....228 N.C. 651....450, 488, 588, 599
Stewart v. Cab Co. ....227 N.C. 368.... 564
Stewart v. Wyrick....228 N.C. 429.... 740
Stokley, *In re*....240 N.C. 658.... 390
Stone v. Coach Co. ....238 N.C. 662.... 388
Stone v. Phillips....176 N.C. 457.... 721
Story v. Comrs. ....184 N.C. 336.... 457
Stowe v. Gastonia....231 N.C. 157.... 22
Sugg v. Rendering Co. ....239 N.C. 547.... 91

Suits v. Ins. Co. ....241 N.C. 483....588, 599, 697
Summers v. Moore....113 N.C. 394.... 465
Summrell v. Racing Asso. ....239 N.C. 591.... 500
Surratt v. Insurance Agency....244 N.C. 121.... 716
Sutton v. Sutton....222 N.C. 274.... 379
Sutton v. Sutton....236 N.C. 495.... 436
Swaim v. Swaim....235 N.C. 277.... 207
Swinton v. Realty Co. ....236 N.C. 723.... 27
Syme v. Badger.... 92 N.C. 706.... 194

T

Tarrant v. Bottling Co. ....221 N.C. 390.... 582
Tatem v. Paine.... 11 N.C. 64.... 426
Tayloe v. Tayloe....108 N.C. 69.... 194
Taylor v. Bakery....234 N.C. 660.... 29
Taylor v. Johnson....171 N.C. 84.... 390
Taylor v. Racing Asso. ....241 N.C. 80.... 500
Taylor v. Smith....116 N.C. 531.... 232
Taylor v. Wake Forest....228 N.C. 346.... 634
Taylor v. White....160 N.C. 38....305, 306
Teague v. Oil Co. ....232 N.C. 65.... 166
Teague v. Oil Co. ....232 N.C. 469....166, 664
Tedder v. Deaton....167 N.C. 479.... 476
Teer Co. v. Hitchcock....235 N.C. 741.... 52
Thomas v. College Trustees....242 N.C. 504.... 279
Thomas v. Reavis....196 N.C. 254....303, 515
Thomason v. Bescher....176 N.C. 622.... 642
Thompson v. Humphrey....179 N.C. 44.... 547
Thompson v. McDonald.... 22 N.C. 463.... 352
Thompson v. R. R. ....147 N.C. 412....599, 716
Timber Co. v. Yarbrough....179 N.C. 335.... 686
Tindall v. Furniture Co. ....216 N.C. 306.... 212
Todd v. Mackie....160 N.C. 352.... 390
Transport Co. v. Ins. Co. ....236 N.C. 534....540, 616
Travis v. Duckworth....237 N.C. 471....444, 731
Troxler v. Motor Lines....240 N.C. 420.... 48
Trust Co. v. Cooke ....204 N.C. 566.... 476
Trust Co. v. Hood, Comr. of Banks ....206 N.C. 268.... 458
Trust Co. v. McKinne ....179 N.C. 328.... 558
Trust Co. v. Watkins ....215 N.C. 292.... 149
Trust Co. v. Wolfe ....243 N.C. 469.... 292
Tucker v. Lowdermilk....233 N.C. 185....35, 39
Tucker v. Smith....199 N.C. 502.... 578
Tucker v. Yarn Mill Co. ....194 N.C. 756.... 736
Turlington v. Neighbors....222 N.C. 694.... 420
Turnage v. Worthington....204 N.C. 538.... 194
Turner v. New Bern....187 N.C. 541.... 259
Turner v. Reidsville....224 N.C. 42.... 501
Tyndall v. Tyndall....186 N.C. 272....147, 465
Tynes v. Davis....244 N.C. 528.... 697
Tyson v. Ford....228 N.C. 778.... 342

U

Underwood v. Ward....239 N.C. 513.... 493
Upton v. Ferebee....178 N.C. 194.... 367
Utilities Commission v. State....243 N.C. 12.... 249
Utilities Commission v. Telephone Co. ....239 N.C. 675.... 249
Utilities Co., *In re*....179 N.C. 151.... 249

V

Valentine v. Gill, Comr. of Revenue ....223 N.C. 396.... 175
Vassor v. R. R. ....142 N.C. 68.... 247
Vaughan v. Vaughan....211 N.C. 354.... 313
Veazey v. Durham....231 N.C. 354.... 427
Veasey v. King....244 N.C. 216.... 641
Vestal v. Vending Machine Co. ....219 N.C. 468.... 520
Vick v. Flournoy....147 N.C. 209.... 478
Vick v. Vick....126 N.C. 123.... 232
Vick v. Winslow....209 N.C. 540.... 320
Voehringer v. Pollock....224 N.C. 409.... 478

W

Wagoner v. R. R. ....238 N.C. 162.... 28
Wagoner v. Saintsing....184 N.C. 362.... 515
Wake County v. Faison....204 N.C. 55.... 721
Wake Forest v. Medlin....199 N.C. 83.... 259
Waldroop v. Waldroop....179 N.C. 674.... 350
Waldrop v. Hodges....230 N.C. 370.... 225
Walker v. Wilson....222 N.C. 66.... 276
Wall v. Bain....222 N.C. 375....727, 731
Wallace v. Wallace....181 N.C. 158.... 72
Waller v. Brown....197 N.C. 508....98, 102, 145, 207, 208, 436
Walston v. Coppersmith....197 N.C. 407.... 323
Walton v. Pearson.... 85 N.C. 34.... 403
Ward v. Bowles....228 N.C. 273.... 49
Ward v. Cruse....234 N.C. 388.... 522
Ward v. Cruse....236 N.C. 400.... 49
Warren v. Dail....170 N.C. 406.... 643
Warren v. Woodard.... 70 N.C. 382.... 575
Waters v. Boyd....179 N.C. 180.... 515
Watford v. Pierce....188 N.C. 430.... 324
Watkins v. Furnishing Co. ....224 N.C. 674.... 67
Watkins v. Raleigh....214 N.C. 644.... 276
Watson v. Clay Co. ....242 N.C. 763....212, 518
Watson v. Lee County....224 N.C. 508.... 311
Watson v. Smith....110 N.C. 6.... 232
Watson Industries v. Shaw, Comr. of Revenue....235 N.C. 203.... 175
Watters v. Watters....168 N.C. 411.... 305
Weathers v. Bell....232 N.C. 561.... 98
Weavil v. Myers....243 N.C. 386.... 731
Webb v. Bishop....101 N.C. 99.... 272
Welch v. Welch....194 N.C. 633.... 722

Wescott v. Bank....227 N.C. 39.... 353
West v. R. R. ....140 N.C. 620.... 185
Welling v. Charlotte....241 N.C. 312.... 276
Wharton v. Eborn.... 88 N.C. 344.... 272
Wheeler v. Cole....164 N.C. 378.... 599
Wheeler v. Construction Co. ....170 N.C. 427.... 35
Whichard v. Lipe....221 N.C. 53.... 368
White v. Disher....232 N.C. 260.... 220
White v. Keller....242 N.C. 97.... 22
White v. Lumber Co. ....199 N.C. 410....547, 720
White v. Riddle....198 N.C. 511.... 574
White v. White.... 84 N.C. 340.... 451
White v. White....179 N.C. 592.... 478
Whitley v. Ins. Co. .... 71 N.C. 480.... 38
Whitson v. Barnett....237 N.C. 483....73, 207
Whitson v. Frances....240 N.C. 733.... 669
Whitt v. Rand....187 N.C. 805.... 669
Whitted v. Palmer-Bee Co. ....228 N.C. 447.... 38
Wiggins v. Pender....132 N.C. 628.... 467
Wilcher v. Sharpe....236 N.C. 308.... 240
Wilcoxon v. Logan.... 91 N.C. 449.... 272
Wilkins v. Finance Co. ....237 N.C. 396.... 471
Williams v. Blizzard ....176 N.C. 146.... 98
Williams v. Bradford ....158 N.C. 36.... 224
Williams v. Cooper ....222 N.C. 589.... 520
Williams v. Express Lines....198 N.C. 193.... 582
Williams v. Henderson ....230 N.C. 707.... 727
Williams v. Hooks ....200 N.C. 419.... 643
Williams v. Lewis ....100 N.C. 142.... 145
Williams v. Sasser ....191 N.C. 453.... 145
Williams v. Williams ....175 N.C. 160....99, 101
Williams v. Williams ....180 N.C. 273.... 293
Williams v. Williams ....188 N.C. 728.... 720
Williamson v. Clay....243 N.C. 337....193, 554
Williamson v. Jerome....169 N.C. 215.... 294
Williamson v. Williams.... 56 N.C. 446.... 305
Willingham v. Rock & Sand Co. ..240 N.C. 281.... 129
Willis v. Willis....203 N.C. 517.... 131
Wilson v. Boyd & Goforth, Inc. ..207 N.C. 344....635, 635
Wilson v. Finance Co. ....239 N.C. 349....38, 439
Wilson v. Massagee ....224 N.C. 705.... 22
Wilson v. Mooresville ....222 N.C. 283.... 680
Wilson v. Robinson ....224 N.C. 851.... 518
Wilson v. Thaggard ....225 N.C. 348.... 520
Wingler v. Miller....221 N.C. 137.... 166
Winslow v. Speight....187 N.C. 248.... 149
Winslow v. White....163 N.C. 29.... 200
Witherington v. Herring....140 N.C. 495....350, 353
Withers v. Black....230 N.C. 428....634, 635
Wood v. Telephone Co. ....228 N.C. 605.... 67
Woodard v. Clark....236 N.C. 190.... 348
Woodruff v. Woodruff....215 N.C. 685....293, 294, 301, 302, 304, 305
Wooley v. Bruton....184 N.C. 438.... 440
Worsley v. Rendering Co. ....239 N.C. 547....91, 517

Worthy v. Knight.....210 N.C. 498.....26, 27
Wright v. Brown.....116 N.C. 26..... 232
Wyatt v. Sharp.....239 N.C. 655.....517, 518
Wynn v. Grant.....166 N.C. 39.....418, 421, 422

Y

Yarborough v. Moore.....151 N.C. 116..... 722
Yarborough v. Park Commission..196 N.C. 284..... 501
Young v. Mica Co. .....212 N.C. 243..... 91
Young v. Young.....225 N.C. 340.....293, 294, 301, 302, 304, 305
Youngblood v. Bright.....243 N.C. 599..... 683

Z

Zagier v. Zagier.....167 N.C. 616..... 665

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1956

EUGENIA SCARBOROUGH, VIVIAN SCARBOROUGH AND WILLIAM S. SCARBOROUGH v. CALYPSO VENEER COMPANY.

(Filed 2 May, 1956.)

1. Trial § 22a—

On motion to nonsuit, the evidence in behalf of plaintiffs must be taken as true and plaintiffs given the benefit of every fair inference reasonably deducible therefrom.

2. Deeds § 22—Where deed provides that timber should be cut over only once, second cutting of distinct portion constitutes trespass.

Where a deed conveys all merchantable timber of a specified size upon the tract of land described, with right to cut and remove for a designated term, with provision for reversion of all timber not cut and removed during the term specified, and with further provision that the grantee should have the right to cut over the said lands only once during the term, *held*, the cutting of the timber from the tract or any distinct and definite portion thereof terminates the right of the grantee in respect thereto, and any cutting thereafter on such portion would be unauthorized and would constitute a trespass, notwithstanding that such second cutting is within the time allowed, and upon evidence tending to show that the grantee cut over the tract or a distinct portion thereof for saw timber and later went back and cut over the same portion for pulpwood, the issue should be submitted to the jury and nonsuit is error.

3. Same: Evidence § 5—

It is a matter of common knowledge that new timber growth begins immediately after land is cut over, and that a second entry with incidental roadways and placing of locations for a sawmill would seriously interfere with the growth of new timber.

4. Deeds § 22—

Where deed conveys all merchantable timber of a specified size, together with the laps, tops and slabs of the timber cut, with right to cut and remove within a specified time, the grantee has the right to remove such laps, tops and slabs within the designated period, irrespective of a provision in the deed that the grantee should have the right to cut over the land only once, since such provision does not protect grantors against removal of timber cut, but only against a second cutting.

PARKER, J., dissenting.

APPEAL by plaintiffs from *Frizzelle, J.*, September 1955 Civil Term, LENOIR Superior Court.

Civil action for damages on account of the defendant's alleged wrongful re-entry upon plaintiffs' land and the cutting and removing of timber a second time in violation of the terms of their timber deed.

The plaintiffs, on 18 September, 1951, executed to the defendant a fee simple warranty deed for all the merchantable timber ten inches or more in diameter, twelve inches from the ground, situate on a certain described tract of land in Lenoir County.

The deed contained the following pertinent conditions:

"But this conveyance is made subject to and together with the following provisions:

"(b) All timber which is cut and removed from said lands shall be cut and removed therefrom on or before five (5) years next after the date of this deed; and all timber not cut and removed from said land on or before said date, shall be the property of the parties of the first part.

"(c) Parties of the second part shall have the right to remove from said land all of the laps, tops and slabs of the timber cut by it of the size above specified, provided the same are removed from said lands on or before five (5) years next after the date of this deed. But all tops, laps, and slabs left on said land after said date shall be the property of the parties of the first part.

"(d) In cutting and removing said timber, party of the second part shall have the right to cut or injure such smaller timber as is reasonably necessary to handle and remove the timber which it is allowed to cut under this deed, but shall take all reasonable precautions that no smaller timber shall be cut or injured other than such as is reasonably necessary.

"(e) For the purpose of cutting, milling, and removing said timber, party of the second part shall have the right to erect and maintain upon said lands a sawmill.

"(f) For the purpose of cutting, milling, and removing said timber, party of the second part shall have the right at such location as it may elect to open and maintain roadways leading to the public highway, but shall so far as is reasonably convenient use for such purposes roadways already opened; provided, that no roadway may be established upon or over any cleared land.

"(g) Party of the second part shall have the right to cut over said lands only once during the five-year period as hereinabove provided."

The defendant denied liability and alleged: "The defendant has strictly complied with all terms and provisions of the said timber deed in the operations upon said land."

The evidence will be discussed in the opinion. At the conclusion of all the evidence the court granted the motion for nonsuit and from judgment accordingly, the plaintiffs appealed.

Jones, Reed & Griffin for plaintiffs, appellants.

James N. Smith for defendant, appellee.

HIGGINS, J. The plaintiffs' only assignment of error is based on their exception to the judgment of nonsuit. The real controversy arose over provision (g) of the timber deed and whether the defendant had violated that provision by cutting over the land, or at least substantial parts of it, a second time.

The plaintiffs offered Clarence Wade as a witness, who testified: "The Scarborough land is located right across the road from where I live. They went over and got the big timber. Then they came back and cut the other timber, the pulpwood. There was enough difference in the time which elapsed between the time they cut the big timber and the time they went back and cut the pulpwood that the bark would fall off the tops when they did go back after it . . . It was at least six or eight months, or it might have been more. . . . The timber nearest my house was mostly pine timber. From what I could see nearest my house I will say it was cut over twice . . . I will say that the defendant cut over the same area in the second cutting that it did in the first cutting.

"They went over and got the big timber and went back over on the same ground and cut the other timber. I mean the same acreage. They went back the second time. The pulpwood was not all grouped together. They had to scatter around and get it. They got it some here and yonder, first one place and then another."

Sam Barwick testified: "I have lived near the Scarborough land since 1919. They moved the sawmill and started cutting in the Fall of 1951. They cut the hill timber then went into the low ground and got the gum and cypress and they moved out in the Fall. I would guess that about six months elapsed between the first cutting and the second cutting, that is, the pulpwood . . . they moved out in the Fall and the next Spring, in March while we were working in our tobacco beds, the foreman of the pulpwood crew came to the bed where I was working. I said, 'Look here man, you are cutting that timber twice.' He told me they were going to cut it and if anything came up about it or anybody wanted to know anything about it, to refer them to Calypso Veneer Company. . . . I would guess about six months elapsed between the first cutting and the second cutting, that is, the pulpwood."

G. E. Jackson, an expert timber cruiser, testified in substance that he had made a cruise of the timber before the sale in September, 1951, and that he made another cruise beginning on 3 June, 1953. In the course of the cruise it was easy to determine the stumps that had been recently cut. "There was a lapse of time between the recent cut and the original cut on the tract. . . . I would say that from four to six months had elapsed between the last cutting and the next cutting before that, it looked like the weathering of the stumps would indicate that." He estimated the newly cut trees amounted to 60,000 feet, worth $30.00 per thousand.

In passing on the motion for compulsory nonsuit the court must assume the evidence in behalf of the plaintiffs is true. They must have the benefit of every fair inference the jury may reasonably draw from that evidence. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488. Measured by this standard, the evidence offered was sufficient to raise jury questions: (1) Did the defendant breach the terms of its contract by cutting over the land, or a substantial part thereof, more than once; and (2) if so, what damages are the plaintiffs entitled to recover?

Similar questions were presented to this Court in the case of *Davis v. Frazier,* 150 N.C. 447, 64 S.E. 200. The deed in that case conveyed all the merchantable timber of a specified size and provided "the land shall not be cut over for timber a second time." The evidence disclosed that Frazier, the grantee, had cut over some or all of the land and moved out in August or September, 1907, and returned in October, 1907, for the purpose of further cutting. In passing on the questions presented, *Justice Hoke,* for this Court, said: "If . . . it should be established that the land described in the deed had been once entirely cut over, or that a distinct and definite portion of the land had been once cut over, then the right of the grantees, or persons claiming under them, to cut and remove timber as to all, or the stated portions of said

land, by the express provision of the contract would cease and determine, and any further cutting would amount to an actionable wrong. . . . If, however, there should be distinct and definite portions of the land which had not been cut over at all, as to such portions we are of the opinion that the rights granted under the contract will continue until they are cut over once, or the right to cut expires by limitation as to time." . . .

"The instrument conveys to the grantees a base or qualified fee in the timber, determinable as to all timber not cut and removed within the time specified, . . . and that the land embraced in the contract shall not be cut over a second time. This last stipulation does not at all nullify the grant, but only establishes a method or condition by which the right or interest granted may be made available; and there is no reason, as stated, why this provision, made a substantial part of the contract by express agreement of the parties, should not be given effect. The insertion of this provision was no doubt caused by the suggestion indicated in *Hardison v. Lumber Co.*, 136 N.C. 175, where it is said in substance, that if the parties desired protection against a 'second cutting' they should have so contracted."

According to the rule laid down in the *Frazier case,* if the jury should find from the evidence in the case at bar that the lands described in the plaintiffs' deed or any "distinct and definite portion thereof" had been once cut over within the meaning of provision (g) in the deed, then as to such portion the right of the defendant would cease and terminate and any cutting thereafter on such portion would be unauthorized and would constitute a trespass for which the plaintiffs are entitled to recover.

The deed in this case, as in the *Frazier case,* conveyed all merchantable timber ten inches in diameter without any other classification. The deed makes no distinction between saw timber and pulpwood. It gives the defendant the right to cut over the land once only for merchantable timber—not once for saw timber and again for pulpwood. Had the parties seen fit to classify the merchantable timber as saw timber and pulpwood there might be some basis for an argument the defendant could cut over the land once for each type. If the defendant by its own arbitrary classification can cut once for saw timber and once for pulpwood there appears no sound reason why it cannot make further classifications and cut once for pine, once for oak, once for gum, and once for cypress.

The purpose of provision (g) was to prevent the spoilage of any new growth and small timber not conveyed by the deed by cutting over the same area or areas of the boundary more than once. Provision (g) would be nullified if the defendant from time to time within the five

years from the date of the deed could cut over the same area, each time cutting timber of a different type. In the areas cut over by defendant for saw timber in the first operation defendant had no right to go back later in a separate, distinct operation and cut over the same area for saw timber or for pulpwood. On the other hand, in areas of the boundary, if any, not cut over for saw timber in the first operation, defendant would have the right to go back later in a separate, distinct operation and cut over such areas for saw timber and pulpwood.

Other provisions of the deed lend support to the interpretation here placed on the controversial provision. The deed gave the defendant "the right to open and maintain roads"; "the right to cut and injure such smaller timber as is reasonably necessary to handle and remove the timber which it is allowed to cut under the deed"; and "the right to erect and maintain a sawmill."

It is a matter of common knowledge that new growth, especially of pine, begins immediately after the land is cut over. Under improved forestry methods urged both by the State and Federal Governments, plantings are often begun soon after removal of the original growth. To enter a second time and again build roadways, cut smaller timber and place a sawmill on the land after it has been once cut over would seriously interfere with the growth of a new timber crop. The plaintiffs had the right to contract against such interference, and apparently did so contract by the inclusion of paragraph (g) in the timber deed.

The defendant in this case insists it did not exhaust its right to cut and remove trees suitable for pulpwood by having previously cut over the land for saw timber and cites the case of *Cammack v. R-L Lumber Co.*, Tex. Civ. App., 258 S.E. 488, as authority. Cammack's deed to the R-L Lumber Company conveyed "the merchantable timber, *both pine and hardwood,*" and "provided that if said land shall be cut over *and timber removed therefrom* (emphasis added) at any time before the expiration of the said eight years, . . . all timber remaining on said land shall revert back to me." The R-L Lumber Company conveyed the oak stave timber 18 inches in diameter to be removed in two years. After the removal of the oak stave timber Cammack sought to restrain further cutting. The Texas Court of Civil Appeals held the term "cut over" meant a cutting over for pine and hardwood, the classifications fixed in the deed, and that the removal of the stave timber alone did not exhaust the defendant's right.

In the case at bar the plaintiffs sought to include as a part of their cause of action for damages the removal of tops, laps and slabs after the defendant's re-entry in the Spring of 1953. The defendant's contention that it had the right to remove tops, laps and slabs at any time within the period of five years from the date of the deed must be sus-

tained. These items revert to the grantors only upon the expiration of the five-year period. Provision (g) does not protect the plaintiffs against their removal for the reason that removal does not constitute a second cutting but merely the salvaging of that which had already been cut.

The discussion here, it must be understood, is based on the assumption not that the jury will, but that it may find the evidence to be true; and for that reason the case is sent back so that the jury may hear both sides and pass on the issues of fact involved.

Reversed.

PARKER, J., dissenting: The plaintiffs executed and delivered to the defendant a timber deed conveying certain standing timber on their lands. The agreed price was $20,000.00, which the defendant paid. The timber deed conveyed *all timber upon the land* measuring 10 inches or more at the stump 12 inches from the ground, and all laps, tops and slabs of the timber cut by the defendant of the size above specified. The timber of the size described and conveyed by the timber deed consisted of (1) timber suitable for saw timber, as pine, gum, oak and cypress, and (2) timber suitable for pulpwood. The defendant maintained two separate crews of men: one to cut and remove saw timber, and another to cut and remove pulpwood and laps, tops and slabs.

The paragraph in the timber deed, upon which plaintiffs base their action, does not require that all the timber sold must be cut in one continuous operation. Nor does it provide that when one kind of timber conveyed is cut, the defendant may not afterwards within the five-year period, cut the other kinds of timber conveyed. Under the deed the defendant had a perfect right to *cut the saw timber conveyed*, to move out, and two or three years later to come back and cut and remove *the pulpwood of the size conveyed in the deed*, provided that it was cut within the five-year period.

This Court said in *Hardison v. Lumber Co.*, 136 N.C. 173, 48 S.E. 588: "There are no words to restrict the purchaser to a continuous cutting. Had the parties so intended, they should have so contracted. It may be inconvenient to the plaintiff to have the purchaser enter a second time and cut down young trees, incidentally, in making his roads, but the seller should have foreseen and provided for this in making his contract."

In 54 C.J.S., Logs and Logging, p. 698, it is said: "Ordinarily the cutting need not be continuous to comply with a contract to cut and remove within a specified term of years."

The timber deed was dated 18 September 1951. The defendant first cut and removed the saw timber, which work ended, according to the

plaintiff's evidence, in "the summer or real early fall of 1952." The crew for cutting the saw timber left the land, and several months later the pulpwood crew went in and cut and removed the "cat-faced" and crooked trees, not suitable for saw timber, but of use as pulpwood, which pulpwood was conveyed in its deed. The cutting of pulpwood was finished in March 1953. Thus, the entire cutting and removing of trees by defendant was completed within 18 months after the execution and delivery of the timber deed, although, according to the timber deed, the defendant had five years after 18 September 1951 to cut and remove the timber it had bought.

There is no allegation in the complaint that the defendant cut and removed any tree from this land that was not of the size described and conveyed in the timber deed. The real controversy is whether the defendant had violated provision (g) of the timber deed by returning and cutting pulpwood after having cut and removed pine, gum, oak and cypress saw timber. Under the deed the defendant had such a right, because the pulpwood timber was part of the timber conveyed to it, for which it paid $20,000.00.

The majority opinion relies upon the case of *Davis v. Frazier*, 150 N.C. 447, 64 S.E. 200. In that case there was evidence tending to show that the grantees entered the land under a timber deed to them, placed their mills, built shanties and constructed the necessary roads for the purpose, and *having cut-over all the land included in the contract,* removed their mills, machinery, etc., except the shanties which they sold; and that after this was done the defendant, claiming the right to do so, had entered on the land and cut the timber and ties and committed the spoil and injury for which the plaintiff sought redress. It did not clearly appear from the testimony that the defendant entered as assignee under this deed; but the Court assumed this to be true. The contract expressly provided that the parties of the second part shall not have the right to cut-over the lands a second time for timber. The Court said: "If the evidence of I. H. Davis, above set out, and other of like tenor, should be accepted by the jury, and it should be established that the land described in the deed *had been once entirely cut-over* or that a distinct and definite portion of the land had been once cut-over, then the right of the grantees, or persons claiming under them, to cut and remove timber, as to all or the stated portion of said land, by the express provision of the contract, would cease and determine, and any further cutting would amount to an actionable wrong." Under the facts of that case, I accept the above as a statement of sound law. (Emphasis mine.)

In *American Creosote Works v. Campbell,* 172 La. 866, 136 So. 659, the Court said: "A person who purchases timber under contract like

the one under consideration, that is, certain designated timber with right of removal within a specified period, may exercise his right and remove the timber from a part of the tract and cease operations for a time, without losing the right to remove his timber from the remaining portion of the land. But, if he goes over the entire tract and *removes therefrom the timber which he purchased,* he cannot later go upon the cut-over land and renew operations, even though the time given for removal has not expired." (Emphasis added.)

In the instant case there is neither allegation, nor proof, that defendant had not purchased the pulpwood it cut; and there is no evidence tending to show it cut this purchased pulpwood with its first crew. The defendant had purchased the pulpwood of the size described in the deed, and had the right to go back and cut all that it had purchased at a price of $20,000.00.

This is the second headnote in *Cammack v. R-L Lumber Co.* (Court of Civil Appeals of Texas), 258 S.W. 488: "Under timber deed conveying the merchantable timber, upon certain land, giving grantees 8 years in which to cut and remove the timber, and providing 'that, if said land should be cut over and timber removed therefrom at any time before the expiration of said 8 years . . . all the timber remaining on said land shall revert back to' grantor, and that 'this contract shall cease to operate and be of no force whatever,' grantees were not required to cut the different kinds of merchantable timber at one continuous cutting, and removal of merchantable timber of a certain kind, did not terminate grantees' rights during the 8 years to cut and to remove merchantable timber of other kinds, but merely prevented a second cutting of the same kind of timber." In its opinion the Court said: "The contract does not provide that all the timber sold should be cut at one continuous cutting, nor that, when one kind of timber was cut, unless all the other kinds were cut at the same time, they could not be cut afterwards. It is without dispute that no pine nor ash nor gum nor hickory nor cypress was cut, and yet all of those that were merchantable were sold, and appellant received the cash therefor. That interpretation of contracts should be given as will carry out the intention of the parties, and if it be that the clause under consideration is of doubtful meaning, or is susceptible of being construed either as contended by appellant or by appellee, in such case the construction most favorable to the grantee must be given. We do not think it clear and certain that the parties intended that if *any* timber should be cut and removed before the expiration of the time limit, or that if just *one* kind of the merchantable timber sold should be cut and removed, that *all* of the other kinds of timber sold remaining upon the land, although the time limit for removal had not expired, was forfeited under the contract. In such case

the rule is well settled that the doubt should be resolved in favor of the grantee."

In *Smith v. Jasper County Lumber Co.* (Court of Civil Appeals of Texas), 46 S.W. 2d 430, the Court said: "From the evidence, *supra,* it appears that defendant in error at different times entered upon the land and cut some timber, but it is without dispute that there was never a general cutting of all the timber conveyed, or of all the kinds of merchantable timber sold. The cuttings were for special purposes to secure and preserve certain of the timbers and not a general cutting over of the land. It is not questioned but that much, several million feet, of the timber sold still remains on the land, and the time limit for its removal has not expired. We think it plain that plaintiffs in error sold and intended for the purchaser to have all the merchantable timber—of the various kinds—situated on the land, and that the purchaser, or his assigns, should have fifteen years, if necessary, in which to cut and remove said timber, and that the clause in the conveyance providing that, when the owner of the timber had cut over and abandoned the lands one time, all the remaining timber should revert to the grantors or their heirs or assigns, was intended to prevent the purchaser of the timber going on the land and cutting the timber and then holding the timber rights for a number of years, and, before the expiration of the time limit, going back and again cutting timber that had grown to be merchantable since the first cutting. We do not think the words 'cut over and abandoned said land one time,' or the other expression in the conveyance, 'after the entry upon said land and the cutting and removal of said timber therefrom, all right, title and interest of the grantee shall revert to the grantors,' meant that when one kind of timber, or a portion of one kind of timber, or a special grade of any of said timber, only was cut, unless all the other kinds of timber or the whole of the merchantable timber on the land were cut at the same time, that the right to cut same within the time limit named in the contract was lost, but that, when the timber sold (pine and various kinds of hardwood) was cut and removed, then the land would be 'cut over' and the right exhausted. *Cammack v. R-L Lumber Co.* (Tex. Civ. App.) 258 S.W. 488, 490 (writ refused)."

In 54 C.J.S., Logs and Logging, pp. 698-699, it is said: "It has been held that the buyer may not after going over the *entire tract and removing the timber which he has purchased,* subsequently renew logging operations on the cut-over land, even though the time given for removal has not expired, especially where the contract provides that cutting shall be continued until completed, and the land then released to the seller. However, the grantee does not surrender his right to resume the cutting of timber within the time limited where he ceased

operations in the expectation of a compromise purchase of the land, which was never made, or left substantial tracts of timber untouched." (Emphasis mine).

The plaintiffs do not allege in their complaint that the defendant had, in the first cutting, cut and removed all the timber it had purchased. They merely allege: "That the defendant cut-over the lands described in the said timber deed" and that the defendant re-entered the land and cut and removed pulpwood and saw timber.

In my opinion, the plaintiffs have completely failed to show by evidence that the defendant had cut and removed all the timber it had purchased, at the time it moved in and cut and removed pulpwood, laps, tops and slabs. The plaintiffs' evidence simply shows that the defendant cut and removed saw timber, and then after a lapse of from 4 to 10 months returned, cut and removed the pulpwood of the size and type described in its deed, and cut and removed the tops, laps and slabs—all of which it had bought and had a right to do under its deed. If there were any allegations and evidence tending to show that *the defendant had cut and removed all the timber it had purchased* of the size described and conveyed in the timber deed and then moved out, and returned to cut again, I would readily concede that it would be a case for the jury. But, in my judgment, there is neither allegation nor proof of such facts.

It is well settled law in this State that, if the language of the deed is doubtful, it will be construed most favorably to the grantee. *McKay v. Cameron,* 231 N.C. 658, 58 S.E. 2d 638; *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817; *Benton v. Lumber Co.,* 195 N.C. 363, 142 S.E. 229; *Outlaw v. Gray,* 163 N.C. 325, 79 S.E. 676. See also: 16 Am. Jur., Deeds, Sec. 165.

In my opinion, the judgment of nonsuit entered below was correct, and I vote to affirm.

STATE v. JOHN ROSEMAND McCULLOUGH, RAY LINK AND HENRY LEDWELL.

(Filed 2 May, 1956.)

1. Criminal Law § 12f—

Motion to quash a bill of indictment for a misdemeanor on the ground that the general county court had exclusive jurisdiction thereof is properly refused, since by provision of G.S. 7-64, the Superior Court is given concurrent original jurisdiction of all criminal prosecutions over which inferior courts had theretofore been given exclusive original jurisdiction.

2. Conspiracy § 3—

A conspiracy is the unlawful combination or agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means.

3. Conspiracy § 6—

While a conspiracy must usually be proved by circumstantial evidence, such evidence must point unerringly to the existence of the conspiracy.

4. Same: Intoxicating Liquor § 9d—Evidence of conspiracy held insufficient to be submitted to the jury.

Defendants were charged with conspiracy to transport beer unlawfully, and with unlawful transportation of beer pursuant to the conspiracy. The State's evidence tended to show that one defendant owned the vehicle and was transporting beer therein to another defendant, and that he had delivered beer to such other defendant on three previous occasions, but did not identify such other defendant as the person who directed him to so deliver the beer, with further evidence, admitted only as against a third defendant, that such third defendant had stated that defendant owning the truck was his employee, and that on other occasions he had directed him to deliver beer in the truck in question, despite the fact that it had not been registered, but without evidence tending to connect such third defendant with the occasion in suit. *Held:* The evidence is insufficient to be submitted to the jury on the charge of conspiracy, and nonsuit on that count should have been allowed as to each of defendants, and as to the first two defendants on the charge of transportation.

5. Conspiracy § 9—

Where an indictment charges a conspiracy to do an unlawful act, and with the commission of such act pursuant to the conspiracy, a defendant may be convicted of the substantive offense, notwithstanding the absence of sufficient evidence to take the conspiracy count to the jury, since the establishment of the conspiracy is not a prerequisite to the conviction of the substantive offense, and, in such event, the charge that the offense was committed pursuant to the conspiracy will be treated as surplusage.

6. Intoxicating Liquor § 9d—

The State's evidence that one defendant owned the truck in question and was driving same loaded with beer without having the truck first registered for the purpose of transporting beer as required by law, is sufficient to sustain the conviction of such defendant under G.S. 18-66.

APPEAL by defendants from *Clarkson, J.*, January Criminal Term, 1956, of LINCOLN.

This is a criminal action tried upon a bill of indictment. The first count in the bill charges the defendants with conspiring on the 7th day of February, 1955, to unlawfully and wilfully transport beer to Lincoln County without first having the motor vehicle used registered with the Commissioner of Revenue and without proper invoices or bills of sale for the beer transported, in violation of the Beverage Con-

trol Act of 1939, as amended; and the second count charges the unlawful transporting of beer pursuant to said conspiracy.

The State's evidence shows that about 9:00 o'clock on the night of 7th February, 1955, Highway Patrolmen R. E. Smart and R. H. Dillard were parked at the intersection of what is known as the plank road and Highway No. 27 in Lincoln County, near the defendant's service station or store. That they observed a panel truck traveling toward Lincolnton on Highway No. 27. As the driver of the truck got about even with Link's service station or store, the lights on the truck went out. Patrolman Smart started his car and pursued the truck, which was driven by the defendant John Rosemand McCullough. The truck traveled some 200 feet down the highway without lights and made a left turn into the driveway at the defendant Ray Link's home. The patrolmen followed the truck and turned into the driveway. Patrolman Smart testified that the defendant McCullough got out of the truck and "proceeded to the rear of Mr. Link's house . . . , he got to the back porch and rapped on the door once or twice, and I called to the subject (McCullough) on the back porch and asked him to come down, that I would like to talk with him, that I wanted to check his driver's license and registration. I had a short conversation with John McCullough enroute from the back porch to the truck. I asked him what he had on the truck and he said he had sixty cases of beer. I also asked him about his lights, and he said he was having trouble with his lights . . . , I opened the door to check his lights . . . to see where the trouble was and as I did that . . . I observed beer stacked up to the top of the truck, labeled packages. . . . I asked him if it was his truck and he said it was, and I asked him if he had any bill of lading, and he said he did not have any bill of lading or anything for the beer. He said he was advised to carry it to that location, to bring it there. At that time Mr. Ray Link had come up to where we were talking, and I asked him (McCullough) if he had been there before . . . and he said he had been there several times . . . ." The solicitor asked the witness this question: "Did the defendant John McCullough tell you at that time in the presence of Ray Link, that he had hauled beer there at that place for at least three times, on three occasions prior to that time?" Mr. Smart answered "Yes," and further testified, "I then turned to Mr. Link and said, 'Mr. Link, what do you think about all of this conversation that we have had?' And he said, 'I don't know a thing about it.' "

The State's evidence further shows that there was no sign or numbered certificate displayed on the truck to indicate that the vehicle had been registered with the Commissioner of Revenue for use in transporting beer, as required by G.S. 18-66.

Patrolman Dillard testified that he was assisting Patrolman Smart on the occasion in question; that the defendant McCullough stated in the presence of the defendant Link that he had been directed to bring the beer to Link's place and that he had made several deliveries to Link's place on previous occasions. He further testified that he had heard the defendant Ledwell make a statement in a previous trial, in which Ledwell was a witness and not a defendant, that the truck in question belonged to the defendant McCullough; that it was used in transporting beer for his company and that it was not registered with the Department of Revenue; that McCullough was an employee of his and that he paid him "a commission of 15c a case for delivering the beer in the unregistered truck."

Irene LeQueux testified that she was the duly appointed and acting court reporter for Lincoln County in April and May, 1955; that she reported the case at the May Term 1955 of Lincoln Superior Court in which John McCullough and Henry Ledwell testified as witnesses. The witness identified the transcript of the evidence as taken down and transcribed by her. She was permitted to read into the record certain questions propounded to the defendant Ledwell and his answers thereto in a trial in May 1955, in which trial the defendants Link and McCullough were defendants charged with violating the Alcoholic Beverage Control Act and in which case Ledwell was not a party but only a witness. Ledwell's testimony in the former trial was to the effect that he was President and General Manager of the C & G Sales Company in Charlotte, and had been General Manager for four or five years. That McCullough had been employed and paid by him for four or five years; that his company had five trucks duly registered and marked which it used to transport beer, but that he had used the truck in question which belonged to McCullough to transport beer on prior occasions, despite the fact that it had not been registered.

James Taylor, an inspector for the Alcoholic Beverage Control Board, Malt Beverage Division, testified that he had been in court during the previous trial and heard Ledwell testify that, he knew the panel truck was not registered with the Department of Revenue; that he had delivered beer in it before, and that he directed McCullough to deliver the beer to Catawba County.

The jury found all the defendants guilty on each count, and from the judgment entered the defendants appeal, assigning error.

Attorney General Rodman, Asst. Attorney General McGalliard for the State.

W. H. Childs, Sr., R. G. Cherry, O. A. Warren, and Kemp B. Nixon for defendants.

DENNY, J. We shall not undertake a seriatim discussion of the 126 assignments of error based on the 146 exceptions set out in the record.

The first questions for determination are these: (1) Did the court below commit error in refusing to quash the bill of indictment? (2) Was the State's evidence sufficient to withstand the motion made by each defendant for judgment as of nonsuit?

The motion to quash the bill of indictment on the ground that the General County Court of Lincoln County has exclusive original jurisdiction of the misdemeanors charged therein is without merit. G.S. 7-64 provides: "In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof." This statute is applicable to Lincoln County.

The defendants assign as error the refusal of the court below to sustain their motion for judgment as of nonsuit.

The defendants contend that since the defendant Ledwell was only a witness and not a party defendant in the former trial referred to in the evidence, his testimony in that trial was not admissible against him in the present trial. Conceding, but not deciding, that such evidence was admissible, it was admitted, and properly so, against the defendant Ledwell only. This being so, if all the evidence offered by the State, including that admitted against Ledwell, is insufficient to sustain the charge of conspiracy, it is unnecessary to determine whether or not the evidence admitted against Ledwell was admissible.

The statements made by Ledwell in the former trial can be considered against him only in determining whether the evidence offered by the State was sufficient to carry the case to the jury on the charge of conspiracy. "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means." *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907; *S. v. Hedrick,* 236 N.C. 727, 73 S.E. 2d 904.

Direct proof of the charge of conspiracy is rarely obtainable. But to establish such a charge, the evidence or acts relied upon, when taken together, must point unerringly to the existence of a conspiracy. *S. v. Whiteside, supra; S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261.

Here we have no evidence against Ledwell except his own statements at the former trial, which cannot be considered against the defendants Link and McCullough. Furthermore, when the statements are con-

sidered against Ledwell, they do not connect him with the delivery of this particular beer to Link on 7th November, 1955. In fact, the State's evidence tends to show that whatever beer Ledwell turned over to the defendant McCullough to deliver in his truck, he directed its delivery to Catawba County and not to Lincoln County. On the other hand, there is nothing in the statements that McCullough made to the Highway Patrolmen to connect Ledwell with the transportation of the beer found in McCullough's truck. Moreover, Ledwell not being present when McCullough made his statements to the patrolmen, had he implicated Ledwell, such evidence would not have been admissible to establish the conspiracy. As to Link, it is true McCullough said he had delivered beer to Link on three previous occasions, but he did not identify Link as the person who directed him to do so. The defendant Link denied knowing anything about the present or previous deliveries of beer. While such denial was only contradictory of McCullough's statement and did not affect its admissibility, we do not think the State's evidence was sufficient to support the charge of conspiracy. It follows, therefore, that the defendant's motion for judgment as of nonsuit as to the charge of conspiracy should have been allowed as to each of the defendants. *S. v. Wrenn, supra.*

As to the second count, which charges the defendants with the unlawful transportation of beer pursuant to the conspiracy, it is our opinion that the evidence is insufficient to sustain the conviction as to the defendants Link and Ledwell of the substantive offense charged in this count. However, we hold the evidence to be sufficient to sustain the verdict on this count as to the defendant McCullough. "On failure of proof as to conspiracy accused may still be convicted of the substantive offense under an indictment charging both." 15 C.J.S., Conspiracy, section 90, page 1135; *Kelly v. United States*, 258 F. 392, 169 C.C.A. 408, certiorari denied, 249 U.S. 616, 63 L. ed. 803. McCullough's statements to the Highway Patrolmen to the effect that he owned the truck used by him in the transportation of the beer; that he had in his truck sixty cases of beer which he was directed to deliver to Link; that his truck was not registered for the purpose of transporting beer as required by law, and that he had no "bill of lading or anything else for the beer," are sufficient to sustain the conviction as to him on the substantive offense charged in the second count. G.S. 18-66. The fact that the second count states that the substantive offense was committed pursuant to the conspiracy, will be treated as surplusage. No overt act is essential to the establishment of the crime of conspiracy. *S. v. Hedrick*, 236 N.C. 727, 73 S.E. 2d 904; *S. v. Davenport, supra; S. v. Whiteside, supra; S. v. Wrenn, supra;* 15 C.J.S., Conspiracy, section 36, page 1059, *et seq.* Neither was the establish-

ment of a conspiracy a prerequisite to a conviction of the substantive offense charged in the second count in the bill of indictment. Moreover, in the trial below, the court charged the jury that on the second count the jury might find one or more of the defendants guilty or not guilty. In our opinion, the defendant McCullough has had a fair trial, free from prejudicial error, on the substantive offense charged in the second count of the bill of indictment.

The remaining assignments of error, in our opinion, present no prejudicial error that would justify a new trial as to the defendant McCullough. Therefore, the judgment entered below will be reversed as to the defendants Link and Ledwell on both counts and as to the defendant McCullough on the first count, but upheld as to the defendant McCullough on the second count.

Reversed on both counts as to defendants Link and Ledwell.

Reversed on first count as to defendant McCullough.

No Error as to defendant McCullough on second count.

GEORGIA PHILLIPS AND HUSBAND, JOHN W. PHILLIPS, v. HASSETT MINING COMPANY, A CORPORATION; AND WILSON MICA CORPORATION, AND SOUTHERN MICA COMPANY, INC.

(Filed 2 May, 1956.)

1. Pleadings §§ 3a, 13—

The function of a reply is to deny such new matter alleged in the answer or affirmative defenses as the plaintiff does not admit, and to answer any cross action asserted by defendant, but a reply cannot state a cause of action, this being the function of the complaint.

2. Pleadings §§ 15, 28—Parties joined for contribution by original defendant may not move to dismiss plaintiffs' action against original defendant.

The original defendant in its answer alleged affirmative defenses and also had additional parties joined for contribution under G.S. 1-240, under its cross-complaint against them. The additional parties filed answers setting forth the same defenses. Plaintiffs, in their reply, reasserted against the additional defendants the facts alleged against the original defendant and stated that they would amend their complaint so as to include the additional defendants as defendants in their action. *Held:* The reply does not constitute an attempt to state a cause of action against the additional defendants and such additional defendants, as to plaintiffs, are strangers to the action, and therefore plaintiffs' action may not be dismissed upon demurrer or motion for judgment on the pleadings made by such additional defendants.

3. Pleadings § 28—

Ordinarily, a motion for judgment on the pleadings is in essence a demurrer by plaintiff to the answer of defendant, challenging the sufficiency of new matter alleged by defendant to constitute a defense.

4. Torts § 4—

Concert of action is not a requisite of joint tortfeasorship, but if independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue any one or all of them, as he may elect.

5. Torts § 6—

Where the injured party elects to sue only one or less than all joint tortfeasors, the original defendant or defendants may have the others made additional defendants under G.S. 1-240 for the purpose of enforcing contribution in the event the plaintiff recovers.

6. Same: Waters and Watercourses § 3: Mines and Minerals § 4b—Where silt from several mining operations unites in causing injury, each mining company is a joint tortfeasor.

Plaintiffs alleged that defendant, incident to mining operations, washed silt into a stream, which caused the flooding of the lands of plaintiffs, lower proprietors, and rendered their fords across the stream unusable. Defendant alleged that it had the right to wash silt into the stream, but that if recovery should be had against it, that two other mining companies were committing the same acts and that the silt washed into the stream by it and such others united in causing the injury complained of by plaintiffs. *Held:* The original defendant's cross action is sufficient in substance and form to support an order making the other mining companies additional parties defendant under G.S. 1-240.

7. Waters and Watercourses § 3: Mines and Minerals § 4b—

The provisions of G.S. 143-212(3) (d) and G.S. 74-31 afford no defense to an action by a lower proprietor to recover for injuries to his land resulting from the deposit of silt in a stream incident to mining operations.

8. Pleadings §§ 25, 28—Defendants are not entitled to dismissal upon an affirmative defense not admitted by plaintiffs.

In this action by a lower proprietor to recover for damages resulting from the deposit of silt into a stream incident to mining operations, defendants alleged that they were the owners of leasehold estates acquired by mesne conveyances from the grantee in a deed executed by plaintiffs, conveying mining rights, with full rights to woods and waters upon plaintiffs' land. *Held:* The plea of the covenant of the deed is an affirmative defense, and in the absence of admission by plaintiffs that defendants possess a leasehold estate in the land of plaintiffs, defendants are not entitled to dismissal of plaintiffs' action upon demurrer or motion for judgment on the pleadings.

APPEAL by defendant Hassett Mining Company from *Huskins, J.*, November Term, 1955, YANCEY.

Civil action *ex delicto* to recover compensation for the wrongful taking of and damage to the lands of plaintiffs, heard on demurrer and motion for judgment on the pleadings.

Plaintiffs owned about fifty-five acres of real property through which South Toe River flows for about one mile. Prior to the happening of the events alleged in the complaint, the river was a mountain stream of clear, pure, useful water, stocked with fish.

On 20 April 1934 plaintiffs conveyed to James A. Mayberry and E. C. Guy all their mineral rights and mineral privileges in said land with full right of excavation in order to mine said property and to deposit waste matter of any and every kind over and upon any part of the lands described in the deed. The deed contains a warranty or covenant in part as follows:

"No question shall be raised as to the right of lateral or sublateral supports of the surface of said lands. The right to construct buildings; tramroads, and water ways or flume lines and all other rights necessary for the mining of said property be and are hereby granted unto the parties of the second part . . . in fee simple . . . Full rights of ingress and regress over and upon said lands is hereby granted and a full right to woods and waters thereon."

On 13 April 1953 defendant Hassett Mining Company, hereinafter referred to as Hassett, began the mining of mica on said river above the home of plaintiffs. Hassett owned jig mining equipment and in the mining of mica by the force of water loosened the dirt from rock so that it would flow through equipment which separates the mica from the soil itself in proportion of approximately one part of mica out of ten. The remaining nine-tenths of the soil, silt, sediment, waste, and water was dumped into South Toe River. This process of mining has proceeded to the extent that said river has become filled with earth, silt, etc., so that the two fords which afforded the plaintiffs a means of ingress to and egress from their farm have become useless as such. The soft mud and muck is so deep that the fords are not usable either by motor-driven or horse-drawn vehicles. During high water the dirt, silt, and other refuse washed in the river overflow the rich-soil lands of the plaintiffs so that such land has become useless for arable purposes, and this amounts to a taking of the riparian rights and the lands of the plaintiffs without compensation.

The plaintiffs sue to recover compensation for the damage to and the taking of their lands by Hassett in the manner alleged.

Hassett admits its mining operation and the deposit of soil, silt, and the like in said river but asserts that such taking is authorized by statute, G.S. 74-31 and G.S. 143-212(3) (d), and constitutes no inva-

sion of the rights of the plaintiffs for which they are entitled to compensation.

Hassett further alleges a cross complaint against the Wilson Mica Corporation, hereinafter referred to as Wilson, and Southern Mica Company, Inc., hereinafter referred to as Southern. It alleges that Wilson and Southern are engaged in like operations above the home of the plaintiffs and are likewise depositing in South Toe River the same kind of silt and soil as is dumped therein by Hassett, and that if any recovery be had against it, it is entitled to the right of contribution from Wilson and Southern, and it prays that Wilson and Southern be made additional parties defendant. An order was entered accordingly. Both Wilson and Southern answered the cross action. Each of them pleads two statutes referred to in Hassett's answer. All three allege that they are the owners of leasehold estates in the lands being mined by them, which estates were acquired by mesne conveyances from Mayberry, the grantee in the deed conveying mining rights executed by the plaintiffs in 1934. They allege in substance that they are depositing silt and dirt in said river as a matter of right, that their conduct in so doing is authorized by statute, and that they are not joint tortfeasors with the defendant Hassett.

Plaintiffs replied to the answers filed by the original defendant and the two additional defendants. In their reply they assert that Wilson and Southern are committing acts similar to those committed by Hassett, and that if they are made parties defendant, they will amend their complaint so as to allege the same cause of action against them that they have alleged against Hassett.

Before answering, Wilson demurred *ore tenus* to Hassett's cross action for that said cross action does not state facts sufficient to constitute a cause of action. This demurrer was overruled by *Pless, J.*, 5 March 1955.

After a jury had been selected and impaneled in the court below, Southern demurred *ore tenus* for that Hassett's cross action states no enforceable cause of action against it. The defendant Wilson moved for judgment on the pleadings dismissing the plaintiffs' action and the cross action of defendant Hassett. The demurrer of Southern was sustained, and the motion for judgment on the pleadings by Wilson was allowed. Judgments were entered accordingly. Defendant Hassett excepted to each judgment entered and appealed. Apparently plaintiffs did not appeal.

W. K. McLean and R. W. Wilson for plaintiff appellees.

C. P. Randolph for defendant appellant.

Fouts & Watson, G. D. Bailey, and W. E. Anglin for Wilson Mica Corporation, appellee.

Fouts & Watson for Southern Mica Company, Inc., appellee.

BARNHILL, C. J. Whether we say this is an action for damages resulting from a continuing trespass or for the maintenance of a nuisance or accord it some other name is immaterial. Irrespective of the nomenclature used, it is in essence an action in tort for the wrongful damage to and taking of the land of plaintiffs, without compensation, for private gain.

We have here a novel situation. The plaintiffs have not sued either Wilson or Southern. They were brought in as additional parties defendant under G.S. 1-240 so that Hassett may enforce its right of contribution in the event plaintiffs recover from it. Yet the plaintiffs find themselves booted out of court on the motion of Wilson.

It is true plaintiffs, in their reply, reassert against Wilson and Southern the facts alleged against Hassett and state that they will amend their complaint so as to include Wilson and Southern as defendants in their action. Even so, the reply does not constitute an attempt to state a cause of action as against them.

The function of a reply is to deny such new matter alleged in the answer or affirmative defenses as the plaintiff does not admit and to answer any cross action or complaint asserted by defendant. Plaintiffs' cause of action must be alleged in the complaint. *Spain v. Brown,* 236 N.C. 355, 72 S.E. 2d 918.

As plaintiffs do not attempt to allege a cause of action against either Wilson or Southern, these defendants are, as to plaintiffs, strangers to the action which is not dismissible as to plaintiffs on any motion made by these defendants.

While it may sometimes be used by a defendant, ordinarily a motion for judgment on the pleadings is in essence a demurrer by plaintiff to the answer of the defendant. When the defendant admits the allegations contained in the complaint but pleads new matter in defense, the plaintiff may challenge the sufficiency of the new matter by such motion. *McGee v. Ledford,* 238 N.C. 269, 77 S.E. 2d 638.

We are somewhat at a loss to comprehend the rationale underlying the judgments entered. We must assume that they were based on the theory that Hassett, Wilson, and Southern are not joint tortfeasors or that the affirmative defenses pleaded are sufficient in law to defeat the action. Plaintiffs state a good cause of action, sufficient in substance and form, and the allegations made in the various pleadings by way of further defense are not sufficient, on this record, to support the

judgments. *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107; *Lineberger v. Gastonia,* 196 N.C. 445, 146 S.E. 79.

What has already been said is perhaps sufficient to dispose of this appeal, but there are other questions raised which, no doubt, will arise again on a retrial. For that reason they should receive attention at this time.

On the facts alleged by plaintiffs and in the answer of the original defendant the three defendants are joint tortfeasors, for only one single and indivisible injury is alleged.

Concert of action is not a requisite of joint tortfeasorship. *Moses v. Morganton,* 192 N.C. 102, 133 S.E. 421; *Lineberger v. Gastonia, supra; Stowe v. Gastonia,* 231 N.C. 157, 56 S.E. 2d 413; *McKinney v. Deneen, supra.*

If the independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue only one or all the tortfeasors, as he may elect. *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *White v. Keller,* 242 N.C. 97, 86 S.E. 2d 795; *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648.

When the aggrieved party elects to sue only one, or less than all the tortfeasors, the original defendant or defendants may have the others made additional defendants under G.S. 1-240 for the purpose of enforcing contribution in the event the plaintiff recovers. *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335; *Hayes v. Wilmington,* 239 N.C. 238, 79 S.E. 2d 792; *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *Lackey v. Ry. Co.,* 219 N.C. 195; 13 S.E. 2d 234; *Mangum v. Ry. Co.,* 210 N.C. 134, 185 S.E. 644; *Potter v. Frosty Morn Meats, Inc.,* 242 N.C. 67, 86 S.E. 2d 780.

Applying the rule of liberal construction, as we are required to do in cases such as this, we are constrained to hold that the cross action alleged by Hassett is sufficient in substance and form to support an order making Wilson and Southern additional parties defendant under G.S. 1-240 for the purpose of enforcing contribution. While Hassett admits that it is washing sand, silt, and soil into South Toe River with its mining operation, it asserts that it is doing so as a matter of right. It further alleges, however, that if recovery is had against it, then Wilson and Southern are committing the same acts and that the silt and soil washed into South Toe River by it and them unite in causing the single injury complained of by the plaintiffs.

The statutory provisions relied on by Wilson and Southern are not sufficient to defeat either the plaintiffs' cause of action or Hassett's claim to contribution.

G.S. 143-212(3) (d) merely defines the word "waste." G.S. 74-31, which reads as follows: "In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams," constitutes no defense to plaintiffs' action. We have already so held. *McKinney v. Deneen, supra,* and cases cited. The General Assembly is without authority to take the property of one citizen and give it to another for private gain. Even when the taking is for a public purpose, the property owner is entitled to notice and an opportunity to be heard and just compensation for the property taken.

We do not at this time decide the question whether the covenant contained in the deed from plaintiffs to Mayberry is sufficient to bar any claim against Mayberry or any other person claiming under him. We have searched the record in vain for any admission on the part of the plaintiffs that any one of the three defendants possesses a leasehold estate in the land of plaintiffs by mesne conveyances from Mayberry. Hence the plea of the covenant is an affirmative defense and must be established by proof before the court can make any intelligent and binding ruling on the question.

Since the questions raised on this appeal, both as to fact and law, will in all probability arise again on a rehearing, we refrain from any further or extended discussion of the legal questions presented by this appeal lest we by so doing prejudice either plaintiffs or defendants.

It follows from what has heretofore been said that the court committed error in entering judgment upon the pleadings and dismissing the action and in sustaining the demurrer entered. Both judgments must be

Reversed.

ANNIE JONES HINSON, ADMINISTRATRIX OF LEONARD E. HINSON, DECEASED, v. CHARLES EDWARD DAWSON AND CHARLES A. DAWSON.

(Filed 2 May, 1956.)

1. Appeal and Error § 60—

Where adjudication that intestate's death was not proximately caused by injuries received in the collision in suit is affirmed on appeal, allegations in a subsequent pleading inferring that intestate's death was caused by the collision are properly stricken on motion.

2. Pleadings § 31: Damages § 8—

Where the facts alleged form a sufficient basis for the conclusion that defendants were guilty of wanton negligence so as to support the sub-

mission of the issue of punitive damages, allegations in the complaint stating that the acts of defendant were in reckless and wanton disregard of and indifference to the rights and safety of intestate are improperly stricken, and the fact that they are stated in a paragraph subsequent to the one in which the acts of negligence are particularized, is unobjectionable.

3. Pleadings § 31—

In passing upon a motion to strike, facts alleged in the pleading, but not the conclusions of the pleader, are deemed admitted.

4. Damages § 7—

Punitive damages are not recoverable as a matter of right, but only in the discretion of the jury upon a separate issue in those cases in which the pleadings and evidence warrant the submission of the issue.

5. Same—

Punitive damages may be recovered when the injury is inflicted maliciously or wilfully, and may be recovered for negligent injury only when such injury is the result of wanton negligence, and conduct is wanton when it is in conscious and intentional disregard of and indifference to the rights and safety of others.

6. Damages § 8—

Allegations that defendant driver, upon reaching an intersection, suddenly and without warning made a left turn directly across the path of the car in which intestate was riding, and, upon information and belief, that defendant driver had defective vision and was incapable of seeing and apprehending the dangers inherent in the operation of a motor vehicle, and that defendant owner had full knowledge of this defect of vision, but nevertheless permitted such defendant to drive, *are held* sufficient to support plaintiff's allegation that defendants' conduct was wanton and to support plaintiff's prayer for the recovery of punitive damages.

7. Same—

Even though the allegations of the complaint are sufficient to support plaintiff's prayer for punitive damages, allegations in the complaint as to the financial worth of a defendant should be stricken on motion as being an allegation of evidence rather than of an ultimate fact, and as being prejudicial if plaintiff's evidence turns out to be insufficient to warrant submission of an issue as to punitive damages.

ON WRITS OF CERTIORARI, treated as cross-appeals, to review order of *Frizzelle, J.*, September Term, 1955, WAYNE.

The hearing before Judge Frizzelle was on defendants' motion to strike designated portions of plaintiff's amended complaint. The order granted the motion as to certain portions and denied it as to others. The respective parties excepted to rulings adverse to them and petitioned for writs of certiorari under Rule 4(a), 242 N.C. 766. These petitions were allowed by this Court on 30 November, 1955. They are

now treated as cross-appeals. The pertinent facts will be stated in the opinion.

J. Faison Thomson & Son and N. W. Outlaw for plaintiff, appellant and appellee.

Edmundson & Edmundson, John S. Peacock and Smith, Leach, Anderson & Dorsett for defendants, appellants and appellees.

BOBBITT, J. At the conclusion of trial of this cause at August-September Term, 1954, of Wayne, judgment was entered that plaintiff recover nothing from defendants. Plaintiff appealed. A partial new trial was ordered, as appears in *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585. There was a final adjudication that the injuries received by plaintiff's intestate in the automobile collision on 20 December, 1953, did not proximately cause his death on 27 January, 1954; and, after certification of the opinion, judgment was entered in the superior court to that effect. Thereafter, plaintiff was permitted to file an amended complaint relating to alleged personal injuries and property damages sustained by her intestate and allegedly caused by the negligence of defendants.

1. *Plaintiff's Appeal.*

After alleging the facts as to how the collision occurred, plaintiff made allegations as to injuries sustained therefrom by her intestate. In so doing, in paragraphs 7 and 9, she used the words "and fatally"; and in paragraph 11, she alleged that "after lingering . . . the intestate died." In paragraph 14, she alleged "That the plaintiff's intestate, Leonard E. Hinson, was not killed *instantly* as result of the negligence of the defendant Charles Edward Dawson, as hereinbefore set out." (Italics added.) The words quoted, considered in context, allege, either expressly or by plain implication, that the death of plaintiff's intestate was caused by said collision, a position not now available to plaintiff. These allegations were properly stricken. Plaintiff's assignments of error relating thereto are without merit.

Plaintiff assigns as error that portion of the order striking paragraph 12 and the portion of paragraph 16 set forth in her assignment of error No. 6. The allegations involved are to the effect that the conduct of the driver of the Dawson car, alleged with particularity in paragraph 8, was in reckless and wanton disregard of and indifference to the rights and safety of Leonard E. Hinson. These allegations, for reasons stated in consideration of defendants' appeal, might have been included in paragraph 8. The fact that they are alleged in separate paragraphs would seem unobjectionable. Hence, the order is modified by deleting the portion thereof which strikes paragraph 12 and the

allegations of paragraph 16 set forth in plaintiff's assignment of error No. 6.

2. *Defendants' Appeal.*

Defendants' assignments of error are directed to the action of the court in denying their motion to strike the portions of the amended complaint set out below, to wit:

1. A portion of paragraph 16, reading as follows:
   "and the plaintiff is informed and believes, and therefore alleges, that on account of such reckless and wanton disregard of the rights and safety of Leonard E. Hinson, and others using the said highway, which proximately caused the pain and suffering of Leonard E. Hinson, as hereinbefore set out, she is entitled to recover punitive damages of the defendants, and that in view of the financial worth of the defendants such punitive damages should be in some very substantial amount,"
2. All of paragraph 2 of plaintiff's prayer for relief, viz.:
   "That she recover of the defendants the sum of $10,000.00 as punitive damages for their negligent, wanton and reckless disregard or indifference to the rights of Leonard E. Hinson, which resulted in his pain and suffering."

In passing upon the motion to strike, the facts alleged in the amended complaint, but not the conclusions of the pleader, are deemed admitted. *Bank v. Bryan,* 240 N.C. 610, 83 S.E. 2d 485. Are such facts sufficient to warrant submission of an issue as to punitive damages?

Punitive damages are not recoverable in any case as a matter of right. If the pleading and evidence so warrant, an issue as to punitive damages should be submitted to the jury. Upon submission thereof, it is for the jury to determine (1) whether punitive damages in *any* amount should be awarded, and if so (2) the amount of the award. These questions are determinable by the jury in its discretion. *Robinson v. McAlhaney,* 214 N.C. 180, 198 S.E. 647; *Worthy v. Knight,* 210 N.C. 498, 187 S.E. 771. The approved practice is to submit separately the issues as to compensatory damages and as to punitive damages. *Cottle v. Johnson,* 179 N.C. 426, 433, 102 S.E. 769.

No North Carolina statute defines the bases for the recovery of punitive damages. The soundness of the doctrine has been challenged and defended. McCormick on Damages, sec. 77. It is challenged because it enables the injured party to recover more than full compensatory damages. Hence, such damages are sometimes called vindictive damages. It is defended as a needed deterrent to wrongdoing in addition to that provided by criminal punishment. Hence, such damages are sometimes called exemplary damages or smart money. *Stacy,*

C. J., in *Worthy v. Knight, supra,* characterized the doctrine as an anomaly; but the many decisions cited in his opinion as well as later decisions give it an established place in our law. Even so, we are not disposed to expand the doctrine beyond the limits established by authoritative decisions of this Court.

Emphasis is frequently given to the presence or absence of evidence of "insult, indignity, malice, oppression or bad motive" in determining the applicability of the doctrine to a particular factual situation. *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785. Earlier cases leave the impression that the doctrine had its genesis in factual situations in which the injured party could show only nominal or negligible actual or compensatory damages notwithstanding he had been grievously wronged.

No decision of this Court dealing directly with the doctrine of punitive damages as applied to an automobile collision case has come to our attention. (*Cf. Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36, where *Adams, J.*, discusses wilful and wanton conduct as a basis for execution against the person.) Our cases deal with libel and slander, assault, fraud, false arrest and malicious prosecution, officious conduct by agents of common carriers, etc. In the recent case of *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333, where plaintiff's action was grounded on negligence, it was held that the facts alleged were insufficient to support an award of punitive damages.

There is no allegation in the amended complaint under consideration that the conduct of the driver of the Dawson car was either malicious or wilful. No inference can be drawn that such driver intentionally caused the collision.

"In general, exemplary damages may not be recovered in a case involving an ordinary collision caused by negligence on a highway, in the absence of any intentional, malicious or wilful act." 61 C.J.S., Motor Vehicles sec. 560. In the absence of allegation that the conduct was malicious or wilful, there is no basis for submission of an issue as to punitive damages unless the *facts* alleged justify the allegation (by way of conclusion) that the conduct was wanton. *Hansley v. R. R.*, 115 N.C. 602, 20 S.E. 528.

References to *gross* negligence as a basis for recovery of punitive damages may be found in our decisions, e.g., *Horton v. Coach Co.*, 216 N.C. 567, 5 S.E. 2d 828; *Cottle v. Johnson, supra; Stanford v. Grocery Co.*, 143 N.C. 427, 55 S.E. 815. It is noted that the references to *gross* negligence in the *Cottle* and *Stanford cases* are based on *Holmes v. R. R.*, 94 N.C. 318; but the expression used by *Ashe, J.*, in that case, was not gross negligence but "such a degree of negligence as indicates a reckless indifference to consequences." When an injury

is caused by negligence, any attempt to differentiate variations from slight to gross is fraught with maximum difficulty. *Hansley v. R. R., supra.* (Incidentally, *Hansley v. R. R., supra,* which expressly overruled *Purcell v. R. R.,* 108 N.C. 414, 12 S.E. 956, was modified on rehearing, *Hansley v. R. R.,* 117 N.C. 565, 23 S.E. 443, so as to reinstate the decision in the *Purcell case* in relation to its particular facts.) Experience in other jurisdictions confirms this view. Annotation: 98 A.L.R. 267. Moreover, the words "reckless" and "heedless" would seem to import an uncertain degree of negligence somewhat short of wantonness.

An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others. *Wagoner v. R. R.,* 238 N.C. 162, 77 S.E. 2d 701; *McCormick, op. cit.,* sec. 79; *Hintz v. Roberts,* 98 N.J. Law 768, 121 A. 711; *W. T. Sistrunk & Co. v. Meisenheimer,* 205 Ky. 254, 265 S.W. 467; *Cadle v. McHargue,* 249 Ky. 385, 60 S.W. 2d 973; *Smith v. King,* (Ky.) 239 S.W. 2d 955; *Moore v. Wilson,* 180 Ark. 41, 20 S.W. 2d 310; *Goff v. Lubbock Bldg. Products,* (Court of Civil Appeals, Amarillo, Texas) 267 S.W. 2d 201; *Belk v. Rosamond,* 213 Miss. 633, 57 So. 2d 461. These cases from other jurisdictions arise out of automobile collisions.

True, decisions in other jurisdictions are somewhat divergent in the statement of the applicable rule. The divergence is greater in the application to specific factual situations. See cases cited, including those in 1956 Cumulative Pocket Part, relative to 61 C.J.S., Motor Vehicles sec. 560; also, Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition, Vol. 10, sec. 6467.5, and cases cited. In relation to the mass of automobile collision cases, the number of cases bearing on the question before us is surprisingly small.

Now, testing the amended complaint:

The facts alleged in the original complaint as to the cause of collision are brought forward in the amended complaint. The gist of these factual allegations is that the driver of the Dawson car, upon reaching the intersection, suddenly and without warning, made a left turn directly across the path of the oncoming Hinson car. The amended complaint contains this additional allegation, viz.: An allegation, upon information and belief, that the driver of the Dawson car "had defective vision, and was incapable, if he had tried to do so, of seeing and

apprehending the dangers inherent to the operation of a motor vehicle," and that the owner of the Dawson car, codefendant with the driver, "had full knowledge of this defect of vision, and permitted and allowed" the driver, his minor son, to operate his car. The alleged conduct of the driver of the Dawson car, as noted above, is described as in reckless and wanton disregard of and indifference to the rights and safety of Leonard E. Hinson.

True, this additional allegation is made on information and belief; but the amended complaint, including the additional allegation, must be considered in the light most favorable to plaintiff. *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273. When so construed, we cannot say that plaintiff had no right, in relation to the facts alleged, to allege that defendants' conduct was wanton and to include a claim for punitive damages in her prayer for relief.

Even so, we are constrained to hold that the following portion of paragraph 16 should have been stricken, viz.: "that in view of the financial worth of the defendants." The court below was supported in overruling the motion to strike this allegation by our decision in *Taylor v. Bakery,* 234 N.C. 660, 663, 68 S.E. 2d 313. While this case continues as authority on all other questions decided therein, upon further consideration we have reached the conclusion that it should be withdrawn as authority as to this particular point.

True, it is well established that evidence as to the financial worth of a defendant is competent for consideration by the jury when an issue as to punitive damages is warranted and submitted. But allegation as to such financial worth is another matter. We have concluded that such an allegation should be stricken as an allegation of evidence rather than of a substantive, ultimate fact. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. See: 31 N.C.L.R. p. 250; *Lutz Industries, Inc., v. Dixie Home Stores, supra,* p. 345. The matter involved in such allegation is patently prejudicial if plaintiff's evidence proves insufficient to warrant submission of an issue as to punitive damages. It should not be brought to the attention of the jury unless and until the trial judge determines that the *evidence* warrants the submission of such issue. In such event, it becomes competent as evidence relevant to such issue.

Defendants' assignments of error are overruled except as to the quoted allegation relating to their financial worth; but, as to such allegation, their assignment of error is well taken.

The costs on the cross-appeals are taxed, one-half to plaintiff and one-half to defendants.

On plaintiff's appeal, modified and affirmed.

On defendants' appeal, modified and affirmed.

L. D. BRYAN v. THE CITY OF SANFORD; THE BOARD OF ALDERMEN OF THE CITY OF SANFORD; AND HAROLD T. MAKEPEACE, MAYOR; LYNN PERRY, JOHN T. SALMON, THURMAN F. NANCE, BERNICE C. KELLY, THOMAS C. BARKER, SAM DAVIS AND O. A. ZACHARY, MEMBERS OF THE BOARD OF ALDERMEN OF THE CITY OF SANFORD.

(Filed 2 May, 1956.)

1. Municipal Corporations § 37—

Where a municipality incorporates in its zoning regulations a registered map which shows an intersection of streets, the intersection has four corners within the purview of G.S. 160-173, notwithstanding that one of the streets is not actually opened or used for public purposes beyond its intersection with the other. Therefore, where two of the corners are zoned for business purposes, the owner of another corner at the intersection is entitled to have his lot also zoned for business purposes.

2. Dedication § 4—

Where a street is dedicated to the public by a registered map and the sale of lots as bounded on a proposed street shown on the map, the city accepts the dedication by its acceptance of the map as official and its incorporation in a subsequently enacted zoning ordinance.

3. Mandamus § 2a—

Mandamus will lie to compel a municipality to zone one of four corners at an intersection in the same manner as it had zoned two other corners at the intersection, such action being a ministerial duty of the city under G.S. 160-173.

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

APPEAL by plaintiff from *McKeithen, Special Judge,* November Term, 1955, of LEE.

This was an action to require the defendants to re-zone a lot owned by him in the City of Sanford in accord with the provisions of the statute, G.S. 160-173.

Plaintiff alleged he was the owner of a lot designated as Lot #1 in Block 157 on the official map of the City of Sanford; that this lot is situated on the southwest corner of Gray and Third Streets; that Third Street runs approximately north and south, and Gray Street extends from Chatham Street eastwardly to and intersects with Third Street, and, as laid down in the map of the City (hereinafter referred to as the Deaton map), extends three blocks east of Third Street to the right of way of the Atlantic and Western Railroad; that Gray Street from Chatham Street to Third Street is open, used and maintained by the City, but east of Third Street it has not been opened, but was surveyed, platted and dedicated as a public street; that on each side of Gray Street as platted there are laid out a number of city blocks, with

numbered lots, and lots have been sold on either side as fronting on Gray Street. Plaintiff further alleged that Lot #4 in Block 153 is situated on the northwest corner of the intersection of Gray and Third Streets; that Lots #1 and #2 of the Barnes subdivision are situated on the northeast corner of the intersection; that Lots A and B in Block 156 are situated on the southeast corner of the intersection, and plaintiff's lot No. 1 in Block 157 is situated on the southwest corner of the intersection.

It was further alleged that on 2 February, 1954, the defendants (hereinafter referred to as the City) adopted a general zoning ordinance under the statute (Chapter 160, General Statutes) and divided the City into designated business, industrial, and residential districts, and imposed restrictions as to the use of premises in each district; that the ordinance referred to and incorporated as a part thereof the Deaton map; that under this ordinance all four corners of the intersection of Gray and Third Streets, including plaintiff's lot, were zoned as industrial; that at that time the building on plaintiff's lot was being used by plaintiff as office, storeroom and warehouse for the conduct of his plumbing and heating business.

Plaintiff further alleged that on 21 June, 1955, the Board of Aldermen of the City adopted a resolution designating the northwest and southwest corners of the intersection of Gray and Third Streets as residential, but did not change the zoning of the corners on the east side of Third Street; that on 6 September, 1955, plaintiff made written application to the defendant Board requesting re-districting of his lot at the southwest corner of Gray and Third Streets to conform to the other corners, as required by G.S. 160-173; that thereafter the defendant Board rejected his request and refused to re-district said lot. Thereupon plaintiff instituted this action, praying for writ of *mandamus* requiring defendants to re-district his lot as provided by the statute.

The defendants, answering, admitted the facts alleged in the complaint as to the location of plaintiff's lot, and the actions of the Board of Aldermen of the City in re-zoning the plaintiff's lot from industrial to residential, but alleged that Gray Street as platted east of Third Street was never opened, used or maintained by the City, and never became a public street; that there are no actual corners on the east side of Third Street and no opening used by anyone as a passageway east of Third Street, and that the provisions of G.S. 160-173 have no application.

By consent the cause was heard without a jury. The court found that the extension of Gray Street east of Third Street as shown on the Deaton map has never been opened, used or maintained by the City as a public street; that the Board of Aldermen of Sanford on 2 Febru-

ary, 1954, adopted a general zoning ordinance for the City under the provisions of the statute, and divided the municipality into designated business, industrial and residential districts; "that said ordinance refers to and incorporates as a part thereof" the map of Sanford herein referred to as the Deaton map; "that the map made a part of the zoning ordinance is a copy of the map by Deaton and Cooke, dated December 18, 1928"; that the Deaton map had been in 1929 accepted and paid for by the City by official action of the Board of Aldermen; "that said map shows numerous lots fronting on the area" between the platted lines of Gray Street east of Third Street, "and all of said lots have been conveyed by descriptions which designate Gray Street as a boundary line, including the lots immediately east of Third Street"; that the area on both sides of Third Street north and south of Gray Street was originally zoned industrial, and the re-zoning resolution adopted 21 June, 1955, changed the character of plaintiff's lot on the southwest corner of the intersection from industrial to residential, but did not change the zoning of the area east of Third Street and fronting on Gray Street as platted. It was stated on the argument that the Deaton map had been duly registered.

Upon the facts found, the court concluded that there were no corners on the east side of Third Street opposite Gray Street within the purview of G.S. 160-173, and that plaintiff was not entitled to have his lot re-zoned from residential to industrial as prayed.

The plaintiff excepted and appealed.

J. G. Edwards and J. Allen Harrington for plaintiff, appellant.

Orton J. Cameron for defendants, appellees.

DEVIN, J. The question presented by this appeal is this: Did the incorporation of the so-called Deaton map as a part of the zoning ordinance of the City of Sanford, showing the intersection of Gray and Third Streets and the platted extension of Gray Street eastward beyond Third Street, have the effect of constituting an intersection with four corners within the purview of section 160-173 of the zoning statutes? Or, does the fact that Gray Street east of Third Street had never been actually opened, used or maintained by the City preclude the application of the statute?

There was no controversy as to the facts. It was found by the court that when the City of Sanford on February 2, 1954, adopted a general zoning ordinance under the provisions of the statute, it therein referred to and incorporated as a part thereof "a map referred to as 'Sanford, N. C. Zoning map' showing the various districts; that the map made a part of the zoning ordinance is a copy of the map by Deaton and

Cooke, dated December 18, 1928"; that the Deaton map was in 1929 duly accepted and paid for by the City by vote of the Board of Aldermen.

The court further found that the four corners of the intersection of Gray and Third Streets were shown on the map and were designated and identified by numbered lots and blocks situated at each corner of the intersection.

It is provided in G.S. 160-173 that when at any intersection of streets the City promulgates regulations and restrictions as to two or more of the corners at said intersection, the City shall upon the written application from the owner of the other corners of the intersection re-district and regulate the remaining corners in the same manner.

The plaintiff's position is that since the City originally zoned all four corners of this intersection as industrial and has now re-zoned two corners only, the northwest and southwest corners, as residential, leaving the other corners unchanged, he is entitled upon written application to have his lot on the southwest corner restored to the original classification as industrial, in accord with the proviso in G.S. 160-173.

The defendants' position is that there never were corners on the east side of Third Street, and hence the City had authority to change the classification of the only two corners, which were on the west side of Third Street, the northwest and southwest corners, from industrial to residential. The defendants argue that the mathematical lines on the map showing extension of Gray Street east of Third Street could not and did not constitute an acceptance by the City of unopened and unused land as a public street. The plaintiff, however, calls attention to the fact that the Deaton map was incorporated in and became a part of the zoning ordinance itself, and thereby established the lines and corners therein set forth for zoning purposes, and that blocks and subdivisions east of Third Street were laid off and lots sold as bounded by Gray Street as the lines of such street were designated and established by the official map. Hence plaintiff contends that by the City's ordinances and actions the dedication of the eastern extension of Gray Street has been accepted and determined as a public street, to the extent that four corners at the intersection have been established within the meaning of the statute.

In *Marren v. Gamble*, 237 N.C. 680, 75 S.E. 2d 880, the proviso of G.S. 160-173 was considered and analyzed, and the Court, speaking through *Ervin, J.*, said: "When its phraseology is reduced to simple terms, it merely declares that whenever the legislative body of a municipality zones two or more corners at an intersection of streets in the corporate limits of a municipality in a *certain* way, 'it shall be the duty of such legislative body upon written application from the

owner of the other corners' of the intersection to rezone such other corners in the *same manner.*"

In *Robbins v. Charlotte,* 241 N.C. 197, 84 S.E. 2d 814, a factual situation similar in some respects to the instant case was considered by this Court. In that case it appeared that Brandywine Road intersects but does not cross Selwyn Avenue. There was no extension of Brandywine Road beyond Selwyn Avenue, nor was there any usable way. It was said that this constituted a "dead-end" for Brandywine Road at Selwyn Avenue, and the property opposite was characterized as forming the "top of the 'T'." The Court held in an opinion written by *Johnson, J.,* that the proviso of G.S. 160-173 could not be extended to cover only two corners, and that the area along the top of the "T" at the dead-end of the intersection could not be treated as a corner within the meaning of the statute.

However, we think the instant case distinguishable from the *Robbins case,* for the reason that here the extension of Gray Street beyond Third Street had been surveyed and laid out on a map which was accepted officially by the City, and there were laid out on this map the lines of Gray Street as extending east beyond Third Street for several blocks, and on this map were the lines of several blocks abutting on Gray Street, in consequence of which were sold lots described as bounded by the lines of Gray Street as shown on the map. In this situation, the City of Sanford in adopting the zoning ordinance incorporated this map as a part of the zoning ordinance showing four corners at this intersection.

We think the area within the platted lines of the extension of Gray Street had been dedicated to public use by the recorded map and the sale of lots as bounded thereby, and that the City by its acceptance of the map as official and incorporating it in, and as a part of, its zoning ordinance, had signified its acceptance for all purposes connected with its zoning regulations.

It would seem to follow as a logical conclusion that in so far as the zoning ordinance was concerned, there were four corners established at the intersection of Gray and Third Streets, and that the provisions of G.S. 160-173 are applicable.

The established rule in this jurisdiction is that the platting of land showing streets and public places and sale of lots pursuant thereto, constitutes a dedication of the public places delineated upon the plat as between the grantor and the purchaser. But in so far as the municipality is concerned, this constitutes only an offer of dedication, and there is no complete dedication without an acceptance of some kind by the municipality. *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Russell*

v. Coggin, 232 N.C. 674, 62 S.E. 2d 70; *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Wheeler v. Construction Co.,* 170 N.C. 427, 87 S.E. 221; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898.

However, evidence of acceptance would not be confined to use and maintenance of the land as such. Acceptance may be manifested by the adoption as official of a map delineating areas as public streets or places, followed by official acts and ordinances recognizing their character as such.

"Recognition of dedicated streets or alleys in official maps constitutes acceptance of the dedication, particularly when followed by other acts." 26 C.J.S., 109; 16 Am. Jur., 380; *Sullivan v. City of Louisville,* 291 Ky. 60; *Village of Pleasantville v. Siciliano,* 252 N.Y.S. 469.

Plaintiff here was entitled to require the defendants to comply with the provisions of the statute and to redistrict the plaintiff's lot at the intersection of Gray and Third Streets as industrial, as originally zoned. *Marren v. Gamble, supra.* Mandamus will lie to compel the performance of a purely ministerial duty imposed by law. *Nebel v. Nebel,* 241 N.C. 491 (499), 85 S.E. 2d 876; *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481.

Judgment reversed.

JOHNSON, 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 *Johnson, J.,* who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

JOE PARIS, EMPLOYEE, v. CAROLINA BUILDERS CORPORATION, EMPLOYER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER.

(Filed 2 May, 1956.)

1. Payment § 2—

In the absence of agreement to the contrary, delivery and acceptance of a check is only conditional payment until the check is paid, but if the check is paid on presentation, such payment ordinarily relates back to the time the check is delivered to the payee or his duly authorized agent.

2. Master and Servant § 53c—

Where request for review of an award for changed conditions is not made until more than twelve months after delivery and acceptance of check in final payment, review of the award is barred, G.S. 97-47, not-

withstanding that the check is negotiated to and actually paid by the drawee bank less than twelve months prior to the request.

3. Same—

Where an employee accepts payment for permanent partial disability in a lump sum, the twelve month period within which request for review of the award for change of condition must be made is to be calculated from the date of such payment and not the date on which the last payment of compensation would have been due had the employee not elected to accept a lump sum payment.

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

APPEAL by plaintiff from *McKeithen, Special Judge,* November Term, 1955, of WAKE.

This is an appeal from a judgment affirming an order of the North Carolina Industrial Commission (hereinafter referred to as Commission).

The facts are not in dispute and are summarized below:

1. On and prior to 20th June, 1952, the plaintiff was employed by the defendant employer at an average weekly wage of $57.50, and on that date sustained an injury to his right hand as the result of an accident arising out of and in the course of his employment. The parties were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act (hereinafter referred to as Compensation Act). The defendant Hartford Accident and Indemnity Company was the compensation carrier for the defendant employer and was on the risk at the time of the injury. The defendant employer admitted liability under the Compensation Act and paid to plaintiff compensation for temporary total disability from 21st June, 1952, to 6th September, 1952, in the amount of $330.00.

2. Thereafter, plaintiff was medically rated as having sustained twenty per cent permanent partial loss of use of his right hand on account of the injury. The parties thereupon executed another agreement on Commission Form No. 26, by the terms of which the defendants agreed to pay and the plaintiff agreed to accept compensation at $30.00 per week for a period of 34 weeks commencing as of the 5th day of September, 1952, which agreement was approved by the Commission. The plaintiff thereafter applied for payment in a lump sum of the compensation awarded which the Commission calculated to be $1,014.05, and his application for the lump sum payment was approved by the Commission. Whereupon, the defendant carrier issued two drafts, one in the amount of $50.00 payable to the plaintiff's attorney and the other in the amount of $964.05 payable to the plaintiff; these drafts bore the date of 31st October, 1952. The draft

payable to the plaintiff was delivered to him on 1st November, 1952, at which time he executed the closing receipt on Commission Form No. 27.

3. The plaintiff endorsed the draft payable to him and negotiated it at the First Citizens Bank and Trust Company of Raleigh on 3rd November, 1952, receiving at that time cash or its equivalent in the sum of $964.05. By subsequent negotiation the draft reached the bank upon which it was drawn, namely, the Hartford-Connecticut Trust Company of Hartford, Connecticut, and was actually paid by the bank on 7th November, 1952.

4. The plaintiff thereafter left the State of North Carolina and went to Birmingham, Alabama. Later he wrote a letter to the Commissioner of Labor, Raleigh, North Carolina, which letter was dated 1st November, 1953, making inquiry about his case and asking when it would come up for a hearing. This letter was forwarded to the Commission by the Commissioner of Labor and was received by the Commission on 4th November, 1953, having been received by the Commissioner of Labor on 3rd November, 1953. On 18th January, 1954, the Commission received a request from the plaintiff's counsel of Birmingham, Alabama, for a reopening of plaintiff's claim to determine what additional compensation plaintiff was entitled to receive on account of a change in his condition for the worse.

From the foregoing facts the Commission held that the "last payment" of compensation within the meaning of G.S. 97-47 occurred on the 1st day of November, 1952, and that the plaintiff's application for review of his case and for additional compensation based on a change in condition came too late, the last payment of compensation within the meaning of G.S. 97-47 having been made more than one year prior to the 4th day of November, 1953. As a consequence of the foregoing findings of fact and conclusions of law, the Commission entered an order denying compensation.

Upon appeal to the Superior Court the order entered by the Commission was affirmed. The plaintiff appeals, assigning error.

Smith, Leach, Anderson & Dorsett for plaintiff.

Ruark, Young & Moore for defendant.

DENNY, J. The Commission, upon its own motion, or upon the application of any party in interest, on the grounds of a change in condition, may review any award and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum compensation allowable by the Compensation Act. Provided, however, no such review

shall be made after twelve months from the date of the last payment of compensation pursuant to an award as provided in the Act, or when no award has been made for compensation no such review shall be made after twelve months from the date of the last payment of bills for medical or other treatment pursuant to the provisions of the Compensation Act. G.S. 97-47; *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109; *Whitted v. Palmer-Bee Co.,* 228 N.C. 447, 46 S.E. 2d 109; *Knight v. Body Co.,* 214 N.C. 7, 197 S.E. 563; *Lee v. Rose's Stores, Inc.,* 205 N.C. 310, 171 S.E. 87.

It follows, therefore, that the determinative question posed on this appeal is whether the request for review on the grounds of a change in plaintiff's condition was made within twelve months of the date of the last payment of compensation, pursuant to an award under the Compensation Act.

The appellant contends that the date of the last payment of compensation made to him within the mea: ing of G.S. 97-47 was on the 7th day of November, 1952, the date on which the draft was paid by the Hartford-Connecticut Trust Company of Hartford, Connecticut. He relies upon the well recognized rule that in the absence of an agreement to the contrary, the delivery and acceptance of a check is not payment until the check is paid, citing *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908; *Lumber Co. v. Hayworth,* 205 N.C. 585, 172 S.E. 194, and similar cases. However, there is another well established rule, and that is that when a draft or check is accepted in payment of an obligation and is paid on presentation, payment ordinarily relates back to the time the draft or check was delivered to the payee or his duly authorized agent. 40 Am. Jur., Payment, section 86, page 775; 70 C.J.S., Payment, section 12, page 219, *et seq.; Hooker v. Burr,* 137 Cal. 663, 70 P 778, 99 Am. St. Rep. 17, affirmed in 194 U.S. 415, 48 L. ed. 1046, 24 S.Ct. 706; *McFadden v. Follrath,* 114 Minn. 85, 130 N.W. 542, 37 L.R.A. (NS) 201; *Tonnar v. Wade,* 153 Miss. 722, 121 So. 156; *Franciscan Hotel Co. v. Albuquerque Hotel Co.,* 37 N.M. 456, 24 P. 2d 718; *Hunter v. Wetsell,* 84 N.Y. 549, 38 Am. Rep. 544; *Texas Mut. L. Ins. Asso. v. Tolbert,* 134 Tex. 419, 136 S.W. 2d 584; *Ruppert v. Edwards,* 67 Nev. 200, 216 P. 2d 616; Anno.: 1 British Ruling Cases, 494. *Cf. Kendrick v. Ins. Co.,* 124 N.C. 315, 32 S.E. 728, 70 Am. St. Rep. 592; *Whitley v. Ins. Co.,* 71 N.C. 480.

In the case of *Marreco v. Richardson,* 1 British Ruling Cases, 485, at page 494, *Farwell, L. J.,* in considering the identical point we have under consideration, said: "Byrne, J., held that a cheque or a bill of exchange given in respect of a pre-existing debt operated as a conditional payment thereof, and on the condition being performed by ac-

tual payment, the payment related back to the time when the cheque or bill was given. That is only expressing the same principle in another form, and I should myself prefer to say that the giving of a cheque for a debt is payment conditional on the cheque being met, that is, subject to a condition subsequent, and if the cheque is met it is an actual payment *ab initio.*"

Likewise, in *Ruppert v. Edwards, supra*, in considering the same question we have before us, the Court said: "So, in such a transaction as that involved in the instant case, payment is *payment when completed delivery is had,* and to that extent is evidence of the existing obligation, but it is conditional merely, according to the great weight of authority, and continues such until the check is paid on the presentation; thereupon, the condition having been satisfied by the check having been paid, the same becomes absolute. The payment conditionally contemplated is not what is construed properly as a condition precedent, but rather a condition subsequent. The condition having been subsequently satisfied by the check having been paid, 'the debt is deemed to have been discharged *from the time the check was given.*' "

The appellant further contends that he should have been allowed twelve months in which to request a review from the last date on which the compensation would have been due had he not elected to accept payment of the award in a lump sum. This contention is not supported by the statutes which authorizes review for a change in a claimant's condition. G.S. 97-47. *Cf. Tucker v. Lowdermilk, supra.*

Treating the letter addressed to the Commissioner of Labor on 1st November, 1953, and later received by the Commission on 4th November, 1953, as a request for review, we hold that it was received more than twelve months after the date of the last payment of compensation, to-wit, the 1st day of November, 1952. However, it will be noted that no formal request for a review of the award theretofore entered in favor of the plaintiff, was filed with the Commission until the 18th day of January, 1954.

The judgment of the court below is

Affirmed.

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

STATE v. BRUCE PHILLIP STEVENS.

(Filed 2 May, 1956.)

1. Grand Jury § 1—

A party litigant has no right to select a grand juror but may object only to his selection on the ground that he does not possess the qualifications or that the manner of his selection was illegal.

2. Same—

The authority conferred on the presiding judge by local law applicable to the county to discharge the whole grand jury includes the right to discharge any one of the grand jurors and to fill the vacancy thus occasioned with another possessing the requisite qualifications.

3. Same—

Statutory provisions which relate to the number and qualifications of grand jurors and which are designed to secure impartiality and freedom from unfair influences are deemed to be mandatory; those which prescribe mere details as to the manner of selecting or drawing them are usually regarded as directory only.

4. Same—

The burden is on the objecting party to show disqualification of a grand juror.

5. Criminal Law § 44—

Where motion for continuance is based solely on absence of witnesses and not lack of time to prepare the defense, and defendant fails to show any effort to have the witnesses in court and fails to show what testimony material to the defense they could give if present, there is no showing of abuse of discretion by the trial court in denying the motion.

6. Criminal Law § 50d—

The court may ask a witness questions of a clarifying nature.

7. Criminal Law § 81b—

Appellant must show prejudice in order to be entitled to a new trial.

8. Criminal Law § 78e (1)—

An exception to a long portion of the charge which does not point out the matter complained of is insufficient. Rule of Practice in the Supreme Court No. 19(3).

9. Criminal Law § 53e—

Where the State relies largely on direct evidence, the failure of the court to charge with respect to the nature of incidental and corroborative circumstantial evidence will not be held for error in the absence of a special request.

10. Criminal Law § 53j—

In the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of accomplices will not be held for error, the matter being a subordinate and not a substantive feature of the case.

JOHNSON, J., not sitting.

APPEAL by defendant from *Williams, J.*, October, 1955 Criminal Term, Superior Court, LEE County.

Criminal prosecution upon bill of indictment in which the defendant was charged with aiding and abetting William G. Holifield and William Longo in the commission of the crime of robbery with firearms. Bill of indictment was returned at the October, 1955 Term, Lee Superior Court, by a grand jury selected under the authority of Chapter 354, Public-Local Laws of 1931, applicable to Lee County. The Act provides in substance that the grand jurors shall serve for one year, nine of whom shall be selected at the March Term, and nine at the October Term each year. The judge of the Superior Court presiding over any civil or criminal court "may at any time discharge said grand jury from further service, and, in such event, he may cause a new grand jury to be drawn which shall serve out the unfinished time of any grand jury thus discharged."

At the October, 1955 Term of the Superior Court the nine grand jurors, including Clarence C. Kelly, selected at the March, 1955 Term, were present. The presiding judge in open court made this statement: "The court finds that grand juror Clarence C. Kelly is disqualified for grand jury service and he is, therefore, dismissed and excused from further duty on the grand jury." The court inquired of defense counsel, "Do you want me to find facts?" Counsel replied, "It is not necessary." The court then stated: "I found that he was disqualified, he having been indicted and convicted of drunk driving and not fit to serve on the grand jury."

Under the court's order 10 grand jurors were then drawn, sworn and charged. The ten grand jurors thus drawn, together with the eight holding over, constituted the panel. The grand jury returned the indictment on which the defendant was put upon trial. The defendant moved for a continuance for that certain of his witnesses were on maneuvers in Alabama and unable to attend. The witnesses were not shown to have been under subpoena. The motion for continuance was not supported by affidavit or other showing as to the relevancy of their testimony, if present. The court denied the motion and the defendant excepted. Before plea, the defendant moved to quash the indictment for that it was returned by an illegally drawn grand jury. The motion to quash was denied and the defendant excepted.

The State offered numerous witnesses, among them two soldiers from Fort Bragg, William G. Holifield and William J. Longo, both of whom pleaded guilty to the robbery. Both testified the defendant, Bruce Phillip Stevens, planned the crime, furnished the pistol, waited for them in his car outside the place where the holdup occurred, took them away from the scene, and that the three divided the money obtained in the holdup. The State introduced the evidence of other witnesses in corroboration.

The defendant introduced evidence of his good character. He offered evidence of his wife, his brother and his brother's wife, and others tending to establish an alibi. He also, by consent, offered a statement from Tommis Measamer, who "asked Longo why they were trying to put the robbery on Bruce, and Longo said Bruce had a blue Mercury car and they were trying to make a fall guy out of Bruce."

The jury returned a verdict of guilty. The defendant moved (1) to set aside the verdict, (2) for a new trial, and (3) in arrest of judgment. The motions were denied and the defendant again excepted. From the judgment that the defendant be confined in the State's Prison at hard labor for not less than 15 years nor more than 20 years, the defendant appealed.

William B. Rodman, Jr., Attorney General, T. W. Bruton, Assistant Attorney General, for the State.

Pittman & Staton,

By: J. C. Pittman, for defendant, appellant.

HIGGINS, J. The defendant's motion to quash the indictment made before plea, and the motion in arrest of judgment made after verdict, challenge the validity of the indictment upon the ground that it was returned by an illegally constituted grand jury. The defendant contends the court committed error (1) in discharging grand juror Kelly for an insufficient reason, that is, "He had been tried and convicted for driving drunk and not fit to serve on the grand jury," and (2) ten grand jurors were selected at the October, 1955 Term, whereas the law applicable to Lee County provided for the selection of only nine members.

While the defendant had no right to keep Kelly on the grand jury and cannot complain of his removal, he did have the right to object to the selection of his successor, either on the ground that he did not possess the qualifications or that the manner of his selection was illegal. In the case of *S. v. Peacock,* 220 N.C. 63, 16 S.E. 2d 452, this Court, speaking through *Stacy, C. J.,* said: "The right of a defendant, or a party litigant, in respect of the jury, grand or petit, is to challenge or reject, and not to select jurors, *S. v. Levy, supra* (187 N.C. 581, 122

S.E. 386)." The defendant does not contend the 10th juror lacked the necessary qualifications. The objection is upon the ground that 10 men were selected instead of the nine provided for in the Local Law applicable to Lee County. The Act provides the judge presiding at any criminal or civil term of Superior Court, may, at any time, discharge the grand jury from further service, in which event he may cause a new grand jury to be drawn for the unexpired term. The authority to discharge the whole grand jury would seem to include the right (if that right did not already exist) to discharge any one or more of its members. "The power of the court to discharge or excuse grand jurors on the original panel and fill vacancies created thereby are inherent and existed at common law in the absence of express statutory authority. . . . Generally, discharging or excusing some of the grand jurors on the original panel and supplying their places will not invalidate their action so long as the newly constituted panel is within the statutory limit." 24 Am. Jur. 848. See 27 L.R.A. 780; 49 L.R.A.(n.s.) 1215."

"When power is given a court to excuse one called to serve as a grand juror, authority to fill the vacancy thus occasioned with another possessing the requisite qualifications is also conferred by necessary implication." 22 C.J.S. 1013. See also, *S. v. Perry*, 122 N.C. 1018, 29 S.E. 374; *S. v. Barber*, 113 N.C. 711, 18 S.E. 515.

Statutory provisions which relate to the number and qualification of grand jurors or which are designed to secure impartiality and freedom from unfair influences are ordinarily deemed to be mandatory; those which prescribe mere details as to the manner of selecting or drawing them are usually regarded as directory only. *Hyde v. U. S.*, 225 U.S. 347, 56 L. Ed. 1114.

We conclude, therefore, that the presiding judge, in his discretion, had the power (1) to discharge Kelly from the grand jury for cause, and (2) to fill the vacancy thus created by the drawing of another duly qualified grand juror. Of the grand jurors drawn, one was to take the place of Kelly and the other nine to take the places of those whose terms expired by reason of having already served one year. The burden was on the defendant to show the disqualification. *S. v. Perry, supra.*

The defendant contends the court abused its discretion in refusing to continue the case on account of the absence of witnesses. However, the defendant made no showing as to his efforts to have these witnesses in court and no showing as to what testimony material to the defense they could give if present. While the indictment was returned at the term at which the trial was held, the offense was alleged to have been committed one month and two days prior to the beginning of the term. The motion for continuance was made upon the ground of absence of

witnesses and not for lack of time in which to prepare the defense. The record does not show abuse of discretion in denying the motion for continuance. *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Whitfield,* 206 N.C. 696, 175 S.E. 93.

While defendant's counsel, out of abundance of precaution, took numerous exceptions to the admission and exclusion of evidence, careful examination of the record fails to show prejudicial error. The questions asked by the court appear to be of a clarifying nature. *Andrews v. Andrews,* 243 N.C. 779. The evidence was ample to take the case to the jury and to sustain the verdict. To prevail on appeal it must be made to appear that appellant's rights have been prejudiced. *S. v. Creech, supra; S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

The charge of the court covered 36 pages of the record. All except 15 lines have been made the subject of the 72 exceptions taken to it. Some of the exceptions relate to two or more pages of the charge. They do not point up with the definiteness required by Rule 19(3), Rules of Practice in the Supreme Court, Vol. 221, at p. 555. *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *Boyer v. Jarrell,* 180 N.C. 479, 105 S.E. 9; *Harrison v. Dill,* 169 N.C. 542, 86 S.E. 518.

In charging the jury, the court stated the principles of law as they relate to the evidence in the case in substantial accord with the decisions of this Court. The recapitulation of the evidence and the statement of contentions of the parties are unobjectionable. The exception to the court's failure to charge on circumstantial evidence cannot be sustained. The evidence in the case was largely direct. It consisted of the statements of the two men who actually committed the robbery. The circumstantial evidence offered was incidental to and in corroboration of the direct evidence. In the absence of special request, failure to charge with respect to circumstantial evidence was not error. *S. v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42.

The defendant, both in his brief and on the oral argument, urges as error the failure of the trial judge to charge the jury to scrutinize and receive with caution the evidence of admitted accomplices. Request for such instruction was not made at the trial. In the case of *S. v. Wallace,* 203 N.C. 284, 165 S.E. 716, *Justice Adams,* in discussing the trial court's failure to instruct the jury to scrutinize the testimony of an accomplice, stated: "The principle is sustained in a number of our decisions and explicitly approved in the following words: 'Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the

judge's failure to caution the jury with respect to prejudice, partiality or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction.' *S. v. O'Neal,* 187 N.C. 22; *S. v. Sauls,* 190 N.C. 810." *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *S. v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533; *S. v. Cagle,* 209 N.C. 114, 182 S.E. 697; *S. v. Bohanon,* 142 N.C. 695, 55 S.E. 797.

In the case of *S. v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690, this Court granted a new trial for failure of the judge to charge the jury to scrutinize the evidence of accomplices. However, the defendant, in apt time and in writing, requested the instruction and excepted to the refusal of the court to give it. The request for the instruction in the *Hooker case* distinguishes it from this case and the others here cited.

No error.

JOHNSON, J., not sitting.

BOBBY JAMES WRIGHT v. BERNARD G. PEGRAM AND TAYLOR JAMES PEGRAM.

(Filed 2 May, 1956.)

1. Negligence § 19c—

In order to warrant nonsuit on the ground of contributory negligence, plaintiff's evidence must establish his contributory negligence so clearly that no other conclusion may be reasonably drawn from that evidence.

2. Automobiles § 17—

While a motorist entering an intersection with the traffic control light is nevertheless under duty to maintain a proper lookout, keep his vehicle under reasonable control, and avoid hitting persons or vehicles which he sees, or should see, in time to avoid collision, such duty does not require him to anticipate that a motorist along the intersecting street will approach the intersection at an unlawful speed or fail to observe the traffic signal governing the traffic in his direction of travel.

3. Automobiles § 42g—Evidence held not to disclose contributory negligence as a matter of law in failing to avoid collision at intersection.

Where plaintiff's evidence tends to show that he entered an intersection as the traffic control signal turned green, that defendants' car, approaching along the intersecting street from plaintiff's left, could not be seen by plaintiff until about 100 feet away because of a hill, that defendant driver approached at an unlawful speed and collided with plaintiff's car about the center of the intersection, that plaintiff looked to the right and left before he started into the intersection, but did not see defendants' car until it hit him, with inferences that if plaintiff first looked to his left before entering the intersection and then had his attention diverted to

other traffic, defendants' car would not then have been visible, and that plaintiff could have cleared the intersection in safety except for defendants' excessive speed, *held*, whether under all the circumstances plaintiff should have avoided the accident, presents a question of fact for the jury and not one of law for the court.

APPEAL by the plaintiff from *Armstrong, J.*, November 28, 1955 Term Superior Court, RANDOLPH County.

Civil action brought by the plaintiff for personal injury and property damages suffered as a result of an automobile collision at the intersection of North Fayetteville and Salisbury Streets in the Town of Asheboro.

The collision occurred about 7:15 a.m. on December 11, 1954. The plaintiff alleged the defendant, Bernard G. Pegram, agent of Taylor James Pegram, operated the latter's Ford automobile in a negligent and careless manner in that he attempted to run through an intersection against a red light and at an excessive rate of speed, collided with plaintiff's car while the latter was lawfully passing through the intersection, injuring the plaintiff and damaging his car. The defendant denied negligence and pleaded sole and contributory negligence on the part of the plaintiff.

At the time of the accident there was an electrically operated traffic control signal light over the center of the intersection showing alternately red, yellow and green, stop, caution, and go signals. White lines for control of pedestrian traffic were placed on both North Fayetteville and Salisbury Streets, though their exact location with respect to distance from the intersection is not disclosed by the record.

According to the pertinent part of plaintiff's testimony, he was driving his Buick automobile north on North Fayetteville Street at a speed between 15 and 20 miles per hour. At the time his car arrived at the white line in his approach to the intersection the light became green for northbound traffic. At the same time three other cars were stopped on the opposite side of the intersection headed south on Fayetteville Street—one in the center lane, and two in the west lane. The plaintiff proceeded into the intersection on the east traffic lane and the collision occurred about the center of Salisbury Street. The Ford hit plaintiff's car, threw him from under the steering wheel. He lost control of his car and it ran into a telephone pole at the corner of the intersection. . . . "When I saw Mr. Pegram was when he hit me. I looked to the right and left when I started through. . . . When I drove up to the light I didn't see a car coming whatever over that little hill. . . . I could see a distance of about 100 feet either way. . . . Speed zone signs say 20 miles an hour on Salisbury Street and 35 on North Fayetteville Street."

James L. Bradley, Jr., testified for the plaintiff: "I was at the intersection and witnessed the wreck . . . I seen this Ford coming . . . he was not slowing up. Bernard Pegram was in it, looked like he was trying to beat that caution out. In my opinion the speed of defendant was 35 to 40 miles an hour. I figured the light turned red on him about the time he hit the white line. It was definitely red when he went under the light. The light turned red about the time he hit the white lines, pedestrian lines. Plaintiff was doing 15 or 20."

At the time they entered the intersection the plaintiff was going north on North Fayetteville Street and the defendant Bernard Pegram was going east on Salisbury Street. There is no evidence in the record as to the width of either street or as to the location of the white lines marked off for pedestrians.

The plaintiff introduced medical and other evidence of his injuries, which included a broken wrist, the loss of a tooth and injury to other teeth, and other bruises and contusions. He introduced evidence of his medical and hospital expenses and damage to his car.

At the close of the plaintiff's evidence the court rendered judgment of compulsory nonsuit, to which the plaintiff excepted and from which he appealed.

Ottway Burton, for plaintiff, appellant.

Coltrane & Gavin,

By: T. Worth Coltrane, for defendants, appellees.

HIGGINS, J. The evidence of the defendant's speed of 35-40 miles per hour in a 20-mile zone and his entrance into the intersection against a red light was sufficient to go to the jury on the question of defendant's negligence. The judgment of nonsuit, therefore, can be upheld only if the plaintiff's contributory negligence appears as a matter of law. In order to warrant a nonsuit on that ground the plaintiff's evidence must establish his contributory negligence so clearly that no other conclusion may be reasonably drawn from that evidence. *Bradham v. Trucking Co.*, 243 N.C. 708; *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.

Fractions of a second and a few feet of space may determine the difference between safety and danger in crossing intersecting streets and highways. At 20 miles per hour a motor vehicle will travel approximately 29 feet in one second. While the evidence warrants the inference the light turned green for the plaintiff at the time he arrived

at the white line (for guidance of pedestrians) on North Fayetteville Street, yet the distance of that line from Salisbury Street is left to conjecture. Likewise, the evidence warrants the inference the light turned red for the defendant Bernard Pegram at the time he arrived at the white line on Salisbury Street, yet the distance of that line from North Fayetteville Street is likewise left to conjecture. There was no evidence offered as to the width of the streets.

On account of a little hill the plaintiff could see only about 100 feet west in the direction from which the defendant's car approached. The plaintiff had a right to assume and to act on the assumption that a motorist from that direction would obey the speed limit of 20 miles per hour, and upon that basis determine whether he had time to clear the intersection. He testified he looked both to the left and to the right as he entered the intersection and that he saw no approaching traffic. He did see three cars north of the intersection. The evidence indicates the defendant Bernard Pegram approached and drove into the intersection at a speed of 35-40 miles per hour, practically double the legal speed limit. By reason of the defendant's speed, the plaintiff actually had only about one-half the time to clear the intersection he had a right to expect. Of course, it was the plaintiff's duty to look and to see what he should have seen. But it was his duty to look not only to the left and to the right, but also in front. Naturally he could take a last look in only one direction. The defendant's speed carried his car the 100 feet from the point of first possible visibility to the intersection in less than two seconds. The plaintiff did not see the Ford until the collision. The evidence disclosed that two of the cars in front of the plaintiff were in movement. This fact may have occupied his sole attention. Whether under all the circumstances he should have seen the defendant's approach, and in the exercise of due care could and should have avoided the accident, presents a question of fact for the jury and not one of law for the court.

Both parties in their briefs cite the case of *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342. That case turned on the question whether the allegations of the complaint absolved Mrs. Lefler from liability by alleging facts sufficient to show upon the face of the complaint that negligence of her co-defendants was the sole proximate cause of the collision and resulting damage; and whether her negligence, if any, was insulated and not a proximate cause of that collision. In discussing the question, Justice Winborne said: "On the other hand, Lefler, having the green light as she approached the intersection, it seems clear that she had the right to proceed. It is alleged she did proceed into the intersection. But if it be inferred from the allegation that she entered the intersection as the light was in the

process of changing, she was not under any duty of anticipating negligence on the part of Wyrick, but in the absence of anything which gave or should have given notice to the contrary, she was entitled to assume, and to act on the assumption, that Wyrick in the exercise of ordinary care would not proceed into the intersection until after he had the green light and she had cleared the intersection." Citing *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

Mrs. Lefler's situation in the *Troxler case* is not unlike the plaintiff's in the case at bar. Mrs. Lefler, according to the allegations in the complaint, and the plaintiff, according to the evidence in this case, entered the intersection when the light was red for the other party. We are not unmindful of the fact that a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354. Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25.

We conclude the case at bar falls within that category in which the issue of contributory negligence is for the jury and does not appear as a matter of law. *Smith v. Buie,* 243 N.C. 209, 90 S.E. 2d 514; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485; *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; *Mikeal v. Pendleton,* 237 N.C. 690, 75 S.E. 2d 756; *Ward v. Cruse,* 236 N.C. 400, 72 S.E. 2d 835; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496; *Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658; *Batchelor v. Black,* 232 N.C. 745, 61 S.E. 2d 894; *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Bobbitt v. Haynes,* 231 N.C. 373, 57 S.E. 2d 361; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *McMillan v. Butler,* 218 N.C. 582, 11 S.E. 2d 788; *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87.

The judgment of the Superior Court of Randolph County is

Reversed.

NOLAND COMPANY, INCORPORATED, v. LAXTON CONSTRUCTION COMPANY, INCORPORATED, AND UNITED STATES CASUALTY COMPANY.

(Filed 2 May, 1956.)

1. Corporations § 3—

Domesticated corporations may sue and be sued under the laws which apply to domestic corporations, subject to the limitation that domestication does not deprive the Federal courts of their jurisdiction in respect to foreign corporations.

2. Same—

The location of the principal office and place of business of a corporation is a question of fact, and the instrument a foreign domesticated corporation is required to file in the office of the Secretary of State is merely notice of that fact. G.S. 55-118. Therefore, when a domesticated corporation declares in writing that it had moved its principal office from one county to another county on a particular date, it will not be permitted to take advantage of its own neglect for more than 18 days to so inform the Secretary of State as required by the statute.

3. Venue § 1e—

Where a domesticated corporation some days prior to its institution of an action on contract, moves its principal office from the county in which the action is instituted, defendants, residents of another county, are entitled as a matter of right to the removal of the action to the county of their residence upon motion aptly made.

JOHNSON, J., not sitting.

APPEAL by defendants from *Bickett, J.*, October Term, 1955, WAKE.

Civil action to recover an account for material furnished.

The defendant Laxton Construction Company, hereinafter referred to as the Construction Company, contracted to construct a high school building in Chester, S. C. It executed a performance bond with the defendant United States Casualty Company, hereinafter referred to as Casualty Company, as the surety thereon.

The Construction Company sublet the electrical work in connection with said building to Southeastern Electric Company, Inc., hereinafter referred to as the Electric Company. Plaintiff thereafter furnished the Electric Company material to be used in the performance of its contract to do the wiring, etc. in connection with the construction of said school building. The Electric Company defaulted in the payment for said material, and the plaintiff instituted this action in Wake County to recover from the principal contractor and the surety on its performance bond.

Plaintiff is a foreign domesticated corporation. Formerly it maintained its principal office in Wake County. Sometime prior to 21

March 1955 it removed its principal office and place of business to Durham, Durham County, N. C. On 21 March 1955 it executed a "Certificate of Change of Agent and Location of Principal Office" in which it declares that "The place within the State of North Carolina which now is, and is to be its principal office, is Suite 523, 111 Corcoran Street, in the City of Durham." This instrument was mailed to the Secretary of State of North Carolina on 18 April 1955 and was received on 19 April. There is endorsed thereon the following: "FILED APR 19 1955, THAD EURE, SECRETARY OF STATE."

Plaintiff instituted this action in Wake County and filed its complaint herein shortly after 11:00 a.m. on 19 April 1955.

It is stipulated by the parties that the defendants are residents of Charlotte, Mecklenburg County, N. C. They, in apt time, moved the court to transfer the cause to Mecklenburg County, N. C., for the reason neither plaintiffs nor defendants are residents of Wake County. Later they also moved the court for a removal to Mecklenburg County for the convenience of witnesses and to promote the ends of justice.

The court below found that the burden of showing a change of residence of plaintiff from Wake to Durham prior to the institution of this action rested on the defendants, and that they had failed to carry the burden of so proving. It was of the opinion that plaintiff's place of business remained in Wake County until the certificate of change of residence was actually filed in the office of the Secretary of State, and that as we do not count fractions of a day, plaintiff was a resident of Wake County on 19 April 1955 and was therefore authorized to institute, and may now maintain its action in Wake County. Thereupon the court entered its order denying the motion of defendants to remove the cause to Mecklenburg County as a matter of right and also denied defendants' motion to remove for the convenience of witnesses and to promote the ends of justice. Defendants excepted and appealed.

A. L. Purrington, Jr. for plaintiff appellee.

Lassiter, Moore and Van Allen for defendant appellants.

BARNHILL, C. J. The decisive question in this case is this: Was plaintiff's principal office and place of business located in Wake County on 19 April 1955, the day this action was instituted? The court below answered in the affirmative. We are constrained to hold to the contrary.

Our law of corporations is in large measure contained in ch. 55 of the General Statutes. Provisions therein referring to suits in behalf of or against domestic corporations and foreign corporations which

have submitted to domestication must be read *in pari materia,* subject to the limitation that domestication does not deprive the Federal courts of their jurisdiction in respect to foreign corporations.

Domesticated corporations may sue and be sued under the laws which apply to domestic corporations. *Hill v. Greyhound Corp.,* 229 N.C. 728, 51 S.E. 2d 183; *Smith-Douglass Co. v. Honeycutt,* 204 N.C. 219, 167 S.E. 810.

The location of the principal office and place of business of a corporation is a fact. The instrument a foreign domesticated corporation is required to file in the office of the Secretary of State, G.S. 55-118, is merely notice of that fact. It is not required for the benefit of the corporation but for the information of the public. And it does not, in and of itself, fix the location of the place of business of the corporation which files the same. Herein is where the court below fell into error.

The principal office and place of business of plaintiff has been in Durham County since sometime prior to 21 March 1955. This is established by its own solemn declaration in writing. It will not be permitted to take advantage of its own neglect for more than eighteen days to so inform the Secretary of State as required by G.S. 55-118 and assert that because it neglected to act promptly in this respect its principal office and place of business continued to be and remained in Wake County. It is estopped by its own declaration to so contend, and, in any event, its contention is without foundation.

Since the plaintiff instituted this action in a county other than in the county of its residence where it maintained its principal office and place of business, defendants were and are entitled to have this cause removed to Mecklenburg County as a matter of right.

"Considering the statutes *in pari materia* it has been consistently held by this Court that where the plaintiff is not a resident of the county in which an action is instituted, or is not otherwise entitled to maintain the action therein as a matter of right, the defendant may require the removal of the cause to the county of his residence by complying with the terms of the statute. When the motion to remove to the county of the residence of the defendant, the action not having been brought in the proper county, is made, the question of removal is not one of discretion, but 'may' means *shall,* or *must,* and it becomes the duty of the judge to remove the cause. (Cases cited.)" *R. R. v. Thrower,* 213 N.C. 637, 197 S.E. 197; *Teer Co. v. Hitchcock,* 235 N.C. 741, 71 S.E. 2d 54; *Roberts v. Moore,* 185 N.C. 254, 116 S.E. 728; *McIntosh,* N.C. P & P, 279, sec. 295.

It is a matter of common knowledge that Mecklenburg County is bordered by the northern line of South Carolina, and that Chester,

S. C., is a town in South Carolina near Charlotte, the county seat of Mecklenburg County. Hence it would seem that the court below might well have granted the motion to remove for the convenience of witnesses. However, whether this motion should be granted rested in the sound discretion of the court below, and we do not hold that it abused its discretion in declining to remove for this cause.

An order will be entered removing this cause to Mecklenburg County for trial. To that end the judgment entered in the court below is

Reversed.

JOHNSON, J., not sitting.

STATE v. PRESTON LUCAS.

(Filed 2 May, 1956.)

1. Perjury § 4—

Subornation of perjury consists in procuring another to commit the crime of perjury. G.S. 14-210.

2. Perjury § 5—

Since the commission of perjury by another is the basic element in the crime of subornation of perjury, the statutes, G.S. 15-145 and G.S. 15-146, must be read together. Therefore, an indictment for subornation of perjury which fails to set out the matter alleged to have been falsely sworn by the person suborned and fails to allege that the suborner knew such to be false or that he was ignorant whether or not it was true, is fatally defective.

3. Criminal Law § 82—

A motion in arrest of judgment may be made in the Supreme Court upon the hearing of the appeal. Rule of Practice in the Supreme Court No. 21.

4. Criminal Law § 56—

Where the indictment is fatally defective, the Supreme Court will arrest the judgment either on motion or *ex mero motu*, and the arrest of judgment vacates the verdict and sentence, but does not preclude the State from instituting a subsequent prosecution upon a new and sufficient bill, if it so desires.

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

APPEAL by defendant from *Williams, J.*, at 5 December, 1955 Term, of JOHNSTON.

Criminal prosecution upon a bill of indictment for subornation of perjury.

The bill charges: ". . . that Preston Lucas late of the County of Johnston, on the.....day of November in the year of our Lord one thousand nine hundred and fifty-five, with force and arms at and in the County aforesaid, unlawfully, willfully and feloniously (did) procure one J. D. Stancil to willfully and corruptly commit the felony of perjury in a criminal action tried in the Recorder's Court of Selma, N. C., wherein the said Preston Lucas was charged with the unlawful operation of a motor vehicle upon the public streets of the town of Selma, while under the influence of some intoxicant, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Upon trial in Superior Court the jury returned a verdict of guilty as charged in the bill. The judgment on the verdict is that defendant be confined in the State Prison at Raleigh for a term of not less than five years and not more than seven years. Defendant appeals therefrom to Supreme Court, assigning as error that the sentence imposed is excessive, and that the bill of indictment is fatally defective.

Attorney-General Rodman, Assistant Attorney-General Robert E. Giles, and F. Kent Burns, Staff Attorney, for the State.

W. H. Yarborough for defendant, appellant.

WINBORNE, J. Defendant, appellant, files in this Court "motion and brief" in which he moves the Court to arrest judgment in this cause for that the bill of indictment is fatally defective, and the argument submitted is in support of the motion. Thus the question: Is the bill of indictment fatally defective? Yes, it is!

In this connection subornation of perjury, the crime of which defendant stands convicted, consists in procuring another to commit the crime of perjury. G.S. 14-210. *S. v. Chambers,* 180 N.C. 705, 104 S.E. 670; *S. v. Cannon,* 227 N.C. 336, 42 S.E. 2d 343; *Bell v. State,* 5 Ga. App. 701, 63 S.E. 860; *S. v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191.

The principle is aptly stated by *Hill, C. J.,* in the *Bell case, supra,* in this manner: "The crime of subornation of perjury consists of two elements—the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury." See *S. v. Sailor, supra.*

Perjury, as defined at common law and enlarged by statute in this State, G.S. 14-209, is "a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by

law to be sworn, as to some matter material to the issue or point in question." *S. v. Smith,* 230 N.C. 198, 52 S.E. 2d 348, and cases cited; also *S. v. Sailor, supra.*

Indeed this statute, G.S. 14-209, declares in pertinent part that "if any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of this State, . . . every person so offending shall be guilty of a felony," and fined and imprisoned as there indicated.

And the statute G.S. 14-210, pertaining to a subornation of perjury, declares that "if any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in G.S. 14-209, the person so offending shall be punished in like manner as the person committing the perjury."

And the General Assembly of 1889 passed an act (Chapter 83) to simplify indictments for perjury. This act has been brought forward in the various subsequent codifications, and is now a part of G.S. 15-145. This section provides that "in every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned," without setting forth several enumerated items constituting the judgment roll, so to speak, of the case. And then it is declared that "In indictments for perjury the following form shall be sufficient, to wit:

> "The jurors for the State, on their oath, present that A. B., of .....County, did unlawfully commit perjury upon the trial of an action in.....Court, in.....County, wherein ..... was plaintiff and .....was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true."

And this Court, speaking of the Chapter 83, Laws of 1889, in the case of *S. v. Flowers,* 109 N.C. 841, 13 S.E. 718, had this to say: "The form of indictment provided by the act in question has been sustained by this Court in *S. v. Gates,* 107 N.C. 832, and *S. v. Peters,* 107 N.C. 876. The effect of the act is not to change in any respect the constituent elements of perjury nor the nature or mode of proof. It only relieves the State from charging in the indictment the details, or rather the definition of the offense, and makes it sufficient to allege that the defendant unlaw-

fully committed perjury, charging the name of the action and of the court in which committed, *setting out the matter alleged to have been falsely sworn and averring further that the defendant knew such to be false, or that he was ignorant whether or not it was true.*" (Italics ours.)

And the General Assembly has provided by statute, G.S. 15-146, that "in every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth" several enumerated items constituting the judgment roll, so to speak, of the case.

Therefore since "the commission of the crime of perjury is the basic element in the crime of subornation of perjury" it is appropriate to read the two statutes, G.S. 15-145 and G.S. 15-146, in reference to each other. And if it be essential to charge the offense of perjury in conformity to the form of indictment prescribed in the statute, it would seem equally clear that in an indictment charging subornation of perjury the crime of perjury the basis therefor is required to be set forth in conformity to the form of indictment so prescribed.

Hence, testing the bill of indictment in case in hand by the form of bill prescribed by the General Assembly, it is seen that the indictment is in fact defective in that it does not, as required, set out either the false statement or statements defendant is alleged to have procured another to make, or that defendant knew said statement to be false, or that he was ignorant whether or not said statement was true. These omissions are fatal to the bill. In their absence the bill fails to allege a criminal offense. Therefore the motion in arrest of judgment must be followed.

It is well settled that a motion for the arrest of a judgment of the Superior Court in a criminal action tried in that court may be made in the Supreme Court at the hearing of an appeal from the judgment of the Superior Court. Rule 21 of Rules of Practice in the Supreme Court, 221 N.C. 544, at 558. See *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828, and numerous other cases, including *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. Indeed, the defect appearing upon the face of the record, this Court will in such case arrest the judgment of its own motion. See *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781.

"The legal effect of arresting the judgment," as stated in opinion by *Parker, J.,* in the *Strickland case, supra,* "is to vacate the verdict and sentence, and the State may proceed against defendant, if it so desires, upon a new and sufficient bill of indictment," citing cases.

Judgment arrested.

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

STATE v. JOHNNY COX.

(Filed 2 May, 1956.)

1. Indictment and Warrant § 9—

An indictment must charge the offense with sufficient certainty to apprise defendant of the specific accusation against him and to protect him from a subsequent prosecution for the same crime.

2. Prostitution § 5a—

A warrant charging that defendant "did unlawfully and wilfully aid and abet in prostitution and assignation contrary to the form of the statute," without stating wherein defendant aided and abetted, is insufficient, and defendant's motion in arrest of judgment is allowed in the Supreme Court. *S. v. Johnson*, 220 N.C. 773, overruled on this point.

3. Indictment and Warrant § 9—

While ordinarily a warrant or indictment for a statutory offense is sufficient if it follows the language of the statute, where the words of the statute do not in themselves inform the accused of the specific offense of which he is charged so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, the words of the statute must be supplemented by other allegations so as to charge the particular offense.

4. Same: Indictment and Warrant § 17—

A bill of particulars may not be used to supply a fatal deficiency in a warrant or indictment. G.S. 15-143.

5. Criminal Law § 56—

The arrest of judgment vacates the verdict and sentence, but does not preclude the State from thereafter proceeding upon valid process.

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

PARKER, J., dissenting.

APPEAL by defendant from *Pless, J.*, at January 1956 Special Criminal Term, of WAKE.

Criminal prosecution upon a warrant issued out of the City Court of Raleigh, N. C., charging "that on or about the 10th day of October, 1955, in the City of Raleigh, and in Raleigh Township, Wake County, Johnnie B. Cox did unlawfully and wilfully aid and abet in prostitu-

tion and assignation contrary to the form of the statute and against the peace and dignity of the State."

In the City Court of Raleigh, "after hearing the evidence in the above entitled action, it is adjudged that the defendant is guilty. It is further ordered and adjudged that the defendant serve two years on road. Notice of appeal. Bond $500.00 . . . ."

"And thereafter on 28 October, 1955, the warrant was received, filed and docketed in the Superior Court of Wake County for trial."

Thereafter, on Monday, 23 January, 1956, the action came on for trial. Defendant pleaded not guilty.

Verdict: Guilty as charged.

Judgment: That defendant be confined in common jail of Wake County for a period of two years, assigned to work the roads under the supervision of the State Highway & Public Works Commission.

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

Attorney General Rodman, Assistant Attorney General Love for the State.

Taylor & Mitchell for defendant appellant.

WINBORNE, J. Defendant moved in the court below and again in this Court for arrest of judgment for that the warrant upon which he was tried, convicted and sentenced fails to particularize the crime charged, and is not sufficiently explicit to protect him against subsequent prosecutions for the same offense. The case of *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d, 654, is cited for the "standard and test."

In the *Scott case* it is declared by *Barnhill, C. J.,* for the Court, that "the allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense."

Indeed, "The authorities are in unison," as expressed by *Parker, J.,* in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d, 917, "that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provision is (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case, citing *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E.

2d, 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d, 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883."

To like effect are decisions of this Court in cases both before and since the above summation of the principle. Among these are: *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795; *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d, 155; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d, 140; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Burton,* 243 N.C. 277, 90 S.E. 2d 390.

In the light of these decisions, an accused has the right to be informed of the specific accusation against him, and to be tried accordingly. Hence the motion in arrest of judgment here presented is meritorious, and should be allowed for that the warrant is fatally defective.

The warrant here merely charges that defendant did "aid and abet in prostitution and assignation." It fails to state wherein defendant aided and abetted. Without a description of the acts constituting the aiding and abetting, the warrant is defective.

Now, looking to the situation in hand: It is to be noted that the Legislature, in the "Act for the Repression of Prostitution," P.L. 1919, Chapter 215, now G.S. 14-204, has set forth in six paragraphs definitions in minute detail of numerous substantive offenses, in the main—specific acts pertaining to aiding and abetting prostitution or assignation. And then the Legislature set forth the all-inclusive section which reads: "7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever." It is specially noted that this section does not merely say "to aid or abet prostitution or assignation," as charged in the warrant, but there are added the descriptive words "by any means whatsoever," thereby covering a multitude of acts. Thus, it is manifest that the Legislature intended that these supplemental words should be given a meaning, and catch all other acts of aiding and abetting prostitution or assignation.

Therefore in order to determine whether any offense be committed, it is essential that for the words of the statute "by any means whatsoever" to be given force and effect, there must be stated in the warrant the acts and circumstances of the particular charge, so that the court can see as a matter of law that a crime is charged, *S. v. Phelps,* 65 N.C. 450; *S. v. Finch,* 218 N.C. 511, 11 S.E. 2d 547, and the defendant be apprised of the particular offense charged against him.

Moreover, while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused

so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. See among others *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346; *S. v. Whedbee,* 152 N.C. 770, 67 S.E. 60; *S. v. Ballangee, supra; S. v. Cole, supra; S. v. Gibbs, supra; S. v. Greer, supra; S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774.

Furthermore, defect in a warrant or bill of indictment is not cured by the statute which enables the defendant to call for a bill of particulars, G.S. 15-143. This section applies only when further information not required to be set out in the indictment is desired. The "particulars" authorized are not a part of the indictment. Request for bill of particulars is addressed to the discretion of the court. Such a bill therefore does not supply any matter which the indictment must contain. *S. v. Long,* 143 N.C. 670, 57 S.E. 349; *S. v. Deal,* 92 N.C. 802; *S. v. Cole, supra; S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654; *S. v. Greer, supra.*

Now, let it be understood that this Court is not unmindful of the fact that the decision here is contrary to the majority view in the case of *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358. Hence to the extent that the *Johnson case* is in conflict with the decision now reached by the Court, the *Johnson case* is overruled.

Since the judgment in this case is arrested, it is needless to discuss the assignments of error appearing in the case on appeal, on which defendant relies to support his contention that he is entitled to a nonsuit, or to a new trial. *S. v. Baxter,* 208 N.C. 90, 179 S.E. 450.

"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. Strickland, supra;* also *S. v. Lucas, ante,* 53; *S. v. Baucom, post,* 61.

Judgment arrested.

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

PARKER, J., dissenting: The majority opinion overrules *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358, on this point: "The warrant was drawn in the language of the statute, and is sufficient in law." That statement of law, though declared by a divided Court, has been accepted

by the Bench and Bar for 15 years. Doubtless, a number of defendants have been convicted on warrants and bills of indictment similar to the warrant in the *Johnson case,* and sentenced. After such acceptance of that statement of the law for 15 years, I do not agree that it should now be overruled on that point.

STATE v. ROBERT E. BAUCOM.

(Filed 2 May, 1956.)

1. Criminal Law §§ 12f, 56—

A statute provided that the recorder's court of the county should have exclusive original jurisdiction of misdemeanors, with provision that in any instance in which prosecution was not begun in the recorder's court within six months, the Superior Court might proceed to try such misdemeanor. Chapter 860, Public Laws of 1907, as amended. *Held:* Upon an indictment disclosing on its face that it was issued less than six months from the date the misdemeanor charged was committed, defendant's motion in arrest of judgment must be allowed. G.S. 7-64 restoring to Superior Courts concurrent jurisdiction is not applicable to the county.

2. Criminal Law § 56—

Arrest of judgment for want of jurisdiction in the Superior Court vacates the verdict and judgment, but does not preclude the State from thereafter proceeding against defendant in the tribunal having jurisdiction of the offense.

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

APPEAL by defendant from *Phillips, J.,* at 31 October, 1955 Term, of UNION.

Criminal prosecution upon a bill of indictment returned charging that Robert E. Baucom on.....day of April, 1955 "did unlawfully and willfully operate a motor vehicle on the public highways while he was under the influence of intoxicating liquors, this being the second or subsequent offense and violation of driving a motor vehicle upon the public highways while he was under the influence of intoxicating liquors . . ." G.S. 20-138.

The record and case on appeal disclose that: Upon the call of the case for trial and prior to trial on 1 November, 1955, the defendant moved to quash the indictment upon the grounds "that jeopardy had already attached to this defendant through proceedings pending in the Recorder's Court of Union County, which proceedings were commenced prior to the indictment upon which this action was founded, or, in the

alternative, to abate this action upon the ground that the Recorder's Court of Union County had exclusive jurisdiction of the alleged offense, and in support thereof introduced defendant's Exhibit 1, reading as follows:

'State of North Carolina
Union County

In Recorders Court
of Union County

State of North Carolina
v.
Robert E. Baucom

Special Verdict

This cause coming on to be heard before Honorable Byron E. Williams, Judge of the Union County Recorders Court, on the 8th day of August, 1955, the following proceedings were had: The defendant was called before the court by the Solicitor and was read the charges contained in a warrant executed by A. A. Mauney, Justice of the Peace, dated April 19, 1955, and was thereafter asked as to his plea; the defendant thereupon entered a plea of Not Guilty and witnesses for the State were called before the court and sworn. Mr. Mauney, who likewise holds the position of Asst. Chief of Police, was requested to take the witness stand; at this point counsel for the defendant moved the court that the charges against the defendant be dismissed on the grounds that the warrant was defective in that the charge against the defendant had been altered and changed after its execution without motion having been made and after the arraignment of the defendant in violation of Chapter 15, Section 20 of the General Statutes of North Carolina; at this point the Solicitor moved the court to amend the warrant by inserting the name of the defendant, Robert E. Baucom, in the affidavit of the warrant and also in the order of arrest contained in the warrant; the defendant, through counsel, objected, but the court allowed this motion; the defendant excepted to this ruling.

" 'After hearing the arguments of both parties, the court ruled that the warrant was defective; whereupon the Solicitor entered a motion that he be allowed to take a Nolle Pros in the matter and have a new warrant executed. The motion was denied and the Solicitor gave notice of appeal. The warrant in question is attached and made a part hereof.

/s/ Byron E. Williams
Judge, Union County Recorders Court.'

"And, in further support, introduced Defendant's Exhibit 2, a document reading as follows:

'State of North Carolina,
Union County
against
Robert E. Baucom

Recorder's Court
of Union County
Before the Recorder

'L. L. Helms, being duly sworn, complains and says that on or about the 10th day of April, A.D. 1955, Robert E. Baucom with force and arms, in the County and State aforesaid, unlawfully and willfully did operate a motor vehicle upon the public streets in the City of Monroe, N. C., while under the influence of liquor or other intoxicating beverages, this being a second offense, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. /s/ L. L. Helms.

Subscribed and sworn to before me this 10th day of April, 1955.
/s/ A. A. Mauney, J. P.
Clerk to Recorder's Court

'THE STATE OF NORTH CAROLINA, UNION COUNTY

To Sheriff, Chief of Police of Monroe, Constable, or other Lawful Officer—Greeting: For the causes stated in the above affidavit, you are commanded forthwith to apprehend the said Robert E. Baucom and have him before the Recorder at his office in the court house in Monroe, on the 18 day of April, 1955, at 9:30 A. M., then and there to answer the charge and be dealt with according to law.

'Given under my hand and seal this 10th day of April, 1955.
/s/ A. A. Mauney, J. P.
Clerk to Recorder's Court.' "

Also attached is a bond dated 10 April, 1955, signed by Robert E. Baucom and another, for his appearance at the time and place designated for the return of the warrant, etc.

The case came on for trial in Superior Court of Union County, at October Term, 1955. The court overruled the motion of defendant and, to this action of overruling his motion, defendant objected and excepted, and this is Exception No. 3.

Both plaintiff and defendant offered evidence, and the case was submitted to the jury. The jury returned verdict of guilty as charged.

Thereupon the court pronounced judgment that defendant be confined "in common jail and assigned to work upon the roads under the supervision and direction of the State Highway and Public Works Commission for a period of six months and pay a fine of $300. It is respectfully requested by the court that the operator's or chauffeur's

license of the defendant be permanently revoked by the Department of Motor Vehicles."

Upon pronouncement of judgment defendant excepted, appeals to Supreme Court and assigns error.

Attorney-General Rodman, Assistant Attorney-General Bruton, and Harvey W. Marcus, Staff Attorney, for the State.

Charles B. Caudle and William B. Webb for defendant, appellant.

WINBORNE, J. This criminal prosecution in the Superior Court is upon a bill of indictment, and not upon the warrant. Therefore, this is the basic question for decision on this appeal. It appearing upon the face of the record of the bill of indictment that the offense for which defendant stands indicted was committed on a date less than six months prior to the date the bill of indictment was returned by the grand jury a true bill, did the Superior Court of Union County have jurisdiction to take cognizance of the offense? In the light of the jurisdiction then vested in the Recorder's Court of Union County, the question merits a negative answer. For it appears that at the time the bill of indictment was returned a true bill the Recorder's Court of Union County had exclusive original jurisdiction of the offense charged under G.S. 20-138 designated a misdemeanor by G.S. 20-176.

In this connection, it is provided in subsection 5 of Section 4 of Chapter 860 Public Laws 1907, that the jurisdiction of the court created thereby, the Recorder's Court of the City of Monroe, later changed to the name of Recorder's Court of Union County, Chapter 240 of 1943 Session Laws of North Carolina, that in addition to the jurisdiction conferred in subsections (1), (2), (3) and (4) of this Section, said court "shall have exclusive original jurisdiction to hear and determine all other criminal offenses committed within the County of Union, below the grade of a felony as now defined by law, and all such offenses committed within the County of Union are hereby declared to be petty misdemeanors."

And it is further provided in subsection 6 of Section 4 of Chapter 860 P.L. 1907 "that in all criminal offenses whereof said court has been given jurisdiction in this Act wherein no prosecution has been commenced within six months from the commission thereof, the Superior Court of said County may proceed to try the same as though this court did not exist."

Moreover, it is noted here that the statute G.S. 7-64 restoring to Superior Courts concurrent jurisdiction of criminal actions in which by statute original jurisdiction has been taken from the Superior Court

and vested exclusively in inferior courts does not apply to Union County.

Defendant also moves in this Court to dismiss the action upon the ground that the Superior Court of Union County did not have jurisdiction over the subject matter of the prosecution for reasons as above set forth. The motion is well taken. Hence the judgment will be arrested.

And since the Superior Court is without jurisdiction over the offense charged in the bill of indictment on which the case is prosecuted, the legal effect of arresting the judgment is to vacate the verdict and judgment, and to dismiss the action in Superior Court upon the bill of indictment. However, the State may proceed against defendant, if it so desires, *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781, in the Recorder's Court of Union County upon the original warrant or upon the original warrant as it has been or may be amended.

Judgment arrested.

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

KAMUS McNAIR, JR., v. MELVIN LEE RICHARDSON.

(Filed 2 May, 1956.)

1. Automobiles §§ 41c, 42f—

Conflicting evidence as to which vehicle was to the left of the center of highway when the vehicles, traveling in opposite directions, collided, requires the denial of defendant's motions for judgment of nonsuit.

2. Negligence § 5—

The only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation.

3. Negligence § 9—

Foreseeability of injury is a requisite of proximate cause, even though the act complained of be a violation of statute.

4. Automobiles §§ 6, 46—

An instruction to the effect that the violation by defendant of certain statutes regulating the driving of motor vehicles upon the highway, and designed for the protection of life and limb, would render defendant liable for any consequences that might flow therefrom as a proximate cause regardless of whether defendant could have foreseen or anticipated injury, must be *held* for prejudicial error, since foreseeability is an essential element of proximate cause even when the act complained of is the violation of safety statute.

JOHNSON, J., not sitting.

APPEAL by defendant from *Phillips, J.*, December Civil Term 1955 of RICHMOND.

Civil action for personal injuries and property damage resulting from an automobile collision.

The defendant filed answer denying negligence on his part, pleaded contributory negligence of plaintiff, and alleged a counter-claim for property damage.

Six issues were submitted to the jury, who answered the issues of negligence, contributory negligence, damages for personal injuries and property damage in plaintiff's favor. The two issues in respect to defendant's counter-claim were not answered.

From judgment in accord with the verdict, the defendant appeals, assigning error.

Jones & Jones for Plaintiff, Appellee.

Bynum & Bynum and Broughton & Broughton for Defendant, Appellant.

PARKER, J. Plaintiff was driving his automobile in a southeasterly direction on Hatcher Road in Richmond County: the defendant was driving his automobile in a northwesterly direction on the same road. The automobiles were meeting, and collided in the road. The plaintiff offered evidence tending to show that the defendant's automobile came across the middle of the road on to his side, and ran into him. The defendant offered evidence tending to show that the plaintiff's automobile ran into him on his side of the road. The collision occurred 100 feet north of where Hatcher Road intersects another road. It was daytime. The court properly denied the defendant's motions for judgment of nonsuit.

The defendant assigns as error this part of the charge:

> "But there is a distinction between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful, or is at least a willful wrong. In the latter case the defendant is liable for any consequences that might flow from his act as the proximate cause thereof, whether he could have foreseen or anticipated it or not; but when the act is lawful, the liability depends not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In one case he is presumed to intend the consequences of his unlawful act,

but in the other, while the act, if lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen."

It is a fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation. *Cox v. Freight Lines* and *Matthews v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Smith v. Whitley*, 223 N.C. 534, 27 S.E. 2d 442; *Byrd v. Express Co.*, 139 N.C. 273, 51 S.E. 851.

In *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796, this Court said: "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted."

It is well settled by our decisions that foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co.*, 238 N.C. 106, 76 S.E. 2d 378; *Cox v. Freight Lines, supra; Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717; *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Montgomery v. Blades*, 222 N.C. 463, 23 S.E. 2d 844; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446.

In *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E. 180, the Court said: "All the decisions of this State since *Ledbetter v. English*, 166 N.C. 125, 81 S.E. 1066, concur in the view that the violation of an ordinance or of a statute designed for the protection of life and limb, is negligence *per se*. Notwithstanding, the same decisions do not permit recovery for the mere violation of the statute, unless there was a causal connection between the violation and the injury." See also: *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331; *Holland v. Strader*, 216 N.C. 436, 5 S.E. 2d 311.

Barnhill, C. J., said for the Court in an illuminating opinion in *Aldridge v. Hasty, supra:* "When the action is for damages resulting from the violation of a motor vehicle regulation, does the doctrine of foreseeability apply? We are constrained to answer in the affirmative. Whatever the conflict of decision in other jurisdictions on this question may be, it is uniformly held that to entitle a plaintiff to recover in an action bottomed on the violation of a criminal statute it must be made to appear that the injury or damage complained of was the natural and probable result of such violation. Causal connection between the unlawful act committed and the injury or damage sustained must be

shown; that is to say, proximate cause must be established. And we relate foreseeability to proximate cause as an essential element thereof."

The court in its charge instructed the jury to the effect that a person doing an unlawful act is liable for any consequences that might flow from his act as the proximate cause thereof, whether he could have foreseen or anticipated it or not. The plaintiff's action against the defendant was based upon the defendant's alleged unlawful acts in operating his automobile in violation of certain statutes regulating the driving of motor vehicles upon the highways, and designed for the protection of life and limb. The plaintiff does not contend that the defendant's acts in causing his injury were lawful acts. This instruction removes foreseeability as an essential element of proximate cause, and in substance told the jury that, in plaintiff's action for damages allegedly resulting from the violation or violations of motor vehicle regulations, the doctrine of foreseeability did not apply.

For error in the charge the defendant is entitled to a New trial.

JOHNSON, J., not sitting.

STATE v. ARCHIE PRENTISS UNDERWOOD.

(Filed 2 May, 1956.)

1. Constitutional Law § 32—

In all misdemeanor cases where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal the defendant may be tried in the Superior Court upon the original warrant. Constitution of North Carolina, Article I, Section 12.

2. Criminal Law § 7—

In prosecutions for misdemeanors not requiring an indictment, the issuance of a warrant tolls the running of G.S. 15-1, and upon appeal from conviction in an inferior court, defendant is not entitled to quashal upon trial in the Superior Court upon the original warrant, even though the appeal is not called until more than two years after the commission of the offense.

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

APPEAL by defendant from *Burgwyn, Emergency Judge,* January Term, 1956, of HARNETT.

This is a criminal action. The defendant was tried upon a warrant duly issued by the Clerk of the Recorder's Court of Harnett County on 29 June, 1953, charging that the defendant on 28 June, 1953, did unlawfully and wilfully operate a motor vehicle upon the public highways of the State of North Carolina, in said County, "while under the influence of intoxicants or narcotics." The defendant was found guilty, and from the judgment imposed appealed to the Superior Court.

When this case was called for trial on the original warrant in the Superior Court of Harnett County, the defendant moved that the warrant be quashed and especially plead the statute of limitations on the grounds that the crime charged in the warrant occurred more than two years prior to the term of court at which it was called for trial, and that no bill of indictment or presentment had been brought or found by the grand jury. The motion was denied and the defendant was tried and found guilty as charged. From the verdict and judgment imposed thereon the defendant appeals, assigning error.

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

Taylor & Morgan for defendant.

DENNY, J. The defendant's assignments of error, based on exceptions Nos. 1, 2, 3, 5 and 6, are bottomed on the refusal of the court below to sustain his motion to quash the warrant.

Section 15-1 of the General Statutes of North Carolina provides in pertinent part as follows: "All misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of same, and not afterwards."

The question presented for decision is whether G.S. 15-1 requires a bill of indictment in order to toll the statute of limitations in those misdemeanor cases in which the defendant may be tried in the Superior Court on a warrant issued by an inferior court and without an indictment.

In *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283, *Ervin, J.,* speaking for the Court, in an exhaustive opinion, reviewed the situations in which a defendant can be tried in the Superior Court only on an indictment found by a grand jury, and under what conditions a defendant may be tried in the Superior Court on a warrant issued by an inferior court. Our opinions clearly hold that where an appeal is taken to the Superior Court from a conviction in an inferior court, if the inferior court had final jurisdiction of the offense charged, the accused may be tried in the Superior Court on the original warrant and without an indictment of a grand jury. *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642; *S. v.*

Thomas, supra; S. v. Turner, 220 N.C. 437, 17 S.E. 2d 501; *S. v. Jones,* 145 N.C. 460, 59 S.E. 117; *S. v. Lytle,* 138 N.C. 738, 51 S.E. 66; *S. v. Thornton,* 136 N.C. 610, 48 S.E. 602; *S. v. Quick,* 72 N.C. 241.

It is provided in Section 12, Article I of the Constitution of North Carolina that, "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment or impeachment," and the provisions of Section 13, Article I of the State Constitution provides that, "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal." Our Legislature has provided other means of trial for petty misdemeanors with the right of appeal, as well as trial upon warrants pursuant to the exceptive phrase contained in Section 12, Article I of our Constitution. *S. v. Thomas, supra.* Therefore, we hold that in all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the Superior Court the accused may be tried upon the original warrant and that the statute of limitations is tolled from the date of the issuance of the warrant.

The case of *S. v. Hedden,* 187 N.C. 803, 123 S.E. 65, relied upon by the defendant, involved an entirely different factual situation from that involved in the present appeal. Hedden was charged with the abandonment of his wife and three children without cause on 11 September, 1921, and with thereafter failing to contribute anything to their support. The magistrate's warrant was issued on 25 October, 1922. Indictment was not found until 1 November, 1923. The committing magistrate did not have final jurisdiction of the offense charged but bound the defendant over to the Superior Court. Consequently, the defendant could not have been tried in the Superior Court on the original warrant, but only upon a bill of indictment, unless he had elected to waive the bill of indictment in the manner prescribed by law, which he did not do. Therefore, since the indictment was returned by the grand jury more than two years after the offense was committed, this Court held the defendant's motion for judgment as of nonsuit should have been allowed, citing *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769.

In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations. G.S. 15-1; *S. v. Williams,* 151 N.C. 660, 65 S.E. 908.

While the defendant is not entitled to the relief he seeks on this appeal, nevertheless, we feel constrained to call attention to certain facts revealed by the record. Sixteen terms of criminal court were held

in the Superior Court of Harnett County between June 1953 and the term held in January 1956 at which the defendant was tried. The trial judge found as a fact "that the defendant had not been negligent in his attendance upon the court and that witnesses had been subpoenaed for the defendant each term." Such delay would seem to be indefensible. A defendant should be given a trial as promptly as the condition of the docket will permit. Furthermore, it is an imposition upon witnesses to require them to spend so much time attending court. We sincerely hope that with our increased judicial manpower, authorized by the last session of the General Assembly, our criminal and civil dockets in the Superior Court in the respective counties may be brought to a more current status within the very near future.

The defendant's remaining assignment of error has been abandoned.

In the trial below we find

No error.

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

LEO M. HAMMER AND WIFE, INEZ M. HAMMER, AND GENNIE BUNTING, A WIDOW, V. FRED T. BRANTLEY AND JOE M. BRANTLEY.

(Filed 2 May, 1956.)

Wills § 33b—

Where a will devises lands to the beneficiary "for the term of her natural life and at her death to her heirs," the Rule in *Shelley's case* obtains as a rule of property without regard to the intent of devisor.

JOHNSON, J., not sitting.

APPEAL by defendants from *Crissman, J.*, in Chambers, 19 March 1956, RANDOLPH. Affirmed.

This is a controversy without action relating to the title to real property.

Mary Jane Sluder, in her will probated in 1933, devised 100 acres of her home place, including the buildings, to her daughter Gennie Sluder Bunting, subject to the prior life estate of her husband. The devise was "to be hers for her life time and at her death to her bodily heirs, in fee simple forever." The remainder of the home place was devised to Lessie Hammer, a stepdaughter of testatrix, "for the term of her natural life and at her death to her heirs . . ." Plaintiff Leo M. Hammer

acquired that part of the home place devised to Lessie Hammer prior to 1952.

On 18 September 1952, Gennie Bunting and husband and Leo M. Hammer and wife executed a written agreement partitioning the home place, in which agreement the 100 acres devised to Gennie Bunting were set apart and allotted to her by metes and bounds, and she entered into possession thereof, claiming it as her own. Hammer likewise took possession of his share as a part of his sole and separate estate.

On 18 December 1954, Gennie Bunting and husband conveyed a one-half interest in the land devised to her to plaintiff Leo M. Hammer.

On 5 March 1956, plaintiffs agreed in writing to convey said land in fee to defendants for the sum of $1,609.25, and in due course tendered warranty deed therefor. Defendants declined to accept said deed and pay the agreed purchase price for the reason they were advised plaintiffs, under the terms of the Sluder will, could not convey a good marketable fee simple title to said land. Thereupon the legal question raised was submitted to the court for decision by this controversy without action in which the facts are agreed. The court below held that the tendered deed conveyed a marketable fee simple title and ordered specific performance of the agreement of purchase and sale. Defendants excepted and appealed.

Hammond & Walker and J. Harvey Luck for plaintiff appellees.

Coltrane & Gavin for defendant appellants.

BARNHILL, C. J. This appeal is not complicated by the indefiniteness of the devise to Gennie Bunting. The bounds of her devise have been settled by the parties by an agreement of partition in which the 100 acres have been set apart to her by metes and bounds.

"It is established by repeated decisions of this Court that the rule in *Shelley's case* is still recognized in this jurisdiction, and where the same obtains it does so as a rule of property without regard to the intent of the grantor or devisor. *Jones v. Whichard,* 163 N.C. 241; *Price v. Griffin,* 150 N.C. 523; *Edgerton v. Aycock,* 123 N.C. 134; *Chamblee v. Broughton,* 120 N.C. 170; *Starnes v. Hill,* 112 N.C. 1; *Bank v. Dortch,* 186 N.C. 510; *Wallace v. Wallace,* 181 N.C. 158; *Hampton v. Griggs,* 184 N.C. 13." *Allen v. Hewitt,* 212 N.C. 367, 193 S.E. 275.

When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee simple estate upon the death of the testator subject to any prior life estate created by the will. It is so provided by statute, G.S. 31-38 and G.S. 41-1, and has been so held by numerous opinions of this Court. The line of cases so

holding is represented by *Chamblee v. Broughton,* 120 N.C. 170; *Bank v. Dortch,* 186 N.C. 510; *Jackson v. Powell,* 225 N.C. 599, 35 S.E. 2d 892; and *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391. See also *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341. We could say nothing on this subject which has not already been said which would be helpful to Bench or Bar. Hence an extended discussion of the subject is wholly unnecessary.

Daniel v. Bass, 193 N.C. 294, relied on by defendants, is distinguishable. Furthermore, it does not sustain the position of the defendants.

The judgment entered by the court below is

Affirmed.

JOHNSON, J., not sitting.

STATE v. ALMETA WHITE.

(Filed 2 May, 1956.)

Searches and Seizures § 2: Criminal Law § 43—

Where a search warrant is issued without the signed affidavit under oath of the complainant, the warrant is fatally defective, notwithstanding testimony of complainant that he was sworn by the justice of the peace in whose name the warrant was issued and stated to him under oath his information and the location of the premises. Motion to suppress evidence obtained by such defective warrant should have been allowed. G.S. 15-27.

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

APPEAL by defendant from *Paul, J.,* January Term, 1956, of CRAVEN.

Indictment for unlawful possession of nontax-paid whiskey.

On the trial the State called as a witness the constable who had searched the dwelling house of the defendant under authority of a search warrant, and offered to show by him the finding of illicit whiskey in the house, discovered pursuant to the search.

The defendant objected on the ground that the search warrant was not legally issued and that evidence obtained by means thereof was incompetent. Preliminary examination of this witness in the absence of the jury revealed the material facts to be as follows: The constable, upon receipt of information that the defendant had whiskey in her home, went to the justice of the peace and applied for a search warrant. He stated to the justice under oath that he had reason to believe the defendant had intoxicating liquor in her home, describing it, and the

constable then proceeded to fill out the warrant. The justice was quite feeble and the constable did all the writing in the name of the justice, presumably by his authorization. The constable then went, with two other officers, to the home of the defendant, read the search warrant to her and proceeded to search the house, finding whiskey therein.

Objection to the testimony of the witness was overruled, and motion to suppress the evidence obtained by means of the search warrant was denied. The testimony of the constable and that of the two other officers showing the result of their search was admitted.

There was verdict of guilty as charged, and from judgment pronounced the defendant appealed.

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

J. Wayland Sledge for defendant, appellant.

DEVIN, J. The statute, G.S. 15-27, provides that a search warrant shall not be signed or issued by any officer without first requiring the complainant or other person "to sign an affidavit under oath, and examining said person or complainant in regard thereto"; and further that "no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of the action."

In the instant case no affidavit to support the issuance of the search warrant appears in the record, nor does it appear that the constable signed an affidavit under oath, though he testified he was sworn by the justice of the peace in whose name the warrant was issued, and that he stated to him under oath his information and the location of the premises.

The search warrant was not issued in accordance with the requisite provisions of the statute, and hence the evidence discovered by reason thereof was by the statute rendered incompetent and was improperly admitted. *S. v. McMilliam,* 243 N.C. 771.

There was no motion for judgment of nonsuit. The defendant is entitled to a new trial, and it is so ordered.

New trial.

JOHNSON, 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 *Johnson, J.,* who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

STATE v. CHARLIE RYALS.

(Filed 2 May, 1956.)

Intoxicating Liquor § 9d—

Evidence tending to show that a quantity of nontaxpaid liquor was found on defendant's premises near his house and at places under his control is sufficient to be submitted to the jury in a prosecution for unlawful possession of intoxicating liquor.

JOHNSON, J., not sitting.

APPEAL by the defendant from *Seawell, J.*, August, 1955 Term, HARNETT Superior Court.

Criminal prosecution first tried in the Recorder's Court of Harnett County upon a warrant charging the defendant did unlawfully (1) have in his possession spirituous liquors for the purpose of sale, and (2) have in his possession spirituous liquors upon which the taxes imposed by the laws of the United States or by the State of North Carolina had not been paid. The defendant was convicted on the count charging unlawful possession but was acquitted on the charge of unlawful possession for the purpose of sale. From the judgment imposed, the defendant appealed to the Superior Court of Harnett County. He was again convicted for the unlawful possession of nontaxpaid whisky and from the judgment imposed he appealed to this Court, assigning as error the failure of the trial court to grant his motion for a directed verdict at the close of the State's evidence.

William B. Rodman, Jr., Attorney General, and Samuel Behrends, Jr., Asst. Attorney General, for the State.

Young & Taylor, by J. R. Young, for defendant, appellant.

PER CURIAM. The evidence in the case shows that four officers armed with a search warrant searched the defendant's premises with the following result: One quart of nontaxpaid whisky was found in the weeds about 15 feet from the defendant's house; at least 24 fruit jars, half a dozen of which contained the odor of whisky, were found in the defendant's tobacco barn, 75 to 100 yards from his house; a sack containing six fruit jars of nontaxpaid whisky was found in the weeds within two or three feet of the defendant's hog pen. The defendant admitted ownership of the pen and the hogs. The evidence was sufficient to present a jury question and to support the verdict.

No error.

JOHNSON, J., not sitting.

DEWEY C. COATS (EMPLOYEE) v. B. & R. WILSON, INC. (EMPLOYER) AND EMPLOYERS MUTUAL CASUALTY COMPANY.

(Filed 2 May, 1956.)

Master and Servant § 43—

Finding that claimant employee did not file claim for compensation within twelve months from the date of the accident causing the injury, as required by G.S. 97-24(a), supports the conclusion that the claim is barred.

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

APPEAL by plaintiff, employee, from *Williams, J.*, in Chambers in Harnett County, 10 November, 1955, of JOHNSTON.

Proceeding before North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The Industrial Commission upon all the competent evidence in the case found as a fact that on 14 March, 1952, plaintiff employee received an injury by accident which arose out of and in the course of his employment with defendant employer, but the Commission's file does not show that any notice of the injury was received until 20 April, 1954, approximately two years after the injury. Thereupon the Commission concluded as a matter of law that plaintiff, employee, did not file a claim with the North Carolina Industrial Commission within twelve months from the date of the accident, as required by G.S. 97-24(a), and that, therefore, his claim is barred. And from award in accordance therewith, plaintiff employee excepted thereto and appealed to Superior Court, where, after hearing, the court entered judgment affirming the award of the Industrial Commission.

Plaintiff employee excepted thereto, and appeals to Supreme Court and assigns error.

E. R. Temple, Jr., for Plaintiff, Appellant.

Teague & Johnson for Defendants, Appellees.

PER CURIAM. The facts found by the North Carolina Industrial Commission are sufficient to support the conclusions of law reached by it. Hence the judgment from which this appeal is taken is

Affirmed.

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

STATE v. ROY FLOWERS.

(Filed 2 May, 1956.)

Criminal Law § 44: Indictment and Warrant § 17—

Motion for a bill of particulars and motion for continuance are addressed to the sound discretion of the trial court, and when the indictment affords the defendant sufficient information as to the crime charged and defendant does not show that subpoena had been issued for any witness and does not give the name of any witness whom he wished to have present to testify, no abuse of discretion in denying the motions is shown.

JOHNSON, J., not sitting.

APPEAL by defendant from *Seawell, J.*, September Special Term 1955, HARNETT.

Criminal prosecution on bill of indictment in which the defendant is charged with assault on a female under G.S. 14-33(b)(3).

There was verdict of guilty. From judgment pronounced thereon the defendant appealed.

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

Taylor & Morgan for defendant appellant.

PER CURIAM. There was a regular term of court for the trial of criminal causes calendared for Harnett County to convene 29 August. A special term was called for the trial of criminal cases to convene the next week, 5 September. During the regular term defendant was put on trial under a warrant which charged an assault with a deadly weapon. For some undisclosed reason, mistrial was ordered and the solicitor sent a bill charging assault on a female under G.S. 14-33(b)(3). This bill was returned a true bill on Thursday of the regular term. On 6 September, during the special term, the case was called for trial. On motion of the defendant, it was continued until Thursday. The cause was again called for trial on Thursday, 8 September, when for the first time the defendant moved for a bill of particulars and for a continuance for the term. The motions were denied and defendant excepted. Denial of the motions constitutes his primary exceptions brought forward and discussed in his brief.

The bill of indictment afforded the defendant sufficient information as to the crime charged. On his motion to continue he did not make it appear any subpoena had been issued for any witness and did not give the name of any witness whom he wished to have present to testify. He merely alleges in his written motion that "if granted a sufficient

amount of time . . . he will be able to prepare his defense by locating witnesses who would know of his whereabouts . . . if granted such time (he) might be able to show by witnesses that the defendant is not guilty of the crime charged."

Whether the motion for a bill of particulars and for a continuance should be granted or disallowed rests in the sound discretion of the presiding judge. There is nothing appearing on the face of this record to indicate any abuse of that discretion. Indeed, the judge seems to have accorded the defendant considerable consideration. The other exceptive assignments of error are not of sufficient merit to require discussion.

In the trial below we find

No error.

JOHNSON, J., not sitting.

STATE v. HARTMAN RIDDLER.

(Filed 2 May, 1956.)

Criminal Law § 81c(4)—

Where concurrent sentences are imposed upon conviction on two counts, any error relating to one count only would be harmless.

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

APPEAL by defendant from *Armstrong, J.*, December Term, 1955, of RANDOLPH.

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

Brown & Mauney and E. H. Morton, Jr., for the defendant, appellant.

PER CURIAM. The warrant on which the defendant was tried in the Superior Court, pursuant to his appeal from conviction in the Recorder's Court, contained two counts, charging (1) possession of nontax-paid whiskey for the purpose of sale, and (2) sale of one pint of nontax-paid whiskey. There was verdict of guilty on both counts, and judgment was pronounced imposing concurrent prison sentences of 12 months on the first count and 18 months on the second count.

The defendant noted exception to the court's charge to the jury on the first count, and contended on the argument here that the expressions used by the court to which he excepted tended to prejudice his cause.

However, without conceding error, we deem it unnecessary to discuss the question, as we note that on the verdict of guilty on both counts the court imposed concurrent prison sentences on the two counts. Hence it would seem no harm has resulted to the defendant of which he can justly complain.

No error.

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

The foregoing opinion was prepared by *Devin, Emergency Justice,* while he was sitting in place of *Johnson, J.,* who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

STATE v. JESSE GARNER.

(Filed 2 May, 1956.)

1. Automobiles § 72—

Evidence in this case *held* sufficient to support defendant's conviction of driving an automobile on the highways of the State while under the influence of intoxicants.

2. Criminal Law § 79—

An assignment of error not supported by reason or argument or authority in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

JOHNSON, J., not sitting.

APPEAL by defendant from *Armstrong, J.,* December Term 1955 of RANDOLPH.

Criminal prosecution upon a bill of indictment with two counts: the first count charging the defendant with the unlawful driving of a motor vehicle upon the highways within the State while under the influence of intoxicating liquor, a violation of G.S. 20-138, and the second count charging the defendant with the reckless driving of a motor vehicle upon the highways within the State, a violation of G.S. 20-140.

Plea: Not Guilty. Verdict: Guilty on the first count in the indictment.

From the judgment imposed, the defendant appeals, assigning error.

William B. Rodman, Jr., Attorney General, T. W. Bruton, Assistant Attorney General, and F. Kent Burns, Staff Attorney, for the State.

J. Harvey Luck for Defendant, Appellant.

PER CURIAM. The State's evidence shows these facts. On 11 June 1955 W. W. Wilson, Sheriff of Randolph County, saw the defendant driving an automobile on Highway 220 in Randolph County. The sheriff followed the defendant ¾ of a mile on this highway. The defendant turned off on a dirt road, and the sheriff followed. When they were on the dirt road, the sheriff sounded his siren. The defendant drove about ¼ of a mile down the dirt road, cut in behind a house, drove on and his automobile got stuck. The defendant jumped out of the driver's side of his automobile, and ran. The sheriff jumped out of his automobile, ran the defendant down, and caught him. The defendant was highly intoxicated. There was sufficient evidence to carry the case to the jury. It may not be amiss to add that the defendant testified in his own behalf, and on cross-examination stated that he had been convicted in 1953 for driving an automobile drunk, had been convicted of reckless driving and speeding, had had one wreck, had no license to operate a motor vehicle, was drinking on this occasion, but was not drunk, and was not driving.

We have carefully examined the assignments of error as to the charge of the court, and the charge of the court. No error appears in the charge sufficient to justify a new trial.

The assignment of error as to the admission of evidence is deemed abandoned, because in defendant's brief in support of it no reason or argument is stated or authority cited. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544, 563; *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

In the trial below we find

No error.

JOHNSON, J., not sitting.

STATE v. CHARLIE BERRY BARHAM, JR.

(Filed 2 May, 1956.)

Automobiles § 72—

Evidence in this case *held* sufficient to support defendant's conviction of driving an automobile on the highways of the State while under the influence of intoxicants.

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

APPEAL by defendant from *Bickett, J.,* December Term, 1955, of WAKE.

This is a criminal action. The defendant was tried on a warrant issued out of the Wake Forest Recorder's Court charging him with unlawfully and wilfully operating a motor vehicle upon the public roads of North Carolina on 13 March, 1955, while under the influence of some intoxicating beverage or narcotic drug. The second count charged the defendant with the unlawful possession of a quantity of nontax-paid whiskey.

The defendant was convicted in the Recorder's Court on the first count charging him with driving while intoxicated, and he appealed to the Superior Court. He was found not guilty in the Recorder's Court on the second count.

Defendant was tried and convicted in the Superior Court on the first count in the original warrant. From the judgment imposed on the verdict the defendant appeals, assigning error.

Attorney-General Rodman and Asst. Attorney-General Love for the State.

W. Brantley Womble and Ellis Nassif for defendant.

PER CURIAM. The defendant seriously contends that the State's evidence is insufficient to support the verdict. A careful consideration of the evidence, however, leads us to the conclusion that it is sufficient, and we so hold. Consequently, the assignments of error, in our opinion, present no prejudicial error that would justify disturbing the verdict rendered below.

No error.

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

STATE v. I. J. SPARROW, JR.

(Filed 2 May, 1956.)

Criminal Law § 53f—

The fact that the court necessarily takes more time in stating the contentions of the State than in stating those of defendant is not ground for objection. G.S. 1-180.

JOHNSON, J., not sitting.

APPEAL by defendant from *Grady, Emergency Judge,* January-February, 1956, Term, of WAYNE.

Defendant was tried on a bill of indictment charging that he feloniously received 21 cases of cigarettes of the value of $1,800.00, the property of Thompson-Stevens Wholesale Company, with knowledge that said cigarettes had been stolen. Upon the jury's verdict of guilty, judgment was pronounced imposing a prison sentence. Defendant excepted and appealed.

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

LaRoque & Allen and Edmundson & Edmundson for defendant, appellant.

PER CURIAM. Defendant's only assignment of error is that the trial judge, in charging the jury, "failed to give equal stress to the contentions of the defendant as required by G.S. 1-180."

Careful study of the evidence and of the charge convinces us that the trial judge sufficiently and fairly reviewed the contentions of defendant. In relation to the facts in evidence, it was natural and reasonable that the review of the State's contentions should take somewhat longer than the review of defendant's contentions. The State's principal witnesses testified in detail as to their transactions with defendant. Defendant's evidence was that he did not know these men and had had no transactions with them. Hence, defendant offered no evidence in respect of the details of any of the transactions concerning which these witnesses had testified.

The assignment of error is without merit. Hence, the verdict and judgment must stand.

No error.

JOHNSON, J., not sitting.

B. J. CLONINGER v. AKERS MOTOR LINES, INC.

(Filed 2 May, 1956.)

APPEAL by plaintiff from *Crissman, J.*, January Term, 1956, of CABARRUS.

This is a civil action instituted by the plaintiff to recover for injuries allegedly sustained as a result of the negligence of the defendant's driver and employee while engaged in the course and scope of his employment.

The accident complained of occurred on 29 August, 1953, around 9:15 a.m. when the plaintiff, a Highway Patrolman, was allegedly giving chase to a speeding Ford car on State Highway No. 49. Plaintiff's car was parked off the highway and before entering it to give chase to the speeding motorist, a Buick car and the defendant's tractor-trailer passed him traveling westerly in the same direction of the speeding car. Plaintiff, by reason of the eastbound traffic, followed the defendant's tractor-trailer which was traveling from 40 to 45 miles an hour, for more than half a mile. The paved highway was 24 feet wide and the plaintiff was traveling about 60 miles an hour when he passed the tractor-trailer. Plaintiff testified that, "As I pulled up alongside the tractor-trailer, the tractor pulled some 3 or 4 feet to the left of the center of the highway. . . . I cut left with him and hit the shoulder of the road." Plaintiff further testified that he was about 100 or 150 feet from where the accident occurred when he actually passed the tractor-trailer; that he did not give but one signal of his intention to pass the tractor-trailer and did not give that until "I was almost alongside of it." That when he had gotten by the tractor-trailer and was attempting to get back on the highway, his car went across the highway in front of the tractor-trailer, turned completely around, hit the shoulder again and went backward off the highway, resulting in serious bodily injury to him. The patrol car which the plaintiff was driving did not collide with the defendant's tractor-trailer, or any other vehicle.

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

Bedford W. Black and John Hugh Williams for plaintiff.

Helms & Mulliss, Wm. H. Bobbitt, Jr., and Hartsell & Hartsell for defendant.

PER CURIAM. A careful consideration of the evidence adduced in the trial below leads us to the conclusion that the ruling of the court below on the motion for judgment as of nonsuit should be upheld.

Affirmed.

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

F. T. HART, EMPLOYEE, v. THOMASVILLE MOTORS, INC., EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 9 May, 1956.)

1. Master and Servant § 45—

The jurisdiction of the Industrial Commission as a court is limited to that prescribed by statute, and its jurisdiction in this sense may not be enlarged by consent of the parties, waiver or estoppel, or by procedural rules of the Commission itself.

2. Same—

Where a party who has received compensation under the Workmen's Compensation Act upon agreements of the parties, approved by the Commission, attacks the jurisdiction of the Commission at the first hearing before the Hearing Commissioner, and counsel for the employer and insurance carrier states thereat that defendants do not object to the attack upon the jurisdiction, the question of estoppel does not arise.

3. Same: Master and Servant § 53c—

G.S. 97-47 does not apply where a party challenges the jurisdiction of the Industrial Commission after receiving compensation under agreement of the parties approved by the Commission, the statute being applicable only when the Industrial Commission has jurisdiction.

4. Courts § 2: Judgments § 25—

A challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is a void judgment without legal effect and may be treated as a nullity at any time.

5. Courts § 2—

Where its want of jurisdiction is made to appear to a court, it cannot enter a judgment in favor of either party, but may only set aside such orders as may have been improperly entered before want of jurisdiction was discovered, and dismiss the proceeding.

6. Master and Servant §§ 39b, 45—

Only employees are covered by the Workmen's Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to an independent contractor.

7. Master and Servant § 55d—

Jurisdictional findings of the Industrial Commission are not conclusive upon appeal to the Superior Court, but the Superior Court may review the evidence and make its own findings upon questions of jurisdiction.

8. Master and Servant § 45—

Where a party who had been receiving compensation under agreements approved by the Industrial Commission thereafter attacks the jurisdiction of the Commission on the ground that he was an independent contractor and not an employee, the Commission upon its findings, supported by evi-

dence, that such party was an independent contractor should strike out its approval of the agreements and dismiss the action, but it has no jurisdiction to order such party to return amounts theretofore received under the agreements.

9. Master and Servant § 55d—In dismissing proceeding for want of jurisdiction, court should not set aside agreements of parties.

Where a party who had been receiving compensation under agreements approved by the Industrial Commission thereafter attacks the jurisdiction of the Commission, and upon the appeal of defendants from order dismissthe proceeding, the Superior Court finds that claimant was an independent contractor and not an employee and that therefore the Industrial Commission had no jurisdiction, the Superior Court should remand the proceeding to the Commission with direction that it enter an order setting aside its approval of the agreements and dismiss the proceeding, but it is error for the Superior Court to hold that the agreements entered into by the parties should be set aside and in overruling exception to the action of the Commission in setting aside the agreements.

BOBBITT, J., concurring in result.

WINBORNE, J., joins in concurring opinion.

APPEAL by defendants from *Johnston, J.*, January Civil Term 1956 of DAVIDSON.

Proceeding by plaintiff before the North Carolina Industrial Commission to set aside prior agreements concerning the payment of compensation to him, because his injury was not covered by the North Carolina Workmen's Compensation Act, for the reason that an employee-employer relationship did not exist between him and Thomasville Motors, Inc.

The plaintiff received an injury in October 1953, while working as a carpenter at the garage of the Thomasville Motors, Inc. By reason of an agreement entered into by plaintiff and defendants on I. C. Form 21, and approved by the Industrial Commission on 23 November 1953, and by reason of a further agreement entered into by plaintiff and defendants on I. C. Form 26, and approved by the Commission on 7 July 1954, the defendants have paid, and the plaintiff has received, compensation, as provided by the Workmen's Compensation Act. In addition the defendants have paid medical bills, as a result of plaintiff's injuries, in amounts approved by the Workmen's Compensation Act.

In March 1955 plaintiff moved before F. H. Shuford, II, a Deputy Commissioner of the North Carolina Industrial Commission, that the agreements as to the award be set aside by the Industrial Commission on the ground that the Industrial Commission had no jurisdiction, because an employee-employer relation did not exist between him and

Thomasville Motors, Inc., at the time of his injury. The opinion of the Deputy Hearing Commissioner states: "Counsel for the defendants stated that the defendants made no contentions regarding coverage under the Workmen's Compensation Act, or regarding the employee-employer relationship." The plaintiff offered evidence before the Hearing Deputy Commissioner: the defendants none. Based upon competent evidence adduced at the hearing, the Deputy Hearing Commissioner found as a fact that the plaintiff was injured while performing work for Thomasville Motors, Inc., as an independent contractor: that the plaintiff was not an employee of Thomasville Motors, Inc., and the Industrial Commission had no jurisdiction over his claim. Whereupon, the plaintiff's claim was dismissed and removed from the hearing docket, and the prior agreements entered into by the parties were set aside.

Whereupon, the defendants alleged error, and applied for a review by the Full Commission. Upon review the Full Commission adopted as its own the findings of fact of the Hearing Deputy Commissioner, and made an additional finding of fact that payments were made by defendants and accepted by plaintiff by reason of the agreements of November 1953 and July 1954 between the parties approved by the Commission. The Full Commission further amended the opinion and award of the Hearing Deputy Commissioner by adding an additional paragraph to the award as follows: "Plaintiff shall refund to the defendants all moneys paid by them to plaintiff by way of compensation or medical bills, and unless and until this provision has been complied with the original agreements entered into by the parties and approved by the Industrial Commission shall remain in full force and effect." Except as amended and revised, the Full Commission adopted as its own the findings of fact and conclusions of law of the Hearing Deputy Commissioner, and ordered the same affirmed.

The defendants filed eight exceptions and appealed to the Superior Court. In the Superior Court the defendants' exceptions 1, 2, 3, 4, 5, 7 and 8 were overruled. Defendants' exception 6 was to the additional paragraph added by the Full Commission to the award of the Deputy Hearing Commissioner as to the refund of moneys—quoted above. As to exception 6, the judgment of the Superior Court states: "With regard to defendants' Exception VI, the Court is of the opinion that this Exception should be granted on the ground that the portion of the award of the Full Commission, to which exception is taken, is void, and defendants' Exception VI is hereby granted. However, the argument of the defendants as stated in their Exception No. VI, that the North Carolina Industrial Commission has jurisdiction over the parties and cannot avoid or evade the exercise of its jurisdiction upon the conditions as set out in the portion of the award challenged by this Excep-

tion, is expressly rejected, and this exception is granted on the ground that the Commission, having no jurisdiction, was without authority to include the challenged provision in its award." The judge of the Superior Court, being of the opinion that the question raised by the appeal involved the jurisdiction of the Industrial Commission, and for that reason the findings of fact of the Full Commission were not conclusive upon appeal, though supported by competent evidence, and that the Court had the power and the duty to consider all the evidence in the record and to find therefrom whether the Industrial Commission had jurisdiction, without regard to the findings of fact of the Full Commission, struck out the findings of fact of the Full Commission as to jurisdiction. Whereupon, from competent evidence in the record, the Superior Court Judge found that the plaintiff was not an employee of Thomasville Motors, Inc., when injured, but was an independent contractor, that he was not subject to the North Carolina Workmen's Compensation Act, that the Industrial Commission had no jurisdiction over his claim, and that the prior agreements should be set aside. Based on these findings of fact, the judge made the following conclusions of law: one, the claim should be dismissed, because the Industrial Commission had no jurisdiction; two, any agreements entered into by the parties should be set aside upon motion of plaintiff; three, the Industrial Commission does not have jurisdiction over the respective rights and liabilities of the parties concerning money already paid. Whereupon, the judge dismissed the proceeding.

The defendants appeal, assigning error.

W. H. Steed and Walser & Brinkley for Plaintiff, Appellee.

Armistead W. Sapp for Thomasville Motors, Inc., Employer, and The Travelers Ins. Co., Carrier, Defendants, Appellants.

PARKER, J. The plaintiff has challenged the jurisdiction over the subject matter of the Industrial Commission in making an award to him based upon prior agreements between him and the defendants, on the ground that he is not subject to the provisions of the North Carolina Workmen's Compensation Act, for the reason that at the time of his injury he was not an employee of Thomasville Motors, Inc., but was an independent contractor.

The defendants contend that the Industrial Commission had no power or authority to hear and determine this challenge, because, one, there was no showing of a change of condition as set forth in G.S. 97-47, and two, the plaintiff was bound by his prior agreements and receipt of compensation, and is estopped to attack the jurisdiction of the Commission.

The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel. *Hanson v. Yandle,* 235 N.C. 532, 70 S.E. 2d 565; *Anderson v. Atkinson,* 235 N.C. 300, 69 S.E. 2d 603; *Chadwick v. Dept. of Conservation and Development,* 219 N.C. 766, 14 S.E. 2d 842; *Reaves v. Mill Co.,* 216 N.C. 462, 5 S.E. 2d 305; *Hollowell v. Dept. of Conservation and Development,* 206 N.C. 206, 173 S.E. 603; *Dependents of Thompson v. Funeral Home,* 205 N.C. 801, 172 S.E. 500; *Burroughs v. McNeill,* 22 N.C. 297; *Hartford Accident and Indemnity Co. v. Thompson* (Ga.), 147 S.E. 50; *Woolsey v. Security Trust Co.,* 74 F. 2d 334, 97 A.L.R. 1081; *Gavin v. Hudson & Manhattan R. Co.,* 185 F. 2d 104, 27 A.L.R. 2d 739; 14 Am. Jur., Courts, sec. 184; 19 Am. Jur., Estoppel, sec. 77.

However, the doctrine has been announced that one who procures or gives consent to a decree, even though it is void as beyond the powers of the court to pronounce, is estopped to question its validity, at least where he has obtained a benefit from the act of the court. *Dean v. Dean,* 136 Or. 694, 300 P. 1027, 86 A.L.R. 79; 19 Am. Jur. Estoppel, sec. 77. The basis of this doctrine is that whether the court had jurisdiction either of the subject matter of the action or of the parties is not important, but that such practice will not be tolerated.

While the defendants in their brief assert "plaintiff was bound by his agreements and estopped to attack the jurisdiction upon the grounds asserted," they have favored us with neither reason, argument nor citation of authorities in support of their statement.

These were the facts in *Reaves v. Mill Co., supra.* An agreement for compensation for plaintiff's disability was entered into by plaintiff and both defendants, supposedly in pursuance of the provisions of the North Carolina Workmen's Compensation Act. This memorandum was examined and approved by the Industrial Commission, which made an award. Compensation was paid for about 38 weeks. The defendants then ceased payment, and challenged the jurisdiction of the Industrial Commission on the ground that at the time of his injury the plaintiff was not a resident of this State. The plaintiff then applied to the Commission for the enforcement of the award. This Court denied plaintiff's application holding that the Industrial Commission did not have jurisdiction over the original claim, and the parties could not confer jurisdiction by consent or agreement, because the Commission's jurisdiction over contracts for the settlement of claims is limited to those made

under and within the purview of the Workmen's Compensation Act. This Court in its opinion said: "We think it is clear that neither the agreement entered into by the plaintiff and the defendants nor the subsequent payments of the defendants thereupon amounted to a waiver of jurisdiction."

A decision of the Industrial Commission is only conclusive when it is acting within its jurisdiction. *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 77 L. Ed. 676, 87 A.L.R. 245; *Uphoff v. Individual Board*, 271 Ill. 312, 111 N.E. 128, Ann. Cas. 1917-D1.

The jurisdiction of the Industrial Commission in relation to the subject matter over which it may exercise authority is limited by the North Carolina Workmen's Compensation Act, and this jurisdiction can be enlarged or extended only by the General Assembly, its creator. It is not necessary for us to decide whether under all circumstances a party to a proceeding before the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter, for the reason that under the facts of this case no such estoppel arises here. It is to be noted that this occurred during the hearing before the Hearing Deputy Commissioner. The Deputy Commissioner said to defendants' counsel: "Mr. Edwards, you say you will not hold the plaintiff to the agreement?" Mr. Edwards replied: "No, so far as getting a dismissal. If he wants to contend they are not bound by the Act, that is all right with us." At that time counsel for defendants made other statements of similar import.

The defendants contend that the Industrial Commission could not hear and determine plaintiff's challenge to its jurisdiction over the subject matter, because "the only basis for reopening a matter before the North Carolina Industrial Commission is upon the ground of change of condition," and cite in support of their statement, G.S. 97-47; *Murray v. Knitting Co.*, 214 N.C. 437, 199 S.E. 609; Larson's Workmen's Compensation Law, Vol. 2, p. 330, sec. 81, *et seq.*

The authorities cited are not in point. G.S. 97-47 reads in part: "Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . ." This statute applies where the Industrial Commission has jurisdiction. In *Murray v. Knitting Co., supra*, the Commission had jurisdiction.

The defendants further contend that the plaintiff is barred from challenging the jurisdiction of the Commission over the subject matter by reason of Rule XV of the Commission, the pertinent part of which reads as follows: "No party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny

the truth of the matters therein set forth unless it shall be made to appear to the satisfaction of the Commission that there was error due to fraud, misrepresentation, undue influence, mutual mistake, or other sufficient reason." Such a contention is untenable. The Commission cannot enlarge its jurisdiction, or prevent a challenge to its jurisdiction over the subject matter, by one of its rules. Its limited jurisdiction is fixed by the Act.

A challenge to jurisdiction may be made at any time. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748; *Anderson v. Atkinson, supra; Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Johnson v. Finch,* 93 N.C. 205, 208.

A judgment is void, when there is a want of jurisdiction by the court over the subject matter of the action, *Hanson v. Yandle, supra,* and *Clark v. Homes,* 189 N.C. 703, 708, 128 S.E. 20, and a void judgment may "be disregarded and treated as a nullity everywhere," *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

In *Stafford v. Gallops,* 123 N.C. 19, 31 S.E. 265, the Court said: "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless."

The plaintiff had a legal right to challenge the jurisdiction of the Industrial Commission over the subject matter, and, when such challenge was made, it was the duty of the Industrial Commission to hear and determine it.

The jurisdiction of a court does not relate to the rights of the parties as between each other, but to the power of the court to hear and adjudicate. The question of its existence precedes the question of the rights of the parties to avail themselves of its jurisdiction, if it exists. An universal principle as old as the law is that proceedings of a court without jurisdiction over the subject matter are a nullity and its judgment without effect either on the person or property. *Monroe v. Niven, supra; Downing v. White,* 211 N.C. 40, 188 S.E. 815; *Clark v. Homes, supra; Card v. Finch,* 142 N.C. 140, 54 S.E. 1009; 14 Am. Jur., Courts, sec. 167.

A court without jurisdiction over the subject matter of a proceeding or case cannot enter a judgment in favor of either party: it can only dismiss the proceeding or case for want of jurisdiction. *New Orleans & Bayou Sara Mail Co. v. Fernandez,* 12 Wall. (U.S.) 130, 29 L. Ed. 249; *Corbett v. Boston & M. R. Co.,* 219 Mass. 351, 107 N.E. 60, 12 A.L.R. 683.

In *Mail Co. v. Fernandez, supra,* the Court said: "Where the circuit court is without jurisdiction, it is in general irregular to make any order in the cause except to dismiss the suit; but that rule does not

apply to the action of the court in setting aside such orders as had been improperly made before the want of jurisdiction was discovered."

An injured person is entitled to compensation under our Workmen's Compensation Act only if he is an employee of the party from whom compensation is claimed at the time of his injury. G.S. 97-2; *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425.

An independent contractor is not a person included within the terms of the Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298.

The Superior Court reviews the rulings and decisions of the Industrial Commission. This Court reviews the decisions of the Superior Court, when alleged errors are properly presented to us. *Worsley v. Rendering Co.*, and *Sugg v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467.

The Superior Court overruled all the defendants' exceptions to the findings of fact, conclusions of law and award of the Full Commission, except that it sustained their Exception VI to the award of the Full Commission which is addressed to the amendment made to the award of the Hearing Deputy as to the refunding of money by plaintiff to defendants. Under this exception the defendants said: "The North Carolina Industrial Commission has jurisdiction over the parties and cannot avoid or evade the exercise of its jurisdiction upon the conditions as set out in this part of its award. A conditional award of this nature is void and of no legal effect." The Superior Court expressly rejected this argument of defendants, and stated in its judgment, "this exception is granted on the ground that the Commission having no jurisdiction was without authority to include the challenged provision in its award." This ruling of the Superior Court was correct. The Superior Court Judge being of the opinion that the question raised by the appeal involved the jurisdiction of the Industrial Commission over the subject matter of the proceeding struck out the findings of fact of the Commission that the plaintiff was not an employee, but was an independent contractor, and made his own findings of fact and conclusions of law, yet in doing so he copied in his judgment *verbatim* the findings of fact and conclusions of law of the Deputy Hearing Commissioner that the plaintiff was an independent contractor, and not an employee of Thomasville Motors, Inc. at the time of his injury. This the Judge had the right and power to do. *Aycock v. Cooper*, 202 N.C. 500, 163 S.E. 569; *Francis v. Wood Turning Co.*, 204 N.C. 701, 169 S.E. 654; *Miller v. Roberts, supra; Young v. Mica Co.*, 212 N.C. 243, 193 S.E. 285; *Buchanan v. Highway Com.*, 217 N.C. 173, 7 S.E. 2d 382; *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730; *Aylor v. Barnes*, 242

N.C. 223, 87 S.E. 2d 269. The Judge, thereupon, made these conclusions of law: One, the employer-employee relationship did not exist between plaintiff and Thomasville Motors, Inc., and the Industrial Commission had no jurisdiction over plaintiff's claim, and it should be dismissed. Two, any agreements entered into by the parties should be set aside pursuant to motion of plaintiff. Third, the Industrial Commission does not have jurisdiction over the respective rights and liabilities of the parties concerning money already paid. The court, thereupon, dismissed the proceeding.

The findings of fact of the Superior Court Judge that the plaintiff was not an employee of Thomasville Motors, Inc., while performing the work when he was injured, but was an independent contractor, are supported by competent evidence. The defendants at the hearing before the Deputy Commissioner offered no evidence to the contrary. At the hearing defendants' counsel in respect to plaintiff's contention that he was not an employee at the time of his injury, but an independent contractor said: "We won't object, but we are not going to consent: in other words, we just don't take any position."

However, the Superior Court was in error in overruling the defendants' exception to the Industrial Commission's setting aside the prior agreements entered into by the parties. The Superior Court was also in error in holding that any agreements entered into by the parties should be set aside, pursuant to motion of the plaintiff.

The Superior Court was right in its conclusions of law that the proceeding should be dismissed for lack of jurisdiction in the Industrial Commission over the subject matter of the proceeding, and that the Industrial Commission had no jurisdiction over the respective rights of the parties concerning money already paid.

When the Industrial Commission held that it had no jurisdiction over the subject matter of the proceeding, all that it had the power to do was to set aside its approval of the agreements and its award for the payment of compensation and medical benefits, as improperly made before the want of jurisdiction was discovered, and to dismiss the proceeding. When the Superior Court made its own findings of fact and conclusions of law to the effect that the Industrial Commission had no jurisdiction over the subject matter of the proceeding, thereby affirming the Industrial Commission on that question, it dismissed the proceeding. That left standing in the records of the Industrial Commission the Commission's approval of the agreements and its award for the payment of compensation and medical benefits. The Superior Court should have remanded the case to the Industrial Commission directing it to enter an order setting aside its approval of the agreements and its award for the payment of compensation and medical benefits, and

dismissing the proceeding for lack of jurisdiction over the subject matter, on the ground that plaintiff was not an employee of Thomasville Motors, Inc., while performing the work when he was injured, but an independent contractor.

The sole question of fact involved here is whether in performing the work at which he was injured, plaintiff was an employee of Thomasville Motors, Inc., or an independent contractor. The Deputy Commissioner, the Full Commission and the Superior Court have concluded, upon competent evidence, that the plaintiff, at the time he was injured, was doing work as an independent contractor, and that the Industrial Commission had no jurisdiction. There is no need to remand for the finding of any additional facts. The legal consequences that follow from such findings and conclusions are clear so far as the jurisdiction and power of the Industrial Commission is concerned.

This proceeding is remanded to the Superior Court so that it can remand it to the Industrial Commission with direction to enter an order setting aside its approval of the agreements and its award for the payment of compensation and medical benefits and dismissing the proceeding on the ground of lack of jurisdiction.

Error and remanded.

BOBBITT, J., concurring in result: The record contains findings that I.C. Form 21 and I.C. Form 26 were executed by the parties. However, these forms, executed or unexecuted, do not appear in the record. Upon approval thereof by the Commission, compensation payments were made by defendants to plaintiff in accordance therewith.

Presumably, the executed forms embodied stipulations to the effect that the relationship subsisting between the parties was that of employee-employer-carrier. Apart from these executed forms, there were no stipulations that such relationships existed.

Plaintiff, in challenging the jurisdiction of the Commission, moved that these agreements be set aside because executed by plaintiff "through mistake and lack of knowledge and understanding," on the ground that in fact plaintiff was not an employee of Thomasville Motors, Inc. Confronted by this motion, defendants' counsel stated: "Now, the defendants don't take any position one way or the other about this. We are just leaving it up to the Commissioner, because we don't contest it if he wants to set it aside. Doesn't matter to us one way or the other." Defendants' position was that plaintiff was not entitled to a modification of the award under G.S. 97-47 otherwise than "on the grounds of a change of condition."

In this setting, the inquiry proceeded; and, upon such inquiry, it appeared plainly from all the evidence that plaintiff was not an em-

ployee but an independent contractor. It is patent that the executed forms, if they contained stipulations that plaintiff was an employee, were executed by mistake. Therefore, I concur in the result.

In my view, we need go no further in the disposition of this appeal.

Whether the Commission has jurisdiction depends solely on the authority conferred on it by statute. If the case is not within its statutory jurisdiction, jurisdiction cannot be conferred by any agreement of the litigants, express or implied. *Reaves v. Mill Co.*, 216 N.C. 462, 5 S.E. 2d 305. There is no disagreement as to this well established proposition.

If, however, *facts* are stipulated, and the facts so stipulated, if true, bring a case within the statutory jurisdiction of the Commission, the Commission is authorized to exercise jurisdiction unless and until such stipulated facts are set aside. If, later in the proceeding, any party undertakes to challenge before the Commission the stipulated facts upon which the Commission's jurisdiction depends, Rule XV of the Commission, quoted in the Court's opinion, seems to be a just and reasonable rule. And when stipulated facts, upon which jurisdiction depends, are challenged in the Superior Court, it seems to me that a like rule should apply. Litigants should not be permitted to challenge their stipulations of fact without first showing substantial grounds why they should not be bound thereby. In my view, there is a marked distinction between conferring jurisdiction by agreement and making stipulations of fact which, if true, bring the proceeding within the statutory jurisdiction of the Commission.

It is noted that in *Reaves v. Mill Co., supra*, the original stipulations, on the basis of which compensation was paid, did not include a stipulation to the effect that plaintiff was a resident of North Carolina when he received the injury. In the subsequent hearing, lack of jurisdiction was predicated on the then admitted fact that plaintiff at the time of injury was a citizen and resident of South Carolina. Hence, there was no conflict between the facts stipulated and the determinative jurisdictional fact established by plaintiff's admission at the subsequent hearing.

WINBORNE, J., joins in this opinion.

MARY NELME GRIFFIN AND HUSBAND, THOMAS E. GRIFFIN; AND NONA NELME CLARKE AND HUSBAND, KENNETH CLARKE, v. L. C. SPRINGER (ORIGINAL PARTY DEFENDANT), AND BENNETT M. EDWARDS, GUARDIAN AD LITEM FOR THOMAS E. GRIFFIN, JR., BENNETT GRIFFIN, DAVID GRIFFIN, MARY CHARLOTTE GRIFFIN, AND THE UNBORN CHILDREN OF MARY NELME GRIFFIN; HENRY C. DOBY, JR., GUARDIAN AD LITEM FOR THE UNBORN CHILDREN OF NONA NELME CLARKE; AND THE BANK OF WADESBORO, SUBSTITUTE TRUSTEE UNDER ITEM XXII OF THE LAST WILL AND TESTAMENT OF WILLIAM A. SMITH, DECEASED (ADDITIONAL PARTY DEFENDANTS).

(Filed 9 May, 1956.)

1. Controversy Without Action § 1—

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250.

2. Deeds § 11—

The intention of grantor as expressed in the entire instrument must be given effect in construing the deed unless such intention is in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant, and to this end all parts of the deed should be given force if this can be done by any reasonable interpretation.

3. Same—

The granting clause is the heart of a deed, and in the event of repugnacy between it and preceding or succeeding recitals, the granting clause will prevail.

4. Deeds § 13a—Deed held to convey life estate and not the fee to grantor's grandnieces.

The introductory recitals in the deed in question stated that the instrument was between grantor, party of the first part, his nephew by marriage, party of the second part, the nephew's two children, parties of the third part; the granting clause was to the party of the second part for life, at his death to be divided to the parties of the third part equally, and "at their death" to the children of the named grandnieces, with *habendum* "to hold the estate as set out to the parties above named." *Held:* The named grandnieces took only a life estate after the life estate of their father, with limitation over upon their respective deaths to their respective children, G.S. 39-1 not being applicable, since the granting clause plainly discloses the intent of grantor to grant the grandnieces merely a life estate.

5. Deeds § 13b—

A conveyance to grantor's grandnieces by marriage for life and to the children of the named grandnieces respectively at their deaths does not convey a fee simple to the grandnieces by application of the rule in *Shelley's case*, since that rule does not apply unless it manifestly appears that the word "children" is used in the sense of heirs general.

6. Deeds § 13d: Estates § 9a—

Where a deed conveys land for life to persons *in esse* with remainder upon their respective deaths to their respective children, and one of the life tenants has children and the other none, the rule against perpetuities is not applicable, since the remainder vests immediately in the children of one life tenant, subject to be opened up to include after-born children, and as to the other life tenant, the remainder must vest, if at all, during her life.

7. Estates § 9a—

In contemplation of law, the possibility of issue is commensurate with life.

8. Same—

A conveyance to a person for life with remainder to her children is valid even though the life tenant have no children at the time of the execution of the deed, since the life estate is sufficient to uphold the contingent remainder, and such contingent remainder will vest *eo instanti* a child is born to the life tenant.

APPEAL by defendants from *Phillips, J.*, December Term 1955 of ANSON.

Controversy without action to determine the sufficiency of a deed to convey title, submitted to the Court under G.S. 1-250, for its decision and judgment.

William A. Smith, a resident of Anson County, had no children. Mr. Smith had an ancestor by the name of Nelme. That name was about to become extinct in the county. William Bennett Dunlap, a distant relative by blood of Mr. Smith and a nephew of his wife, came to live with Mr. Smith when a child, and lived with him until 1916. Mr. Smith proposed to his young relative that if he would have his named changed to Bennett Dunlap Nelme, he would give him his property. The young relative accepted the offer, and his name was changed from William Bennett Dunlap to Bennett Dunlap Nelme by a special proceeding in Anson County, North Carolina, in 1904. In 1916 Bennet Dunlap Nelme moved on a farm of Mr. Smith, known as the Nelme Place.

On 4 June 1921 William A. Smith, in consideration of ten dollars to him paid by Bennett Dunlap Nelme, the receipt of which was acknowledged, and the further consideration of love and affection borne by him to Bennett Dunlap Nelme and his children, the parties of the third part, viz. Mary and Nona Nelme,—he calls Bennett Dunlap Nelme his adopted son—executed and delivered to Bennett Dunlap Nelme the deed, whose contents are thus summarized. The deed is by and between William A. Smith, party of the first part, and Bennett Dunlap Nelme, party of the second part, and B. D. Nelme's children, Mary and Nona, parties of the third part. The granting clause sells and conveys, gives,

grants and aliens to Bennett Dunlap Nelme "a life estate, at his death to be divided to the parties of the third part equally, and to the children of the said Mary and Nona Nelme, respectively, at their death." The land conveyed lies in Anson County, contains 1,325 acres, and is known as the Presley Nelme land. The *habendum* clause reads "to have and to hold the estate as set out to the parties above named."

Bennett Dunlap Nelme lived on this land from 1916, until his death in 1939. William A. Smith died in 1934.

Mary Nelme Griffin has four children, the oldest of whom was 13 years old in 1955. Nona Nelme Clarke has no children.

Since their father's death Mary Nelme Griffin and Nona Nelme Clarke have been in the peaceful possession of this 1,325-acre tract of land.

On 15 August 1955, Mary Nelme Griffin, nee Mary Nelme, and her husband, and Nona Nelme Clarke, nee Nona Nelme, and her husband, entered into a contract with the defendant L. C. Springer to sell him 11.87 acres of the 1,325 acres embraced in the Smith deed of 4 June 1921.

In compliance with the contract Mary Nelme Griffin, and her husband, and Nona Nelme Clarke, and her husband, executed under date of 25 August 1955 a fee simple deed with full covenants of warranty to the 11.87 acres of land, and tendered the same to L. C. Springer, and demanded payment of the purchase price specified in the contract.

L. C. Springer refused to accept the deed and to pay the purchase price agreed upon on the ground that the plaintiffs could not convey a fee simple title to the 11.87 acres of land.

The court rendered judgment in favor of the plaintiffs, and the defendants excepted, and appealed.

Little, Brock & McLendon for Mary Nelme Griffin and husband, Thomas E. Griffin, Plaintiffs, Appellees.

R. L. Smith & Son for Nona Nelme Clarke and husband, Kenneth Clarke, Plaintiffs, Appellees.

Taylor, Kitchin & Taylor for L. C. Springer and The Bank of Wadesboro, Substitute Trustee, Defendants, Appellants.

Henry C. Doby, Jr., Guardian Ad Litem for the unborn children of Nona Nelme Clarke, Defendant, Appellant.

Bennett M. Edwards, Guardian Ad Litem for Thomas E. Griffin, Jr., Bennett Griffin, David Griffin, Mary Charlotte Griffin, and the unborn children of Mary Nelme Griffin, Defendant, Appellant.

PARKER, J. The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S.

1-250. *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Weathers v. Bell,* 232 N.C. 561, 61 S.E. 2d 600; *Prince v. Barnes,* 224 N.C. 702, 32 S.E. 2d 224; *Williams v. Blizzard,* 176 N.C. 146, 96 S.E. 957.

From the earliest periods, and continuously to the present time, we have adhered to the rule that in construing a deed the discovery of the intention of the grantor must be gathered from the language he has chosen to employ, and all parts of the deed should be given force and effect, if this can be done by any reasonable interpretation, unless the intention is in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant. *Davis v. Brown,* 241 N.C. 116, 84 S.E. 2d 334; *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157; *Seawell v. Hall,* 185 N.C. 80, 116 S.E. 189; *Brown v. Brown,* 168 N.C. 4, 84 S.E. 25; *Gudger v. White,* 141 N.C. 507, 54 S.E. 386; *Rowland v. Rowland,* 93 N.C. 214; *Kea v. Robeson,* 40 N.C. 373; *Campbell v. McArthur,* 9 N.C. 33.

Ruffin, C. J., said for the Court in *Kea v. Robeson, supra:* "Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow."

It has been said that the strongholds of this now widely accepted rule of intention appear to have been North Carolina, Kentucky and California. Anno. 84 A.L.R., page 1063.

These are the relevant parts of the deed, which has no warranty clauses:

It is a deed made by and between William A. Smith, party of the first part, Bennett D. Nelme, party of the second part, and Bennett D. Nelme's children, Mary and Nona, parties of the third part.

GRANTING CLAUSE. The deed gives, grants, aliens, assigns and conveys "to the party of the second part a life estate, at his death to be divided to the parties of the third part equally, and to the children of the said Mary and Nona Nelme respectively at their death" the 1,325-acre tract of land.

HABENDUM CLAUSE. "To have and to hold the estate as set out to the parties above named."

The heart of a deed is the granting clause. That clause is naturally looked to to see what was intended to be conveyed. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Bryant v. Shields, supra;* 16 Am. Jur., Deeds, page 567. A reason for this is that an effective deed must contain operative words of conveyance. *Pope v. Burgess,* 230 N.C. 323, 53 S.E. 2d 159; *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687. Another reason is that where the name of the grantee, the thing granted, and the *quantum* of the estate are clearly set forth in the granting clause, the *habendum* clause is not absolutely necessary to make a deed effective. *Bryant v. Shields, supra;* 16 Am. Jur., Deeds, page 567.

The words "the children of the said Mary and Nona Nelme respectively at their death" appear in the operative words of conveyance: these words do not appear in the introductory recital giving the names of the parties. This Court said in *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624: "In the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail. *Williams v. Williams,* 175 N.C. 160, 95 S.E. 157; 16 A.J. 575." See also: *Dull v. Dull,* 232 N.C. 482, 61 S.E. 2d 255.

In *Mayberry v. Grimsley,* 208 N.C. 64, 179 S.E. 7, the deed was to "M. and her children," with granting clause "to M., her heirs and assigns," and *habendum* "to have and to hold . . . to M., her heirs and assigns." It was held to convey no estate to the children of M. *in esse* at the time of the execution of the deed, the word "children" appearing only in the introductory recital, and the intent of the grantor as gathered from the whole instrument being to convey the estate to M. in fee. In other words, the granting clause was held to prevail. To the same effect see: *Martin v. Knowles,* 195 N.C. 427, 142 S.E. 313.

The words in the granting clause "to the children of the said Mary and Nona Nelme *respectively* at their death" means to the children of Mary Nelme and to the children of Nona Nelme, respectively, for the all sufficient reason that no child can possibly be the child of both sisters. *Mewborn v. Mewborn,* 239 N.C. 284, 79 S.E. 2d 398; *Horne v. Horne,* 181 Va. 685, 26 S.E. 2d 80; Anno. 16 A.L.R. 123.

The plaintiffs contend that, pursuant to the provisions of G.S. 39-1, Mary Nelme Griffin and Nona Nelme Clarke each owns an indefeasible fee to one-half of this tract of land. This contention is untenable, for the reason that in the granting clause the deed in plain and explicit words shows that the intention of the grantor was to grant them merely a life estate, and the *habendum* clause creates no estate contradictory or repugnant to that given in the granting clause. To adopt plaintiffs' contention would require us to nullify the words in the granting clause "to the children of the said Mary and Nona Nelme respectively at their" (Mary's and Nona's) "death." "Words deliberately put in a deed, and inserted there for a distinct purpose, are not to be lightly considered or arbitrarily thrust aside . . ." *Brown v. Brown, supra.*

In *Mewborn v. Mewborn, supra,* the testator in the part of his will relevant to the question before us used words strikingly similar to the language of the deed here. He devised to his wife a life estate in all his real estate. Item 4 of his will reads: "After the death of my beloved wife, I give and devise to George Washington Mewborn and Paul Hodges Mewborn my home place where I now reside . . ., and the tract of land known as the Shine's Farm . . ., for a term of their natural lives; said tracts of land to be equally divided between them

and after the death of the said George Washington Mewborn and Paul Hodges Mewborn it is my will and desire that the aforesaid tracts of land go to their children." The testator died in 1924. George Washington Mewborn never married, and died without issue. This Court by *Denny, J.*, said: "We think the provision in Item 4 of the will of W. D. Mewborn, directing an equal division of the lands devised therein between the two life takers, indicates a clear intent on the part of the testator that upon the death of his wife, the first taker for life, the sons should hold their shares in the devised lands in severalty. Therefore, upon their respective deaths their respective shares would go to their respective children, if each one of them had children. But since George Washington Mewborn died without issue, the interest in the lands devised to him for life reverted to the estate of W. D. Mewborn."

In *Power Co. v. Haywood*, 186 N.C. 313, 119 S.E. 500, William Boylan, who died in 1861, in Item 3 of his will devised a plantation in Chatham County to his son, John H. Boylan for life, and in this Item of his will further provided, "if my said son, John, shall marry and shall have any lawfully begotten child or children, or the issue of such, living at his death, then I give, devise and bequeath the said plantation and negroes to such child or children; but, if he shall die, leaving no such child or children, nor the issue of such, then living, then I give the said plantation and negroes to my grandson, William (son of William M. Boylan), during his natural life, and at his death to his eldest son." John H. Boylan never married, and died without issue. The grandson, William Boylan, married, and his eldest and only son, William James Boylan, was born in 1886, twenty-five years after the testator's death. This Court speaking through *Adams, J.*, said: "We regard it unquestionable that William Boylan (son of William M. Boylan), by virtue of the devise in the third item of the will, immediately upon the death of John H. Boylan, unmarried and without issue, took an estate in the land for his natural life, and that the remainder which was contingent theretofore (the remainderman not being *in esse*) became vested in William James Boylan at the moment of his birth. For this reason, section 1773 of the Consolidated Statutes, which pertains to contingent limitations, is not applicable to the facts."

In *Bond v. Bond*, 194 N.C. 448, 139 S.E. 840, the devise was to a nephew for life, and after his death to his oldest daughter, if he shall have one, who shall be named for testatrix. The Court said: "At the time the will was made it was uncertain whether the life tenant would be the father of a daughter who should be named for the testatrix, and for this reason the remainder was then contingent; but when the daughter was born and named the remainder *eo instanti* became vested."

In *Johnson v. Lee,* 187 N.C. 753, 122 S.E. 839, there was a deed to lands to A. W. Lee, an unmarried grantee for life, with remainder to his children, not then *in esse.* The Court said: "The life estate of A. W. Lee, appellant, is sufficient to uphold the estate in his children, though not *in esse* at the time, by way of contingent remainder till they were born, and thereafter as owners of a vested remainder."

In Shepherd's Touchstone, pp. 229-234-235, after treating of the necessity of a grantor, grantee and a thing granted in order to a valid grant, the author, as to the grantee, among other things, says: There shall "be a person in being at the time of the grant made, (if he be to take immediately) . . . But if he be to take by way of remainder, it is not necessary that he should be in being, so as there be a preceding estate of freehold to support a contingent remainder," etc. This statement of the learned author was recognized in this State in *Dupree v. Dupree,* 45 N.C. 164, in *Newsom v. Thompson,* 24 N.C. 277, and was directly approved and applied in *Powell v. Powell,* 168 N.C. 561, 84 S.E. 860, and *Johnson v. Lee, supra.*

The plaintiffs contend that the rule in *Shelley's case* applies, because " 'children' as used in the deed should be construed heirs generally or heirs of the body." In our opinion, the rule in *Shelley's case* does not apply, for we think the intent of the grantor is plainly manifest that he did not use the word "children" in the sense of heirs. *Williams v. Williams,* 175 N.C. 160, 95 S.E. 157; *Hutton v. Horton,* 178 N.C. 548, 101 S.E. 279.

In *Moore v. Baker,* 224 N.C. 133, 29 S.E. 2d 452, the Court said: "The use of the word 'children' following the life estate does not create a fee simple estate or a fee tail estate which would be converted by the statute into a fee simple estate. 'When the devise is to one for life and after his death to his children or issue, the rule (in *Shelley's case*) has no application, unless it manifestly appears that such words are used in the sense of heirs generally.' 25 A. & E., 651, and cases there cited; *Brown, J.,* in *Faison v. Odom,* 144 N.C. 107, 56 S.E. 793."

The plaintiffs contend that the rule against perpetuities is applicable. The contention is not sound. The manifest intent of the grantor is that Bennett D. Nelme was to take a life estate, and upon his death, his children, Mary and Nona, shall take a life estate and should hold their lands in severalty during their lives, and upon their respective deaths their respective shares should go to their respective children, if each of them had children. The grant of the future interest in the land "to the children of the said Mary and Nona Nelme respectively at their deaths," means that the future interests of Mary Nelme's children must vest during her life, and the future interests of Nona Nelme's children, if any, must vest during her life. Therefore, the rule against perpe-

tuities does not apply. *McQueen v. Trust Co.*, 234 N.C. 737, 68 S.E. 2d 831.

At the present time Nona Nelme Clarke has no children. In contemplation of law, the possibility of issue is commensurate with life. *McPherson v. Bank*, 240 N.C. 1, 81 S.E. 2d 386; *Prince v. Barnes, supra; Shuford v. Brady*, 169 N.C. 224, 85 S.E. 303.

A part of the will of William A. Smith is incorporated in the agreed facts. It has no bearing on the question before us, and is scarcely referred to in the briefs of counsel.

Mary Nelme Griffin and Nona Nelme Clarke have only life estates in the 1,325-acre tract of land, and cannot convey to L. C. Springer a fee simple title to the 11.87 acres of land they have contracted to convey to him. The four children of Mary Nelme Griffin have a vested remainder in their mother's undivided interest in the 1,325-acre tract of land, subject to open up to let in any afterborn child or children of their mother. *Mason v. White*, 53 N.C. 421; *Chambers v. Payne*, 59 N.C. 276; *Powell v. Powell, supra; Waller v. Brown, supra; Beam v. Gilkey*, 225 N.C. 520, 35 S.E. 2d 641; 33 Am. Jur., Life Estates, Remainders, Etc., sec. 134. The remainder to the children of Nona Nelme Clarke is contingent, but will *eo instanti* become vested upon her giving birth to a child. *Power Co. v. Haywood, supra; Bond v. Bond, supra;* 33 Am. Jur., Life Estates, Remainders, Etc., sec. 134.

The judgment below is

Reversed.

WACHOVIA BANK & TRUST COMPANY v. W. J. CURRIN, ORIGINAL DEFENDANT, AND GREAT AMERICAN INSURANCE COMPANY, ADDITIONAL DEFENDANT.

(Filed 9 May, 1956.)

1. Pleadings § 31—

A motion to strike allegations from a pleading for irrelevancy admits, for the purposes of the motion, the truth of all facts well pleaded as well as all inferences which legitimately may be drawn from the facts alleged, but does not admit conclusions of the pleader.

2. Same: Pleadings § 19b: Bills and Notes § 29—Where a chattel mortgage note is protected by insurance procured by holder, maker may set up loss covered by policy as defense.

In this action by a bank on a note, defendant alleged that the note was executed to a motor company for the balance of the price of a truck, that the bank loaned the money and required that the note be secured by a chattel mortgage and protected by a policy of insurance on the truck, with loss payable clause to it to the amount of the unpaid balance of the note,

that the motor company transferred the note without recourse to the bank on the date of its execution, and that the bank issued the policy as authorized agent of insurer. *Held:* Under the allegations, the bank was not a holder in due course, and defendant is entitled to have insurer joined as an additional party and to set up as a defense damage to the truck by a risk covered by the policy, demand upon and wrongful refusal of insurer to pay the loss, and wrongful failure and refusal of the bank to demand payment of the insurer for application on the note. Therefore, insurer's motion to strike the defense and demurrer for misjoinder of parties and causes should have been overruled.

BOBBITT, J., dissenting.

APPEAL by the defendant, W. J. Currin, from *Bickett, J.*, October, 1955 Term, WAKE Superior Court.

This is a civil action instituted by the plaintiff, Wachovia Bank & Trust Company, against the defendant, W. J. Currin, for the recovery of $644.85, balance due on a promissory note for $1,547.60 payable to Northam Motor Company and secured by a chattel mortgage on one 1954 model Ford truck. The note was transferred without recourse to the plaintiff on the day it was executed. The plaintiff alleged it was the purchaser of the note for value, before maturity, and without notice of any infirmities. The plaintiff at the time suit was brought obtained possession of the truck under a writ of claim and delivery, and asked that it be sold to satisfy the balance due on the note.

The defendant Currin filed answer, admitted the execution of the note and that $644.85 was unpaid, but denied the plaintiff was a purchaser in due course or that it took the note free of prior equities. In addition, the answer set up the following:

"FURTHER ANSWER, COUNTER-CLAIM AND CROSS ACTION AGAINST WACHOVIA BANK & TRUST COMPANY AND GREAT AMERICAN INSURANCE COMPANY:

"For a further answer, counter-claim and cross action against Wachovia Bank & Trust Company and Great American Insurance Company, defendant alleges:

"1. That defendant is a citizen and resident of Harnett County, North Carolina; that Wachovia Bank & Trust Company is a North Carolina corporation with one of its subordinate offices in the City of Raleigh, N. C.; and that Great American Insurance Company is a New York corporation, with its principal office in the City of New York.

"2. That Wachovia Bank & Trust Company is a banking institution under the laws of North Carolina and is also engaged in the insurance business; and in connection with its insurance business

defendant alleges upon information and belief that Wachovia Bank & Trust Company is an agent for Great American Insurance Company, and as such is authorized and licensed to write policies in said insurance company upon property located in the State of North Carolina.

"3. That on March 2, 1954 defendant purchased a 1954 Ford truck bearing motor number F35VLN-10681 from Northam Motor Company of Lillington, N. C. for a total purchase price of $2,259.85; that defendant made a down-payment of $712.21 and borrowed the balance of the purchase price for said vehicle totaling $1,547.64 from Wachovia Bank & Trust Company, evidencing said loan by a promissory note in said amount payable in 12 equal monthly installments of $128.97 each, secured by a chattel mortgage on said truck.

"4. That it was agreed by defendant and Wachovia Bank & Trust Company that said truck should be covered by insurance against fire, theft, rising waters and other hazards; that the cost of said insurance should be borne by defendant; that loss, if any, under said insurance should be payable to Wachovia Bank & Trust Company as its interest might appear; and that the insurer was authorized and directed to make payment direct to Wachovia Bank & Trust Company of any monies not in excess of the unpaid balance due on said note which might become payable under such insurance.

"5. That pursuant to this agreement with respect to insurance, Wachovia Bank & Trust Company on March 10, 1954, acting in its capacity as duly authorized agent for Great American Insurance Company, issued a policy of insurance on the above described motor truck naming itself and defendant as insureds and insuring said truck, among other things, against

" 'Direct and accidental loss of or damage to the automobile caused by windstorm, earthquake, explosion, hail, external discharge or leakage of water (except loss resulting from rain, snow, or sleet), flood or rising waters, riot or civil commotion, the forced landing or falling of any aircraft or of its parts or equipment, or malicious mischief or vandalism, except that $25.00 shall be reduced from the amount of each determined loss resulting from malicious mischief or vandalism.' "

"6. That defendant, in accordance with his contract, paid the premiums on said insurance policy and the same was in full force and effect on October 17, 1954 on which date the said Ford truck insured thereunder was directly and accidentally damaged by flood and rising waters to the extent that it was virtually a total loss.

"7. That thereafter defendant gave due notice to Great American Insurance Company and its agent, Wachovia Bank & Trust Company, of said loss, and fully complied with all of his obligations under said policy, but that Great American Insurance Company wrongfully denied liability under said insurance policy and the plaintiff, Wachovia Bank & Trust Company, in violation of its agreement with the defendant, has wrongfully failed and refused to require payment of the proceeds of said insurance policy by its employer, Great American Insurance Company, for application on said promissory note of defendant; that instead, Wachovia Bank & Trust Company has seized defendant's said truck under claim and delivery with intent to sell the same and apply the proceeds to said note leaving defendant without remedy under said insurance policy.

"8. That prior to sustaining the aforesaid damage by reason of flood and rising waters on October 17, 1954, defendant's said truck had a fair market value of at least $1,850.00. and immediately thereafter it was not worth more than $100.00, so that defendant was damaged by reason of said loss in the amount of at least $1,750.00; that defendant is entitled to recover said sum of Great American Insurance Company and to have so much thereof as may be necessary applied to the note sued on in this action by the plaintiff and to have the balance paid to defendant.

"9. That demand has been made upon Wachovia Bank & Trust Company that it exercise its rights as named insured under said insurance policy to enforce collection of the money due thereon, and demand has also been made of Great American Insurance Company that it pay the money due under said policy by reason of the loss above described; and that each of said demands has been refused.

"10. That it is necessary that Great American Insurance Company be made a party to this action to the end that it may be required to discharge its policy obligation as aforesaid to the plaintiff and defendant."

Great American Insurance Company was made a party defendant. The plaintiff made a motion to strike as irrelevant paragraphs 3 to 10, inclusive, of the defendant's further answer, counter-claim and cross action. The additional defendant filed a demurrer and asked that the action be dismissed as to it for that there was a misjoinder of parties and causes of action. After hearing in the Superior Court the judge allowed the motion to strike and sustained the demurrer. To the judgment entered accordingly, the defendant Currin excepted, and from it appealed.

Dupree, Weaver & Montgomery,
By: John R. Montgomery, Jr.,
Nancy Fields Fadum, for defendant, appellant.
Mordecai, Mills & Parker, for Great American Insurance Company, defendant, appellee.

HIGGINS, J. A motion to strike allegations from a pleading for irrelevancy admits, for the purposes of the motion, the truth of all facts well pleaded as well as all inferences which legitimately may be drawn from the facts alleged. The motion, however, does not admit conclusions of the pleader. *Bank v. Bryan,* 240 N.C. 610, 83 S.E. 2d 485; *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410.

In the further defense, the defendant Currin alleged he arranged for the purchase of the truck from Northam Motor Company for $2,258.85; that he paid $712.21 in cash and arranged with the plaintiff for a loan of $1,547.46 to finance the balance due, for which he executed a note payable in 12 equal monthly installments of $128.97; that the note was made payable to Northam Motor Company and endorsed by it to the plaintiff on the day executed and without recourse; that in reality the transaction was a loan by the plaintiff to the defendant Currin rather than the purchase of the note from the Motor Company. As security for the loan the plaintiff required (1) a chattel mortgage on the truck, and (2) insurance against its accidental loss or damage (among other things) on account of flood and high water. Accordingly, the defendant Currin executed the chattel mortgage and paid to the plaintiff the premium for the insurance which the plaintiff took out in Great American Insurance Company for which it was agent. Both the plaintiff and defendant Currin were named insureds and beneficiaries in the insurance policy—the former to the extent of any balance due on the note, and the latter to the extent of any additional liability on the part of the insurance company.

While the policy of insurance was in force the truck was damaged by flood waters to the amount of at least $1,750.00, so that by reason of said damage Great American Insurance Company became liable to the plaintiff in the amount necessary to discharge the note, and to Currin for the remainder of the coverage. Currin gave due notice of loss to Great American Insurance Company and to its agent, the plaintiff, Wachovia Bank & Trust Company. "Great American Insurance Company wrongfully denied liability . . . and the plaintiff, Wachovia Bank, its agent, in violation of its agreement with the defendant, has wrongfully failed and refused to require payment of the proceeds of the policy by its employer, Great American Insurance Company, for application on defendant's note. That instead, Wachovia Bank &

Trust Company has seized said truck, . . . with intent to sell the same and apply the proceeds to said note, leaving defendant without remedy under said insurance policy."

It may be reasonably inferred that to the plaintiff was left the selection of the insurance carrier and that it selected its principal, Great American Insurance Company, after requiring the defendant to pay to the plaintiff the amount of the premium. The allegations stricken permit the inference the purchase of the truck, the loan from the bank, the execution of the note and chattel mortgage, the assignment of the same to the plaintiff, and the procurement of the insurance were not separate transactions but were in fact integral parts of the loan transaction. *Bank v. Bryan, supra; Crouse v. Vernon,* 232 N.C. 24, 59 S.E. 2d 185; *Batts v. Sullivan,* 182 N.C. 129, 108 S.E. 511; *Insurance Co. v. Reid,* 171 N.C. 513, 88 S.E. 779.

Assuming, as we are required to do for the purposes of the motion, that the facts alleged are true, the plaintiff is not a holder of the note in due course and the defendant Currin is not precluded from asserting the equities set up in his further defense. It follows that the trial court committed error in allowing the motion to strike.

Left for consideration is the question of misjoinder of parties and causes of action raised by the demurrer. According to the allegations in the further defense and cross action, the additional defendant, Great American Insurance Company, is obligated to pay $1,750.00 on account of damage to the truck. Both the plaintiff and the original defendant are named beneficiaries—the plaintiff for the amount due on the note, and the defendant for the remainder. Unquestionably the Wachovia Bank & Trust Company and Currin can maintain a joint action against Great American Insurance Company for the amount due them as named insureds under the policy.

It is argued for the insurance company that it is in no way concerned with the controversy between Wachovia and the defendant Currin and that to bring it into the case would be a misjoinder of parties and causes of action. The argument overlooks the allegations in the cross action "that Wachovia Bank and Trust Company is an agent for Great American Insurance Company and as such *is authorized and licensed to write policies in said Insurance Company* upon property located in the State of North Carolina"; and *"acting in its capacity as duly authorized agent* for Great American Insurance Company (Wachovia) *issued a policy of insurance,"* etc.; and "that Great American Insurance Company wrongfully denied liability under said insurance policy."

The above quotations are from the further defense which was stricken *in toto.* In essence, the charge is that Wachovia is the agent of and is

authorized by Great American to issue the insurance policy involved, and that Wachovia issued the policy purporting to bind Great American and that Great American denies liability on the policy; that Wachovia has refused to make demand for payment. These allegations tie both the insurance company and the bank together in denying defendant the benefit of the insurance for which he paid. The defendant Currin by his cross action asked that he have before the court at one and the same time the agent who acted for the principal and the principal who denies liability on the policy issued by the agent. The issues raised by the cross action require the presence of both Great American and Wachovia before the court in one action rather than in two. If the defendant Currin is required to bring two actions, the jury in one case might say the bank is not bound because it was only acting as agent for its principal. And in another action the jury might say the principal is not bound because of lack of authority on the part of the agent. Such an eventuality would defeat the defendant's claim altogether.

The case of *Land Bank v. Foster*, 217 N.C. 415, 8 S.E. 2d 614, presented questions not unlike those now before us. In both cases the defendant was sued by the plaintiff bank for default in the payment of a note. In both, the bank held title to the property conveyed as security for the note. In both, the maker of the note paid for insurance on the property payable to the bank and to himself as beneficiaries according as their interests might appear. In the *Foster case*, this Court said: "It is not unreasonable to assume that it was the duty of the Land Bank to carry out that part of the contract . . . the collection of the proceeds and the performance of those things incident thereto." . . . "We think and so hold that the question of reasonable diligence in the collection of the item (insurance) should have been left to the jury . . . upon appropriate issues, and failure to do so was error." In the *Foster case,* the insurance carrier was made a party by cross action just as the defendant Currin seeks to do in this case.

The insurance was a part of the security for the note sued on in this case. The presence before the court of all interested parties (the bank, the insurance company, and Currin) is necessary to a final termination of the matters in controversy. There is neither misjoinder of parties nor of causes of action. The judgment of the Superior Court of Wake County, therefore, is

Reversed.

BOBBITT, J., dissenting: The insurance company's liability, if any, is to pay the loss within the coverage of its policy. It is immaterial to it whether it pays the amount thereof to plaintiff or to defendant or both. Whether defendant is or is not indebted to plaintiff will not

enlarge or reduce its liability. Hence, it is in no sense a party to the cause of action alleged in the complaint.

If plaintiff has failed or neglected to perform any duty owed by it to defendant in relation to the insurance policy and resulting in loss to defendant, defendant can so allege by way of counterclaim to plaintiff's action. Present allegations do not state facts sufficient to constitute such counterclaim. The purport thereof is that plaintiff may not recover herein without first proceeding against the insurance company. In my opinion, the law does not require that plaintiff's action on the note and chattel mortgage be so postponed.

Whether defendant's allegations are sufficient to constitute a counterclaim to plaintiff's action, the insurance company would not be affected thereby. Its liability, if any, is solely under the terms of its policy.

In my view, if plaintiff had joined in this action (1) the action against defendant to recover the debt, *and* (2) an action against the insurance company, for its own benefit or for the joint benefit of plaintiff and defendant, there would have been a misjoinder of parties and causes of action. It is equally so if defendant is permitted to join the insurance company and sue it in this cause for the loss recoverable under the terms of the policy. At least, it seems so to me.

Hence, I vote to affirm.

STATE v. ROBERT S. CONNER.

(Filed 9 May, 1956.)

1. Criminal Law § 81c(3)—

Defendant's confession and testimony at the trial were to the effect that he fired his pistol, fatally wounding deceased, while robbing deceased's store. *Held:* The admission in evidence of a bullet of the same caliber found in the store more than a month after the commission of the offense and testimony as to abrasion on the wall near where the bullet was found, with photographs of the abrasion for the purpose of illustrating the testimony, is not prejudicial.

2. Criminal Law § 42c—

Questions asked by the solicitor on cross-examination of the defendant as to defendant's participation in other specific crimes of a kindred nature, most of which were admitted by defendant, will not be *held* for prejudicial error when the questions appear to have been based upon information and to have been asked in good faith.

3. Criminal Law § 50f—

The argument of the solicitor as to the manner in which the offense was committed *held* to have a legitimate basis in the evidence, and defendant's assignment of error thereto cannot be sustained.

4. Criminal Law § 53n—

A charge to the effect that the jury should not base its verdict on sympathy will not be *held* prejudicial when such statement relates to the portion of the charge that the verdict should speak the truth and not be based on prejudice or sympathy, and is entirely disconnected from the later portion of the charge wherein the court correctly instructed the jury as to its right to recommend life imprisonment if they should find defendant guilty of the capital offense.

APPEAL by defendant from *Johnston, J.*, at 5 September, 1955 Term of FORSYTH.

Criminal prosecution upon a bill of indictment charging "that Robert S. Connor, late of Forsyth County, on the 24 day of May, A.D. 1954, with force and arms, at and in the aforesaid county, did unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did kill and murder Langston B. Roberts, while in the perpetration of a felony, to wit, the crime of robbery, contrary to the form of the statute . . .," etc.

Plea: Not guilty.

Thereafter defendant was placed upon trial, and tried at 12 July, 1954 Term, of Superior Court of Forsyth County. There was a verdict of guilty of murder in the first degree without recommendation of life imprisonment, pursuant to which judgment of death by asphyxiation was pronounced, from which defendant appealed to the Supreme Court. And on such appeal for error committed in the course of the trial in Superior Court, a new trial was granted. See opinion in 241 N.C. 468, 85 S.E. 2d 584.

Upon re-trial at the 5 September, 1955 Term, of the Superior Court of Forsyth County, pursuant to the order of the Supreme Court, the State offered evidence, including evidence of confession by defendant, tending to show that on morning of 24 May, 1954, about 7:30 o'clock, defendant, armed with a .38 pistol, went to the Third Street Grocery, a store operated by Langston Roberts, a colored man, in Winston-Salem, N. C., for the purpose of robbing Roberts, and that in the act of robbing him defendant intentionally fired the pistol, inflicting upon Roberts a mortal wound, from which he died in a short time thereafter.

And defendant, as a witness in behalf of himself, testified in detail to substantially the same state of facts as those which the evidence offered by the State tends to show.

The case was submitted to the jury upon the evidence offered, and under the instruction of the court.

(Further recital of the evidence is deemed unnecessary, since defendant made no motion for judgment as of nonsuit. Pertinent portions of the evidence will be related in considering matters to which exceptions are taken, and assigned as error.)

Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

Judgment: Death by inhalation of lethal gas in the manner provided by law.

Defendant excepts thereto and appeals therefrom to Supreme Court, and assigns error.

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

Oren W. McClain and Philip E. Lucas for defendant, appellant.

WINBORNE, J. Defendant presents for consideration five assignments of error based upon exceptions taken in the course of the re-trial in Superior Court. A careful consideration of each of the assignments fails to show error for which the judgment from which defendant appeals should be disturbed.

The first assignment of error is that the trial court erred in allowing a police officer to testify, over objection by defendant, as to the discovery of a bullet on the west side of the store at the end of the meat counter, a month and a half or two months after the commission of the alleged crime, and in allowing, over objection, the introduction of the bullet into evidence as shown by Exceptions 1, 5, 6 and 8.

The evidence offered by the State tends to show that defendant confessed to the officers, and admitted on the trial, he shot Roberts twice in the store at the place of the robbery. And the evidence offered by the State tends to show that the bullet so found in the store had been shot out of the .38 pistol with which defendant admitted he shot Roberts. Whether the conditions in the store at the time the bullet was found were the same as at the time of the crime seems to be immaterial.

The second assignment of error is that the trial court erred in allowing police officer to testify, over objection of defendant, as to an unidentified abrasion on the wall near where the bullet, to which the exceptions on the first assignment of error relates, was so found, and in allowing, over objection of defendant, the introduction in evidence of photographs showing an arrow pointing to said abrasion as shown by Exceptions 2, 2a, 3, 4 and 7. The record discloses that the photographs

were admitted in evidence for the purpose of illustrating the testimony of the witnesses in the case, under appropriate instruction to the jury. For this purpose the photographs were competent. Moreover, whether the abrasion was made by a bullet shot from a pistol, and whether it was made by a bullet shot from the .38 pistol defendant admits he used in shooting Roberts in another part of the store, are immaterial matters and harmless.

The third assignment of error is that the trial court erred in allowing the Solicitor, on cross-examination, to question defendant as to his participation in specific crimes, as shown by Exceptions 9, 10, 11, 12 and 13. Counsel for defendant direct attention to stenographic report of the cross-examination by consent of the Solicitor.

Nevertheless it does not appear that the Solicitor exceeded the bounds of legitimate practice in asking defendant as to his various infractions of the law, enumerated in the case on appeal. See *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926; *S. v. Neal,* 222 N.C. 546, 23 S.E. 2d 911, and numerous other cases.

In the *Neal case,* just cited, in opinion by *Devin, J.,* it is stated: "It has been uniformly held . . . that witnesses may be asked questions tending to show the commission of other offenses for the purpose of impeaching their credibility, provided the questions are based on information and asked in good faith . . . and that whether the cross-examination goes too far or is unfair is a matter for the determination of the trial judge, and rests largely in his sound discretion," citing cases.

The questions asked in the case in hand are in the main of a kindred nature to the offense in which defendant was engaged when he shot Roberts, and appear to have been based upon information and to have been asked in good faith, in that defendant admitted most of the impeaching questions. The case is distinguishable in factual situation from *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762.

The fourth assignment of error is that the trial court erred in allowing the Solicitor to argue to the jury, over objection of defendant, that the shooting took place in a manner which was not supported by any competent evidence, as shown by Exception 14. It is contended that the Solicitor argued to the jury that the defendant probably marched the deceased to the back of the store and shot him.

In the light of the evidence this argument appears to have a legitimate basis. The case on appeal discloses that Estelle Wright, witness for the State, testified that she lives on the northeast corner of Third Street, across the street from Roberts' store, and that on the morning of 24 May, 1954, she heard shots or sounds like pistol shots. "I heard three . . . about 7:35 in the morning," in her language.

And defendant gave this narrative: That when the two children came out of the store "then I went in. And . . . I did ask for the chewing gum. I went in there with the intention to rob him and he turned around . . . and I told him this was a stick-up . . . after he turned around, we were standing just probably about a step or two from the cash register, which . . . was open . . . He started to reach under the counter,—that is, Mr. Roberts . . . and I asked him to get away from the counter. He would not do it. I took my left hand and I pushed him away from the counter, . . . he grabbed my right arm. That is the hand I had the gun in . . . and me and him—I was trying to get loose from him . . . As we scuffled the first shot went off and he still had hold of me, and as we stood there I fired the next shot . . . I didn't know at the time that either shot had hit him. As he stood there a moment against the counter, and then he began to walk back from this place . . . As he walked back, I stood there just a moment and then I walked toward him, and he had then turned and went there about the meat block, and he laid his hand on that meat block and made a peculiar groan; that is when I left. He slumped over. The gun was pointed down the whole time . . . I went out. I do remember taking the money . . ."

The fifth assignment of error is that the trial judge erred in instructing the jury to the effect that its verdict should not be based on sympathy, as shown by Exception 15.

It appears that the court, early in the charge, and after telling the jury that it is the province of the jury to determine what the truth is and what the facts are, allowing the verdict, in so far as it is humanly possible, to speak the truth, stated to the jury: "It is your duty to return a verdict that does speak the truth, members of the jury, and not one based on some prejudice or some sympathy that might arise in the case." The exception is to quoted sentence.

In this connection the case on appeal clearly shows that this portion of the charge is wholly disconnected from later portion of the charge wherein the court instructed the jury in respect to the various verdicts that might be returned. In respect to the unbridled right of the jury to return a verdict of guilty of murder in the first degree, with recommendation that his punishment be imprisonment for life, the instruction of the court is explicit, and understandable, and fully in accord with the opinion of this Court on the former appeal in this case (241 N.C. 468, 85 S.E. 2d 584).

Furthermore, careful examination of the record in the case indicates that the trial below was conducted in accordance with the usual practice and procedure. And the Supreme Court finds no error in the trial.

No error.

RADIO ELECTRONICS COMPANY v. RADIO CORPORATION OF AMERICA.

(Filed 9 May, 1956.)

1. Contracts § 7a: Monopolies § 1—

If a contract is illegal, either at common law or by reason of statutory provisions relating to monopolies and trusts, plaintiff cannot recover damages for the breach thereof. G.S. 75-1.

2. Same—

Plaintiff declared upon an oral contract under which plaintiff was constituted the sole and exclusive distributor in North Carolina in the sale of a particular product manufactured by defendant. *Held:* The contract substantially limits defendant's right to do business in this State, within the purview of G.S. 75-4 declaring such contracts to be void unless the party so limited agrees thereto in writing. Therefore, demurrer was properly allowed upon the declaration on the oral agreement.

APPEAL by plaintiff from judgment of *Johnston, Resident Judge,* entered 29 December, 1955, in Chambers, FORSYTH.

Civil action to recover damages for breach of contract.

Defendant, by demurrer, challenged the validity of the alleged contract. The hearing was on such demurrer. A condensed narrative of the terms of the contract, as alleged by plaintiff, is as follows:

Plaintiff is a North Carolina corporation, with principal office and place of business in Winston-Salem, North Carolina.

Defendant is a Delaware corporation, with principal office and place of business in Camden, New Jersey. It was and is "engaged in a diversified business covering all phases of radio, electronics, television, and related fields, including manufacturing, broadcasting, televising, selling at wholesale and retail, and service businesses related to all of its other activities." The alleged contract concerns only one line of defendant's products, to wit, its 16mm projectors, auxiliary equipment, accessories and parts.

Before 1945, other 16mm projectors had been sold and were in use in North Carolina. Manufacturers thereof had established sales outlets in North Carolina. Shortly before August, 1945, defendant began to market its said products; but prior to 15 August, 1945, the date of its contract with plaintiff, no market therefor had been established in North Carolina.

Under the contract of 15 August, 1945, an *oral* contract, these obligations were assumed:

Plaintiff agreed: (1) to maintain offices, show rooms, a sufficient inventory, a service department, etc., to enable it to market and service

defendant's said products in North Carolina; (2) to introduce, promote and develop, etc., the sale of defendant's said products in North Carolina, through sales personnel, advertising, etc.; and (3) to pay for defendant's products according to the list price established by defendant covering sales to its distributors.

Defendant agreed: (1) to assist plaintiff in the promotion of sales by means of national advertising, literature, supervisory and demonstration personnel, etc.; (2) to ship and sell its said products, at its list price to distributors, as ordered by plaintiff; (3) ". . . to allocate to the plaintiff the exclusive sale of all Radio Corporation of America 16mm Visual Products in the State of North Carolina . . ."; (4) ". . . to appoint no other distributor or distributors in the State of North Carolina . . ."; and (5) ". . . to refrain from selling Radio Corporation of America Visual Products directly to consumers within the State . . ."

It was agreed that the contract should continue in effect "for an indefinite period, said period to continue for so long as the plaintiff complied with the terms of the agreement and conducted its business in such a way as to promote the sales and efficient service of" defendant's said products.

Plaintiff developed, through its sales personnel and through dealers approved by defendant, a large market throughout North Carolina for defendant's said products; and in so doing plaintiff established for itself and for defendant an extensive and profitable business. In short, plaintiff has discharged fully all of its contractual obligations.

Prior to 12 November, 1954, defendant wilfully breached the contract (1) by quoting prices and making direct sales of its said products to plaintiff's customers in the State of North Carolina, and (2) by constituting another firm, to wit, a firm procured by plaintiff as one of its approved dealers, to act as a *distributor* of its said products within the State of North Carolina.

On 12 November, 1954, defendant notified plaintiff that its distributorship contract had been cancelled, "that the plaintiff's name had been stricken from its list of distributors and . . . defendant would no longer honor its contracts or any orders placed thereunder." Thereafter, notwithstanding plaintiff's refusal to accede to this attempted unilateral cancellation of the contract, defendant has refused to recognize said contract or to permit plaintiff to act as its distributor in the State of North Carolina.

By reason of defendant's breach of contract, plaintiff alleges that it has been greatly damaged.

Defendant demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action, specifying as grounds

for demurrer that the alleged contract is void and unenforceable because: (1) it is in restraint of trade or commerce in the State of North Carolina; (2) it is an oral contract purporting to limit defendant's right to do business in North Carolina; (3) it purports to prevent the appointment of other distributors in the State of North Carolina, and purports to prevent sales direct to customers, and purports to give plaintiff the exclusive right to sell defendant's said products, all with intent to prevent competition in the buying and selling of such products; and (4) it is for an indefinite period, terminable at will, and has been validly terminated.

The court below entered judgment sustaining the demurrer. Plaintiff excepted and appealed.

Spry, White & Hamrick for plaintiff, appellant.

Deal, Hutchins & Minor for defendant, appellee.

BOBBITT, J. If the contract is illegal, either at common law or by reason of statutory provisions relating to monopolies and trusts, G.S. 75-1 *et seq.*, plaintiff cannot recover damages for the breach thereof. *Shoe Co. v. Department Store,* 212 N.C. 75, 193 S.E. 9; *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606. In the cited cases, the contract, in direct violation of G.S. 75-5(2), prohibited the merchant from selling competitive products of other manufacturers.

The oral contract as alleged herein contains no express provision of this character. Nor does it contain any express provision prohibiting plaintiff from purchasing similar products from defendant's competitors. *Lewis v. Archbell,* 199 N.C. 205, 154 S.E. 11. We need not consider whether the terms of the oral contract as alleged imply an obligation on the part of plaintiff to deal in defendant's said products to the exclusion of those of defendant's competitors.

The oral contract as alleged prohibits defendant from making any sale or distribution of its said products in North Carolina other than to and through plaintiff as exclusive distributor in the territory.

G.S. 75-4, in pertinent part, provides:

"No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory.

G.S. 75-4 was applied in *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910. Reference was made to G.S. 75-4 in *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352. No other case in which G.S. 75-4 was considered has come to our attention.

The question is not whether the oral contract as alleged herein is void as an unreasonable restraint of trade, but whether it is void and unenforceable by reason of the provisions of G.S. 75-4. The General Assembly has declared that no contract whereby a person limits and restricts his legal right to do business in the State shall be valid and enforceable unless in writing and signed by the party so contracting.

True, the oral contract as alleged does not exclude defendant from engaging in business in North Carolina, but it does prohibit defendant's right to do business except through plaintiff as its exclusive distributor. Thus, it limits substantially defendant's right to do business in North Carolina. Hence, under G.S. 75-4, the alleged oral contract is void and unenforceable.

The conclusion reached is that a contract whereby a person, firm or corporation is made exclusive distributor for the State of North Carolina, precluding the manufacturer from doing business in North Carolina otherwise than through this single channel, is void unless the party so limited or restricted agrees thereto *in writing*. We need not consider whether the contract as alleged herein is void and unenforceable on other grounds. G.S. 75-4 controls. The wisdom thereof is a matter for the General Assembly.

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

Affirmed.

STATE v. JOHN W. KAY.

(Filed 9 May, 1956.)

Criminal Law § 67b—

Where the record fails to show final judgment, but only prayer for judgment continued upon condition, and recites that defendant excepts to the judgment, the cause must be remanded for judgment or for correction of the record.

APPEAL by defendant from *Preyer, J.*, at 18 July, 1955 Criminal Term, of GUILFORD.

Criminal prosecution upon a warrant purporting to have been issued returnable before Judge of the Municipal Court of the city of High Point, North Carolina, charging "that John W. Kay did . . . at and in the county aforesaid . . . willfully, maliciously and unlawfully operate an automobile upon the public highway while under the influence of intoxicating liquors or narcotic drugs, against the statute in such case made and provided . . .," etc.

The record on the appeal indicates that in Municipal Court defendant was found guilty, and judgment was pronounced against him, and he appealed.

The record also shows that upon trial in Superior Court during 18 July, 1955 Criminal Term of Guilford County, the jury returned a verdict of guilty; and that "motion was made in arrest of judgment, whereupon his Honor continued prayer for judgment until the September 26, 1955 Term of the Superior Court, Guilford County, High Point Division, at which time prayer for judgment was continued for a period of 12 months on condition . . ." stated. And while it is recited in the record on appeal "The judgment of the court at the September 26, 1955 Term of Superior Court of Guilford County, High Point Division, the defendant excepts . . .," the record fails to show a judgment entered in the case. Hence appeal may not be maintained.

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

Thomas J. Gold and Robert M. Martin for Defendant Appellant.

PER CURIAM. In the absence of judgment appearing in the record, this case will be remanded to Superior Court of Guilford County, High Point Division, for judgment or for correction of the record so as to reveal the actual status of the record. Then defendant may appeal, or proceed otherwise as he may be advised.

Quaere: It appearing upon the face of the record that the affidavit on which warrant was issued was made before "B. Mason, Sgt.," and that the warrant is signed by "B. Mason, Sgt.": Is this a valid process?

Remanded.

FLOYD MERRELL v. CLYDE W. KINDLEY, JR.

(Filed 9 May, 1956.)

1. Automobiles § 7—

Negligence is not to be presumed from the mere fact that an accident has occurred.

2. Automobiles §§ 33, 41l—

Evidence disclosing only that plaintiff, in the act of crossing a street inside a block, had taken two steps into the street and, while in the act of taking a third, heard a horn, turned around and was hit by plaintiff's car, *is held* insufficient to show actionable negligence, and nonsuit was proper.

MERRELL *v.* KINDLEY.

APPEAL by plaintiff from *Preyer, J.*, 27 February Civil Term, GUILFORD Superior Court.

Civil action to recover damages plaintiff alleges he sustained as a result of being run over as he attempted to walk across Battleground Avenue in the City of Greensboro. The complaint contains appropriate allegations of negligence, proximate cause, injury, and resulting damage. The defendant by answer denied negligence on his part and alleged contributory negligence on the part of the plaintiff. The plaintiff by reply denied contributory negligence and alleged the defendant had the last clear chance to avoid the injury.

The plaintiff's evidence paints the following picture: Battleground Avenue in the City of Greensboro is a paved street 48 or 50 feet wide. It runs east and west. On 19 June, 1955, at about 6:00 p.m. the plaintiff, a pedestrian, intending to cross Battleground Avenue from south to north (inside the block), looked to the west where he had a view of about 60 feet, saw nothing. Then he looked to the east where he saw an approaching car going west. After waiting at the curb for it to pass on the north traffic lane of Battleground Avenue, he started across and, to quote his own words: "To summarize what I have just said, I had taken two steps from the curb across Battleground. I heard the sound of a horn and I turned to the right, turned clear around, so that as I turned I was facing east. I had not been able to take a step toward the curb. In other words, just as I turned, he hit me." The plaintiff had previously testified that he did not see the approach of defendant's car which was going east. There were no skid marks. There was no evidence of the speed of the car. There was evidence the plaintiff stepped out from a position between a light pole and a mailbox, took two steps into the street and while he was in the act of taking the third step he heard a horn, turned around and was hit on the right hip. There was medical evidence of the nature and extent of plaintiff's injuries and other evidence as to his loss of time from work. At the close of the plaintiff's evidence a motion for nonsuit was allowed and from the judgment accordingly, the plaintiff appealed.

E. L. Alston, Jr., for plaintiff, appellant.
Deal, Hutchins & Minor,
By: Roy L. Deal, for defendant, appellee.

PER CURIAM. The only question presented is the sufficiency of the evidence of negligence to withstand the motion for nonsuit. Negligence is not to be presumed from the mere fact that an accident has occurred. The only evidence in the record against the defendant is that he sounded his horn and his car hit the plaintiff. All else is left to conjecture. In

no aspect of the case does the evidence show actionable negligence. Consequently the judgment of nonsuit must be

Affirmed.

STATE v. WILLIE JAMES RAINEY.

(Filed 9 May, 1956.)

APPEAL by defendant from *Preyer, J.*, September Criminal Term 1955 of GUILFORD.

Criminal prosecution on two warrants, which by consent were tried together. The first warrant charged the defendant on 13 May 1955 with the unlawful possession, the unlawful possession for the purpose of sale, and the sale, of ½ gallon of nontax-paid whisky for $5.00. The second warrant charged the defendant on 19 May 1955 with the same offenses, except that the amount of nontax-paid whisky alleged was 1 gallon and the sale price was $10.00.

Plea: Not Guilty. Verdict: Guilty as charged in each warrant.

The court consolidated the two cases for judgment, and imprisoned the defendant for nine months.

The defendant appealed, assigning error.

William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

J. Kenneth Lee and Major S. High for Defendant, Appellant.

PER CURIAM. The defendant was tried, convicted and sentenced upon both warrants in the Municipal-County Court of the city of Greensboro, and appealed to the Superior Court.

We have carefully examined the defendant's assignments of error. They present no questions that require discussion, and no prejudicial error appears to justify a new trial. In the trial below we find

No error.

STATE v. JAMES NASH POWELL.

(Filed 9 May, 1956.)

Prostitution § 5a—

Warrant charging that defendant did aid and abet in prostitution *held* fatally defective on authority of *S. v. Cox, ante,* 57.

APPEAL by defendant from *Williams, J.,* January Criminal Term, 1956, CUMBERLAND.

The warrant on which defendant was tried charged, in pertinent part, that "on or about the 8th day of October 1955, James Nash Powell, did, with force and arms, within the limits of the said City of Fayetteville or within five miles outside of said city limits wilfully and unlawfully, did aid and abet in prostitution by soliciting and offering to procure for the purpose of prostitution against the statute in such case made and provided, . . ."

From judgment, based on verdict of guilty, defendant appeals, assigning errors.

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

Nance, Barrington & Collier for defendant, appellant.

PER CURIAM. For the reasons stated by *Winborne, J.,* in *S. v. Cox, ante,* 57, the warrant is fatally defective. Hence, defendant's motion in arrest of judgment is allowed. The State, if it so elects, may prosecute upon a new warrant or bill of indictment.

Judgment arrested.

J. G. SURRATT v. CHAS. E. LAMBETH INSURANCE AGENCY, INC., SAMUEL L. ARRINGTON, AND THE NATIONAL INDEMNITY COMPANY.

(Filed 23 May, 1956.)

1. Appeal and Error § 21—

A sole exception to the signing and entry of judgment presents only whether the predicate pleadings and facts admitted support the judgment.

2. Judgments § 32—

Estoppel by judgment ordinarily depends upon the identity of the parties, subject matter and issues.

3. Same—Adjudication that judgment was not procured by fraud held to bar subsequent action for damages upon substantially identical allegations of fraud.

Defendant sought to set aside a judgment obtained against him by his co-defendant on a cross-action on the ground that he did not know his co-defendant was seeking judgment against him, that he was misled by the misrepresentations of the attorney for the insurance carrier, and therefore was prevented from having his day in court. The motion was denied upon the court's findings, *inter alia*, that defendant had knowledge that his co-defendant was seeking judgment against him on the cross-action, and that defendant was advised and urged to secure counsel, and refuse to do so. *Held:* The judgment constitutes *res judicata* barring an action for fraud against the co-defendant, the insurance carrier, and the attorney and agency for the insurance carrier, to recover damages upon substantially similar allegations of fraud.

4. Election of Remedies § 1—

Where a party has inconsistent rights or remedies, his choice of one is an election not to pursue the other.

5. Election of Remedies § 2—

A party may sue to rescind what has been done as a result of fraud, or affirm what has been done and sue for damages caused by such fraud, but he may not pursue both remedies.

6. Same—

A motion by a party to set aside a judgment on the ground of alleged fraud bars such party from thereafter maintaining an action to recover damages for the same fraud.

7. Appeal and Error § 7—

The Supreme Court may allow a party to amend his pleadings under the provisions of G.S. 7-13.

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

APPEAL by plaintiff from *Campbell, J.*, at 12 September, 1955 Civil Term, of MECKLENBURG.

Civil action to recover damages allegedly resulting to plaintiff from fraudulent misrepresentations as alleged in the complaint, heard upon motion of defendants for judgment upon the pleading and admissions made at pre-trial conference.

Plaintiff alleges in his complaint substantially the following:

(1) That, at all the times therein mentioned, (a) plaintiff was trading as S. & S. Transit Company; (b) defendant Chas. E. Lambeth Insurance Agency, Inc., was the general agent for, acting in behalf of, and in the course of its employment with National Indemnity Company of Omaha; (c) that Samuel L. Arrington, attorney at law, was acting as the attorney and agent for, and in the course of his employment with

National Indemnity Company and (d) that National Indemnity Company is a corporation duly created under the laws of the State of Nebraska, carrying on business in the State of North Carolina.

(2) That plaintiff had an automobile liability insurance policy with defendant National Indemnity Company on a truck which was involved in a collision with one Atlas T. Newsome on 21 May, 1951, near Wilmington, N. C., on which date plaintiff had leased the truck to Jocie Motor Lines under a trip lease agreement,—plaintiff furnishing a driver, one Fred C. Porter.

(3) That unbeknown to the plaintiff or to said Jocie Motor Lines, there was an indemnifying clause whereby plaintiff agreed to indemnify Jocie Motor Lines for any negligence or incompetence of the said driver, Fred C. Porter, which may result in a loss to the said Jocie Motor Lines.

(4) That Atlas T. Newsome was injured in the collision on 21 May, 1951, following which plaintiff contacted Chas. E. Lambeth Insurance Agency to report the collision, and was assured by the agency that he was fully covered under his insurance policy with National Indemnity Company, and that the Indemnity Company would represent him in the matter and defend any lawsuit which might ensue, for which purpose Samuel L. Arrington was employed as attorney, and that he, Arrington, advised plaintiff that he had nothing to worry about in the matter as he was representing plaintiff, and guarding and protecting his interest; and the plaintiff relied upon advice and representations so made to him.

(5) That in an action entitled Atlas T. Newsome against J. G. Surratt, trading as S & S Transit, Fred C. Porter and Jocie Motor Lines, Inc., plaintiff here was not aware of the fact that there was a possibility that he might be bound under the indemnity clause in the above described trip lease agreement, nor was he advised that defendant Jocie Motor Lines had filed a cross-action against him; that as a consequence "plaintiff did not hire counsel for the defense of this lawsuit, always relying fully upon the representations of the agents of the National Indemnity Company," because of which he was deprived of his day in court and of his right to defend the action both against the plaintiff, Atlas T. Newsome, and against his co-defendant, Jocie Motor Lines, under the cross-action.

(6) "That all of the aforesaid representations of the agents of the National Indemnity Company were materially false, and made with the knowledge of their falsity or in culpable ignorance thereof . . ., and . . . with intent to mislead this plaintiff and . . . with the intent that this plaintiff should rely upon these representations" and same "were reasonably relied upon by this plaintiff to his damage and injury."

(7) That without his knowledge a judgment under Jocie's cross-action was rendered against him in favor of Jocie Motor Lines for $6,000, and interest thereon, "and this said judgment was procured by fraud upon this plaintiff and upon the courts of the State of North Carolina," to his damage.

Defendants, in joint answer filed, each denied in material aspects the allegations of the complaint, and for further answer and defense, and in bar of plaintiff's right to recover, aver:

"1. That on the 10th day of July 1950, defendant, National Indemnity Company, through Charles E. Lambeth Insurance Agency, Inc., issued to plaintiff an automobile policy No. CA 61940 with certain limits and coverages, together with general change endorsements as thereon appears; said policy being in printed form and speaks for itself as to the provisions contained therein.

"2. That defendants are advised, informed and believe that on or about May 21, 1952, plaintiff's leased truck to Jocie Motor Lines, Inc., and operated by Fred C. Porter, employee of plaintiff, collided with a vehicle operated by Atlas T. Newsom, on Highway No. 74, about 18 miles west of Wilmington, N. C., thereby injuring Atlas T. Newsom and damaging the vehicle which he was operating.

"3. That, subsequent to said collision, plaintiff was notified by W. M. Nicholson, Attorney for National Indemnity Company, by letter dated September 25, 1951, that his policy limits in this case was $5,000 and plaintiff thereby assumed all risks of a judgment in excess of this amount, and further, plaintiff's attention was called to the fact that a general change endorsement on his policy provided that no coverage under this policy would be in effect if the insured's property was more than 150 miles from Charlotte, N. C., at the time of said collision. That on December 11, 1951, plaintiff was further notified by letter written by W. M. Nicholson, that Samuel L. Arrington, Attorney at law, Rocky Mount, N. C., had been retained by National Indemnity Company to defend said lawsuit, and in view of the fact that the policy coverage limits were far below the amount sued for, that National Indemnity Company would be glad for plaintiff to employ an attorney of his own choice to defend his interest. That plaintiff failed and refused to acknowledge the receipt of either of said two letters, but did, on the 5th day of October 1951, after consultations with his own attorney, sign a non-waiver agreement and said action was thereafter defended under said non-waiver agreement.

"4. That plaintiff was fully notified by letter, and otherwise, of the seriousness of the lawsuit filed against him and of the cross-action filed against him by Jocie Motor Lines under a lease agree-

ment dated May 19, 1951, and signed by plaintiff, which defendants are advised, informed and believe, among other things:

Paragraph (e) Plaintiff agrees to indemnify lessee (Jocie Motor Lines) against (2) any loss or damage resulting from the negligence, incompetence or dishonesty of such driver.

"5. That the case of Atlas T. Newsom *v.* J. G. Surratt, *et al.*, came on for trial on an agreed statement of facts, signed by plaintiff herein, with only one issue of fact left open for the court to decide, and plaintiff, who was present in court at the trial of this case, took the witness stand in his own behalf and testified as to the cargo in transit at the time of said collision, and judgment was thereafter rendered against Jocie Motor Lines in the sum of $6,000; that thereafter during the same day, at the same term of court, with the same Judge presiding, and in the presence of plaintiff, Jocie Motor Lines was successful in its cross-action against the plaintiff and judgment was rendered in favor of Jocie Motor Lines and against plaintiff in the sum of $6,000 because of the agreement between plaintiff and Jocie Motor Lines herein referred to. At no time during the trial of the original cause, or Jocie Motor Lines' cross-action, did plaintiff make any protest or indicate to attorney Arrington or to the court that he did not understand the contentions made by Jocie Motor Lines or the decision of the court. In fact, at said time, plaintiff was fully advised by attorney Arrington of the results of both cases, and that a judgment had been rendered against the plaintiff in the sum of $6,000, and plaintiff made no protest or gave any indication that he did not fully understand the whole proceedings.

"6. That thereafter plaintiff filed a Motion in the Superior Court of Wilson County, N. C., seeking to vacate and set aside the judgment entered against him in favor of Jocie Motor Lines, alleging in said Motion, among other things, he never had knowledge that he was being sued on a cross-action and that he was misled by attorney Arrington, and was prevented from having his day in court and that the judgment against him was procured as a result of a fraudulent prevention in that it caused plaintiff to offer no defense or counterclaim. That this Motion, which embraces the material allegations of plaintiff's complaint against the defendants herein, was heard before Honorable Joseph W. Parker, Judge of the Superior Court, present and presiding at a term of Superior Court in Wilson County, North Carolina, on May 20, 1953, and thereafter the following Judgment was entered:

'NORTH CAROLINA
WILSON COUNTY

In the Superior Court.

Atlas T. Newsome
v.
J. G. Surratt, trading as S & S Transit; Fred C. Porter, and Jocie Motor Lines, Inc.

JUDGMENT

'This cause is heard before Honorable Joseph W. Parker, Judge Presiding, upon motion of J. G. Surratt to set aside the judgment herein entered against him at December 1952 Term of the Superior Court for Wilson County, upon the cross-action of Jocie Motor Lines, Inc., against J. G. Surratt.

'The Court finds as facts: That J. G. Surratt was fully advised of the fact that Jocie Motor Lines was seeking to obtain judgment against him under the indemnity provision of the lease executed between J. G. Surratt and Jocie Motor Lines and was advised and even urged to secure the services of counsel; that defendant Surratt was present at the hearing of the cause before Sharp, J., at said December Term, where he heard read the pleadings and the stipulations set forth in the Judgment and heard the argument of counsel upon the question of liability under the indemnity provision of the lease, and heard the decision of the court; that at no time did he attempt to secure counsel and at no time made any objection or remonstrance; that he has never denied the execution of the lease and does not now deny the execution thereof by him; that the question of his liability under the indemnity provision of the lease has already been decided in this court as a matter of law and affirmed by the Supreme Court of North Carolina; that he neither alleges in his motion, nor attempts to show any meritorious defense to the cross-action and that he has not alleged nor attempted to show any improper action on the part of Jocie Motor Lines in its conduct of the cross-action against him.

'It is, therefore, by the Court ordered and adjudged that the motion be denied and that the preliminary restraining order herein entered be and the same is hereby vacated.

'Let the costs of this hearing, as taxed by the Clerk, be paid by the defendant, J. G. Surratt.

This May 20, 1953.

JOSEPH W. PARKER
Judge Presiding.'

"The foregoing judgment is pleaded herein, by said defendants, as an estoppel and bar to the plea of plaintiff herein, as same constitutes a Judicial determination of material facts alleged by plaintiff in his complaint, and without which the plaintiff has no right or grounds on which to proceed with his said action, and, therefore, should be dismissed on this plea of an estoppel."

Plaintiff moved to strike paragraph 6 of defendants' further answer and defense. The motion was denied.

Defendants Charles E. Lambeth Insurance Company by leave of the court filed in lieu of the original answer an individual amended answer—

(1) Substantially the same as the original;

(2) A first further answer and defense, substantially the same as the further answer and defense set up in the original answer;

(3) A second further answer and defense, in which is set up narrative of the proceedings in the action of "Atlas T. Newsome *v.* J. G. Surratt t/a S & S Transit, Fred C. Porter, and Jocie Motor Lines, Inc.," resulting in judgment against Jocie Motor Lines, in favor of the plaintiff for $6,000, and judgment against J. G. Surratt in favor of Jocie Motor Lines, Inc. for $6,000 upon its cross-action under the terms of its written lease agreement with Surratt; that subsequent to the entry of such judgment National Indemnity Company advised J. G. Surratt that it did not intend to prosecute an appeal from said judgment, pursuant to which Surratt employed his present attorneys and perfected his appeal, —decision affirming the judgment being in 237 N.C. 297; and that subsequent thereto and when the opinion of the Supreme Court was certified plaintiff here sought to have judgment in favor of Jocie set aside— as to which the judgment of Parker, Joseph W., Judge, hereinbefore set forth was rendered; and that (a) by so perfecting his appeal, plaintiff Surratt elected to ratify and confirm the proceedings to date in that action, and (b) by invoking the aid of the Superior Court of Wilson County in effort to set aside the judgment, upon same grounds as are mentioned in the complaint in the instant action, Surratt elected to attempt to rescind what has been done in his behalf, and cannot now proceed against the defendant and others in an independent action;

(4) A third further answer and defense, in which after reviewing the proceedings leading up to and culminating in the judgment of Parker, Joseph W., Judge, as hereinbefore related, it is set forth that this defendant, being in privity to the interest of National Indemnity Company and S. L. Arrington, in that case, and also by virtue of the nature of the judgment so rendered by Parker, Joseph W., J., pleads same in bar of the right of plaintiff, Surratt, to proceed in this action, in that

all matters and things stated to be in controversy between plaintiff and this defendant in the complaint in this action were determined and finally disposed of in that judgment.

And defendant National Indemnity Company by leave of the court first amended its answer by adding at the end thereof a second further answer and defense in words as follows:

"1. That the defendant National Indemnity Company re-alleges Paragraph 6 of the First Further Answer and Defense.

"2. That by filing and pressing to hearing said motion to set aside the judgment in the Superior Court for Wilson County on the grounds of fraud, the plaintiff elected to rescind what had been done and to proceed in said action as if no fraud had been carried into effect and having failed to proceed further in said cause pending in the Superior Court for Wilson County after the court entered its order of May 20, 1953, the plaintiff cannot now sue in the Superior Court for Mecklenburg County for said actions on the part of the plaintiff constituted an election of remedies and said election is pleaded in bar of the plaintiff's right to sustain this action in the Superior Court of Mecklenburg County."

Same defendant, by leave of the court, further amended its answer "in order to set up and allege the action of the plaintiff in filing a motion to rescind the judgment of Parker, Joseph W., Judge, entered in Superior Court of Wilson County, as above related, as an estoppel and bar to the plea of plaintiff herein, as same constitutes a judicial determination of material facts alleged by plaintiff in his complaint;" and that by so proceeding plaintiff exercised an election of remedies which is pleaded in bar of his right to maintain this action.

In this state, the record discloses that the cause came on for hearing in Superior Court of Mecklenburg County upon a pre-trial hearing and in the course thereof it was stipulated:

"1. That a certified copy of a motion, affidavits and order dated May 20, 1953, entered by the Honorable Joseph W. Parker, then presiding Judge of the Superior Court of Wilson County, N. C., in a certain civil action entitled Atlas T. Newsome *v.* J. G. Surratt, *et al.*, were exact copies of the documents filed in that cause; said documents marked Defendant's Exhibit A, and ordered filed in the record in this cause.

"2. That the action referred to in paragraph 1, set forth above, was the action referred to in paragraph 7 of the complaint in this action.

"3. That the 'general agent for the National Indemnity Company,' referred to in paragraph 4 of the above mentioned motion, was Chas. E. Lambeth Insurance Agency, Inc., one of the defendants herein; that 'S. L. Arrington,' referred to in said motion, is Samuel L. Arrington,

one of the defendants in this action, and that 'National Indemnity Company,' referred to in said motion, is The National Indemnity Company, one of the defendants in this action.

"4. That no appeal was perfected from the aforesaid order by the Honorable Joseph W. Parker;

"And the defendants thereupon having moved the court for judgment upon the pleadings and aforesaid admissions, upon the grounds that the proceedings and judgment in the above mentioned action in the Superior Court of Wilson County, N. C., constitutes a bar to the maintenance of the present action by the plaintiff in that judgment of the Honorable Joseph W. Parker, upon the plaintiff's motion in that cause, is *res judicata* with respect to the contentions of the plaintiff in this action, and in that the proceedings in that cause constitute an election of remedies by the plaintiff which precludes the maintenance by him of the present action.

"Upon consideration of said motion, after argument of counsel, the court being of the opinion that such motion should be allowed and this action dismissed,

"It is therefore ordered and adjudged that the motion of the defendants for judgment upon the pleadings and admissions hereinabove set forth be and the same hereby is allowed and this action be and the same hereby is dismissed. The cost shall be taxed against the plaintiff."

Plaintiff excepts to the judgment, and to the signing and entry thereof, and appeals to Supreme Court and assigns error.

Peter L. Long, Goodman & Goodman, and William H. Morrow for Plaintiff Appellant.

Carpenter & Webb for Appellee Insurance Agency.

W. M. Nicholson and Uzzell & DuMont for Appellees Indemnity Company and Samuel L. Arrington.

WINBORNE, J. The exception to the signing and entry of judgment, the sole exception on this appeal, presents for decision the question as to whether the pleadings and admitted facts, on which the trial judge ruled, support the judgment. *Culbreth v. Britt,* 231 N.C. 76, 56 S.E. 2d 15, and cases cited; also *Medical College v. Maynard,* 236 N.C. 506, 73 S.E. 2d 315; *Willingham v. Rock & Sand Co.,* 240 N.C. 281, 82 S.E. 2d 68; *Convent v. Winston-Salem,* 243 N.C. 316, 90 S.E. 2d 879, and cases there cited.

The appellant challenges the judgment upon the grounds: That the trial judge erred in holding (1) that the proceedings and judgment of Parker, Joseph W., J., in Wilson Superior Court in the action of Newsome *v.* Surratt upon the motion of Surratt is *res judicata* of the matters

alleged in the complaint in present action, and (2) that the action of Surratt in so proceeding in that case constitutes an election of remedies which precludes the maintenance by him of the present action.

Now as to *res judicata:* Ordinarily the operation of estoppel by judgment depends upon the identity of parties, of subject matter and of issues, that is, if the two causes of action are the same, judgment final in the former action would bar the prosecution of the second. McIntosh N. C. P. & P. in Civil Cases, Sec. 659, p. 748; *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35.

In the light of this principle, it is appropriate to review the pertinent facts. It appears that in the action instituted in Superior Court of Wilson County by one Newsome against J. G. Surratt, t/a S & S Transit, Fred C. Porter and Jocie Motor Lines, Inc., plaintiff sought to recover for personal injury and property damages sustained in a collision between a truck of Transit Company, operated by its regular employee Porter, under a lease agreement between Transit Company and defendant Jocie Motor Lines, the agreement providing that the Transit Company would indemnify "Lessee against . . . (2) any loss or damage resulting from the negligence, incompetence . . . of such driver(s)." At the time of the collision the truck was being operated with ICC license plates issued to Motor Lines attached thereto and under authority of a certificate of license issued by the Interstate Commerce Commission to the Motor Lines. And Jocie Motor Lines, answering the complaint of Newsome, filed a cross-action against its co-defendant Surratt, t/a Transit Company, and Porter, under the indemnity provision in the said lease agreement. Defendant Surratt t/a Transit Company, through attorney Arrington, filed answer to the complaint of Newsome. After pre-trial conference, and upon stipulation of parties, judgment was rendered denying to plaintiff recovery of any amount against Surratt t/a Transit Company, but a judgment in favor of Newsome against Jocie Motor Lines and Porter was entered in sum of $6,000, and defendant Jocie Motor Lines was allowed judgment over against Porter and Surratt in sum of $6,000.

Thereafter Surratt, through attorneys other than Arrington, perfected appeal to Supreme Court of North Carolina. On such appeal the determinative question raised thereby was as to whether the trial court erred by the entry of the judgment in favor of Jocie Motor Lines over against Surratt and Porter. This Court answered the question in the negative. See 237 N.C. 297, 74 S.E. 2d 732.

The record and case on the present appeal disclose these facts, briefly stated: After the decision on the appeal above referred to, Surratt, through his attorneys, made a motion in the cause in the Newsome case in Superior Court of Wilson County to set aside the said judgment in

favor of Jocie Motor Lines on the grounds of fraud allegedly perpetrated by National Indemnity Company, through its general agent, and attorney Arrington, whereby he was prevented from having his day in court. The motion was heard before Parker, Joseph W., Judge Presiding, who found facts contradictory of the allegations of Surratt, and denied the motion, and entered judgment in accordance therewith, all as is set forth in the record. And no appeal from this judgment has been taken.

Thereafter plaintiff Surratt instituted the present action in Superior Court of Mecklenburg County, North Carolina, for recovery of damages on account of fraud perpetrated by National Indemnity Company, and its agents, as set forth hereinabove. And in this connection it is noted that appellant, in brief filed in this Court, says: "It is frankly admitted by the appellant that the judgment signed by Joseph W. Parker in Newsome *v.* Surratt, and the facts alleged in the complaint of the instant case, are substantially the same."

Hence, with respect to the fraud set up in connection with the motion in the cause in the Wilson County case, the parties are the same; the subject matter, that is, the alleged fraud is the same; and the issues are the same. Therefore, this Court holds that the trial court, from whose decision appeal is taken, properly held that the principle of *res judicata* applies in bar of plaintiff's right to maintain the present action.

Now regarding ruling as to election of remedies: The "whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other." But "the principle does not apply to co-existing and consistent remedies." *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345.

Indeed the rule is pertinently stated in *Durham v. New Amsterdam Gas Co.,* 208 Fed. (2d) 342, *Wilkin, District J.,* writing for the U. S. Circuit Court of Appeals, Fourth Circuit, in this manner: "The law is well settled that one who complains of fraud and deceit has the right either to rescind what has been done as a result of the fraud and deceit, or affirm what has been done and sue for damages caused by such fraud. He can choose either course, but he cannot choose both. The two are inconsistent," citing cases.

And the principle so stated is accordant with uniform decisions of this Court, among which are these: *May v. Loomis,* 140 N.C. 350, 52 S.E. 728; *McNair v. Finance Co.,* 191 N.C. 710, 133 S.E. 85; *Lykes v. Grove,* 201 N.C. 254, 159 S.E. 360; *Willis v. Willis,* 203 N.C. 517, 166 S.E. 398; *Bolich v. Ins. Co.,* 206 N.C. 144, 173 S.E. 320; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Randle v. Grady, supra; Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122.

Applying the principle to the factual situation here under consideration, the election of Surratt to move in the Wilson County case to set aside the judgment on the grounds of alleged fraud, bars his right to maintain this action to recover damages caused by fraud.

Motion of defendant Arrington to be permitted to amend his answer in present action in order to adopt the amendment to the answer of National Indemnity Company hereinabove recited, is allowed under the provisions of G.S. 7-13.

The judgment from which the appeal is taken is

Affirmed.

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

MARY ELIZABETH ALFORD, ADMINISTRATRIX OF THE ESTATE OF CHARLES S. ALFORD, JR., DECEASED, v. MELVERT WASHINGTON AND THE CITY OF KINSTON, A MUNICIPAL CORPORATION.

(Filed 23 May, 1956.)

1. Automobiles § 41g—

Evidence tending to show that the driver along the servient street failed to stop before entering an intersection with the dominant highway in disregard of the stop sign erected on the servient street, and collided in the center of the intersection with a car traveling along the dominant highway, and that one of the cars, as a result of the collision, struck a pole, dislodging a high voltage wire so that it fell across the cars, *is held* sufficient to overrule nonsuit in an action to recover for the death of intestate, electrocuted when he touched one of the cars in attempting to aid the occupants.

2. Negligence § 11—

Ordinarily, a person *sui juris* is under obligation to use ordinary care for his own protection, the degree of care required being commensurate with the danger to be avoided.

3. Electricity § 10—

A person is under duty to avoid coming in contact with an electric wire which he sees and knows to be dangerous.

4. Same: Negligence § 11—

A bystander who sees others in imminent and serious peril through the negligence of another cannot be charged with contributory negligence as a matter of law in risking death or serious injury in attempting to effect a rescue, unless such attempt is recklessly or rashly made.

5. Same: Automobiles § 42j—

The evidence tended to show that intestate, an electric welder, came to the scene of the collision immediately after the impact, that a high tension wire had fallen on the tops of the two cars involved in the collision, and was emitting sparks, that children in one of the cars were crying and screaming, and that intestate, in attempting to render aid, touched one of the cars and was electrocuted. *Held:* Intestate's action in attempting the rescue is not contributory negligence on his part as a matter of law.

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

APPEAL by defendant, Melvert Washington, from *Moore (Clifton L., Jr.)*, at 17 October, 1955 Civil Term, of LENOIR.

Civil action for recovery of damages for alleged wrongful death of plaintiff's intestate.

Opinion on former appeal is reported in 238 N.C. 694, 78 S.E. 2d 915, where judgments of Superior Court (1) sustaining demurrer of defendant City of Kinston, and (2) overruling demurrer of defendant, Melvert Washington, were affirmed.

The facts alleged in the complaint in so far as pertinent to cause of action against defendant Melvert Washington are repeated in summary as follows:

1. Charles S. Alford, Jr., intestate of plaintiff, came to his death at about 10:30 p.m. on 14 June, 1952, at the intersection of East Street and Blount Street in the City of Kinston, N. C. East Street runs in north-south direction, and is a part of the State Highway system, and is designated as a through street. Blount Street runs in east-west direction, with stop signs erected and maintained thereon,—one on the north side about 25 feet east of the intersection, and another on the south side about 25 feet west of the intersection. (This allegation is not controverted.)

2. The City of Kinston, a municipal corporation, owns and operates within its corporate limits an electric power and lighting system, as a part of which there is a street light suspended about 15 feet above the paved surface over the approximate center of said intersection, by means of a wire attached to two poles, one of which was located a few inches from the curbing on the northwest corner of said intersection, and the other a few inches from the curbing on the southeast corner of the intersection. The light was supplied with current by means of high voltage wires attached thereto and hanging over the intersection parallel to the supporting line. (This allegation is not controverted.)

3. And the complaint also alleges that at about 10:30 p.m. on 14 June, 1952, defendant, Melvert Washington, hereinafter referred to as defendant, operated his automobile, a 1948 Plymouth sedan, hereinafter referred to as the Plymouth car, westerly along Blount Street in

unlawful, wrongful and negligent manner, among others as follows: (a) Without bringing his car to a stop, as he approached the intersection, and failing to yield the right of way to through traffic proceeding north and south on East Street, in violation of law at such intersection; and (b) without keeping a proper lookout and without heeding the stop sign located on the north side of Blount Street when he saw, or in the exercise of ordinary diligence, should have seen the approach of a Nash sedan, hereinafter referred to as the Nash car, proceeding northwardly on East Street in said intersection or entering it, and when he knew, or in the exercise of ordinary diligence, should have known that he could not clear the said intersection without colliding with, or being struck by the Nash car, and that, while so proceeding through the intersection, in the manner aforesaid, defendant caused his Plymouth car "to be collided with" by the Nash car, and to be hurled against the pole which was located near the curbing at the northwest corner of the intersection, jarring the support wires loose from the pole, thereby causing the exposed high voltage wires, supplying current to the light, to fall across or upon the Nash car, and charging it with electric current or voltage of such high degree as to produce instant death to plaintiff's intestate as he reached the scene of the accident and sought to rescue the entrapped occupants of the Nash car, which acts of negligence on the part of defendant were the "direct and proximate cause of the injury and death of plaintiff's intestate, in the manner . . . alleged."

And defendant Melvert Washington filed answer in which in so far as the allegations of the complaint relate to him he admits: That on 14 June, 1952, at about 10:30 p.m. he was the owner of a 1948 model Plymouth sedan and was operating it in a westerly direction over Blount Street in the City of Kinston at the time referred to in the complaint; and that for some time prior to that date, East Street in the said city, had been designated as a part of the State Highway system.

And defendant denies all other material allegations of the complaint.

And defendant "for further answer and defense to the alleged cause of action and to the complaint, herein filed, and as a bar to plaintiff's cause of action," avers in pertinent part substantially the following:

1. That he was not guilty of any negligence in connection with the operation of his Plymouth car at time it was run into by the Nash car, owned by J. B. Cauley, being driven by George Edward Cauley, as the servant, agent and employee of J. B. Cauley, and that whatever injuries plaintiff's intestate suffered were not due to any want of care or wrongful conduct on the part of this defendant, but were due to the negligent, wrongful, and unlawful conduct of plaintiff's intestate and to his contributory negligence as hereinafter more fully alleged.

2. That defendant avers upon information and belief that plaintiff's intestate, at the time of his death, was a welder, accustomed to working with electric welding machines and possessed considerable knowledge as to the use of electrical instruments, and knew that wires carrying electric current to street lights carried sufficient voltage to be likely to inflict serious bodily injury or death, and knew that a person standing upon the ground and touching one of the wires or any other metal object against which such wires were resting would cause an electric current of like force to flow through his body.

3. That defendant also avers upon information and belief that the persons in the Nash car, immediately after the collision of it with defendant's Plymouth car, were in no immediate danger for that the rubber tires upon said car afforded them sufficient insulation to prevent the grounding of said electric wires, rendering the current therefrom ineffective as to said occupants of the Nash car. And defendant avers, upon information and belief, that plaintiff's intestate, notwithstanding his expert knowledge of the dangerous character of electricity, carelessly and negligently and with reckless abandon of the exercise of ordinary care, unnecessarily and in a reckless and rash manner, approached said car, well knowing that said electric wires were lying across the same and were charging the metal parts of said car with electric current and causing visible electric sparks,—which he saw, or in the exercise of ordinary care, should have seen.

4. That all of the conduct and acts of negligence on the part of plaintiff's intestate, as herein alleged, were the direct and proximate cause of his death, and defendant pleads same as contributory negligence in bar of plaintiff's recovery on her alleged cause of action.

Thereupon defendant prays that plaintiff recover nothing from him, and that he go hence without day, and that plaintiff be taxed with the cost.

Plaintiff replying, reiterates the allegations of her complaint, and denies each of the averments made by defendant except such portions thereof as conform to the facts set forth in the complaint.

And upon the trial in Superior Court plaintiff offered evidence which she contends tends to support the allegations of her complaint as set forth in the third paragraph of allegations in the complaint in manner following:

I. In respect to collision:

George William Cauley, witness for plaintiff, testified in pertinent part: "I was driving the Nash . . . going north on East Street just prior to the accident. My brother Burcell and his wife and four children were . . . with me. The children were all in the back seat,—my brother's wife was sitting in the middle, and he was on the right-hand

side of the car, and I was on the left side . . . I was operating my car at about 18 to 20 miles per hour as I approached the intersection of East and Blount Streets. As I approached that intersection, I glanced to my left. My brother's wife hollered 'Look out, he is going to get you.' When I cut my eyes back, this Plymouth was in front of me. The only thing I saw was his headlights. The car with which I collided did not stop at the intersection. I couldn't say at what speed he was traveling . . . I don't know what happened to me in the collision because when we went together, I just went out . . . I did not regain consciousness at the scene of the accident . . . The other occupants of my car were in the car when they were hurt . . . I do know they were hurt in the wreck."

Mrs. Sallie W. Cauley, wife of Burcell Cauley, also witness for plaintiff, testified in pertinent part that she also had her eighteen months old baby with her on the front seat on the right and that her husband was in the middle, and that four of her children were in the back seat. She said: "The first thing that attracted my attention about the car we had a collision with was the lights . . . I remember seeing the lights of the car coming, and I hollered to my brother-in-law, 'Look out, George, he is going to hit us'; . . . that's all I remembered for several days. I did not form an opinion as to the speed."

J. B. Cauley, also witness for plaintiff, testified in pertinent part: "I was riding in the center of the front seat . . . My wife was sitting in the front seat, right-hand side . . . All I can say is about what she said . . . and I saw the light; that's all I remember . . . The collision between the cars knocked me out. I regained consciousness while I was at the scene of the accident . . . I remember a man dragging me out and feeling my feet dragging."

And Dewey Merritt, sergeant of police force of the city of Kinston, testified in pertinent part that there was no obstruction to the view of the Stop sign as "you approach the intersection"; and that on the next day after the collision defendant said he didn't know whether there was a Stop sign there or not; that he did not stop.

This same witness also narrated the result of his investigation as follows: That in his official capacity he had occasion to investigate the accident at the intersection of East and Blount Streets; that two automobiles appeared to be involved in the accident—a Plymouth, headed right head-on into the pole on the northwest corner,—the other car, a Nash, jammed up against the back end of the Plymouth with the radiator headed south and the right rear fender jammed against the boot of the Plymouth; that just slightly north of the center of Blount Street and just about the center east of the center line of East Street there was found the headlights of the Nash, part of the bumper guards

off the front of the Nash, and a piece of chrome from the Plymouth, between 4 and 6 feet from the center line, and a lot of dirt; that from this point there were skid marks right up to the Plymouth, and there were skid marks to the Nash; that a wire had fallen down across the top of the Plymouth and across the top of the Nash, the same wire across both cars; that the end of it was in the street in the center of the intersection or thereabouts, and there was another wire hanging down; that it was an electric wire from one of the poles; that the pole was broken in two places, but still standing; that two wreckers had to be used to pull the cars apart; that the front end of the Nash, the hood, the grille, all the lights—were bent or pushed to the left, and the left side of the Plymouth was pushed back toward the back fender; and that after the occupants of the Nash had been removed to an ambulance and on to the hospital, he was trying to get up with the driver of the Plymouth; that he asked several people if they knew the driver, and one of them he afterwards learned was defendant Washington, and he said he did not know; but that between an hour and an hour and a half after the accident Washington came to the police station, and said he was the driver of the Plymouth; and that at both times Washington had the odor of having been drinking intoxicating beverages.

II. In respect to alleged rescue:

Mary Elizabeth Alford, widow of Charles S. Alford, testified on direct examination that on 14 June, 1952, "I was living . . . about two and a half blocks from the intersection of Blount and East Streets. I was at home that night. The last time I saw my husband before the accident was when he left to go to the accident. I heard the impact. He left immediately after the impact. He traveled to the collision in his truck . . . He was a welder, and had been doing that sort of work for approximately 12 years . . . He was 35."

Then on cross-examination she testified: "Mr. Alford was an electric welder, and had been engaged in electric welding 12 years. He had gone to Newport News Shipbuilding and Dry Dock Company to take a course in electric welding. He was working for himself."

Plaintiff also offered the testimony of others, as follows:

Thomas E. Harper, who worked at a funeral home on E. Blount Street, second house from the corner, east of the intersection of East Street and Blount Street, testified: "On the night of June 14 I left the funeral home to go to a neighbor's house, and I seen this car coming down Blount Street. I made it across the street, and about the time I got in the house, I heard a collision. I turned and ran back out. Someone said 'Don't run, the wire is down,' and fire was flying all over one of the cars. I don't know which one . . . After the collision a man drove up, pulled to the left of the curb. He went up there and put his

hands on one of the cars; I don't know which car it was. He just blanked out . . . He did not move any from the time I saw him fall until I got there with the ambulance . . . After I saw him fall it didn't take over two or three minutes to get the ambulance there and put him in it . . . I saw somebody in both cars. I knew there were people in both cars when I went back to pick up this other man to put him in the hearse. That was the man with Mr. Alford. Some were trying to get out and some were out. They were hollering, some children. I do not know how long they continued to holler. Just as soon as we got this other man up, we left . . . They were hollering when we left."

Then on cross-examination this witness continued: ". . . I was (in) second house from corner right where it happened . . . Lillie Simms lived there. I was going in the door of the house when I heard the collision. When I came out of the house I started out to the scene. The truck drove up as I came out of the house. It was right behind this car coming down Blount Street. . . . The truck came by the funeral home going toward the intersection. It came from east to west along Blount Street . . . The truck, when it seen the accident, pulled right out and stopped in front of Miss Lillie Simms' house, got out of his truck and walked to the scene. I was standing there looking, standing on the sidewalk in front of . . . house. I saw this man . . . walk to the corner. I don't know which car he went to. I saw him when he put his hand on one of the cars; I don't know which one. He put his hand on the car just once. I don't know which part of the car he touched. One of the cars was on East Street, on the other side, up against the telephone pole. The other one was out in the street-like. The back of it was up against the other one, I think . . . I was looking at him touch the car . . . it looked to me it was around middleway of one of the cars . . . but I couldn't tell which car he was touching. I am sure he parked in front of Lillie Simms' house . . . Mr. Webb went to the funeral home and called for the ambulance. I went to get the ambulance in the driveway between the church and the funeral home. I couldn't say how many people were in the street. Right at that time, as fast as they gathered, I would say as many as 25 or 30 head. When I heard it hit, I ran back out there and seen some sparks . . . coming from one of them cars. There were right smart of them. It was still sparking when Mr. Alford walked up there. It was sparking when he fell over . . ."

William Webb, an undertaker, whose funeral home was located approximately 100 yards from the intersection of Blount and East Streets, testified in pertinent part: ". . . I did not see the actual wreck between the Cauley automobile and the automobile driven by Melvert Washington, but I saw it immediately after it happened. I was sitting in front of my funeral home in an automobile which was facing east on

Blount Street and the back of it west . . . I . . . heard a lot of noise. I turned and saw there was an accident on the corner. These cars had hit. Two cars were together . . . one . . . against the post and the other right next to it, and at that time the street wire had fallen because I could see the sparks. I rushed in the funeral home and called the police department . . . I heard a child crying . . . I went to the door to try to see, and I walked out in the street and saw this man walking to the automobile that was against the post . . . It was told to me it was Mr. Alford . . . At the time . . . there was a wire that had fallen across the automobile and a few sparks coming every once in awhile from the wire as if there was a break in the wire some place. Several people were out there, and they began to holler, 'Don't go over there, that wire is down.' He went to the car, reached in the car as if he had been trying to cut off the ignition. He put his hand in once, pulled his hand out, and he tried it a second time and pulled it out, and the third time he tried it, he fell back like that, drawed up both hands and feet, and I called the boy that helped me to get the ambulance . . . There was a motor to a car racing, but which car I wouldn't know. All I know there was a lot of noise. I wasn't right close to the car. You could hear a child hollering and a lady saying, 'My baby is hurt.' What car it was coming from I don't know. People were saying not to go near the car. Personally, I don't know whether Mr. Alford heard those statements. I was on one side of the street and the people on the other side were saying, 'Don't go to the car.' They were saying 'Don't go to that car, there is a live wire across it.' Whether Mr. Alford heard it or not, I could not say."

And the witness continued: "When I first saw Mr. Alford, he was coming across East Street on the west side of Blount Street, coming from the south going toward north of Blount Street . . . I imagine it was about 10 or 15 minutes, or maybe more, before another ambulance came up . . . The police officer, Sgt. Merritt, and the ambulance came up about the same time . . . I don't know definitely when the current was cut off to that wire that was broken, across the cars."

Then on cross-examination the witness Webb stated: ". . . Alford . . . was coming from the southwest corner of Blount and East. He went directly across to this car. He was on the side of the car so that I could see him." And on re-direct examination, the witness stated: "I don't know how long Mr. Alford had been there before I saw him walk across to where the cars were. I didn't see him when he came up. The only thing I know, I saw a man walking from one side to the other."

Then on re-cross-examination the witness said: "The truck driver did not park right across the street from where I was sitting in my car at that time. I didn't see Mr. Alford walk from in front of my place down to the automobile . . ."

Sgt. Dewey Merritt being recalled testified that when he arrived at the scene George Cauley and Burcell Cauley were in the Nash, George sitting in the front seat under the wheel; that they were all so mixed up in there and hollering; that he noticed the hollering by the occupants of the Nash car when he drove up—"three or four kids in there . . . screaming."

The defendant offered no evidence and the case was submitted to the jury upon these issues, which the jury answered as indicated:

"1. Was the death of plaintiff's intestate, Charles S. Alford, caused by the negligence of the defendant Melvert Washington, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff's intestate, Charles S. Alford, through his negligence contribute to his injury and death, as alleged in the answer? Answer: No.

"3. What damages, if any, is plaintiff entitled to recover of the defendant Melvert Washington? Answer: $25,000.00."

To judgment in accordance therewith defendant Melvert Washington excepted and appeals to Supreme Court, and assigns error.

Jones, Reed & Griffin for Plaintiff Appellee.
White & Aycock for Defendant Appellant.

WINBORNE, J. The foremost question on this appeal is whether or not the trial court erred in overruling plaintiff's motion for judgment as of nonsuit.

In respect thereto the evidence offered upon the trial in Superior Court is sufficient to make out a case against defendant for actionable negligence in connection with the collision between his Plymouth car and the Cauley Nash car as a result of which it clearly appears the electric wire was jarred loose from the poles, and dropped down upon the two cars. Hence the evidence is fully sufficient to support a finding by the jury of negligence on the part of the defendant in bringing about the situation disclosed by the evidence. And the evidence is sufficient to support a finding by the jury that the situation so brought about was one in which the occupants of the cars were in apparent peril and imminent danger of life or bodily injury.

Therefore, question arises as to whether plaintiff's intestate was guilty of contributory negligence in doing what the evidence tends to show he did do.

Ordinarily the law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided. *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543; *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849. Thus where a person seeing an electric wire knows that

it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith. See 18 Am. Jur. 471, Electricity 76; also *Rice v. Lumberton, supra; Mintz v. Murphy, supra; Alford v. Washington, supra.*

But "the rule is well settled that one who sees a person in imminent and serious peril through the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life, or serious injury, in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." See Annotation 19 A.L.R. 4 on subject "Liability for death, or injury to, one seeking to rescue another." And the annotator of decided cases there goes on to say that some of the cases do not state the proviso, but probably it is implied in practically all of them. It is said, however, "All agree that the fact that the injury is sustained in attempting to save human life is a proper element for consideration upon the question of contributory negligence, and that the latter question ordinarily is one for the jury, and not for the Court." Attention is then called to cases in other jurisdictions, as well as *Norris v. R. Co.*, 152 N.C. 505, 27 L.R.A. (N.S.) 1069, 67 S.E. 1017.

In the *Norris case, supra,* our own Court, in opinion by *Hoke, J.*, speaking of a situation the evidence tended to show was due to negligence of defendant, declared: "This being true, it is well established that when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question. It is always required in order to establish responsibility on the part of defendant, that the company should have been in fault, but, when this is established, the issue is then between the claimant and the company; and when one sees his fellow-man in such peril he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend the help which the occasion requires; and his efforts will not be imputed to him for wrong, according to some of the decisions, unless his conduct is rash to the degree of reckless; and all of them hold that full allowance must be made for the emergency presented.

"This principle is declared and sustained in many well-considered and authoritative decisions of the courts and by approved text-writers, and prevails without exception, so far as we have examined," citing cases and quoting from some of them.

Applying this principle to the facts presented in instant case, the trial judge properly overruled defendant's motion for judgment as of

nonsuit and fairly submitted the case to the jury upon a charge, considered contextually, free from prejudicial error.

Hence the various assignments of error, based upon exceptions taken during the course of the trial, and to the charge of the court, and to the alleged failure of the court to properly charge, after due consideration fail to disclose harmful error. Therefore, in the judgment from which appeal is taken there is

No error.

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

A. G. BLANCHARD AND WIFE, REBECCA W. BLANCHARD, v. R. E. WARD, SR.

(Filed 23 May, 1956.)

1. Deeds § 13a—

Where there is a conveyance to A for life and then to his children, with limitation over in the event A has no children, *held* the remainder to A's children is contingent until they are *in esse*, but upon the birth of a child the remainder vests in such child subject to be opened up for any child or children of A who may thereafter be born. The distinction is noted where the conveyance is to the surviving children of the life tenant.

2. Same: Estates § 9a—

The deed conveyed to A a life estate, with remainder to his children, with limitation over in the event A had no children. A's only son died during childhood. *Held:* Upon the birth of the son, the remainder vested in him and the limitation over was defeated, and upon the death of the son, A and his wife took the vested remainder under G.S. 29-1, Rule 6, as tenants in common.

3. Estates § 4—

In order for a lesser estate to be merged in a greater estate, both estates must be held by the same person in the same right without an intermediate estate.

4. Same—

Where the owner of a life estate acquires a one-half interest in the remainder as tenant in common, his life estate merges with the remainder *pro tanto*, but the other tenant in common holds his interest in the remainder subject to the first tenant's life estate.

5. Same: Estates § 9a—

Land was conveyed to A for life, remainder to his children. A's only child died during childhood, and A and his wife inherited the vested remainder as tenants in common. *Held:* The wife's interest in remainder

was subject to the husband's life estate, which life estate is sufficient to support the contingent remainder to any child or children of A who may thereafter be born, and A and wife cannot convey the indefeasible fee.

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

APPEAL by defendant from *Hobgood, J.*, December Term, 1955, of WAKE.

This is a civil action for specific performance.

It was agreed by all parties hereto and their counsel that the trial judge might hear this matter on an agreed statement of facts and the written instruments attached thereto; that he should make his findings of fact therefrom and draw his conclusions of law and enter a judgment consistent therewith, pursuant to the provisions of our Declaratory Judgment Act, G.S. 1-253, *et seq.*

The court found the following pertinent facts:

1. That on 15th September, 1931, A. G. Blanchard and his wife, Maggie E. Blanchard, executed a deed to A. G. Blanchard, a plaintiff herein, and A. J. Blanchard, nephews of the said grantors. The grantees are brothers. The deed is recorded in Book 621, page 532, Wake County Registry. The said deed, embracing about 309 acres of Wake County farm land, including the one-acre tract at issue in this action, reserved unto the grantors each a life estate in the entire *locus.* That at the time of the execution of said conveyance in 1931 each of the grantees was a minor and unmarried.

2. That on 20th June, 1932, A. G. Blanchard, grantor in the aforesaid deed, died, and on 10th September, 1946, Maggie E. Blanchard, the other grantor, died.

3. That on 17th September, 1946, the said A. J. Blanchard and his wife, Marie Murphrey Blanchard, filed a petition for partition of the farm conveyed by the said deed. A. G. Blanchard and his wife, Rebecca Wheeler Blanchard, their son, Robert Gibson Blanchard, and petitioners' two minor children, Jacquelyn Marie and Jennifer Lee Blanchard, were named defendants in the petition. The Wake County Superior Court appointed guardians for the three minor defendants to the action and for the unborn children of A. G. and A. J. Blanchard. The farm involved was partitioned in severalty, one-half to A. G. Blanchard and his children, one-half to A. J. Blanchard and his children.

4. That the said Robert Gibson Blanchard died intestate in 1952 at the age of 13. His mother and father, plaintiffs herein, survived. He left no brothers or sisters or issue of such and his parents have had no other child.

5. That on 20th October, 1955, plaintiffs contracted in writing with the defendant herein, the plaintiffs to sell and the defendant to buy a

one-acre tract of land cut from the share of the farm allotted to A. G. Blanchard and his children. The stipulated price was $1,500.00.

6. That plaintiffs prepared and executed a deed, embracing the tract described in the contract of sale, and tendered same to the defendant as provided in the contract. The defendant refused to accept the deed, contending that plaintiffs do not own an indefeasible fee in the premises and, therefore, could not deliver a marketable title thereto.

The granting clause in the deed under consideration is as follows: ". . . do grant, bargain, sell and convey to the said A. J. Blanchard and A. G. Blanchard for their natural lifetime and then to their children, if any, a certain tract or parcel of land in Middle Creek Township." The *habendum* in the deed is as follows: "The above described lands are hereby conveyed to the said A. J. Blanchard and A. G. Blanchard to be held by them during their natural lifetime and then to go to their children, if they shall have any, but if there is no issue, then this land shall go to the father of said A. J. Blanchard and A. G. Blanchard, and to the heirs of their father, Dexter Blanchard."

The remaining findings of fact are not essential to a decision herein.

Upon the foregoing findings of fact, the court concluded as a matter of law: (1) That it was the intention of the grantors in the deed to A. G. and A. J. Blanchard that the interests of the children born to them or either of them should become vested in such children upon their birth; that the grantors further intended that the remainders, after the life estates of A. G. and A. J. Blanchard, should pass to their children as a class and as tenants in common. (2) That since there had been a partition proceedings between the life tenants and their children, as vested remaindermen, that at the time of his death in 1952, Robert Gibson Blanchard, held a vested remainder in the entire share allotted to A. G. Blanchard and children. (3) That "the deed under which the property involved was conveyed did not anticipate or provide for the succession of vested interests to meet the situation which actually developed. . . . The instrument specifically set up a limitation over to Dexter Blanchard and his heirs upon the failure of 'issue' by the life tenants. Both tenants had issue and remainders vested in the same upon their birth. The limitation over to Dexter Blanchard and his heirs upon the failure of issue was thus rendered void for the reason that the contingency upon which it depended had happened." (4) "Plaintiffs have done nothing to defeat the contingent interest of unborn children of A. G. Blanchard in the property. Yet they have become seized of the vested remainder of their son, Robert Gibson Blanchard, by the law of intestate descent prevailing at the time of the latter's death in 1952. The life estate of A. G. Blanchard was thus terminated by its merger into a vested remainder. The contingent re-

mainders of A. G. Blanchard's unborn children were thus defeated by the elimination of the prior estate upon which such remainders depended."

Judgment was accordingly entered to the effect that the petitioners do have a good and indefeasible fee simple title to the property and that the contract between the plaintiffs and the defendant is valid and enforceable. Defendant appeals, assigning error.

Charles W. Daniel for plaintiffs, appellees.
Robert A. Cotten for defendant, appellant.

DENNY, J. The defendant takes the position that the remainder interest of the child, Robert Gibson Blanchard, at the time of his death was contingent. Therefore, he contends that the provisions of G.S. 41-4 are controlling and the roll call may not be had until the death of A. G. Blanchard, the first taker, who is one of the plaintiffs herein. *House v. House*, 231 N.C. 218, 56 S.E. 2d 695; *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401; *Rees v. Williams*, 165 N.C. 201, 81 S.E. 286; *Perrett v. Bird*, 152 N.C. 220, 67 S.E. 507; *Dawson v. Ennett*, 151 N.C. 543, 66 S.E. 566; *Williams v. Lewis*, 100 N.C. 142, 5 S.E. 435; *Galloway v. Carter*, 100 N.C. 111, 5 S.E. 4; *Buchanan v. Buchanan*, 99 N.C. 308, 5 S.E. 430.

An examination of the *habendum* in the deed under consideration is to the effect that the land conveyed to A. J. and A. G. Blanchard is to be held by them during their lives and "then to go to their children, if they have any, but if there is no issue, then this land shall go to the father" of the grantees and to his heirs.

The land conveyed by the above deed, having been duly partitioned as set forth hereinabove, we are concerned only with the title to that portion allotted to A. G. Blanchard and his children. *Lumber Co. v. Herrington*, 183 N.C. 85, 110 S.E. 656.

It is settled law in this jurisdiction that when a deed is made to A for life, and at his death to his children, if any, and if there is no issue, then to B and his heirs, if the life tenant has no child or children when it is executed, the remainder is contingent as to such child or children until they are *in esse*, but the moment a child is born to such life tenant, the remainder vests in such child, subject to open and make room for any child or children who might thereafter be born within the class before the falling in of the life estate. *Mason v. White*, 53 N.C. 421; *Lumber Co. v. Herrington, supra; Power Co. v. Haywood*, 186 N.C. 313, 119 S.E. 500; *Williams v. Sasser*, 191 N.C. 453, 132 S.E. 278; *Waller v. Brown*, 197 N.C. 508, 149 S.E. 687; *Beam v. Gilkey*, 225 N.C. 520, 35 S.E. 2d 641; *Neill v. Bach*, 231 N.C. 391, 57 S.E. 2d 385; *Doe v.*

Considine, 73 U.S. 458, 18 L. ed. 869; 33 Am. Jur., Life Estates, Remainders, etc., section 134, page 595, *et seq.;* 31 C.J.S., Estates, section 73, page 92; 24 A. & E. Enc. of Law (2nd Ed.), page 382, *et seq.*

It will be noted that the deed to A. J. and A. G. Blanchard gave to them a life estate and the same instrument gave to their children, if any, the remainder. This deed was not made to these grantors and to such of their children as might survive them. The moment Robert Gibson Blanchard came into being he took a vested interest in common with the children of A. J. Blanchard prior to the partition proceeding. Consequently, when he died, where did his vested remainder in the lands allotted to A. G. Blanchard and his children, as a class, go?

The Supreme Court of the United States, in *Doe v. Considine, supra,* in considering this identical question, quoted with approval from 4 Kent's Commentaries, page 284, the following: "A devises to B for life, remainder to his children but if he dies without leaving children remainder over, both the remainders are contingent; but if B afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs."

Therefore, when Robert Gibson Blanchard died, before the life estate fell in, leaving no brother or sister and no issue capable of inheriting, he being the sole representative of the class, his interest vested in his father and mother as tenants in common. G.S. 29-1, Rule 6.

In the case of *Severt v. Lyall,* 222 N.C. 533, 23 S.E. 2d 829, the testator devised certain lands "to my beloved wife, Letha Severt, during her natural life, and at her death to go in fee simple to Clarence Odell Severt, son of W. A. Severt." Clarence Odell Severt, the remainderman, survived the testator but died 23rd August, 1914, intestate and without issue. He predeceased the life tenant. At the time of his death he left surviving as his heirs at law two sisters of the whole blood, the defendants Nellie Severt Lyall and Nelia Severt Church. After his death, there were born to his father and second wife four children, the plaintiffs in the action. The eldest was born in December, 1919, over four years after the death of the remainderman, but all were born prior to the death of the life tenant. *Barnhill, J.,* now *Chief Justice,* said: "Clarence Odell Severt, upon the death of the testator and by virtue of the devise to him, became seized of a vested remainder. *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341. This seems to be conceded. Being a vested remainder it was a fixed interest in land to take effect in possession after the particular estate is spent. *Priddy &*

Co. v. Sanderford, supra. As the owner of the remainder he had a vested interest in the land and was 'seized' of an interest in the inheritance and the remainder owned by him became a new estate acquired by purchase. It passed by inheritance in the line of the new purchaser, 2 Minor Institutes, 442.

"When the owner of the fee conveys it to one for life with the remainder to another the remainderman takes by purchase and becomes a new *stirpes* of inheritance or new stock of descent. On his death the estate passes directly to his heirs at law. *King v. Scoggin*, 92 N.C. 99; *Early v. Early*, 134 N.C. 258; *Tyndall v. Tyndall*, 186 N.C. 272, 119 S.E. 354; *Allen v. Parker*, 187 N.C. 376, 121 S.E. 665; *Hines v. Reynolds*, 181 N.C. 343, 107 S.E. 144. It follows that the *feme* defendants, the nearest blood kin of Clarence Odell Severt, living at the time he died, acquired title by inheritance at his death. Plaintiffs cannot take as his heirs. They were not 'in life' at the time of the death of the remainderman and were not born within ten lunar months thereafter."

In *Power Co. v. Haywood, supra,* in 1861 William Boylan devised a plantation and negro slaves to his son, John H. Boylan, for life, with this further proviso: "If my son, John, shall marry and shall have any lawfully begotten child or children, or the issue of such, living at his death, then I give, devise and bequeath the said plantation and negroes to such child or children; but if he shall die, leaving no such child or children, nor the issue of such, then living, then I give the said plantation and negroes to my grandson, William (son of William M. Boylan), during his natural life, and at his death to his eldest son."

John H. Boylan never married, and died leaving no issue surviving him. Upon the death of John H. Boylan, William Boylan (son of William M. Boylan and grandson of the testator), entered into possession of the land in controversy. William Boylan married and there were born to the marriage two children: the first was William James Boylan, who was born 30th July, 1886, and who was the oldest and only son of the said William Boylan; the other child was Miss Josephine Boylan. William James Boylan predeceased his father and died unmarried and without issue on 14th July, 1906, leaving surviving him his sister, Josephine Boylan.

The will of William Boylan contained a residuary clause giving and devising to his children all his real and personal property not disposed of in the will. Since William James Boylan, the eldest son of William Boylan, was not living when William Boylan (grandson of the testator) died, and the life estate fell in, the defendants claimed the plantation in controversy under the residuary clause in the will.

The appellants contended, as in the instant case, that C.S. 1737, now G.S. 41-4, controlled and that the only two elements necessary to bring

the statute into operation were a contingent limitation and the death upon which the limitation is made to depend. The Court, however, held that "William Boylan (son of William M. Boylan), by virtue of the devise in the third item of the will, immediately upon the death of John H. Boylan, unmarried and without issue, took an estate in the land for his natural life, and that the remainder which was contingent theretofore (the remainderman not being *in esse)* became vested in William James Boylan at the moment of his birth. For this reason, section 1737 of the Consolidated Statutes, which pertains to contingent limitations, is not applicable to the facts. . . . We must, therefore, hold in the instant case that William James Boylan acquired a heritable interest in the land in suit, which, upon his death, descended to Josephine, his sister and only heir at law." *Early v. Early,* 134 N.C. 258, 46 S.E. 503; *Allen v. Parker, supra; Bond v. Bond,* 194 N.C. 448, 139 S.E. 840.

The court below held that since A. G. Blanchard and his wife took the vested remainder of Robert Gibson Blanchard by operation of law, under G.S. 29-1, Rule 6, the life estate of A. G. Blanchard was terminated by this merger into a vested remainder. It should be noted that under the general rule of descent, A. G. Blanchard and his wife, Rebecca W. Blanchard, took the vested remainder of Robert Gibson Blanchard as tenants in common. This being so, it is our opinion that the interest of Rebecca W. Blanchard is still subject to the life estate of A. G. Blanchard.

It is stated in 31 C.J.S., Estates, section 126, page 147, *et seq.,* "If the owner of a life estate acquires the fee to only a portion of the remainder there will be a merger *pro tanto,* but the life estate in the remainder of the property will not be affected." *Larmon v. Larmon,* 173 Ky. 477, 191 S.W. 110; *Clark v. Parsons,* 69 N.H. 147, 39 A. 898, 76 Am. St. Rep. 157.

While in 33 Am. Jur., Life Estates, Remainders, etc., section 175, page 642, we find this statement: "The whole title, legal as well as equitable, must unite in one and the same person in order that there may be a merger which will destroy a contingent remainder." It is further stated in 19 Am. Jur., Estates, section 135, page 588, *et seq.,* "Under the common law definition which is generally accepted under the modern law, merger is the absorption of one estate in another, where a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged or absorbed in the greater. To constitute a merger, it is necessary that the two estates be in one and the same person at one and the same time and in one and the same right. . . . An estate may merge for one part of land acquired, and continue in another part of it. With respect to joint tenants and tenants in common, a merger will not

operate beyond the extent of the part in which the owner has two several estates." *Larmon v. Larmon, supra; Clark v. Parsons, supra; Bowlin v. Rhode Island Hospital Trust Co.*, 31 R.I. 289, 76 A. 348, 140 Am. St. Rep., 758.

In the case of *Trust Co. v. Watkins*, 215 N.C. 292, 1 S.E. 2d 853, this Court quoted with approval from Blackstone's Commentaries, Vol. 2, page 177, as follows: "Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater. Thus, if there be tenant for years and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance and shall never exist any more. But they must come to one and the same person in one and the same right."

Therefore, we hold that since the estate or interest of Rebecca W. Blanchard is subject to the life estate of A. G. Blanchard, this life estate is sufficient to support the contingent remainder of any child that might be born to the plaintiffs during the continuance of such estate (*Griffin v. Springer, ante,* 95), and, therefore, the plaintiffs cannot convey a fee simple indefeasible title to the premises they have contracted to convey to the defendant. *Cf. Winslow v. Speight,* 187 N.C. 248, 121 S.E. 529. This being so, we deem it unnecessary to determine whether or not A. G. Blanchard's interest would also open up for contingent remaindermen.

The facts involved herein might raise this question: With the joinder of the plaintiffs in the proposed conveyance, would not all the interests of the plaintiffs merge in the defendant, as grantee, and give him a good title? We know of no decision in this State that has permitted contingent remainders to be destroyed by the tortious conveyance of a life tenant. Hence, the judgment of the court below is reversed.

Reversed.

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

IN THE MATTER OF JOHN GAMBLE, RESPONDENT.

(Filed 23 May, 1956.)

1. Evidence § 22—

Ordinarily, the answers of a witness to questions relating to collateral matters, asked on cross-examination for the purpose of impeachment, are conclusive, and may not be contradicted by other evidence, but this rule

does not obtain when the questions tend to impeach the impartiality of a witness by showing bias, interest, prejudice, etc., since such questions are not irrelevant to the issue in the sense that the cross-examiner is concluded by the answer.

2. Same—

The exclusion of evidence which would clearly show bias, interest, prejudice, etc., on the part of a witness is erroneous and may be ground for a new trial.

3. Same—Exclusion of evidence tending to show bias and interest of witness held prejudicial error.

In this proceeding to have respondent declared incompetent to manage his own affairs and to set aside conveyances executed by him, petitioner testified on cross-examination that his motive was not to have the conveyances set aside to preserve the property of respondent, his uncle, so that petitioner could inherit the property under his uncle's will. *Held:* Respondent was not concluded by the answer of the witness, and it was error for the court to exclude the paper writing prepared as a testamentary disposition of respondent's property and filed in the office of the Clerk of the Superior Court for safekeeping, sought to be introduced to impeach the credibility of petitioner as a witness by showing his bias or interest and for the purpose of cross-examining petitioner in regard thereto. This result is not affected by G.S. 8-89 or G.S. 31-11.

4. Appeal and Error § 39—

The burden is upon appellant to show prejudicial error.

5. Appeal and Error § 41—

Ordinarily appellant fails to show that the exclusion of evidence was prejudicial when he fails to make it appear of record what the excluded evidence would have been.

6. Same—

Where appellant is precluded by the lower court from disclosing the contents of a sealed envelope or introducing the instrument in evidence, but the record nevertheless makes it appear that the instrument was competent to show prejudice of petitioner as a witness and for the purpose of cross-examination, the rule that the exclusion of evidence cannot be held prejudicial unless the record shows what the excluded evidence would have been does not apply upon the particular facts.

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

APPEAL by respondent from *Clarkson, J.*, October Civil B Term 1955 of MECKLENBURG.

Petition filed by J. Arthur Gamble, a nephew, before the Clerk of the Superior Court, pursuant to G.S. 35-2, to inquire into the mental state of his uncle John Gamble, allegedly incompetent from want of understanding by reason of physical and mental weakness on account of old age to manage his own affairs, and to appoint a trustee for him.

The respondent filed an answer denying the allegations of the petition that he was incompetent from want of understanding to manage his own affairs, though he is 89 years of age, and asking that the prayer of the petition be denied, and that the proceeding be dismissed.

The issue raised by the petition and answer was submitted to a jury in a hearing presided over by the Clerk of the Superior Court, and the jury having heard the evidence found for their verdict that the respondent was incompetent from want of understanding to manage his own affairs. Whereupon, the clerk entered judgment that a trustee be appointed to manage the estate of John Gamble, and the respondent appealed to the Superior Court.

In the Superior Court the matter at issue was tried *de novo* before a jury. This issue was submitted to the jury: "Is the said John Gamble incompetent from want of understanding to manage his own affairs?" The jury answered the issue Yes. Judgment was entered in accord with the verdict, and the proceeding was remanded to the Clerk of the Superior Court of Mecklenburg County for further proceedings as provided by law.

The respondent appealed to the Supreme Court, assigning error.

William H. Booe and Blakeney & Alexander for Petitioner, Appellee.

Sedberry, Clayton & Sanders and Hugh M. McAulay for Respondent, Appellant.

PARKER, J. The petition filed herein on 1 August 1955 by J. Arthur Gamble, a nephew of the respondent John Gamble, alleges that John Gamble is incompetent from want of understanding by reason of physical and mental weakness on account of old age to manage his affairs, that recently he has committed great waste of his estate by purported sales and conveyances of his property and by gifts of substantially all his money, and prays that a trustee be appointed to preserve his estate and to recover this property.

Petitioner's evidence tends to show that on 26 March 1955 the respondent conveyed by three deeds all of his real estate to Carrie Donaldson Knox as gifts, subject to a life estate in all the property reserved to himself. John Gamble, who was examined as a hostile witness by petitioner, testified that he had raised Carrie Donaldson Knox from a child two years old, that she had lived with him 20 or 25 years, and had done more for him than all his kinsfolk put together.

The petitioner J. Arthur Gamble testified as a witness in behalf of the petition. On recross-examination he testified as follows: He did not know whether his Uncle John had made a last will and testament in which he left substantially all his property to him and his brother

James. He doesn't remember that he testified in the other hearing that that was true. He and his brother brought John Gamble to Mr. Alexander's office, that he knew his Uncle did have a will, and he knew that John Gamble left something with Mr. Alexander for Mr. Alexander to deposit with the Clerk of the Superior Court. He believes the will was written by a lawyer in Statesville, but he was not present when it was written, and does not know its contents. On cross-examination Arthur Gamble testified: "My whole purpose is not to try to get my old uncle declared mentally incompetent, then to have a proceeding brought through a trustee to set aside the deeds to Carrie Donaldson Knox, so that I and my brother can get that land. I am just looking after his interest in it. I want some way to take care of his interest in the land for his benefit, not mine." Later on in the trial Arthur Gamble was recalled as a witness, and testified: "I know that something was deposited with the Clerk of the Court called a will, but I do not know the contents of it."

Henry Washam, a witness for the respondent, testified that in the hearing before the Clerk of the Superior Court he heard J. Arthur Gamble testify to the following: "Well, this will was brought up, he mentioned that he and his brother James, about them being on that will. I can't remember whether Arthur said he read the will or not. What I heard him say was that he and his brother James were mentioned in the will."

The petitioner read to the jury a transcript of the testimony of John Gamble, the respondent, when he was examined as an adverse witness by petitioner in the hearing before the Clerk. The Court allowed it to be read for the purpose of showing John Gamble's mental condition at the time. This appears in his direct examination by Mr. Alexander, counsel for petitioner:

> "Q. Yes, sir; well, now, let's go back to 1940 and 1944 and in there; did you make a will back in those days leaving everything to Arthur? A. Not as I know of. Q. You don't recall it at all? A. No, sir. Q. Do you recall bringing that will to me in my office, yourself, and handing it to me, and asking me to deposit it in the will depository in the Office of the Clerk of Superior Court several years ago? No answer."

After the jury was impaneled the respondent made a motion that the Clerk of the Superior Court of Mecklenburg County be permitted or required to deliver to the respondent a will of John Gamble filed with him for safekeeping. Counsel for respondent stated that a subpoena *duces tecum* had been issued for the Clerk requiring him to bring the will in court: that the respondent had gone to the Clerk and asked him

to deliver the will to him, which the Clerk declined to do on the ground that he was required to bring the will in court in compliance with the subpoena *duces tecum*. Upon objection by petitioner the court, in its discretion, denied the motion to allow respondent's counsel to examine the paper writing filed with the Clerk on 1 July 1952 having written on the face of the sealed envelope with a typewriter "Will of John Gamble." The respondent excepted, and assigns this as error. Respondent then made a motion that he be allowed to examine the contents of the sealed envelope. The court denied the motion, holding as a matter of law that the paper writing is incompetent, and would not be admitted in evidence. The respondent excepted, and assigns this as error. Respondent then moved that he be permitted to examine the will, but let it remain in the custody of the court. The court denied this motion, and respondent excepted, and assigns it as error.

When nearly all the evidence had been introduced, J. Lester Wolfe, Clerk of the Superior Court of Mecklenburg County, was called as a witness by the respondent. A subpoena *duces tecum* signed by the presiding judge was served on him by the Sheriff. Respondent's counsel asked him this question: "Mr. Wolfe, do you have any papers at all belonging to Mr. John Gamble, or any papers that were delivered to you on behalf of John Gamble for safekeeping?" The witness replied: "I do. What I have is a sealed envelope. I have that in my possession." Court: "What does it have on the outside of it, Mr. Wolfe?" Answer: "It just says 'Will,' written at the top, 'John Gamble.' It's typewritten." Mr. Wolfe testified that he also had some deeds and other things of John Gamble, which had been put in evidence. The respondent offered the subpoena *duces tecum* in evidence. Petitioner objected, and moved that it be quashed. The court allowed petitioner's motion, and the respondent excepted, and assigns error. Respondent then moved for permission of the court to inspect the paper in the sealed envelope which the Clerk had in his possession. The motion was denied, and the respondent excepted and assigns this as error. The respondent then moved that he be permitted to make a copy of this paper. The court denied the motion, and the respondent excepted, and assigns error. The court said it denied the motions in its discretion.

The petitioner J. Arthur Gamble testified that he and his brother James brought his Uncle John Gamble to Mr. Alexander's office, that he knew his Uncle had a will, and left something with Mr. Alexander, for Mr. Alexander to deposit with the Clerk of the Superior Court. He also testified he knew something was deposited with the Clerk of the Court called a will. Henry Washam testified that in the hearing of this proceeding before the Clerk of the Superior Court J. Arthur Gamble testified that he and his brother James were mentioned in the will. It

is also significant that Mr. Alexander, counsel for petitioner, in examining John Gamble as a hostile witness in the hearing before the Clerk asked him didn't he in 1940 or 1944 "and in there" make a will back in those days leaving everything to Arthur Gamble. John Gamble, now 89 years old, replied not as I know of. It appears that John Gamble had forgotten the contents of the will inquired about, which he had left with Mr. Alexander to deposit with the Clerk. Petitioner did all he could, and successfully, to keep from the knowledge of the jury the contents of this will. It seems that respondent can draw the fair inference from the evidence that petitioner knew the contents of the will, and that he was named therein as sole, or a principal, devisee and legatee, and that his principal object in bringing this proceeding was to have his Uncle declared incompetent and to set aside the deeds to Carrie Donaldson Knox, so that he could inherit under the will. The petitioner, on cross-examination by respondent's counsel, denied that his whole purpose in bringing this proceeding was to try to get his old Uncle declared mentally incompetent, then to have a proceeding brought through a trustee to set aside the deeds to Carrie Donaldson Knox, so that he and his brother James could get John Gamble's lands, and asserted that his purpose was to protect John Gamble's interest, not his.

These questions arise: One, was the answer of petitioner, that it was not his purpose in bringing the proceeding to get his old Uncle declared mentally incompetent, and then to have a proceeding brought by a trustee to set aside the deeds to Carrie Donaldson Knox, so that he and his brother could get the lands of his Uncle, but to take care of his Uncle's interests, conclusive, and could not be contradicted by other evidence? Two, did the refusal of the Court to permit respondent to open and see the contents of the sealed envelope, marked Will of John Gamble, filed with the Clerk, impair, if not prevent, a reasonable cross-examination of petitioner by respondent's counsel as to petitioner's pecuniary interest in the proceeding for the purpose of impeaching his credibility as a witness?

Ordinarily, the answer of a witness on cross-examination concerning collateral matters for purposes of impeachment is conclusive, and he may not be contradicted by other evidence. *S. v. Patterson*, 24 N.C. 346; *Clark v. Clark*, 65 N.C. 655; *Burnett v. R. R.*, 120 N.C. 517, 26 S.E. 819; *S. v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277; 3 Jones on Evidence, Civil Cases, 4th Ed., Sec. 827. However, the rule seems to be well settled that, on cross-examination, questions which tend to impeach the impartiality of a witness, *e.g.* bias, interest, favor, animus, hostility, prejudice, disposition, in relation to the cause or the parties, are not irrelevant to the issue in the sense that the cross-examiner is concluded by the answer. His answers as to such matters are not deemed con-

clusive, and may be contradicted by other evidence. *S. v. Patterson, supra; Cathey v. Shoemaker,* 119 N.C. 424, 26 S.E. 44; *Scales v. Lewellyn,* 172 N.C. 494, 90 S.E. 521; *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901; 5 Jones, Commentaries on Evidence, 2d Ed., pp. 4614-15; 3 Jones on Evidence, Civil Cases, 4th Ed., Sections 828-829; 2 Wigmore on Evidence, 2d Ed., Sec. 948. A trial would have little safety and be unduly perilous, if an unscrupulous witness could conclude the adverse party by his statements denying his prejudice or interest in the controversy.

This Court said in *S. v. Roberson, supra:* "Latitude is allowed in showing the bias, hostility, corruption, interest or misconduct with respect to the case or other facts tending to prove that the testimony of the witness is unworthy of credit." This is sound law for the range of external circumstances from which probably bias, interest, prejudice, etc. may be inferred is infinite. Too much refinement in analyzing and classifying their probable effect is out of place. Accurate rules would seem impossible to state, and if possible, usually undesirable. In general, the circumstances should have some clearly apparent force, as tested by experience of human nature, and should not be too remote or uncertain. 2 Wigmore on Evidence, 2d Ed., Sec. 949.

If evidence which would clearly show bias, interest, prejudice, etc. on the part of a witness is excluded by the Court, it is error, and may be ground for a new trial. *S. v. Roberson, supra;* 3 Jones on Evidence, Civil Cases, 4th Ed., Sec. 829.

Cross-examination is the right of the party against whom a witness is called, and the right is a valuable one as a means, among other things, of testing the impartiality of the witness as to whether he is biased or influenced by interest in respect to the cause or parties. The *Ottawa v. Stewart,* 3 Wall. 268, 18 L. Ed. 165, 167. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he cannot state to the court what facts a reasonable cross-examination might develop.

It seems clear that the object of respondent's counsel in seeking to open and examine the sealed envelope, marked "Will of John Gamble," was for the purpose of impeaching the credibility of the testimony of petitioner, by cross-examining petitioner in respect to his pecuniary interest as a devisee and legatee under the will, and by introducing it in evidence to show that he was a devisee and legatee under the will, as tending to show the pecuniary interest of petitioner in the proceeding, in that, if he could have John Gamble declared incompetent, and could set aside the deeds to Carrie Donaldson Knox, he would obtain all, or a large part, of John Gamble's property under his will made several years before and not to be successfully assailed on the ground of lack

of mental capacity of the testator. It is a well known rule of appellate practice that the burden is upon the appellant to show prejudicial error. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. As a general rule, the exclusion of evidence cannot be reviewed on appeal, when the record does not disclose what the excluded evidence would have been, so that the appellate court can determine whether or not its exclusion was prejudicial. *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; 4 C.J.S., Appeal and Error, pp. 580-583; 3 Am. Jur., Appeal and Error, Sec. 354.

However, in this proceeding the appellant could not place in the record the contents of the sealed envelope, marked "Will of John Gamble," because by the court's rulings he could not open the sealed envelope and inspect its contents—the court quashed his subpoena *duces tecum* served upon the Clerk—and he could not show the contents of the will orally by John Gamble, who apparently had forgotten about it. That the sealed envelope contained a will of John Gamble seems clear. The court's rulings impaired respondent's right to a reasonable cross-examination of petitioner as to his interests under the will, a subject tending to show his interest in the proceeding, and prevented respondent from offering the will in evidence for the same purpose. It cannot be said that the court's rulings in refusing the motions of respondent to inspect the will in the sealed envelope are harmless error. The rulings permitted petitioner to represent himself to the jury as a nephew solely interested in protecting and recovering his old Uncle's property for his old Uncle, and not for his own hoped for benefit. The jury might well have discounted petitioner's evidence, if it had appeared that he was the sole, or a principal, devisee and legatee under his old Uncle's will executed several years before. In *Alford v. U. S.,* 282 U.S. 687, 75 L. Ed., 624, the Court said: "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

We still adhere to the general rule stated in *S. v. Poolos, supra,* that to present a question for review the excluded evidence must appear in the Record, but we do not think that it should be applied to the particular facts presented here, where it seems plain that the sealed envelope contains a will of John Gamble, which he left with Mr. Alexander to file with the Clerk, and where it appears that petitioner knew a will of his Uncle was deposited with the Clerk, that Henry Washam testified that in the hearing before the Clerk petitioner testified he and his brother James were mentioned in the will, and that Mr. Alexander, petitioner's counsel, asked respondent in 1940 and 1944 and in there "did you make a will back in those days leaving everything to Arthur," and when the efforts of respondent to open the sealed envelope and

inspect the will were to impeach the credibility of petitioner's testimony on the ground of interest in the proceeding.

Petitioner in his brief relies upon G.S. 8-89—Inspection of Writings—to support the court's rulings. It does not apply here. Petitioner further relies upon G.S. 31-11, which permits persons to file their wills with the Clerk of the Superior Court for safekeeping, and provides that the Clerk "shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator," and contends respondent has not complied with this statute. However, respondent was not seeking to withdraw his will, but merely to see and inspect it. The proviso of this statute provides that the contents of the will shall not be open to the inspection of any one other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. The court's rulings prevented John Gamble and his counsel from inspecting his will, which the statute says he can do.

In our opinion, and we so hold, the ruling of the court denying respondent's motions to open the sealed envelope, marked "Will of John Gamble," and to inspect the will therein, so that it could be used by respondent's counsel as tending to impeach the petitioner as a witness on the ground of his pecuniary interest in the proceeding, necessitates a New trial.

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

SAM DAVIS v. N. E. HARGETT AND TEXTILE INSURANCE COMPANY.

(Filed 23 May, 1956.)

Compromise and Settlement § 3: Election of Remedies § 2—Plaintiff electing to affirm settlement may not recover of third persons for alleged fraud and duress inducing settlement.

Plaintiff alleged that he had a cause of action for the recovery of a large sum for personal injuries and that the individual defendant, a stranger to that cause of action, with the consent and approval of agents of the insurance carrier, induced him to execute a compromise settlement for a grossly inadequate amount by fraudulently misrepresenting that the insurance carrier was not liable for any greater sum, and by duress in threatening to deprive plaintiff, who was in a helpless condition and in the individual defendant's custody, of further medical care and attention. *Held:* Plaintiff not having pursued his remedy against the original tort-feasors but having ratified and confirmed the settlement, made his election, and

may not maintain this action against defendant and the insurance carrier. Therefore, defendants' demurrer to the complaint for its failure to state a cause of action was properly allowed.

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

APPEAL by plaintiff from *Preyer, J.*, 27 February Civil Term, 1956, GUILFORD, Greensboro Division.

Defendants demurred *ore tenus* to the complaint, assigning as ground therefor plaintiff's failure to allege facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the action.

The allegations of the complaint through paragraph 9 may be summarized as stated below.

On 3 June, 1954, plaintiff was injured as the result of a collision of two taxicabs, caused by the concurring negligence of both drivers. These facts, alleged in detail, gave rise to a cause of action in favor of plaintiff against the operators and owners of both taxicabs for the recovery of damages in the amount of $35,000.00. The taxicabs were owned and operated by separate companies. Each company, in respect of its taxicab, had a $5,000.00 liability insurance policy issued by defendant insurance company. Further details are omitted because plaintiff's cause of action herein, if any, is not against the owners and operators of said taxicabs.

Taking up next his relations with defendant Hargett, plaintiff alleges that Hargett knew that plaintiff had such cause of action and that said insurance company was obligated to discharge the liability of each taxicab company up to $5,000.00. Thereupon, Hargett "set out upon a scheme to deceive and defraud the plaintiff of the aforesaid cause of action and the monies recoverable thereunder." Under the pretense of friendship, Hargett visited plaintiff in the hospital in Greensboro; and, by sundry acts of ingratiation, was accepted by plaintiff as his confidential adviser. By reason of Hargett's insistence, plaintiff was induced to leave the hospital in Greensboro and the physicians attending him there for admission into the North Carolina Memorial Hospital at Chapel Hill. Hargett had assured him (falsely) that all arrangements had been made for his admission. He was removed to Chapel Hill in Hargett's ambulance; but, since Hargett had made no arrangements, he was refused admission. Upon such refusal, Hargett took him back to Greensboro; and upon arrival in Greensboro Hargett "placed him in an unheated and filthy outhouse in the back yard of Hargett's funeral home on East Market Street without water or toilet facilities and without medicine or medical services of any kind and the plaintiff was kept there in such condition from about October 14, 1954, until about November 29, 1954."

Then we reach paragraphs 10, 11 and 12 of the complaint, quoted in full below.

"10. After defendant Hargett took plaintiff into his custody as aforesaid, the plaintiff received no medicine or medical care, except for a few aspirin tablets, and plaintiff languished and suffered in pain and sickness while held by the defendant Hargett as aforesaid; and, on November 11, 1954, while being so held and without previous arrangement with the plaintiff, agents of the defendant insurance company, acting for and on behalf of their said principal, appeared with the defendant Hargett in the out-building where plaintiff was held; and the defendant Hargett, in the presence of said agents and with their consent and approval, fraudulently and oppressively took advantage of plaintiff's distress by threatening to withhold further medical aid and treatment from him unless he, the plaintiff, let the defendant Hargett compromise his said claim for damages with the defendant insurance company; and, in the presence of the said insurance agents who knew that defendant Hargett was then fraudulently and oppressively taking advantage of plaintiff's distress for the benefit of the insurance company, the plaintiff, knowing that Hargett had theretofore withheld medical aid from him and believing Hargett would make good his threats as aforesaid and being in a helpless condition, was induced by said fraudulent oppressions to submit and did thereby submit to Hargett's demands; and Hargett then and there compromised plaintiff's claim for damages with the defendant insurance company for the sum of $5,000, which amount included all doctor's and hospital expenses, and such compromise was made at a time when defendants knew, or had reason to know, that doctor's and hospital bills would consume the greater part of the $5,000 and that a compromise of plaintiff's cause of action in that amount was grossly inadequate to compensate plaintiff for his injuries. Notwithstanding such knowledge, however, the said agents and the defendant Hargett, still persisting in their fraudulent oppressions aforesaid and acting for the defendant insurance company and in its interests, falsely represented and deceitfully counseled the plaintiff that there were no facts in the collision case which showed carelessness on the part of McRae Taxi Company and that the negligence of the United Taxicab Company was the only cause of his injuries and that $5,000 was all that plaintiff was entitled to get from the insurance company in any event. That said statements were made by the defendants with knowledge of their falsity, or were made in reckless disregard of their truth or falsity, and with knowledge that the policies of the defendant insurance company covered both taxicabs and carried liability on plaintiff's cause of action to the extent of $10,000; and said statements were made by defendants, while plaintiff was under their oppres-

sions, with a fraudulent design to induce the plaintiff to let Hargett make a compromise of his cause of action under an erroneous belief of its value and with the intent to deceive the plaintiff and to induce him to give up his cause of action for the grossly inadequate price aforesaid; and the plaintiff, being uneducated and in a helpless condition and being wholly at the mercy of his oppressors and in need of medical care, was induced thereby to yield and did yield to their demands for a $5,000 compromise of his cause of action as aforesaid; and the defendant insurance company, intending to take and enjoy the fruits of Hargett's frauds and oppressions, and joining and participating therein as aforesaid, took from the plaintiff a release and delivered a draft to Hargett for plaintiff's benefit in compromise of the claim against both taxicab companies; and the defendant Hargett obtained the money on said draft and kept it in his possession.

"11. After getting the proceeds of the draft in his possession, the defendant Hargett made arrangements to put the plaintiff in the North Carolina Memorial Hospital in Chapel Hill, and thereafter the plaintiff's leg was amputated in said hospital; and, after receiving the monies on the draft as aforesaid, the defendant Hargett doled out to the plaintiff the sum of $10 and $15 at a time for his personal needs and paid for his hospital care and medical services in the Chapel Hill hospital. But when plaintiff returned to Greensboro he discovered, on or about the first part of June 1955, that Hargett had fraudulently converted the remainder of the money to his own use; and thereafter the plaintiff had to sue and did sue and recover from Hargett for such fraudulent conversion. That Hargett intended to and did accomplish such fraudulent conversion of funds as a part of his continuing scheme to cheat and defraud the plaintiff of the aforesaid cause of action and the monies recoverable thereunder.

"12. That plaintiff has lost a cause of action worth $35,000 by reason of the aforesaid frauds and oppressions of both defendants; and, by reason thereof, the plaintiff now suffers actual damages in the sum of $35,000."

In the concluding paragraphs, and in the prayer for relief, plaintiff alleges that, by reason of defendants' conduct he is entitled to recover (1) $35,000.00 as actual damages, subject to a credit of $5,000.00; (2) $15,000.00 punitive damages; (3) execution "against the person of defendants;" and (4) costs.

The sole assignment of error is directed to the court's action in sustaining defendant's demurrer *ore tenus* and in the entry of judgment dismissing the action.

Harry R. Stanley and Alexander & Windsor for plaintiff, appellant.
Howerton & Howerton for defendant Hargett, appellee.

Armistead W. Sapp for defendant Textile Insurance Company, appellee.

BOBBITT, J. Plaintiff alleges that, by reason of the oppression, fraud and duress practiced and imposed upon him by defendants, he was induced to compromise for $5,000.00 his original cause of action for damages against the operators and owners of the two taxicabs; that he has affirmed the compromise settlement whereby the original tort-feasors were released from further liability; but that he is entitled to recover from defendants, jointly and severally, on account of their said wrongful conduct, the value of his original cause of action, to wit, $35,000.00 subject to credit for the $5,000.00 received by him incident to said compromise settlement.

Plaintiff's brief so analyzes the complaint. Excerpts therefrom: "When the plaintiff executed the release, he was conscious of what he was doing and knew exactly what was happening to him; but he could not resist the oppression, and was compelled to surrender his will to the will of his oppressors. This is the wrong of which he complains, . . ." Again: "In his complaint, the plaintiff alleges a fraudulent release and elects to *affirm* it, then alleges a cause of action for personal injury *as property* and asks the jury to determine its true value under standard rules fixed by law for the admeasurement of damages in negligence cases." Again: "The plaintiff's action is in damages for fraud and oppression. He sues defendants as joint tort-feasors."

Hence, there is no need to point out in detail the facts alleged which show an affirmance or ratification by plaintiff of the compromise settlement and releases. *Presnell v. Liner,* 218 N.C. 152, 10 S.E. 2d 639; *Sherrill v. Little,* 193 N.C. 736, 138 S.E. 14, and cases cited therein.

At the time thereof, plaintiff was fully aware that he was effecting a compromise settlement and executing full releases as to his original cause of action. Later, after his confidence in Hargett had been alienated and they became adversary litigants, plaintiff recovered from Hargett the balance of the $5,000.00 not theretofore paid to him or for his benefit by Hargett.

For purposes of decision on this appeal, we assume, under the facts alleged, (1) that plaintiff had a cause of action for damages (worth in excess of $5,000.00) against the operators and owners of the two taxicabs, and (2) that he was induced to make the compromise settlement and execute releases by defendants' wrongful acts of oppression, fraud and duress.

In such case, when the duress was removed and plaintiff became a free agent, he could have maintained his original action, avoiding the compromise settlement and releases if they were pleaded in bar of his right to recover. *Puckett v. Dyer,* 203 N.C. 684, 167 S.E. 43, and

Butler v. Fertilizer Works, 195 N.C. 409, 142 S.E. 483, are typical of such cases. As a prerequisite to such action, plaintiff would have been required to tender or return the portion of the compromise consideration under his control when the duress was removed. *Presnell v. Liner, supra; Sherrill v. Little, supra.*

In his brief, plaintiff states frankly that he makes no contention that he lost his original cause of action by the alleged wrongful conduct of defendants. Plaintiff had three years from 3 June, 1954, when the collision occurred, within which to bring such action. G.S. 1-52(5). See Annotation: "Right of action for fraud or deceit causing loss of remedy." L.R.A. 1917F, 719.

Plaintiff's contention is that his original cause of action was property, wrongfully taken from him by the defendants, and that in this situation he had the legal right to elect as between two remedies, that is, (1) to rescind the compromise settlement and prosecute his original cause of action, or (2) to affirm the compromise settlement and recover damages from defendants for the difference in value between the true worth of his original cause of action and the consideration actually received by him in the settlement. Plaintiff cites no authority in support of his position relating to a similar factual situation. He contends that the general principles declared in numerous cases involving fraudulent sales and conveyances should be applied here.

Unquestionably, where a sale is induced by false and fraudulent representations the defrauded purchaser may elect to affirm the contract as executed; and, having done so, by independent action or by counterclaim to an action by the seller, he may sue for damages resulting from the seller's false and fraudulent representations. Ordinarily, the damages recoverable in such case consist of the difference in value between the property as delivered and as represented. *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210; *Buick Co. v. Rhodes,* 215 N.C. 595, 2 S.E. 2d 699. Similarly, where the seller, by false and fraudulent representations, is induced to include in his deed to the purchaser additional land, not covered by their contract, the seller may affirm the deed and recover from the purchaser as damages the value of such additional land. *Modlin v. R. R.,* 145 N.C. 218, 58 S.E. 1075. These cases are typical of the many cited by plaintiff, each of which has been examined. The remedies allowed in such cases are coexistent and consistent. *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345.

The distinction between the factual situations in the decisions cited and the present case is clear. True, in those cases a recovery of damages was allowed notwithstanding affirmance of the contract *as executed;* but the basis of decision was the fact that the *execution of the contract* was not in accordance with the real agreement. The right to

recover damages was laid squarely on the terms of the *real agreement;* and the damages recoverable were such as flowed from the breach thereof. Moreover, it is clearly recognized in such cases that the party who elects to affirm the contract and sue for damages is bound by all obligations imposed upon him by the terms of the *real* agreement. *Hutchins v. Davis, supra.*

Here plaintiff had a damage claim based on tort, of undetermined merit and for an unliquidated amount. There was no sale or transfer of his claim or cause of action against the original tort-feasors. No other person became entitled to prosecute such claim or cause of action. What he did, and all that he did, was to compromise his original claim or cause of action for $5,000.00; and the $5,000.00 was paid to him as agreed. Admittedly, he is entitled to recover no more under the settlement agreement. There has been no breach thereof. His allegations are to the effect that, while he was fully aware of the terms of the agreement when made, he did not make such agreement of his own free will. When the duress was removed, he had the right to affirm it or to rescind it, one or the other. Under the facts here, these remedies were inconsistent, requiring an election. He made the election and is bound thereby.

While plaintiff alleges that he is entitled to recover from defendants herein as joint tort-feasors on account of their alleged wrongful acts, the recovery he seeks is the amount of damages he alleges he was entitled to recover originally against the operators and owners of the two taxicabs. Thus, he seeks to recover indirectly on his original cause of action against parties who were not involved therein.

In this connection, these facts are noted: (1) Hargett had no liability in connection with plaintiff's original cause of action; and (2) defendant insurance company, by reason of its coverage on the two taxicabs, had a maximum contingent liability of $10,000.00.

The alleged mistreatment of plaintiff by Hargett in respect of bad advice, bad accommodations and inadequate care, set forth by plaintiff in some detail, need not be discussed. It is not the basis of the cause of action alleged herein.

In our view, under the facts alleged, plaintiff has no cause of action against defendants herein; and the judgment sustaining their demurrer *ore tenus* and dismissing the action is

Affirmed.

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

ALBERT JOYNER, LUCILLE LYTLE, JAMES BRYSON AND THURMAN GREENLEE v. THE McDOWELL COUNTY BOARD OF EDUCATION.

(Filed 23 May, 1956.)

1. Appeal and Error § 2—

Even though an appeal is subject to dismissal on the ground that the questions presented have become academic, the Supreme Court may nevertheless consider the appeal on its merits when matters of grave public importance are involved.

2. Pleadings § 20½—

Where there is a misjoinder of both parties and causes of action, the court is not authorized to direct a severance, but must dismiss the action upon demurrer. G.S. 1-132.

3. Schools and School Districts § 3d—Application for enrollment of children in particular school must be made on individual basis and not en masse.

Under the statutory provisions, only the parent, guardian or person standing *in loco parentis* to a particular child or children is entitled to petition the board of education of the county for the enrollment of such child or children in a particular school, or to appeal from the order of such board denying such petition, G.S. 115-178, G.S. 115-179, and since the factors involved necessitate the consideration of the application of any child or children individually and not *en masse*, such petition or appeal may not be made by a group of parents on behalf of themselves and their children, unnamed, and other children of their race similarly situated, to obtain what is in effect a *mandamus* to require immediate integration of all Negro pupils residing in the administrative unit.

4. Same—

Judicial notice will be taken of the fact that boards of education must of necessity employ teachers in advance of the opening of school. Therefore, it would seem that applications for admissions to schools other than those theretofore designated by the board of education or city administrative unit, should be made reasonably in advance of the opening of school.

5. Same—

Pupils residing in one administrative unit may be assigned to a school in another administrative unit pursuant to the provisions of G.S. 115-163.

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

APPEAL by petitioners from *Patton, Special Judge,* February Term, 1956, of McDOWELL.

This is a proceeding brought on 27 August 1955 by petitioners who filed with the Board of Education of McDowell County, hereinafter called the Board, a petition "on behalf of their children and themselves, and on behalf of other Negro children and parents similarly situated," in which, in sum and substance, they assert:

(1) That the (unnamed) children for whom they were speaking were eligible to attend public schools in McDowell County, North Carolina, and particularly the school at Old Fort.

(2) That the petitioners carried their children to the Old Fort school on 24 August 1955 and demanded that they then be enrolled in said school; that the principal of said school, acting in conjunction with and under the direction of the Superintendent of Schools of McDowell County, then and there denied to children of petitioners admission to the said Old Fort School.

(3) That the children were denied admission for the reason that school children were "not to be assigned in the schools of McDowell County during the school year 1955-56 on any basis other than that which has previously existed."

(4) That "the primary if not the sole basis upon which children in McDowell County have been assigned to schools has been race or color."

(5) That the Supreme Court of the United States has declared enforced racial segregation in public schools illegal.

(6) That the refusal to admit children of petitioners to the Old Fort school "was based solely and wholly upon race or color."

The petition, following the foregoing allegations sought redress in the following language:

"The undersigned, on behalf of their own children and on behalf of other Negro children and parents similarly situated, petition your Board that you forthwith issue a directive, order or mandate to the aforesaid Superintendent and Principal requiring them forthwith to admit children of petitioners and other Negro children similarly situated to the school and school facilities maintained by your Board in the Town of Old Fort."

The petitioners appeared before the Board on 3 October 1955 in support of their request. In a letter dated 5 January 1956, the petitioners were informed by the secretary of the respondent Board of the Board's denial on 2 January 1956 of petitioners' request to have their children enrolled in the public school in Old Fort, North Carolina. The denial was in the following language:

"A request on the part of Taylor & Mitchell on behalf of the Negroes at Old Fort to allow Negroes to attend school at Old Fort rather than to be transported to Marion to attend school at Hudgins High, was formally denied by virtue of necessity in that facilities and room are available at Hudgins High and are not available at Old Fort. The motion was made by Mr. Ross, seconded by Mr. Greenlee and duly passed."

The petitioners, through their counsel, gave notice of appeal to the Board by telegram on 13 January 1956 and requested the immediate

certification of the record to the Superior Court. The record was duly certified as requested.

In apt time, in the Superior Court, the respondent moved to dismiss the appeal on the ground that the notice of appeal was not given or filed within ten days as required by statute. In addition thereto, the respondent filed a demurrer to the petition and assigned as grounds therefor: (1) that the petition failed to state a cause of action; and (2) that there was a misjoinder of both parties and causes of action.

After hearing argument of counsel for respondent and counsel for petitioners, the court being of the opinion that the motion to dismiss should be denied and that the demurrer should be overruled in so far as it pertains to the failure to state a cause of action, but, that the demurrer as it relates to the misjoinder of parties and causes of action should be sustained, entered judgment accordingly. The petitioners appeal to the Supreme Court, assigning error.

Taylor & Mitchell for petitioners.

Roy W. Davis for respondent.

Attorney-General Rodman, Amicus Curiae, for the State.

DENNY, J. At the threshold of this appeal the Court is confronted with the fact that the questions presented are now academic as to the school year 1955-56. Even so, Chapter 366 of the Session Laws of 1955, codified as G.S. 115-176 through G.S. 115-179, governing the enrollment of pupils in the public schools of North Carolina is of such public importance that the Court deems it appropriate to clarify the procedure thereunder.

The appellants' pertinent assignments of error are directed to the ruling of the court below in sustaining the respondent's demurrer on the grounds of a misjoinder of parties and causes of action and to the failure of the court to order a severance of the causes of action, if the court was correct in its ruling as to such misjoinder.

A demurrer should be sustained and the action dismissed where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases to direct the severance of the respective causes of action for trial under the provisions of G.S. 1-132. *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711; *Sellers v. Ins. Co.,* 233 N.C. 590, 65 S.E. 2d 21; *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *s.c.* 232 N.C. 65, 59 S.E. 2d 2; *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247.

The Court deems it unnecessary to enter into a discussion of the question of misjoinder in this proceeding. The question is settled by the

statutes governing the enrollment of pupils in the public schools of North Carolina and, in the opinion of the Court, they do not authorize the institution of class suits upon denial of an application for enrollment in a particular school.

The provisions of G.S. 115-176 read as follows: "The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this article, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education."

It is provided in G.S. 115-178 that, "The parent or guardian of any child, or the person standing *in loco parentis* to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which said child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school."

The provisions of G.S. 115-179 are as follows: "Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom

to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard *de novo* in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions."

With respect to the provisions of G.S. 115-178, this Court construes them to authorize the parent to apply to the appropriate public school official for the enrollment of his child or children by name in any public school within the county or city administrative unit in which such child or children reside. But such parent is not authorized to apply for admission of any child or children other than his own unless he is the guardian of such child or children or stands *in loco parentis* to such child or children. In the event a parent, guardian or one standing *in loco parentis* of several children should apply for their admission to a particular school, it is quite possible that by reason of the difference in the ages of the children, the grades previously completed, the teacher load in the grades involved, etc., the school official might admit one or more of the children, and reject the others. The factors involved necessitate the consideration of the application of any child or children individually and not *en masse*. Any interested parent, guardian or person standing *in loco parentis* to such child or children, whose application may be rejected, may appeal to the appropriate board for a hearing in accordance with the rules and regulations established by such board. Furthermore, if the board denies the application for admission of such child or children, the aggrieved party may appeal in the manner prescribed by statute (G.S. 115-179) to the superior court, where the matter shall be heard *de novo* before a jury in the same manner as civil actions are tried therein.

Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing *in loco parentis* to any child or children for the admission of such child or children to a particular school, must be prosecuted in

behalf of the child or children by the interested parent, guardian or person standing *in loco parentis* to such child or children respectively and not collectively.

The Court notes that the petitioners did not apply for the admission of their children and other Negro children similarly situated to the school in Old Fort until the 24th day of August 1955, the day the school opened. It would seem that some rule or regulation might well be promulgated by the county and city boards of education fixing a date reasonably in advance of the opening of school for filing such applications. Judicial notice will be taken of the fact that boards of education must of necessity employ teachers in advance of the opening of school. Teachers are assigned to their particular schools on the basis of the enrollment information in the hands of the respective boards at the time the assignments are made. Hence, it would seem to be extremely desirable if not imperative for the orderly operation of the schools that applications for admission to schools other than those theretofore designated by the board of education or city administrative unit, be made reasonably in advance of the opening of school.

In addition to the assignment of pupils in the manner authorized in the above cited statutes, pupils residing in one administrative unit may be assigned to a school in another administrative unit, pursuant to the provisions contained in Chapter 1372, Session Laws of 1955, sub-chapter VIII, Art. 19, sec. 3, codified as G.S. 115-163. *In re Assignment of School Children*, 242 N.C. 500, 87 S.E. 2d 911.

An additional reason why this proceeding was properly dismissed is that while it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is in effect an application for *mandamus*, requiring the immediate integration of all Negro pupils residing in the administrative unit in which the Old Fort school is located, in the Old Fort school. Such a procedure is neither contemplated nor authorized by statute. Therefore, the appeal is dismissed.

Appeal dismissed.

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

THE DAYTON RUBBER COMPANY v. EUGENE SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 23 May, 1956.)

1. Appeal and Error § 49—

Findings of fact by the trial court under agreement of the parties are conclusive when supported by any competent evidence.

2. Taxation § 29—

Statutory provision for the carry-over of loss from a prior year or years as a deduction from taxable income in a profitable year is a matter of grace, the General Assembly being under no constitutional or other legal compulsion to allow any carry-over.

3. Same—

Plaintiff is a foreign corporation doing business in this State. In computing its income taxable in this State during the year in question, royalty income received by it during the prior year from its non-unitary business, not connected with its operations in this State and not taxable as income here, and such royalty income for the year in question, were deducted from the net loss before computing the amount of the loss carry-over to be allocated to its operations within this State. *Held:* The administrative procedure is supported by the second and third paragraphs, subsection (d) of G.S. 105-147(6), and is upheld.

4. Taxation § 23½—

While an administrative interpretation of a taxing statute is not controlling, and such interpretation which is in direct conflict with the clear intent and purpose of the statute may not stand, nevertheless an administrative construction will be given consideration in interpreting the statute and is *prima facie* correct. G.S. 105-264.

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

APPEAL by plaintiff from *Dan K. Moore, J.,* September Term, 1955, of HAYWOOD.

This is a civil action to recover the sum of $9,171.68 with interest from 20 July, 1954. The sum sought to be recovered is the amount of additional income tax and penalties assessed against the plaintiff for the year ending 31 October, 1950, which amount was paid under protest on 28 June, 1954. The plaintiff, within the time allowed by statute, demanded a refund of the amount so paid. The defendant, after giving the plaintiff a hearing on the questions involved, notified it by letter dated 7 July, 1954, that its request for refund had been denied. This action was instituted 6 July, 1955.

The cause was heard by the trial judge without a jury upon an agreed statement of facts and upon evidence taken on the question of administrative procedure of the North Carolina Department of Revenue in

applying the net economic loss carry-over as set out in Income Tax Regulation No. 2, promulgated on 10 February, 1944 by the Commissioner of Revenue, pursuant to the provisions of G.S. 105-262. The additional facts essential to an understanding of this appeal are as follows:

1. The plaintiff is a foreign corporation doing business both within and without North Carolina. Since the plaintiff's principal business in North Carolina is manufacturing, its income tax is computed under paragraph 1 of G.S. 105-134.II. During plaintiff's fiscal year ending on 31 October, 1949, it suffered a net loss, as computed under the North Carolina Revenue Act, from its entire unitary business operations everywhere of $1,039,572.83. However, during the same fiscal year, the plaintiff received income from certain royalties in the amount of $185,549.03. This royalty income arose from sources not connected with plaintiff's unitary business and no part of it was taxed by North Carolina. For the fiscal year ending on 31 October, 1950, plaintiff had a net income, as computed under the North Carolina Revenue Act, from its unitary business operations everywhere of $4,020,250.29. During the same fiscal year plaintiff had royalty income from non-unitary business activity of $131,594.96, none of which was taxed by North Carolina.

2. For the fiscal year ending on 31 October, 1949, the allocation ratio applicable to the plaintiff was 13.7932%. For the fiscal year ending on 31 October, 1950, the applicable allocation ratio was 21.9236%.

3. In computing its net income allocable to North Carolina for the fiscal year ending in 1950, the plaintiff took its net income from business operations everywhere and deducted from that figure the amount of $1,039,572.83, computed as its loss for the fiscal year ending in 1949. To the resulting figure of $2,980,677.46 the plaintiff applied the allocation ratio for 1950 and alleged that the portion of its net taxable income for 1950 allocable to North Carolina was the resulting amount of $653,471.80. The plaintiff then computed its tax at 6% of this figure.

4. In computing the tax deficiency which forms the basis of the assessment involved in this case, the defendant reduced the plaintiff's net tax accounting loss from its unitary business in 1949 by the amount of nontaxable royalty income received in that year. To the figure resulting from this reduction, the defendant then applied the allocation ratio applicable to the plaintiff for the year 1949 and permitted a carry-over in the amount of $117,797.21. Before permitting this sum to be deducted from the allocable part of the 1950 net income from unitary business, the defendant first reduced the carry-over by an allocable part of the nontaxable royalty income received in 1950. The resulting figure of $88,946.86 the defendant permitted as a deduction from the allocable portion of 1950 net income from unitary business operations.

5. After giving effect to the above method of calculating allowable carry-over from losses in 1949, the plaintiff's income tax paid by it as set forth in paragraph 3 above, for the year ending 31 October, 1950, was deficient in the sum of $8,337.89. This amount, together with interest of $833.79, was assessed against the plaintiff, making a total of $9,171.68.

On the foregoing facts and the evidence with respect to the administrative practice of the Department of Revenue in establishing a carry-over loss, the court found as a fact, "That it has been the administrative practice of the Department of Revenue since February 10, 1944, to reduce a net economic loss claimed by a taxpayer by the amount of nontaxable income received by the taxpayer during the year of the loss and to limit a deduction for net economic loss carry-over from a prior year to the allocable portion of such loss determined by applying to the entire loss, as reduced by nontaxable income of the year, the applicable allocation ratio of G.S. 105-134 for the year in which the loss is sustained and to reduce the carry-over loss deduction by an allocable amount of the nontaxable income received by the taxpayer in the year in which the loss is sought to be used as a deduction."

The court entered judgment to the effect that the plaintiff is entitled to recover nothing. From this judgment, plaintiff appeals, assigning error.

William Medford for plaintiff.

Attorney-General Rodman and Assistant Attorney-General Behrends for the State.

DENNY, J. It is conceded in the plaintiff's brief that the only disputed fact involved in this appeal is whether or not its claim has been handled in accordance with established administrative procedure by the North Carolina Department of Revenue. In our opinion, the finding of fact by the court below on this question is supported by competent evidence and is, therefore, not reviewable on appeal. *Ryan v. Wachovia Bank & Trust Co.*, 235 N.C. 585, 70 S.E. 2d 853; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351; *Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E. 2d 219. Consequently, the appeal only presents for our consideration and determination certain questions which involve an interpretation of the loss carry-over provisions contained in G.S. 105-147 (6) (d) and which are applicable to foreign and domestic corporations as well as to resident individuals.

The questions raised may be stated as follows: (1) Was the Commissioner of Revenue correct in his conclusion that under the above statute all income of the plaintiff, including that from non-unitary business,

must be considered before a loss can be established that may be carried over to the next tax year? (2) Must the loss be further reduced by including the nontaxable income received by the taxpayer in the year in which the loss is sought to be used as a deduction?

The reasons for permitting the carry-over loss deduction and for imposing the restrictions and limitations on it are set forth in paragraph First, subsection (d), of G.S. 105-147(6), as follows: "First, the purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairmen of the net economic situation of the taxpayer such as to result in net economic loss as hereinafter defined."

How the economic loss shall be determined is set forth in paragraphs Second and Third of the above statute, as follows: "Second, the net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes shall exceed income from all sources in the year including any income not taxable under this atricle.

"Third, any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, . . ."

We need not discuss the statute (G.S. 105-134.II) with respect to the method used to arrive at the formula applicable to income earned by a foreign corporation in a multiple-state business. It is conceded that the formula percentage for each year involved is correct. It is further conceded by the defendant that the plaintiff in computing its economic loss in 1949, properly excluded the named deductions in the second paragraph of subsection (d) of G.S. 105-147(6) as set forth above, but it did not take into account other income received but not taxable under G.S. 105-134.

It is also conceded by the defendant that the royalty income of the plaintiff in 1949 and 1950 was from non-unitary business operations having no relation or connection with the plaintiff's manufacturing activities in North Carolina. Thus, it is clear that no part of it could

be taxed as income in North Carolina. However, including this nontaxable income, in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year, is, in our opinion, required by G.S. 105-147(6)(d), and we so hold. Our Legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income.

All the Commissioner of Revenue did in this case was to take the economic loss of the plaintiff for its fiscal year ending 31 October, 1949, in the sum of $1,039,572.83, and reduce it by the amount of its nontaxable income in the sum of $185,549.03, as provided in the second paragraph of subsection (d) of G.S. 105-147(6). This established a net economic loss of $854,023.80 for the fiscal year ending 31 October, 1949. The defendant then applied the allocable ratio of 13.7932% applicable to the plaintiff for the 1949 fiscal year, which established the amount of the permissible carry-over as $117,797.21. Before permitting this sum to be deducted, however, from the allocable part of the 1950 net income from unitary business, the Commissioner of Revenue first reduced the carry-over by the allocable part of the nontaxable income received by the plaintiff during its fiscal year ending 31 October, 1950, as provided in the third paragraph of subsection (d) of G.S. 105-147(6). This further reduced the carry-over loss from $117,797.21 to $88,946.86. This was arrived at by taking the non-unitary income of the plaintiff for the fiscal year ending 31 October, 1950, in the amount of $131,594.96, and applying the allocable ratio of 21.9236% applicable to the plaintiff for the 1950 fiscal year and deducting the amount from the $117,797.21 carry-over. The resulting figure of $88,946.86 was allowed as a deduction from the allocable portion of the 1950 net income from the unitary business operations of the plaintiff.

The provisions of our statute are unlike those in the statute involved in the case of *Bowman Dairy Company v. Wisconsin Tax Commission,* 240 Wis. 1, 1 N.W. 2d 905, cited and relied upon by the plaintiff to sustain its contention that if the nontaxable income is to be included in determining the net economic loss it should be included only for the fiscal year in which the loss occurred. The cited case seems to so hold. However, our statute expressly provides otherwise. Hence, the contention is untenable.

In our opinion, the method used in arriving at the deductible loss of $88,946.86, and allowed as a deduction from the allocable portion of the plaintiff's 1950 net income from its unitary business operations, is

supported by the second and third paragraphs of subsection (d) of G.S. 105-147(6).

Moreover, the construction given the provisions of our tax laws by the Commissioner of Revenue "shall be *prima facie* correct and a protection to the officers and taxpayers affected thereby." G.S. 105-264. The construction given a taxing statute by the Commissioner of Revenue will be given consideration by the Court, though not controlling. *Bottling Co. v. Shaw,* 232 N.C. 307, 59 S.E. 2d 819; *Knitting Mills v. Gill,* 228 N.C. 764, 47 S.E. 2d 240; *Valentine v. Gill,* 223 N.C. 396, 27 S.E. 2d 2; *Powell v. Maxwell,* 210 N.C. 211, 186 S.E. 326. However, the Court will not follow an administrative interpretation which is in direct conflict with the clear intent and purpose of the statute under consideration. *Watson Industries v. Shaw,* 235 N.C. 203, 69 S.E. 2d 505. In the instant case, however, we have found no conflict between the Income Tax Regulation No. 2, promulgated on 10 February, 1944 by the Commissioner of Revenue and followed by the Department of Revenue in its administrative practice with respect to carry-over losses, and the statutory provisions with respect thereto in G.S. 105-147(6)(d).

The judgment of the court below is

Affirmed.

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

ALFRED R. RICH v. NORFOLK SOUTHERN RAILWAY COMPANY, G. T. WILLIAMS, J. A. WOODS, JAMES McDONALD, AND W. L. WILLIAMS.

(Filed 23 May, 1956.)

1. Appeal and Error § 49—

If the findings of fact made by the trial court are not challenged and are sufficient to support the order, the order must be affirmed.

2. Pleadings § 12—

Where the complaint is verified, the answer also must be verified. G.S. 1-144.

3. Same: Judgments § 9—Where answer is not verified, answer must be stricken on motion after notice before rendition of default judgment.

In an action on verified complaint against a corporate and individual defendants, defendants filed joint answer which was verified as to the corporate defendant by its vice-president and secretary, but not verified by or in behalf of the individual defendants. G.S. 1-145. *Held:* Judgment by default and inquiry entered by the clerk, without notice, against the individual defendants because of want of verification of the answer as to

them, was improperly allowed, since such judgment could not be entered until the answer had been stricken as to the individual defendants upon motion and upon hearing after due notice.

4. Judgments § 9—

The jurisdiction of the clerk of superior court to enter judgments by default final and by default and inquiry is both conferred and limited by statute, and the statutes do not deprive the superior court in term of its jurisdiction in regard thereto. G.S. 1-209 *et seq.*

5. Judgments § 11—

A judgment by default and inquiry is an interlocutory judgment which transfers the cause by operation of law to the Superior Court for further hearing in term. G.S. 1-212.

6. Judgments § 25—

Motion to set aside judgment by default and inquiry is properly made before the judge at term.

7. Courts § 4c—

Statutory authority of the clerk to enter judgments by default and by default and inquiry cannot deprive the Superior Court of its statutory and inherent powers to extend the time for, or allow an amendment to, a pleading, which powers the judge of the Superior Court may exercise when the cause reaches him by appeal.

8. Judgments § 27a: Pleadings §§ 12, 22—

Judgment by default and inquiry was entered by the clerk against the individual defendants on the ground that the answer as to them was not verified as required by statute. Defendants moved in Superior Court at term that the judgment by default and inquiry be stricken. The Superior Court allowed verification of the answer by the individual defendants *nunc pro tunc* and struck the default judgment. *Held:* The judgment by default and inquiry was entered contrary to the course and practice of the court and was properly set aside, and the court had authority to permit the verification *nunc pro tunc.*

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

APPEAL by plaintiff from *Hall, J.*, October Term, 1955, DURHAM.

Civil action growing out of a collision that occurred 22 January, 1954, between corporate defendant's train and an automobile owned and operated by plaintiff, at a grade crossing in Durham County.

Plaintiff, in his verified complaint, alleged that the collision, which caused personal injuries and property damage for which he seeks to recover herein, was caused by the negligence of defendants.

On 12 April, 1955, the *clerk* of the superior court, predicated upon recitals that defendants G. T. Williams, W. L. Williams and J. A. Woods had not answered, demurred or otherwise pleaded within the time allowed by law, entered judgment by default and inquiry against said

individual defendants, which judgment ordered "that a writ of inquiry be returned at the next civil term of the Superior Court of Durham County for the purpose of assessing damages . . ." as provided in G.S. 1-212.

Nothing further occurred until 1 September, 1955, when defendants, through counsel, moved in the superior court that the judge thereof in his discretion set aside the (purported) judgment by default and inquiry and permit them to verify the answer theretofore filed by them or in lieu thereof permit them to file a new verified answer.

Upon hearing on defendants' said motion, the judge made full findings of fact; and, in the exercise of his discretion and in furtherance of justice, (1) vacated and set aside the said judgment by default and inquiry, and, (2) allowed the individual defendants 30 days within which to verify, *nunc pro tunc,* the (unverified?) answer theretofore filed in their behalf.

The said order, granting defendants' motion, was entered 24 October, 1955. Plaintiff excepted and appealed, his sole assignment of error being the entry of said order.

N. H. Godwin and Daniel M. Williams, Jr., for plaintiff, appellant.
Simms & Simms and Spears & Spears for defendants, appellees.

BOBBITT, J. The findings of fact made by Judge Hall are not challenged. Are they sufficient to support his order? If so, the order must be affirmed. *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759, and cases cited.

The facts found include those stated in (our) numbered paragraphs below.

1. The summons and complaint were served on the corporate defendant and on defendants G. T. Williams, W. L. Williams and J. A. Woods. There was no service on defendant James McDonald.

2. Corporate defendant, as was its custom, employed counsel, a well-known firm in Durham County and a well-known firm in Wake County, to defend the action for and on behalf of itself and its codefendants, they being employees of the corporate defendant and members of the crew of the train involved in the collision.

3. Counsel so employed acted thereafter in behalf of all defendants, including James McDonald. All defendants, through counsel, moved for additional time within which to plead. An order allowing all defendants such additional time was signed by the *assistant* clerk of the superior court. Within the time allowed, to wit, on 10 September, 1954, an answer was filed by all defendants through said counsel, the said *assistant* clerk signing an entry to the effect that said answer was

then filed. The only verification was by a Vice-President and Secretary of the corporate defendant, whose purpose and intention was to verify said answer for and in behalf of all defendants. The verification was before a notary public in Norfolk, Virginia.

4. Nothing further occurred until 12 April, 1955, when plaintiff, without notice to any of the defendants or to any of their counsel of record, moved before the *clerk* of the superior court for judgment by default and inquiry, which motion was allowed and judgment by default and inquiry was then signed as stated above.

5. The individual defendants G. T. Williams, W. L. Williams and J. A. Woods have a meritorious defense to plaintiff's cause of action; and their failure to verify said answer was not due to any negligence on their part.

6. The said judgment by default and inquiry was "improvidently and inadvertently" entered by the clerk.

Plaintiff bases his position on the ground that the answer filed 10 September, 1954, as to the individual defendants, was an unverified answer. Therefore, the argument runs, the individual defendants filed no answer; and plaintiff was entitled to said judgment by default and inquiry for want of answer.

The complaint was verified. Therefore, verification of the answer was required. G.S. 1-144. The purpose of this statutory requirement is to eliminate dilatory pleadings in cases where no real issue is involved. Thus, one who supports his pleading by his oath is not put to the delay and expense incident to a jury trial unless the answering party supports his denial or counter allegations by his oath. *Griffin v. Light Co.*, 111 N.C. 434, 16 S.E. 423.

The basic rule is that the verification, in substance as prescribed, must be made by each answering party. G.S. 1-145. However, an exception is made when "there are several parties united in interest and pleading together." In such case, the verification must be "by one at least of such parties acquainted with the facts, *if* the party is in the county where *the* attorney resides and is capable of making the affidavit." (Italics added.) G.S. 1-145. The word "if" as used here is synonymous with "provided." And the word "the" refers to the attorney for the parties who file joint answering pleading.

The wording of G.S. 1-145 seems more appropriate in respect of a joint pleading filed by two or more individuals. Whether the exception in respect of joint pleadings relates solely to that situation need not be decided on this appeal. The verification by the Vice-President and Secretary of the corporate defendant, unchallenged as a proper verification as to the corporate defendant, was not verification by or in behalf of the individual defendants in compliance with G.S. 1-145. (Inci-

dentally, the reason for the requirement that the affiant be one who resides in the county where the attorney resides rather than in the county where the cause of action arose or where the action is pending is somewhat obscure. *Ita lex scripta est.)* The deficiency, upon this record, was a technical one; for it appears plainly that all defendants, represented by counsel, were preparing in good faith for a contested trial on the merits.

The judgment by default and inquiry makes no reference whatever to the joint answer filed 10 September, 1954, by all defendants. Whether the *clerk* was aware that the answer had been filed does not appear. Suffice it to say, the joint answer on file and unchallenged from 10 September, 1954, to 12 April, 1955, was ignored.

The jurisdiction of a clerk of the superior court to enter judgments by default final and by default and inquiry is both conferred and limited by statute. G.S. 1-209 *et seq. Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321; *Boone v. Sparrow,* 235 N.C. 396, 70 S.E. 2d 204. These statutes do not deprive the superior court in term of its jurisdiction, but give the clerk concurrent jurisdiction in respect of judgments specifically covered by their provisions. *Hill v. Hotel Co.,* 188 N.C. 586, 125 S.E. 266; *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329.

As stated by *Denny, J.,* in *Moody v. Howell,* 229 N.C. 200, 49 S.E. 2d 233: "A motion to set aside a judgment by default final or by default and inquiry entered by the Clerk pursuant to the authority contained in G.S. 1-211 and 1-212, may be made either before the Clerk or the Judge of the Superior Court. *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329. The authority of the Clerk to enter judgments pursuant to the provisions of the above statutes, as well as the power to vacate such judgments, is concurrent with and in addition to that of the Judge of the Superior Court, and the jurisdiction of the Judge on a motion to set aside a judgment so entered by the Clerk, is original as well as appellate. *Caldwell v. Caldwell, supra.*"

Moreover, when an answer is filed, the cause is transferred by operation of law to the superior court for trial at term on the issues raised. G.S. 1-171. The clerk's jurisdiction to enter judgment by default or by default and inquiry exists when, but only when, no answer has been filed. Upon the filing of an answer, judgment by default or by default and inquiry may not be entered unless and until the answer has been stricken upon motion and upon hearing after due notice. *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; *Cahoon v. Everton,* 187 N.C. 369, 121 S.E. 612. Too, a judgment by default and inquiry is an interlocutory judgment. *Rogers v. Moore,* 86 N.C. 86; *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179. When such judgment is signed by the clerk, the cause is transferred by operation of law to the superior court for further

hearing in term. G.S. 1-212. When so transferred, the superior court judge is "to proceed to hear and determine all matters in controversy in such action, . . ." G.S. 1-276.

In short, defendants' motion in the cause to set aside said judgment by default and inquiry was properly made before the judge of the superior court.

Under the former practice, the issues in a cause were joined by pleadings filed at the term to which process was returnable. *Gilchrist v. Kitchen,* 86 N.C. 20 A motion for judgment for want of an answer, or for want of a verified answer, was made before the presiding judge at term. Upon hearing, the presiding judge had plenary authority, in his discretion, to extend the time for filing answer, or to permit defendant to verify an answer theretofore filed, if this were necessary in furtherance of justice. *Griffin v. Light Co., supra,* and cases cited.

Unquestionably, a superior court judge now has such power. G.S. 1-152. Indeed, *Ashe, J.,* in *Gilchrist v. Kitchen, supra,* after referring to the statute (then C.C.P. sec. 133), says: "But, independent of The Code, we hold that the right to amend the pleadings of a cause and allow answers or other pleadings to be filed at *any* time, is an inherent power of the Superior Courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with." (Italics added.) *Mallard v. Patterson,* 108 N.C. 255, 13 S.E. 93; *Best v. Mortgage Co.,* 131 N.C. 70, 42 S.E. 456. The statutes vesting limited jurisdiction in the clerk were not intended nor can they be construed so as to strip the judge of such discretionary power or to circumvent his opportunity to exercise it. *Bailey v. Davis. supra.*

When the answer filed 10 September, 1954, by all defendants and raising serious issues of fact, remained on file without challenge until 12 April, 1955, neither the plaintiff nor the clerk was at liberty to ignore it even though deficient in respect of verification by the individual defendants. Plaintiff's remedy was by motion, after due notice to the opposing parties or their counsel, to strike out such answer and then for judgment for want of answer. Assuming it would have been proper for plaintiff to move before the clerk to strike out the answer and for judgment by default and inquiry, and the clerk had granted said motions, after due notice and hearing, because of lack of authority to extend the time for filing answer or for verifying the answer theretofore filed or for other cause, defendants could have excepted and appealed. Upon appeal, the judge of the superior court, in his discretion, might or might not have granted defendants' motion for an extension of time. Any other procedure would deprive the judge of the superior court of an

opportunity to exercise his discretionary power, statutory and inherent, to grant such extension.

The clerk had no authority to enter judgment by default and inquiry in the absence of due notice to defendants or their counsel of plaintiff's motion therefor and a hearing thereon. The said judgment by default and inquiry was an irregular judgment, rendered contrary to the course and practice of the court, properly attacked by defendants' motion in the cause. *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409, and authorities cited. Having so determined, it was a matter within the discretion of Judge Hall to allow the individual defendants to verify, *nunc pro tunc,* the answer theretofore filed by them.

The procedure required is analogous to that in actions for the recovery or possession of real property. In such actions, if defendant (unless excused under G.S. 1-112) fails to file the required bond, plaintiff is entitled to judgment by default final as to title and possession. G.S. 1-111. By statute, the clerk is authorized to enter such judgment. G.S. 1-209, G.S. 1-211(4). See *Morris v. Wilkins,* 241 N.C. 507, 85 S.E. 2d 892. Even so, when defendant answers without filing the required bond, judgment by default final by reason of defendant's failure to file such bond is irregular unless entered after hearing on return of notice to defendant to appear and show cause why this should not be done. *Shepherd v. Shepherd,* 179 N.C. 121, 101 S.E. 489; *Gill v. Porter,* 174 N.C. 569, 94 S.E. 108; *Becton v. Dunn,* 137 N.C. 559, 50 S.E. 289; *Cooper v. Warlick,* 109 N.C. 672, 14 S.E. 106; *McMillan v. Baker,* 92 N.C. 110.

Having reached the conclusion that the said judgment by default and inquiry was properly set aside for the reasons stated, we need not discuss the sufficiency of the facts found to warrant setting aside said judgment by default and inquiry on the ground of excusable neglect, etc., defendants having a meritorious defense, under G.S. 1-220. One sufficient ground for sustaining the order is enough.

In accordance with Judge Hall's order, the individual defendants have verified the answer theretofore filed by them 10 September, 1954. After much ado about very little, it would seem appropriate for plaintiff now to concentrate on the merits of his action and to get on with the trial.

The order of Judge Hall is, in all respects,

Affirmed.

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

EUGENE HALL AND WIFE, NELLIE HALL, v. DEWELD MICA CORPORATION.

(Filed 23 May, 1956.)

1. Appeal and Error § 3—

An appeal lies from the overruling of demurrer for misjoinder of parties and causes of action. Rule of Practice in the Supreme Court 4(a).

2. Trespass § 1f: Injunctions § 4d: Pleadings § 19b: Parties § 2—Husband and wife may maintain joint action for trespass to realty by discharge of dust and to abate same as nuisance.

Plaintiffs, husband and wife, alleged that they own their home in which they live with their four children, that defendant, incident to mica mining operations 200 yards distant from their home, was discharging vast clouds of dust, containing minute particles of silicon dioxide, onto plaintiffs' property, exposing plaintiffs and their children to the danger of silicosis, and resulting in damage to the property, additional work to keep the house clean, and mental anguish on account of the threat to the health of themselves and children. Plaintiffs prayed damages in a stipulated amount and injunction to prevent future trespass. *Held:* The allegations that plaintiffs own their home is sufficient to show that both have an interest in the property, and therefore both are properly joined as plaintiffs under G.S. 1-68. *Held further:* Only one cause of action for damages for trespass and to restrain further trespasses was stated, the allegations as to extra labor necessary to keep the house clean and mental anguish on account of the threat to health being merely allegations of elements of damages and grounds for the issuance of a restraining order. Therefore, demurrer for misjoinder of parties and causes was properly overruled.

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

APPEAL by defendant from *Huskins, J.*, January Term 1956 of YANCEY.

Civil action heard upon a demurrer.

The plaintiffs are husband and wife, and allege substantially these facts in their complaint:

One. They own a four-room home, and live in it with their four small children.

Two. The defendant for some time has been, and is now, operating six days a week, 24 hours a day, a mica mining and separating plant about 200 yards from their home. The operation of this plant gives off a vast cloud of dust, which settles all over their yard, lawn, garden, garden vegetables and spring, enters their house covering with dust their furniture, clothing, beds, cooking utensils and china, and settles on their mantles, window sills, walls, curtains and windows, to their great and constant annoyance, resulting in increased work to keep the inside of their house and its contents clean.

Three. This dust is charged with, and partly made up of, minute and invisible particles of silicon dioxide, which produces silicosis, and exposes plaintiffs and their children to danger of that disease.

Four. The defendant for five years has caused this dust to be thrown into the air and on their property, and more particularly, and with an increased quantity, for the last three months, thereby damaging plaintiffs and their property in the sum of at least $1,200.00.

Five. The defendant by polluting the air and permitting and causing this dust to settle on their property and in their home is guilty of a continuing nuisance.

Six. They have suffered, and are suffering, fear and mental anguish on account of the threat to their health and that of their children.

Seven. The defendant by permitting and causing this dust to settle on their property is constantly committing a continuing trespass, and they have no adequate remedy other than by an injunction to grant them relief from this continuing trespass.

The plaintiffs pray for an injunction to prevent the defendant from permitting this dust to settle on their property and in their home and for damages in the sum of $1,200.00.

The defendant filed a written demurrer on two grounds. One, an improper joinder of parties having separate interests and separate damages. Two, an improper misjoinder of several causes of action, because all the parties are not affected by each cause of action, and the causes of action are not separately stated.

The lower court overruled the demurrer.

The defendant appealed, assigning error.

R. W. Wilson for Plaintiffs, Appellees.

Fouts & Watson, G. D. Bailey and W. E. Anglin for Defendant, Appellant.

PARKER, J. The defendant demurs on the ground of a misjoinder of parties and causes. When a demurrer on that ground is overruled, Rule 4(a) Rules of Practice in the Supreme Court, 243 N.C. 766, does not apply.

The defendant contends that there is a misjoinder of parties and causes, because the plaintiffs seek to recover damages and pray for a permanent injunction for: "(1) trespass on their property; (2) labor in keeping things clean; (3) exposure to silicosis; and (4) fear and mental anguish for threat to their health and their children." The defendant further states in its brief: "As to their labor, their exposure to silicosis and their fear and mental anguish, each plaintiff has separate interests and separate damages, and the actions, therefore, are

improperly united in this one action. G.S. 1-123; G.S. 1-127." The above is the complete argument and citation of authority in its brief.

The complaint alleges a direct invasion of plaintiffs' property rights by vast clouds of dust charged with, and partly made up of, minute and invisible particles of silicon dioxide, which produces silicosis, settling on and covering their property, both inside and outside their home, which injurious acts are the immediate result of the operation of a mica mining and separating plant 200 yards from their home by the defendant. This is a trespass, and gives rise to a cause of action. *McPherson v. Williams,* 205 N.C. 177, 170 S.E. 662; *Gwaltney v. Timber Co.,* 115 N.C. 579, 20 S.E. 465; *Newsom v. Anderson,* 24 N.C. 42, 37 Am. Dec. 406; 87 C.J.S., Trespass, pp. 966-967.

In *Kosich v. Poultrymen's Service Corp.,* 136 N. J. Eq. 571, 43 A. 2d 15, the Court said, quoting from *Hennessy v. Carmony, Ch.,* 50 N. J. Eq. 616, 25 A. 374: My neighbor "has no right . . . to throw sand, earth, or water upon my land in ever so small a quantity. To do so is an invasion of property, and a trespass, and to continue to do so constitutes a nuisance."

The sole allegation of ownership of the property by the plaintiffs is in paragraph two of their complaint, which reads: "That the plaintiffs own and have their home in South Toe Township in this State and County, where they have a four-room house and where they live and where they have four children, ages two to eleven years."

This Court said in *Holloway v. Green,* 167 N.C. 91, 83 S.E. 243: "It is also a well recognized principle that in a conveyance to husband and wife they take by entireties, with the right of survivorship (*Bruce v. Nicholson,* 109 N.C. 202), but that a conveyance may be made to them as tenants in common, when there is no survivorship. *Eason v. Eason,* 159 N.C. 539." See also: *Nesbitt v. Fairview Farms, Inc.,* 239 N.C. 481, 80 S.E. 2d 472.

It does not appear from the complaint as to whether the plaintiffs own their home as joint tenants, tenants in common or tenants by the entirety, but it does clearly appear that both are in the actual possession of their home, that both have an interest in it, and both want the relief demanded in the complaint.

G.S. 1-68—WHO MAY BE PLAINTIFFS—reads: "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative . . ." The object of this statute is to permit all persons, who come within its terms, to unite as parties plaintiff, so that a single judgment may be rendered completely determining the controversy for the protection of all concerned.

In *Pake v. Morris,* 230 N.C. 424, 53 S.E. 2d 300, the plaintiffs were husband and wife, who were the owners and in possession of the tract of

land described in the complaint. They brought an action to enjoin an alleged threatened nuisance in the operation of a fish factory in close proximity to their home, which allegedly rendered their home practically uninhabitable and greatly impaired their comfort and health. A verdict and judgment in defendant's favor was affirmed. There was no contention that there was a misjoinder of parties and causes.

In *Morgan v. Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682, the plaintiffs were husband and wife, who were seized in fee simple as tenants by the entireties of nine acres of land. They brought an action to recover temporary damages for a private nuisance and to abate such nuisance by injunction upon the alleged ground of damage to their property rights. In the opinion the Court said: ". . . the evidence is ample to establish the existence of an actionable private nuisance, entitling *the plaintiffs* to recover temporary damages from the High Penn Oil Company." Emphasis added. Further on in the opinion it is said: ". . . the evidence is ample to establish the existence of an abatable private nuisance, entitling *the plaintiffs* to such mandatory or prohibitory injunctive relief as may be required to prevent the High Penn Oil Company from continuing the nuisance." Emphasis added. There was no contention of a misjoinder of parties and causes. See: *West v. R. R.*, 140 N.C. 620, 53 S.E. 477; *Jones v. Smith & Co.*, 149 N.C. 318, 62 S.E. 1092; *Nesbitt v. Fairview Farms, Inc., supra.* In the *Nesbitt v. Fairview Farms, Inc.*, case, which was a processioning proceeding to establish the true dividing line between the lands of petitioners held by them as tenants by the entireties and the lands of the respondent, the Court said: "While she" (petitioner's wife) "is not a necessary party to this proceeding, she is a proper party." See also: *Fowles v. Hayden*, (Mich.) 89 N.W. 571.

In *Morganton v. Hudson*, 207 N.C. 360, 177 S.E. 169, a town owning an easement over lands for its water-shed and the owner of the fee in such lands brought a joint action against a third person for damages for trespass and to restrain further acts of trespass. Defendant demurred to the complaint on the ground of a misjoinder of parties and causes. In the lower court the demurrer was sustained. This Court reversed the court below holding that the joint action could be maintained, because both plaintiffs had an interest in the lands. In its opinion the Court also said: "An easement is an interest in land, and it has been held by this Court that a tenant and an owner may be properly joined in an action for trespass or remainderman and life tenant."

This is the only cause of action the plaintiffs have alleged. A joint action for damages for trespass by the defendant upon the lands and home they own, and at the same time to restrain further trespasses upon

their lands and home by the defendant. It is true that the complaint alleges that the dust settling in their home has caused a great deal of extra working and labor on their part, and the exposure of themselves and their children to this dust charged with, and partly made up of, minute and invisible particles of silicon dioxide, which produces silicosis, has caused them fear and mental anguish on account of the threat to their health and that of the health of their children, but these are alleged as elements of damages for the defendant's wrongful trespass upon their lands and home, and as grounds for the issuance of a restraining order, and not as separate causes of action. The admissibility in evidence of all these facts alleged as elements of damages and as grounds for a restraining order are not before us for decision, for the reason that the sole question before us is as to whether there is a misjoinder of parties and causes. This Court said in *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804: "Where a trespass is shown the party aggrieved is entitled at least to nominal damages." Numerous cases are cited in support.

The plaintiff in its brief states "there is only one defendant and one cause of action"; that the allegation of mental anguish is merely an element of damages and not a cause of action; and that the threat of silicosis is alleged merely as a ground for abatement of a nuisance by injunction.

In this case there is no misjoinder of causes. *Morgan v. Oil Co., supra; Morganton v. Hudson, supra.* And further, there is no misjoinder of parties for G.S. 1-68 provides that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs," and it does not appear that the exception in the statute is applicable here.

The court below properly overruled the demurrer for an alleged misjoinder of parties and causes.

Affirmed.

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

ELIZABETH PRICE ROYAL, ADMINISTRATRIX OF LEON ERNEST ROYAL, JR., v. EVELYN LOUISE McCLURE, ERNEST R. MITCHELL AND WIFE, MRS. ERNEST R. MITCHELL, CARL S. LENNON, B. S. LENNON, L. D. MARKS, MRS. J. M. SAULS, ESMER E. WARD, AND HENRY NANCE.

(Filed 23 May, 1956.)

1. Pleadings § 15—

A demurrer does not admit the conclusions of law of the pleader.

2. Automobiles § 14—

The statutory proscription against following too closely a vehicle traveling in the same direction has no application to the distance between vehicles stopping one behind the other on the highway. G.S. 20-152.

3. Automobiles § 9—

The stopping of a car behind another car, which had stopped on the highway because heavy smoke and fog had impaired or destroyed vision, is a temporary stop because of exigencies of travel, and G.S. 20-161 has no application thereto.

4. Same—

Where a line of cars traveling in the same direction stop successively one behind the other because smoke and fog had obscured visibility, the drivers so stopping are not under duty to anticipate that the drivers of other cars overtaking them would so operate their cars that they could not stop.

5. Automobiles § 35—Complaint held insufficient to allege actionable negligence in stopping on highway.

The complaint alleged that seven automobiles were traveling in the same direction upon the highway, that the first five cars stopped one behind the other because smoke and fog had obscured visibility, that the sixth car, in which plaintiff's intestate was a passenger, collided with the rear of the fifth car and that the seventh car immediately thereafter collided with the rear of the sixth car. *Held:* Demurrers of the drivers of the fourth and fifth cars were properly allowed, since upon the facts alleged, they had operated their cars in a lawful manner, kept them under control, and had stopped them on the highway in accordance with the exigencies of travel.

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

APPEAL by plaintiff from *Nimocks, J.*, March Term, 1956, COLUMBUS.

Action by administratrix to recover damages for wrongful death of her intestate, allegedly caused by the joint and concurring negligence of defendants.

Defendants Marks and Sauls, the only defendants who are parties to this appeal, filed separate demurrers to the complaint. Each assigned as ground for demurrer the failure of plaintiff to allege facts sufficient to constitute a cause of action against such defendant.

The allegations of the complaint, pertinent to this appeal, are set out below.

1. Seven automobiles were headed east on U. S. Highway #74 in this order: (1) the McClure car; (2) the Mitchell car; (3) the Lennon car; (4) the Marks car; (5) the Sauls car; (6) the Ward car, in which plaintiff's intestate was a passenger; and (7) the Nance car.

2. "6. That on or about April 2, 1955, at about 7:30 a.m. at a point one-fourth mile West of Lake Waccamaw, North Carolina, on U. S.

Highway No. 74, a heavy smoke and fog, resulting from nearby forest fires, greatly impaired or destroyed vision on said highway."

3. "8. That notwithstanding the hazardous conditions then and there existing, and particularly the fact that vision was greatly obstructed and impaired and at points altogether destroyed because of said smoke and fog which had descended on and about said highway, the defendants Evelyn Louise McClure, Ernest R. Mitchell, Carl S. Lennon, L. D. Marks and Mrs. J. M. Sauls negligently and carelessly continued to drive said automobiles in the said smoke and fog for some distance; that said defendant Evelyn Louise McClure, after driving for some distance in said smoke and fog, stopped her automobile and in succession and immediately behind each other said Ernest R. Mitchell, Carl S. Lennon, L. D. Marks, and Mrs. J. M. Sauls, respectively, stopped the vehicles which they were driving on said highway notwithstanding that there was ample room on the shoulders of said highway for parking said vehicles."

4. "9. That immediately thereafter the said Carl Eugene Ward, now deceased, drove the vehicle owned by the defendant, Esmer E. Ward, in which automobile plaintiff's intestate, Leon Ernest Royal, Jr. was a passenger, at a dangerous rate of speed into said smoke and fog and collided with the rear automobile parked on said highway as aforesaid, it being a 1954 DeSoto Sedan owned and operated by the defendant Mrs. J. M. Sauls; that immediately thereafter the defendant Henry Nance, driving his own 1951 Hudson automobile as aforesaid, drove his said vehicle at a high, dangerous and excessive rate of speed into said smoke and fog and collided with said automobile in which plaintiff's intestate was a passenger."

5. "10. That as the direct and proximate cause of the negligence and carelessness of the drivers of each of said vehicles as hereinbefore set forth and as will hereinafter appear more fully, all of which acts of negligence were joint and concurring, the automobile in which plaintiff's intestate was a passenger was badly smashed, bent and twisted and was totally destroyed and plaintiff's intestate was thereupon killed."

6. As to each of defendants Marks and Sauls, plaintiff makes these further identical allegations of negligence: "The defendant L. D. Marks (Mrs. J. M. Sauls) drove his (her) said automobile from a place of safety on said highway into a place in which he (she) had little or no vision in disregard of his (her) own safety and the safety of others, and without keeping a proper lookout or having same under proper control." Again: "Said L. D. Marks (Mrs. J. M. Sauls) parked his (her) said automobile on the highway notwithstanding that there was sufficient room on the shoulder of said highway for the parking of said automobile in violation of the Statutes of North Carolina."

From judgment sustaining said demurrers, plaintiff excepted and appealed.

Powell & Powell and L. J. Britt for plaintiff, appellant.
Varser, McIntyre & Henry for defendant L. D. Marks, appellee.
Ellis E. Page for defendant Mrs. J. M. Sauls, appellee.

BOBBITT, J. Only the relevant facts alleged by plaintiff are to be considered. *Pressly v. Walker,* 238 N.C. 732, 78 S.E. 2d 920.

No reason is alleged as to why the McClure car (first in line) stopped. The driver may have reached one of those (alleged) "points" where her vision was "altogether destroyed." However that may be, whether she was negligent in so stopping under the facts alleged is not before us on this appeal.

When the McClure car stopped, the other drivers (Mitchell, Lennon, Marks, Sauls) had only two alternatives, either to stop or to collide with the car immediately ahead. In stopping, it would seem (1) that they made the wise choice, and (2) that they were cautious and alert in their manner of driving.

As to appellees, there is no allegation that either of them followed the car ahead more closely than was reasonable and prudent. The allegation is that each *stopped* immediately behind such car. G.S. 20-152 has no bearing. There is no prescribed distance within which one car must *stop* behind another stopped car. Moreover, the fact that these cars stopped in succession, one immediately behind the other, has no causal relation to collisions occurring when the Ward car crashed into the Sauls car and when the Nance car crashed into the Ward car. It is noted that there is no allegation that the Marks car was struck by or collided with any other car.

Appellant contends that *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32, is authority for her position, "especially in regard to" defendant Sauls. The cited case is readily distinguishable. There the facts alleged, *inter alia,* were that an unlighted truck, on which there was a pipe extending 9 feet and 3 inches beyond the end of the truck body, had been *parked* for the night in the darkness, shortly before 6:00 p.m. on the 3rd of December, near the bottom of a dip on a city street.

While plaintiff alleges that appellees parked their cars on the highway, the facts alleged disclose that appellees stopped their cars on the highway to avoid collision with the cars immediately ahead. G.S. 20-161 has no reference to "a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the 'travel.'" *Barnhill, J.* (now *C. J.*), in *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d

147. See *Skinner v. Evans,* 243 N.C. 760, 92 S.E. 2d 209, in which *Winborne, J.,* cites earlier cases.

Appellees, under plaintiff's allegations, did not park but stopped temporarily for a necessary purpose, with no intent to break the continuity of their travel. *Immediately* after they stopped, so plaintiff alleges, the Ward car, being operated "at a dangerous rate of speed into said smoke and fog," collided with the Sauls car; and *immediately* thereafter the Nance car, being operated "at a high, dangerous and excessive rate of speed into said smoke and fog," collided with the Ward car. Under these circumstances, it does not appear that appellees had time to park on the shoulder if they had attempted to do so. Moreover, assuming the shoulder of the road afforded ample space for parking, if appellees were required to stop at one of those (alleged) "points" where their vision was "altogether destroyed" they could have seen the shoulder no better than the road, if as well.

Under a well established rule, appellees were under no duty to anticipate that the drivers of other cars overtaking them would so operate their cars that they could not stop them after they observed or should have observed the presence of appellees' cars on the highway. *Skinner v. Evans, supra.* Indeed, it would seem reasonable that appellees should anticipate that such drivers would do as they had done, that is, drive with the same care and caution they had exercised.

Appellant emphasizes the allegations that each appellee drove from a place of safety on said highway into a place in which he had little or no vision in disregard of his own safety and the safety of others. But the facts alleged are that appellees drove "for some distance" upon that portion of the highway affected by the smoke and fog; and that, in doing so, they were able to see the cars ahead sufficiently to enable them, by keeping a proper lookout and by keeping their cars under proper control, to stop when necessary without collision or injury to others on the highway.

The facts alleged fail to disclose that appellees proceeded otherwise than in a slow and careful manner. When the car in front stopped, each appellee stopped. Their actions reflect close observations and careful driving. The presence of their cars on the highway, operated in a lawful manner, under control, on the right and proper side of the highway, and stopping when occasion required, must be regarded as circumstances of the ensuing collisions rather than as a proximate cause thereof. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383, and cases cited.

We refrain from discussing questions relating to the negligence of defendants who are not parties to this appeal. Suffice it to say, the allegations of fact made by plaintiff, liberally construed in her favor,

are insufficient to state a cause of action for actionable negligence as to defendants Marks and Sauls. Hence, the judgment sustaining their demurrers is

Affirmed.

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

MRS. MARY CREWS POINDEXTER AND MARY ELIZABETH POINDEXTER v. THE FIRST NATIONAL BANK OF WINSTON-SALEM.

(Filed 23 May, 1956.)

1. Appeal and Error § 51—

Upon appeal from judgment as of nonsuit, plaintiffs' evidence is to be considered as true and interpreted in the light most favorable to plaintiffs, resolving all conflicts in plaintiffs' favor, and the Supreme Court will not attempt to pass on the credibility of the witnesses.

2. Executors and Administrators § 10—

An administrator is not an insurer of the assets of the estate, but is required, in the ordinary course of administration, to act in good faith and with such care, foresight and diligence as an ordinary prudent and sensible person would act with his own property under like circumstances.

3. Executors and Administrators § 12a—

In the absence of statutory provision, a personal representative may carry on the business of the decedent only where a binding contractual obligation made by the decedent so requires, where a temporary operation is necessary to prepare the assets for sale as a going concern or for liquidation, or when authorized by the court, and he is responsible for loss to the estate which proximately results from an unauthorized operation of decedent's business. G.S. 28-73; G.S. 28-190.

4. Same—

Evidence that the personal representative continued the operation of intestate's manufacturing business in the ordinary course of trade, installing its own management, purchasing machinery, etc., for a period of 21 months until the business became insolvent, and that at the time the personal representative took over the business it was worth a large sum over and above its liabilities, *is held* sufficient to overrule nonsuit in an action by the beneficiaries of the estate to recover for loss to the estate proximately resulting from the unauthorized operation of the business by the personal representative.

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

APPEAL by the plaintiffs from *McKeithen, S. J.,* 23 January, 1956 Term, FORSYTH Superior Court.

Civil action for the sum of $53,944.16 which the plaintiffs allege they are entitled to recover from the defendant by reason of its negligence and mismanagement as administrator of the estate of Nat S. Poindexter. The plaintiff Mary Crews Poindexter is the widow, and the plaintiff Mary Elizabeth Poindexter is the only child and heir at law of Nat S. Poindexter. They are his only distributees.

The plaintiffs allege in substance that Nat S. Poindexter died 16 July, 1952, and that 10 days later the defendant qualified as his administrator. The assets of his estate consisted in the main of stock in Winston Manufacturing Company, Inc., which was engaged in the manufacture of various types of furniture. The main plant was located in Winston-Salem and subsidiaries were located in Hickory, Thomasville and Troy. Mr. Poindexter's stock in these plants was worth the sum of $32,000 over and above all liabilities, including costs of administering his estate. The company owed him a salary of $7,415.01 which the defendant should have collected but failed to collect from the assets of the company. He was surety on a note executed by the company for the sum of $14,029.60 payable to the defendant. As collateral for the note, the defendant held stock in the plant located at Hickory which the defendant should have applied to the discharge of the note. The defendant dissipated all the assets of the Winston Manufacturing Company and later subjected the real property of Nat S. Poindexter to sale for the payment of the note. The defendant should have liquidated the assets which came into its possession as administrator. Instead it attempted to operate the furniture business but by reason of inexperience, mismanagement, hiring of incompetent personnel, lack of supervision, the purchase of expensive machinery, and waste of materials the Winston Manufacturing Company after 21 months operation became totally insolvent. Thus the entire assets of the personal estate of Nat S. Poindexter were lost.

The defendant by answer denied the Winston Manufacturing Company was solvent at the time it qualified as administrator. It alleged that it attempted to straighten out the business but that conditions of the plants, its accounts, books and records were in such condition that the company failed, notwithstanding the good business management provided by the defendant; that the defendant at all times and in all things acted in good faith and in the best interests of the estate and that it was not guilty of mismanagement in any particular. The defendant pleaded acts and conduct on the part of the plaintiffs by way of estoppel.

The plaintiffs offered the evidence of Sam C. Jackson who testified in substance that he was a co-owner with Nat S. Poindexter in the

furniture business; that each owned one-half the stock in Winston Manufacturing Company, Inc. Before the defendant entered upon its duties as administrator it required the witness to transfer to it one share of his stock so that thereafter the defendant would have control of the company. The stock was transferred and thereafter the defendant assumed full control. The trust officer of the bank was elected president. The defendant selected a Mr. Clock and placed him in charge as manager. The trust officer of the bank, Mr. Clock and the witness were elected directors although the witness had little or nothing to do with the management which was carried on by the other directors acting for the defendant. Mr. Jackson further testified that in his opinion the assets of the company at the time the defendant qualified as administrator were worth $295,000 and that the debts of all plants amounted to about $135,000. The net worth of the business was approximately $160,000, one-half of which belonged to the Poindexter estate. During the operation the defendant spent $22,000 for new machinery and after operating the business for approximately 21 months it went into bankruptcy.

The attorney for the referee in bankruptcy testified that claims amounting to more than $140,000 were filed and that the remaining assets were sold for approximately $41,000.

The plaintiff offered other evidence, cumulative in character. The court, upon objection, excluded evidence tending to show the management placed in charge of the business was incompetent and permitted waste. The plaintiffs amended their claim for loss by reason of the failure of the defendant to collect the note by reducing it from $14,029.60 to $12,787.81. At the close of the plaintiffs' evidence the court, on motion, entered judgment of involuntary nonsuit, from which the plaintiffs appealed.

Eugene H. Phillips for plaintiffs, appellants.

Dallace McLennan and Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant, appellee.

HIGGINS, J. In passing on the question of nonsuit this Court is required to accept and interpret the evidence offered in the light most favorable to the plaintiffs. If there is conflict in the evidence, or if it is susceptible of more than one interpretation, these must be resolved in the plaintiffs' favor. *Williamson v. Clay*, 243 N.C. 337, 90 S.E. 2d 727; *Marshburn v. Patterson*, 241 N.C. 441, 85 S.E. 2d 683; *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676.

Applying the recognized tests, did the plaintiffs introduce enough evidence to entitle them to have the jury pass on their claim of loss

by reason of the failure of the defendant properly to discharge its duty as administrator of the estate of Nat S. Poindexter? Under the law of this, as well as other jurisdictions, an administrator is not an insurer of the assets committed to his care in the settlement of his decedent's estate. In the ordinary course of the administration all that is required of him is that he act in good faith and with such care, foresight and diligence as an ordinarily sensible and prudent man would act with his own property under like circumstances. *Turnage v. Worthington*, 204 N.C. 538, 168 S.E. 823; *Tayloe v. Tayloe*, 108 N.C. 69, 12 S.E. 836; *Syme v. Badger*, 92 N.C. 706; *Patterson v. Wadsworth*, 89 N.C. 407; *Green v. Rountree*, 88 N.C. 164.

The plaintiffs contend it was the duty of the administrator to liquidate the assets of the estate and that it had no right to operate a furniture business with plants in Winston-Salem, Hickory, Thomasville and Troy. G.S. 28-73 provides: "Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as possible all the personal estate of his decedent." G.S. 28-190 provides: "When any person shall die while engaged in farming operations his executor or administrator shall be authorized to continue such operations until the end of the current calendar year and until all crops grown that year are harvested."

In the absence of statutory provision, it seems that a personal representative may also carry on a business (1) where a binding contractual obligation made by the intestate so requires; (2) where a temporary operation is necessary to prepare the assets for sale as a going concern or for liquidation; (3) when authorized by the court. The clear implication is that subject to these exceptions it is the duty of an administrator to proceed with dispatch to liquidate and settle the estate. Schuler, on Executors and Administrators, paragraph 325, 2d Ed., states the rule: "An administrator is not justified in placing or leaving assets in trade for this is a hazardous use of trust monies and trading lies outside his scope." The rule is stated in Am. Jur., Vol. 21, Sec. 255, pp. 518 and 519, as follows: "The characteristic duty of the personal representative of a decedent is the settlement of his estate . . . it is no part of his duty as an administrator to carry on a business conducted by the decedent; but it is on the contrary . . . a breach of trust for a personal representative of a decedent to carry on a trade or business on behalf of an estate. Accordingly, it may in general be said that unless expressly authorized by statute, by an order of court, by the will of the decedent, or by the terms of a partnership agreement, neither an executor nor an administrator has any authority or power to continue the estate of his decedent in trade or business enterprise engaged in by him

at the time of his death, except for the purpose of disposing of his stock in trade in order to settle the estate or by disposing of the business of a going concern. The personal representative of a deceased person may, in order to settle speedily an estate, continue a business for a reasonable time and sell the stock in the ordinary course of trade, but he cannot without specific authority undertake generally to carry it on." In support, the decisions of courts of last resort in many jurisdictions are cited in the footnote.

It may be stated as a general rule, an administrator is relieved of responsibility for loss to the estate if he acts honestly, with ordinary care, and within his authority. If he acts without authority, he is responsible for loss to the estate which proximately results from his unauthorized acts.

It is generally the practice of this Court when a judgment of nonsuit is reversed and the case sent back to the Superior Court for trial on the merits, to discuss the evidence only to the extent necessary to give the reason for the decision. This Court does not attempt to pass on the credibility of the witnesses or to reconcile conflicts in the evidence. The matters set up in the defendant's answer, including its plea of estoppel, are not now pertinent to this decision. Such matters are for the trial court. We conclude the plaintiffs offered evidence sufficient to entitle them to present their case to the jury. To that end the case is sent back to the Superior Court of Forsyth County for hearing on the merits.

Reversed.

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

B. FRANK MILLIKAN v. MRS. TAMZIN L. SIMMONS.

(Filed 23 May, 1956.)

1. Trial § 29—

Where defendant admits the execution and delivery of the instrument in question, a peremptory instruction to answer the issue in the affirmative is justified.

2. Vendor and Purchaser § 18—

Notice by the vendor that she would not carry out the terms of the option makes tender of payment by the purchaser unnecessary.

3. Vendor and Purchaser § 17b: Frauds, Statute of, § 2—

Where, during the life of an option, there is a verbal agreement for extension of time, and a memorandum thereof, sufficient under the Statute

of Frauds, is thereafter executed and signed by the vendor, such extension of time is valid and binding on the vendor, notwithstanding that the memorandum is executed after the expiration of the term of the original option, since the Statute of Frauds does not require that the agreement shall be in writing but only that some memorandum of the agreement be in writing and signed by the party to be charged. G.S. 20-1.

4. Frauds, Statute of, § 2—

Where, during the term of an option, the parties verbally agree to an extension at the request of vendor, and thereafter a memorandum of the extension is executed and signed by vendor, and such memorandum refers to the original option and stipulates that its terms should remain in effect for the period of the extension, the memoranda will be construed together, and the extension is sufficiently definite and certain when made so by reference to the original option.

5. Trial § 36—

Where an issue embraces all the essential matters in dispute, in view of the admissions in the pleadings and the testimony of the parties, it is sufficient.

6. Appeal and Error § 24—

Ordinarily, objection to the trial court's review of the evidence or its statement of contentions must be called to the court's attention in apt time.

7. Trial § 32—

A party desiring more specific instructions as to the law applicable to the case should aptly tender prayer therefor.

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

APPEAL by defendant from *Crissman, J.*, 10 October, 1955 Civil Term, GUILFORD Superior Court (Greensboro Division).

Civil action to compel specific performance of a contract to convey certain described lands located in Guilford County.

The plaintiff based his cause of action on three documents signed by the defendant and introduced in evidence by the plaintiff. The defendant admitted their execution and delivery. They are:

1. "For and in consideration of the sum of $250 I hereby give you the exclusive and irrevocable right for the term of 60 days from this date to purchase my farm consisting of 48.25 acres located on what is known as the Sampson Road, South of Highway 421 in Friendship Township in Guilford County, North Carolina and being the same property purchased from J. Porter Gray and wife.

"I agree to convey said property to you or your assigns on or before July 15, 1954 free and clear of all encumbrances upon receipt of $20,000.00 cash. It is understood that taxes for the year 1954 will be pro rated to date of conveyance.

"It is further understood and agreed that in event you or your assigns fail to complete payment of purchase price as herein outlined the said sum of $250.00 paid herewith shall be forfeited to me as liquidated damages and your contract to purchase shall become null and void.

"It is further agreed that the amount of $250.00 paid herewith shall apply on the purchase price of $20,000.00.

"This 14th day of May, 1954.

"It is agreed that conveyance will be made subject to crop agreement with H. N. Sampson.

"Mrs. Tamzin L. Simmons, Owner.

"I hereby accept and agree to the above provision inserted in pen and ink with reference to crop agreement. B. Frank Millikan

"Witness: Robert J. Simmons."

2. "Greensboro, N. C., July 15, 1954. Mr. B. Frank Millikan, 208 W. Gaston St., Greensboro, N. C. Dear Sir: With reference to option agreement dated May 14, 1954 given to you for the purchase of my farm in Friendship Township, containing 48 acres, more or less, which I purchased from J. Porter Gray, I hereby extend term of the option for 15 days from this date. All other conditions to remain the same. Yours very truly, Mrs. Tamzin L. Simmons, Owner."
3. "Greensboro, N. C., July 23, 1954. Mr. B. Frank Millikan, 208 West Gaston Street, Greensboro, N. C., Dear Sir: Reference is made to my letter to you, under date of July 15, 1954, relative to the purchase of my farm in Friendship Township, and this letter is to advise you that any offer heretofore made by me to you, whether in my letter of July 15 or otherwise, relative to the sale of my farm, is hereby cancelled and withdrawn. Very truly yours, Mrs. Tamzin L. Simmons."

The real controversy developed over the legal effect of Exhibit No. 2, the extension agreement. The plaintiff testified in substance: That he obtained the option and paid $250 to the defendant as provided. Prior to 15 July, 1954, he went to the defendant and notified her of his election to purchase under the option. After referring to some memoranda in his files, he fixed the date as 13 July. The defendant stated that her son was in Ohio and would be away for a week and that she wanted her son present; and she requested a postponement until his return. The plaintiff agreed to the postponement, provided the defendant would sign an extension of the option. This she agreed to do. The agreement

to extend the option for 15 days was entered into on 13 July at her request and for her benefit. It was reduced to writing and signed by her on 15 July. On 24 July the defendant delivered to him document No. 3, the notice of cancellation. On 27 July he tendered to the defendant a cashier's check on the Security National Bank of Greensboro for $19,750 and demanded a deed. The defendant declined to receive the check and refused to deliver a deed.

The defendant testified in substance: She executed the option on 14 May, 1955; received the payment of $250 according to its terms. On 14 July the plaintiff came to her home and asked her if she still wanted to sell the farm and she replied, "I guess so." It was agreed that she go to his office on the following day and "make out" the papers. The next morning she was ill and so advised the plaintiff's office by telephone. Soon thereafter the plaintiff came to her home where she signed the extension agreement. She denied that at any time she requested a postponement or that the postponement was for her benefit. She admitted the delivery of the notice of cancellation and that on 27 July the plaintiff came to her home, stated he had a cashier's check for $19,750, which she declined to accept, and that she refused to make the deed.

The court, over defendant's objection, submitted to the jury the following issues, which the jury answered as indicated:

"1. Did the defendant execute in writing an option agreement on May 14, 1954? Answer: Yes.

"2. Did the defendant request the plaintiff to extend the time within which to comply with the option agreement of May 14, 1954? Answer: Yes.

"3. Did the plaintiff, within the time limited by the option agreement, pay or tender to the defendant the sum of $20,000.00 in cash in compliance with the terms of said option agreement? Answer: Yes."

From a judgment decreeing specific performance, the defendant appealed, assigning errors.

Thomas Turner for defendant, appellant.

King, Kleemeier & Hagan for plaintiff, appellee.

HIGGINS, J. The admissions of the parties in their pleadings and in their testimony eliminated issues 1 and 3 from controversy. The defendant having admitted the execution and delivery of the option justified a peremptory instruction to the jury to answer the first issue "yes." *Rhodes v. Raxter*, 242 N.C. 206, 87 S.E. 2d 265; *Davis v. Warren*, 208 N.C. 174, 179 S.E. 329; *Mercantile Co. v. Ins. Co.*, 176 N.C. 545, 97 S.E. 476.

As to the third issue, the defendant admitted she delivered to the plaintiff the notice of cancellation dated 23 July. Notice from her that she would not carry out the terms of the option as extended made unnecessary a tender of payment by the plaintiff. *Douglass v. Brooks,* 242 N.C. 178, 87 S.E. 2d 258; *Penny v. Nowell,* 231 N.C. 154, 56 S.E. 2d 428; *Gaylord v. McCoy,* 161 N.C. 685, 77 S.E. 959.

While the evidence of the parties was in agreement as to the first and third issues, their evidence was sharply in conflict on the vital second issue. The plaintiff testified that on 13 July he notified the defendant of his election to purchase the farm. She requested a postponement to which he agreed on condition the option should remain in force. She accepted the condition. The parties agreed the option should be extended for 15 days. This agreement was made on the 13th at the defendant's request and was reduced to writing on the 15th. The plaintiff contended his agreement to forego his right to close the transaction at once and receive his deed (continuing the defendant in possession) constituted sufficient consideration to support the defendant's agreement to extend the option.

The defendant testified in substance: Mr. Millikan came to her home on 14 July; asked her if she still wanted to sell the farm. Upon receiving an affirmative answer, arrangements were made for a meeting on the 15th in his office to prepare the papers. On the 15th she notified his office she was ill and unable to keep the appointment. Whereupon, he came to her home, presented the extension agreement which she signed. She contended the original option had expired on the 13th and that the extension agreement was without consideration and amounted to nothing more than a new offer to sell which was subject to be withdrawn at any time before acceptance and by her letter of 23 July she withdrew the offer. The defendant further contended the extension agreement, regardless of when made, was an agreement to sell land, required to be in writing, and the writing was not signed until the 15th, at which time the option had already expired. She contended also that the extension agreement is so vague, indefinite, and contradictory as to be unenforceable.

While a number of our decisions are to the effect that a contract to sell land must be in writing, the statement is not altogether accurate. G.S. 22-1 provides: "All contracts to sell or convey any lands . . . shall be void unless such contract *or some memorandum or note thereof* be in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." It is not necessary, therefore, that a writing be signed at the time a contract is made. "The writing is not the contract; it is the party's admission that the contract was made." Wigmore on Evidence, 3rd Ed., Vol. 9, Sec. 2454,

p. 175. It is sufficient if subsequent to the contract a memorandum thereof is reduced to writing and signed by the party to be charged. *McCall v. Lee,* 182 N.C. 114, 108 S.E. 390; *Winslow v. White,* 163 N.C. 29, 79 S.E. 258. The extension agreement, if made on the 13th and reduced to writing and signed on the 15th, would be enforceable between the parties as of the 13th. The defendant signed the writing. It refers to the original option by date and by description of the land, and concludes, "I hereby extend terms of the option for 15 days from this date. All other conditions to remain the same." The effect is to substitute 30 July for the date in the original option. The memorandum required may be more than one writing, provided they are connected by internal reference and when taken together their meaning is certain. *Smith v. Joyce,* 214 N.C. 602, 200 S.E. 431; *Simpson v. Lumber Co.,* 193 N.C. 454, 137 S.E. 311; *Mayer v. Adrian,* 77 N.C. 83.

For the foregoing reasons the motion for judgment of nonsuit was properly overruled.

The assignments of error based on the charge on the second issue cannot be sustained. The trial court gave the substance of the evidence, fairly stated the contentions of the parties, and properly placed the burden of proof on the plaintiff. While the wording of the second issue leaves something to be desired, nevertheless, in view of the admissions in the pleadings and in the testimony of the parties, it embraced the essentials of the matters in dispute and is sufficient to support the judgment. Prejudicial error does not appear.

If the defendant found fault with either the court's review of the evidence or its statement of contentions, it was her duty to call the court's attention thereto before the jury retired. If she desired more specific instructions as to the law applicable to the case, she should have made a request by appropriate prayer. No legally sufficient reason is made to appear why the judgment should be disturbed.

No error.

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

JAMES E. STANLEY AND WIFE, MARY S. STANLEY, MARTHA S. LUCAS AND HER HUSBAND, LLOYD LUCAS, MELBA S. PASCHAL AND HUSBAND, ELMER PASCHAL, MAMIE S. SMITH AND HUSBAND, ELBERT SMITH, MARION S. LAND AND HUSBAND, WOODROW LAND; SARAH E. WALKER STANLEY, BETSY ANN SOMERS AND MAY BELLE S. COBB, PLAINTIFFS, v. HENRY A. FOSTER, ADMINISTRATOR OF THE ESTATE OF ADA H. FOSTER, DECEASED, HENRY A. FOSTER, COMMISSIONER, HENRY A. FOSTER, INDIVIDUALLY, J. L. FOSTER, A. H. FOSTER, LILLIAN FOSTER, ELIZABETH FOSTER TAYLOR, JAMES N. TAYLOR, GUARDIAN AD LITEM FOR ELIZABETH FOSTER TAYLOR, AND J. L. FOSTER, GUARDIAN AD LITEM FOR LILLIAN FOSTER, DEFENDANTS.

(Filed 23 May, 1956.)

1. Wills § 33c—

The will devised lands to testator's son with provision that if the son died leaving no children, the land should go to testator's named grandchildren, with further provision that if any named grandchild should die without leaving children, her part should go to the survivors. The son died without issue. *Held:* The named grandchildren each take a fee, defeasible upon her death without issue, and during the lives of the named grandchildren, testator's great grandchildren cannot assert any interest in the property.

2. Estates § 9a—

In contemplation of law, the possibility of issue is commensurate with life.

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

APPEAL by plaintiffs, James E. Stanley and wife, Mary S. Stanley, Martha S. Lucas and husband, Lloyd Lucas, Melba S. Paschal and husband, Elmer Paschal, Mamie S. Smith and husband, Elbert Smith, Marion S. Land and husband, Woodrow Land, and each of them, from *Sink, E. J.*, at November 1955 Regular Term, of CASWELL.

Civil action for recovery of land, and pending final determination of the matters in controversy, a permanent restraining order be issued against the defendant prohibiting them from selling, mortgaging, conveying, or in any other wise encumbering the lands and the timber thereon, and for such other and further relief, heard upon demurrer to the complaint.

The complaint alleges substantially these facts:

1. . . .

2. James Somers, resident of Caswell County, North Carolina, died October 1911, leaving a will, which has been duly probated in the office of Clerk of Court of said county, reading as follows:

"WILL OF JAMES SOMERS

"In the name of God—Amen.

"I, James Somers of the County of Caswell and State of North Carolina, being in feeble health but of sound mind and memory and knowing the uncertainty of life and the certainty of death, and being desirous of making some disposition of the goods which it has pleased God to bestow upon me, do make this my last will and testament.

"FIRST: I wish all my just debts paid by my executor hereafter to be named.

"SECOND: I will and bequeath to my wife, Elizabeth F. Somers, the house and land where I now live during her natural life, together with the household and kitchin furniture; also the farming implements and the provisions on hand.

"THIRD: I will and bequeath to my son, Thomas, one-third of my real estate, and his part will be the place said Thomas, my son, now lives, and if he dies leaving no children, his part comes back to my grandchildren—but his wife, Lucinda Catherine, is to have it her life-time, and after her death it comes back to my grandchildren, which is May Belle and Betsy Ann Somers and Sarah Elizabeth Walker, and if one dies without leaving children, her part comes back to them that is living. The graveyard is to be reserved one hundred feet each way.

"I also request for my three grandchildren's part is to be equally divided between them and then their bodily heirs.

"I nominate and appoint my son, Thomas Somers, my executor of this my last will and testament, revoking all others heretofore made by me, as witness my hand and seal this 27th day of March 1897.

his
JAMES × SOMERS"
mark

3. That Elizabeth F. Somers, wife of James Somers, died a few years before his death; and that he, James Somers, had three children, all of whom have been dead many years, namely: (a) Thomas Somers, who died without issue (b) Pharoah Somers, father of Betsy Ann Somers, and May Belle Somers Cobb, grandchildren referred to in the said will; and (c) Martha Frances Somers, wife of Frank Walker, and mother of Sarah E. Walker, another of the grandchildren referred to in said will.

4. That Thomas Somers, son of James Somers, referred to in the third paragraph of the will, died 18 August, 1918, intestate, and as stated above, without issue, and his wife, Lucinda Catherine, died in the year 1936.

5. That (a) May Belle Somers, referred to in the will, is the same person as May Belle S. Cobb, one of the plaintiffs in this action, having married Lester Cobb, who is now deceased. No children were born of

this marriage, and no children have been born to her, and she is now 77 years of age, and the possibility of issue is extinct.

(b) That Betsy Ann Somers, also a plaintiff in this action, is the same person as Betsy Ann Somers named in said will. She has never married, and no issue has been born to her, and she is now 72 years of age, and the possibility of issue is extinct.

(c) And that Sarah E. Walker Stanley, also a plaintiff, is the same person as Sarah Elizabeth Walker named in said will. She was formerly married to W. A. Stanley, from whom she is now divorced. She is now 70 years of age. These children were born of her marriage with W. A. Stanley: James E. Stanley, Martha Stanley, Melba Stanley, Mamie Stanley and Marion Stanley, who, with their respective spouses, constitute the remaining plaintiffs in this action. No other issue has been born to Sarah E. Walker. And the named children now constitute her bodily heirs.

6. That plaintiffs, James E. Stanley, Martha S. Lucas, Melba S. Paschal, Mamie S. Smith and Marion S. Land, under and by virtue of the terms of the said will, are the owners in fee of the lands willed to Thomas Somers in paragraph third of the said will, subject to the existing life estate in favor of the three grandchildren therein named, as set forth in paragraph 3 above, plaintiffs named above.

7. That the land as willed to Thomas Somers in paragraph third of the will of James Somers is a 61-acre tract designated as "The Somers' Tract," specifically described as shown.

Then there follows in the complaint in paragraphs 8, 9, 10, 11, 12 and 13 allegations on which plaintiffs base petition for restraining order against defendants.

Demurrer was filed 6-14-1955, which reads as follows: "The defendants demur to the complaint of James E. Stanley and wife, Mary S. Stanley, Martha S. Lucas and husband, Lloyd Lucas, Melba S. Paschal and husband, Elmer Paschal, Mamie S. Smith and husband, Elbert Smith, Marion S. Land and husband, Woodrow Land, in the above entitled action, and for cause of demurrer, says: That the complaint does not state facts sufficient to constitute a cause of action in favor of the above named plaintiffs and against the defendants, in that the above named plaintiffs have no interest, title, or right in law in the proceedings and matters and things alleged in the complaint, and cannot as a matter of law maintain said action . . ."

Upon hearing, by consent of all parties concerned, at regular November Term of Superior Court of Caswell County, the demurrer was sustained.

To the ruling of the court and from judgment in accordance therewith, plaintiffs against whom demurrer was entered as above set forth,

and each of them, excepted and appeal to Supreme Court, and assign error.

D. E. Scarborough, Wm. R. Dalton, and W. R. Dalton, Jr., for Plaintiffs, appellants.

Hunter K. Penn and Charles W. Campbell for Defendants, Appellees.

WINBORNE, J. The sole assignment of error presented on this appeal is predicated upon exception to the judgment signed. In this connection, in so far as the appellants are concerned, the determinative question on which decision rests on this appeal is this: What estate, right, title or interest, in and to the 61-acre tract, if any, do they, as great-grandchildren of James Somers, take under his will?

The answer is "Nothing." The 61-acre tract of land is the land devised by the testator to his son, Thomas, and as to it, the will expressly provides (1) that "if he dies leaving no children, his part comes back to my grandchildren," that is, the testator's grandchildren, but (2) "his wife" that is, Thomas' wife, "is to have it her lifetime," and again (3) "after her death it comes back to my grandchildren," and (4) the grandchildren referred to are "May Belle and Betsy Ann Somers and Sarah Elizabeth Walker," and (5) "if one dies without leaving children, her part comes back to them that is living." Thus it is manifest that the testator desired the land so devised to go to his named grandchildren "to be equally divided between them and then (to) their bodily heirs." That is, he gave to each of the grandchildren a fee in the land defeasible by her dying without leaving children. And though all of them are living, and are of advanced ages, and May Belle and Betsy Ann Somers have no children, yet "in contemplation of law, the possibility of issue is commensurate with life," as expressed by *Parker, J.*, in *Griffin v. Springer, ante,* 95, citing cases.

Therefore, in no event do the great-grandchildren of the testator now have any interest which may be asserted. Hence the judgment as to appellants from which appeal is taken is

Affirmed.

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

EUGENE EDWARDS; LOIS E. SHAW AND HER HUSBAND, RALPH SHAW; JOSEPH E. EDWARDS AND WIFE, DOROTHY EDWARDS; VIRGINIA E. TOWNSEND AND HUSBAND, GROVER C. TOWNSEND; ANNIE E. RICH AND HUSBAND, ED RICH, v. CLIFTON LEE BUTLER, INFANT; KIRBY LEE BUTLER, INFANT; BETTY EDWARDS, INFANT; DEWEY EDWARDS, INFANT; VINTON C. EDWARDS AND WIFE, GLADYS EDWARDS; JETTIE MAE WARD AND HUSBAND, BARNEY C. WARD; BEACHIE HILL AND HUSBAND, ROBERT HILL; JAMES L. EDWARDS AND WIFE, THELMA EDWARDS.

(Filed 23 May, 1956.)

1. Deeds § 15—

Where the granting clause, the *habendum*, and the warranty are clear and unambiguous and sufficient to pass immediately a fee simple title to the land described therein, a statement inserted following the description to the effect that the grantor excepted a life estate to himself is ineffectual as repugnant to the fee.

2. Deeds § 13a—

A grant of land directly to the children of a living person conveys the title only to those children who are living at the time of the execution of the deed, including a child then *en ventre sa mere;* but where there is a limitation over to the children at the death of the life tenant, all children who are alive at the termination of the life estate, whether born before or after the execution of the deed, take thereunder.

3. Same—

Grantor conveyed the land in question to his wife for life and then to his children. After the death of the wife, the grantor remarried, and left children surviving of both the first and second marriages. *Held:* Upon the death of the wife named in the deed, her children, including a child *en ventre sa mere* at the time of the execution of the deed, took the fee to the exclusion of the children of the second marriage.

4. Appeal and Error § 2—

The Supreme Court in its supervisory power will correct *ex mero motu* error in a judgment *in rem* affecting title to real estate. Constitution of North Carolina, Article IV, section 8. G.S. 7-11.

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

APPEAL by petitioners and infant respondents from *Mallard, J.,* November Term, 1955, of BLADEN.

The petitioners filed a petition for partition of a 40-acre tract of land described therein, alleging that the petitioners and respondents own the land as tenants in common.

Frank T. Grady was duly appointed guardian *ad litem* for Clifton Lee Butler, Kirby Lee Butler, Betty Edwards and Dewey Edwards, the infant respondents. The guardian *ad litem* filed an answer on

behalf of his wards and admitted the allegations in the petition and joined in the prayer for the relief sought therein.

The remaining respondents filed an answer alleging that Vinton C. Edwards, Jettie Mae Edwards Ward, Beachie Edwards Hill and James L. Edwards, children born of the marriage of Joseph G. Edwards and Lilly Mae Edwards, are the sole owners as tenants in common of the land in question.

On 19 January 1912, Joseph G. Edwards executed a warranty deed to his wife "Lilly Mae Edwards, her lifetime and then to my children . . .," conveying the premises described in the petition.

The granting clause, the *habendum*, and the warranty in the deed are in the usual form and fully sufficient to pass a fee simple title.

Following the description, the grantor inserted the following: "It is known and understood that I, Joseph G. Edwards, hereby except my life estate in the above conveyed premises."

Lilly Mae Edwards died 29 August 1915 and left surviving her husband, Joseph G. Edwards, and four children, the adult respondents in this proceeding. All these children were born prior to the execution and delivery of the above deed except James L. Edwards, who was born on 29 August 1915, the day his mother died.

Thereafter, Joseph G. Edwards married Mary Eugenia Edwards in 1918, and at his death on 19 June 1948, left surviving him the following heirs: Eugene Edwards, Lois Edwards, Joseph E. Edwards, Virginia Edwards, Annie Edwards, all petitioners; Betty Edwards, Dewey Edwards, Clifton Lee Butler and Kirby Lee Butler, all infant respondents; and the above named four children born of his first marriage, all respondents.

The court below held that Vinton C. Edwards, Beachie Edwards (Hill) and Jettie Mae Edwards (Ward), the children of Joseph G. Edwards, who were living at the time of the execution and delivery of the deed to his wife, Lilly Mae Edwards, dated 19 January 1912, are the sole owners of the land involved.

Judgment was accordingly entered and the petitioners and infant respondents appeal, assigning error.

H. H. Clark and Edward B. Clark for petitioners.
Frank T. Grady for infant respondents.
Leon D. Smith for adult respondents.

DENNY, J. The first question to be determined is whether or not the attempted reservation of a life estate in the grantor in the deed from Joseph G. Edwards to Lilly Mae Edwards, his wife, was valid.

We have repeatedly held that when the granting clause, the *habendum*, and the warranty in a deed are clear and unambiguous and fully

sufficient to pass immediately a fee simple estate to the grantee or grantees, that a paragraph inserted between the description and the *habendum,* in which the grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Swaim v. Swaim,* 235 N.C. 277, 69 S.E. 2d 534; *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228.

In the deed under consideration, the words in the granting clause, the *habendum,* and warranty are clear and unambiguous and are sufficient to pass immediately a fee simple title to the land described therein. These portions of the deed contained nothing that might even suggest an intention on the part of the grantor to convey an estate of less dignity than a fee simple, indefeasible title to the premises described therein, subject to the life estate of his wife. Hence, we hold that the attempt of the grantor to create a life estate in himself by the method used was ineffective and will be rejected as mere surplusage. *Jeffries v. Parker, supra.*

The second question presented for determination is whether the court below committed error in holding that only the children of Joseph G. Edwards who were living at the time the deed under consideration was executed and delivered, had an interest in the land described therein.

A grant of land directly to the children of a living person conveys the title only to those who are living at the time of the execution of the deed, including a child then *en ventre sa mere,* it being necessary to the validity of the deed that there should be a grantee as well as a grantor and a thing granted. But where there is a reservation of a life estate in the grantor or another, with limitation over to the children at the death of the life tenant, all the children who are alive at the termination of the life estate, whether born before or after the execution of the deed, take thereunder. *Dupree v. Dupree,* 45 N.C. 164, 59 Am. St. Rep. 590; *Powell v. Powell,* 168 N.C. 561, 84 S.E. 860; *Johnson v. Lee,* 187 N.C. 753, 122 S.E. 839; *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687; *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641; *Mackie v. Mackie,* 230 N.C. 152, 52 S.E. 2d 352.

In light of our decisions, it is clear that all the children of Joseph G. Edwards who were living at the death of Lilly Mae Edwards, the holder of the life estate, own an interest in the premises involved, and the court was in error in excluding James L. Edwards, who was born after the execution and delivery of the deed creating the life estate in his

mother. He was living when the life estate terminated and was, therefore, entitled to take under the provisions of the deed in question. *Powell v. Powell, supra; Waller v. Brown, supra; Mackie v. Mackie, supra.*

The petitioners and infant respondents have no interest in the premises involved in this litigation since they were not in being when the life estate terminated and the identity of the grantor's children had to be ascertained by a calling of the roll.

It will be noted that James L. Edwards did not appeal from the judgment entered below. Even so, the proceeding is one *in rem,* and the judgment entered vitally affects the title to real estate. Consequently, for the purpose of correcting the error in the judgment, the court invokes its supervisory power and *ex mero motu* makes the correction. North Carolina Constitution, Article IV, section 8; G.S. 7-11; *Ange v. Ange,* 235 N.C. 506, 71 S.E. 2d 19; *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; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663; *Mining Co. v. Mills Co.,* 181 N.C. 361, 107 S.E. 216.

In the last cited case, *Chief Justice Clark* said: "Although the plaintiff has not appealed, it is proper that the Court should render such judgment as 'upon an inspection of the whole record ought in law to be rendered,' C.S. 1412 and notes thereto (now G.S. 7-11)."

Therefore, the judgment of the court below is modified so as to include as owners of the land involved herein the four children of Joseph G. Edwards who were living at the death of the life tenant, Lilly Mae Edwards.

Modified and affirmed.

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

MRS. I. E. BLALOCK, WIDOW; J. L. BLALOCK, DEPENDENT SON; I. R. BLALOCK, DECEASED (EMPLOYEE), v. CITY OF DURHAM, SELF-INSURER (EMPLOYER).

(Filed 23 May, 1956.)

1. Master and Servant § 40b—Evidence held sufficient to sustain finding that employee's death resulted from accident.

Evidence tending to show that the employee, in normal health so far as appeared, was working near a high tension wire from which all current had been cut off but which could have been charged with static electricity, that as he came near to or in contact with the wire, he staggered back and fell to the ground unconscious 4 to 10 feet from the wire, and died, together

with testimony, competent as part of the *res gestae*, that the employee exclaimed "that line is hot," *is held* sufficient to sustain the finding of the Industrial Commission that the employee died as a result of an accident arising out of and in the course of his employment, notwithstanding that other employees, in dry clothing, came in contact with the wire without injury. Whether the death certificate of the coroner was competent as to the cause of death is not decided. G.S. 130-79; G.S. 130-102.

2. Master and Servant § 55d—

Where there is sufficient competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive, notwithstanding that the evidence might warrant a contrary finding and notwithstanding that incompetent evidence might also have been admitted.

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

APPEAL by the City of Durham, Employer, from *Mallard, J.*, February, 1956 Civil Term, DURHAM Superior Court.

This action originated before the North Carolina Industrial Commission upon a claim filed by the dependent widow and dependent son of I. R. Blalock, employee, against the City of Durham, Self-Insurer, employer, on account of the death of I. R. Blalock, employee, as a result of an injury by accident arising out of and in the course of his employment.

On 1 June, 1955, a hearing was held before Deputy Commissioner Shuford. Counsel stipulated the parties were subject to and bound by the Workmen's Compensation Act; that the relationship of employer-employee existed; that the defendant was a duly qualified self-insurer; and that the employee's average weekly wage was $60.92. At the hearing, evidence was introduced that the employee worked at the water plant operated by the City and assisted in maintaining and repairing the electric power lines owned by the City. On 16 October, 1954, Mr. Blalock was assisting in repairing the power lines damaged by hurricane Hazel. He had been "walking the line" through wet underbrush and his clothing became wet from his waist down. The line consisted of steel poles and uninsulated copper wire and extended from the power plant into the city, a distance of about 11 miles.

D. M. Williams, electrical engineer for the city, testified he helped design and construct the city's power plant. He had been to the plant just prior to the accident and ascertained that the switches were opened; that is, that the connection was broken between the generators and the power lines so that no current from the generators could pass over the lines. "I am familiar with the term 'static electricity' in contrast to dynamic electricity generated by the passing of a coil of wire through a magnetic field. Static electricity is made by contact—by placing rubber over glass—everybody has generated some with a comb on the

hair. On the transmission line you think of it a little bit different because there is no rubbing contact. Static electricity on a transmission line comes from the atmosphere, probably some action within the atmosphere. . . . Electric shock has different effect on individuals. A man with wet feet is a better conductor of electricity than a man with dry feet."

There was evidence to the effect that other members of the crew working on the line had on dry clothing; that they had been handling the line without shock; that the line was grounded.

B. J. Dry testified: "I was working approximately six or eight feet from Mr. Blalock at the time. . . . I heard a commotion and heard Mr. Blalock cry out, 'Oh, watch out, Mr. Dry, that line is hot.' He was sort of staggering backwards. When I saw him he was falling on his back. His feet were towards the wire. When he hit the ground I would say he was approximately eight or 10 feet from the line which was about four feet high."

There was evidence that "in an electrician's lingo, by the term 'hot wire' is meant a wire that has current on it." There was corroborating evidence by other members of the crew.

The defendant offered evidence the switches at the generating plant were open; that the wire was grounded; and at the time other workers handled it there was no current. There were no burns or marks on the employee's body. One of the defendant's witnesses, E. N. Tilley, testified that when Mr. Blalock fell he was about four or five feet from the wire.

Commissioner Shuford made 10 specific findings of fact, among which 5 and 7 are controversial. They are as follows:

> "5. After working along the power line for two or three hundred yards, and at a place where the power line was approximately 5½ feet above the ground, the deceased employee touched the uninsulated power line or came close enough to such wire to cause electricity to pass through his body. He then cried out or exclaimed, 'Oh! Watch out, that line is hot.' And the deceased staggered backward from the power line two or three steps and fell unconscious six or eight feet from the line, with his feet towards the line."
>
> "7. While the power line was not charged with a steady current of electricity, at the moment that the deceased touched or came close to it, it was 'hot,' or charged with electricity. The deceased died as a result of electrocution, which caused his heart to stop beating."

Among the conclusions of law made by the Deputy Commissioner, No. 1 is in controversy:

"1. On 16 October, 1954, the deceased employee sustained an injury by accident arising out of and in the course of his employment, which resulted in his death. G.S. 97-2(f)."

An award of compensation was made in accordance with the findings. The employer, City of Durham, filed application for a review and appealed to the Full Commission, specifying errors on the part of the Deputy Commissioner. Upon review, the Full Commission was of the opinion the hearing commissioner had not committed error and adopted as its own the findings of fact and conclusions of law of Deputy Commissioner Shuford, approved the award and affirmed the decision in all respects. From the decision of the Full Commission, the defendant appealed to the Superior Court of Durham County, assigning errors and requesting specific findings. After hearing in the Superior Court, Judge Mallard overruled all assignments of error and denied all requests for findings; approved and affirmed the findings, conclusions of law and award made by the Commission. From the judgment accordingly, the defendant appealed, assigning errors.

Bryant, Lipton, Strayhorn & Bryant,
By: Ralph N. Strayhorn for plaintiffs, appellees.
Claude V. Jones for defendant, appellant.

HIGGINS, J. The death certificate signed by Dr. R. A. Harton, the coroner, was introduced in evidence by the plaintiffs. The cause of death was given as (a) cardiac arrest; (b) due to shock by static electricity; (c) contact with high tension wire. Dr. Harton testified as a witness and on cross-examination stated that no autopsy was performed; that no burns appeared on the body of the employee; and that he found nothing to indicate cause of death other than statements by those present at the time of death and the fact that the body was lying near a sagging power wire. He testified further that notwithstanding the statements, his conclusions would have been the same by reason of the position of the body near the sagging power wire and the absence of any other apparent cause of death.

A death certificate and registration thereof are required by statute. G.S. 130-79, *et seq.* G.S. 130-102 provides: ". . . a record of a birth or death with certification of same . . . shall be *prima facie evidence* in all courts and places of the *facts* stated therein." (Emphasis added.)

The defendant contends the cause of death, especially in view of the coroner's statements on cross-examination, is an *opinion* only and not a fact, and with respect to the cause of death was, therefore, inadmissible. This distinction is suggested in the case of *Rees v. Ins. Co.,* 216

N.C. 428, 5 S.E. 2d 154. Whether the certificate was admissible as to the cause of death need not be decided in this case. The record discloses competent evidence sufficient to support the Industrial Commission in finding death was caused by electric shock. The deceased, so far as appeared, in normal health and about his work, exclaimed, "Oh, watch out, Mr. Dry, that line is hot," and fell to the ground, four to five feet, according to one witness, and eight to 10 feet according to another, from the wire. The exclamation was part of the *res gestae* and certainly competent. This evidence is sufficient to support the finding the deceased employee sustained an injury by accident arising out of and in the course of his employment. G.S. 97-2(f).

This Court has held that if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary. *Watson v. Clay Co.*, 242 N.C. 763, 89 S.E. 2d 465; *Rice v. Chair Co.*, 238 N.C. 121, 76 S.E. 2d 311; *Johnson v. Cotton Mills*, 232 N.C. 321, 59 S.E. 2d 828; *Creighton v. Snipes*, 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97; *Clark v. Woolen Mills*, 204 N.C. 529, 168 S.E. 816. The introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings. *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96; *Mallard v. Bohannon, Inc.*, 220 N.C. 536, 18 S.E. 2d 189; *Tindall v. Furniture Co.*, 216 N.C. 306, 4 S.E. 2d 894; *Clark v. Woolen Mills, supra.*

The findings of fact when supported by competent evidence are binding both on the Superior Court and upon this Court. *Gant v. Crouch*, 243 N.C. 604, 91 S.E. 2d 705; *Morgan v. Cloth Mills*, 207 N.C. 317, 177 S.E. 165; *Southern v. Cotton Mills*, 200 N.C. 165, 156 S.E. 861.

The judgment of the Superior Court of Durham County is

Affirmed.

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

STATE v. SAMUEL S. THOMAS.

(Filed 23 May, 1956.)

1. Criminal Law § 79—

Exceptions in the record not set out in appellant's brief or in support of which no reason is given or authority cited are taken as abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 48a: Conspiracy § 5—

The order of proof is a rule of practice resting in the sound discretion of the trial court, and while in a conspiracy prosecution the existence of the conspiracy should ordinarily be proven first and then defendant's connection with it, if at the close of all the evidence every constituent element of the offense is proved, exception on the ground that corroborative evidence was introduced prior to the substantive evidence cannot be sustained.

3. Criminal Law § 78e(1): Appeal and Error § 24—

Argument in the brief that the court failed to state the evidence and declare and explain the law arising thereon as required by G.S. 1-180 will not be considered when the assignments of error to the charge fail to point out this objection.

4. Criminal Law § 81c(4)—

Where concurrent sentences are imposed upon conviction on two counts, any error relating to one count only would be harmless.

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

APPEAL by defendant from *Preyer, J.*, at 28 November, 1955 Criminal Term of GUILFORD (Greensboro Division).

Criminal prosecution upon a bill of indictment charging defendant Samuel S. Thomas and Clayton Strickland (1) with conspiracy to suborn perjury, and (2) subornation of perjury, at the time and place and in the manner set forth therein in detail.

Upon the trial in Superior Court both the State and the defendant offered evidence, and, upon the evidence offered, the case was submitted to the jury under charge of the court.

Verdict: That the defendant Samuel S. Thomas is guilty as charged on both counts.

Judgment: First Count: Imprisonment in Central Prison, Raleigh, North Carolina, for a term of not less than two (2) nor more than four (4) years to be assigned to work as provided by law.

Second Count: Imprisonment the same as on first count—the sentence to run concurrently with the sentence on the first count. Note commitment, under each sentence on each count it is recommended by the court that defendant be given medical examination or psychiatric treatment as is indicated.

Defendant excepts to the judgment and appeals to Supreme Court, and assigns error.

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

J. Kenneth Lee and Major S. High for Defendant Appellant.

WINBORNE, J. While in the case on appeal defendant appellant groups twenty-four assignments of error, Numbers 1 to 24, both inclusive, based upon exceptions of like corresponding numbers, his brief filed in this Court states three questions as involved on this appeal, the first as arising upon eight assignments of error, the second upon two, and the third upon one.

These assignments of error will be treated as grouped. But other assignments of error based on 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, are taken as abandoned by him. Rule 28 of Rules of Practice in the Supreme Court. 221 N.C. 544, at 563. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

I. The assignments of error first grouped by appellant in his brief are numbers 3, 8, 11, 12, 14, 15 and 16, relating to exceptions of like and corresponding numbers, to the trial court admitting certain evidence for corroboration when at the time there had not been any substantive evidence on the points in question which could then be corroborated by other testimony.

"Although the usual and more orderly proceeding in the development of a conspiracy is to establish the fact of the existence, and then the connection of the defendant with it, yet the conduct of the trial and the order in which the testimony shall be introduced must rest largely in the sound discretion of the presiding judge, and if at the close of the evidence every constituent of the offense charged is proved, the verdict rested thereon will not be disturbed," so declared this Court in opinion by *Smith, C. J.,* in *S. v. Jackson,* 82 N.C. 565. To like effect is *S. v. Anderson,* 92 N.C. 733.

Moreover, in civil cases this Court uniformly holds that the order of proof on trials in the Superior Court is a rule of practice, and not of law, and it may be departed from whenever the court in its discretion considers it necessary to promote justice. See McIntosh N. C. P. & P., 564, p. 711. *D'Armour v. Hardware Co.,* 217 N.C. 568, 9 S.E. 2d 12; *In re Westover Canal,* 230 N.C. 91, 52 S.E. 2d 225.

In the light of the rule of practice so enunciated, applied to the matters covered by the assignments of error under consideration, error is not made to appear. It is seen that the trial judge was careful to properly instruct the jury when objection was entered.

II. Another group of assignments of error Numbers 22 and 24 is based upon exceptions to portions of the charge as given, under which it is contended in the brief of appellant, that the court failed to charge the jury as required by G.S. 1-180.

In this connection, it appears that there is in the record no assignment of error to the effect that the court failed to state in a plain and

correct manner the evidence given in the case and to declare and explain the law arising thereon as required by G.S. 1-180. And where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exception on this ground will not be considered on appeal. *S. v. Spivey,* 230 N.C. 375, 53 S.E. 2d 259. Hence, the question of failure to charge, debated in respect to portions of the charge as given, is not presented. For assignments of error must be predicated upon exceptions previously noted in the case on appeal. *S. v. Gordon, supra,* opinion by *Bobbitt, J.* See also *S. v. Spivey, supra.* Nevertheless error in the charge, to which exceptions relate, is not apparent.

III. The third and final question involved, as stated in brief of appellant, is this: "Should the defendant's motion for nonsuit have been granted for the reason that the State has failed to prove its case against the defendant as is required in subornation of perjury cases?"

This question relates to assignment of error Number 17, which is based upon exception of like number, to the action of the trial court in denying defendant's motion for judgment as of nonsuit, renewed at the close of all the evidence. And judging from the phraseology of the question it may be inferred that defendant directed his motion only to the second count. But if not a reading of the evidence in case on appeal reveals sufficient evidence to take the case to the jury on the first count, that is—as to the charge of conspiracy to suborn perjury.

Moreover, the Attorney-General contends that the present case is distinguishable from the *Sailor case,* 240 N.C. 113, 81 S.E. 2d 191, in that the testimony of three named witnesses constitutes corroborating circumstances within the contemplation of decided cases in this jurisdiction. Be that as it may, without conceding error, the Court deems it unnecessary to discuss the question, as it is noted that on the verdict of guilty as charged on both counts, the court imposed concurrent prison sentences on the two counts. Hence, as stated in *S. v. Riddler, ante,* 78, it would seem no harm has resulted to the defendant of which he can justly complain.

Thus after full consideration of the matters and things presented this Court finds in the trial below

No error.

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

AUBREY J. VEASEY AND WIFE, LOUISE S. VEASEY (ORIGINAL PARTIES PLAINTIFF) AND CHARLES E. HARTMAN AND WIFE, GERTRUDE JOYCE HARTMAN (ADDITIONAL PARTIES PLAINTIFF), v. W. L. KING.

(Filed 23 May, 1956.)

1. Parties § 10b: Trespass to Try Title § 3—

Pending an action by the owners of land to recover permanent damages for the wrongful entry and construction of a road on the land by defendant, the land was sold. *Held:* While the purchasers of the land cannot participate in any award of permanent damages, they are entitled to participate in the defense of the title and their right to possession of the land, and upon being made additional parties by order of the clerk, the trial judge has the discretionary power to extend the time for them to file complaint.

2. Pleadings § 1—

The trial judge, in his discretion, is authorized to enlarge the time for filing complaint and the exercise of his discretion is not subject to review.

APPEAL by the defendant from *Hall, J.*, 18 November, 1955 Term, DURHAM Superior Court.

Civil action instituted on 17 December, 1952, by Aubrey J. Veasey and wife against the defendant for recovery of $6,500 alleged to be due as permanent damages caused by the wrongful entry and construction of a road by the defendant upon a tract of land, near a lake thereon, the property of the plaintiffs.

The defendant, by answer, denied wrongful entry upon any land owned by the plaintiffs and alleged that the title to the land where the road was built was in himself. Subsequent to the institution of the suit the plaintiffs sold and conveyed the *locus in quo* to the additional plaintiffs. Charles E. Hartman and wife, Gertrude Joyce Hartman, who, upon motion, were made additional parties plaintiff by an order of the clerk dated 18 December, 1953. They were given 30 days in which to file pleadings. On 20 February, 1954, they filed a complaint in which they alleged they purchased the property on 15 May, 1953, from the original plaintiffs and they adopted the material allegations of the complaint. On 14 April, 1955, the presiding judge, in his discretion, allowed the additional plaintiffs to file the complaint as of 14 April, 1955. The defendant duly excepted. The defendant demurred to the complaint of the additional plaintiffs upon the ground of misjoinder of parties and causes. On 18 November, 1955, Judge Hall entered judgment overruling the demurrer. The defendant excepted and appealed.

Haywood & Denny,
By Emery B. Denny, Jr., Egbert L. Haywood, for plaintiffs, appellees.

Harvey Harward and Bryant, Lipton, Strayhorn & Bryant, Per: Victor S. Bryant for defendant, appellant.

PER CURIAM. The additional plaintiffs, Charles E. Hartman and wife, Gertrude Joyce Hartman, having purchased the *locus in quo* subsequent to the institution of the suit for permanent damages are entitled, if they can, to repel the assault on their title made by the defendant's claim of ownership and right to possession in himself. They are, therefore, at least proper parties to the action. It is true the right to recover permanent damages does not pass upon sale of the damaged property. Although the additional parties cannot participate in any award of permanent damages, yet they are entitled to participate in the defense of the title and right to possession of the property which they have purchased.

The judge, in his discretion, is authorized to enlarge the time for filing complaint and the exercise of his discretion is not subject to review. *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919. The judgment of the Superior Court overruling the demurrer is

Affirmed.

MARVIN SHINAULT, ADMINISTRATOR OF JIMMIE FRANKLIN SHINAULT, DECEASED, v. CURTIS W. CREED.

(Filed 23 May, 1956.)

Automobiles §§ 33, 41l—

Nonsuit was properly entered upon evidence tending to show that intestate was lying prostrate on the highway very early on a foggy morning, and that defendant's car ran over intestate and killed him about the time it passed another car traveling in the opposite direction, with further evidence that defendant was driving at a lawful speed and stopped his car a distance of about a car's length after running over intestate, since the evidence fails to disclose any negligence on defendant's part or that by the exercise of reasonable care he should have discovered intestate's perilous plight and incapacity before striking him.

APPEAL by plaintiff from *Rousseau, J.*, February Term 1956 of SURRY.

Action by administrator to recover damages for alleged wrongful death.

Plaintiff's intestate, 18 years of age, about 4:45 a.m., on 6 September 1954, was lying prostrate on the Shoals Road on the defendant's side of the highway and with his head about a foot from the center line. The morning was foggy. The fog was low on the road, and at the point where the body of the deceased was lying the fog was heavy enough

"to obscure the vision of an automobile approaching at a distance." The road was straight. The defendant was driving his automobile 25 to 30 miles an hour and was meeting an automobile driven by Paul Bullington, who was going 40 to 45 miles an hour. It was stipulated that the speed regulation at the scene was 55 miles per hour. Bullington had just come out of a curve, and straightened out. Both dimmed their lights. About the time these two automobiles passed each other, the defendant's automobile ran over and killed plaintiff's intestate. Defendant's car came practically to a stop after running over deceased. The defendant stopped his automobile in a distance of about the length of a car. There were no skid marks on the road.

At the close of the plaintiff's evidence, the court sustained the defendant's motion for judgment of nonsuit.

From judgment of nonsuit, the plaintiff appealed, assigning error.

Allen, Henderson & Williams and Folger & Folger for Plaintiff, Appellant.

Deal, Hutchins & Minor for Defendant, Appellee.

PER CURIAM. No negligence is presumed from the mere fact that plaintiff's intestate was run over, and killed by the defendant. The evidence, when considered in the light most favorable to the plaintiff, and giving to him the benefit of every reasonable inference to be drawn therefrom, fails to disclose any negligence on defendant's part, and, in particular, fails to show that the defendant by the exercise of reasonable care could have discovered the perilous plight of the deceased and his incapacity to escape therefrom before he ran over him.

The judgment of nonsuit below is

Affirmed.

ROBERT ATKINS v. EDWARD O. DANIEL, JR.

(Filed 23 May, 1956.)

Negligence § 21—

Where defendant files a cross action upon his contention that the collision was the result of plaintiff's negligence, the court, after submitting the issue of defendant's negligence, may submit the question of plaintiff's contributory negligence to the jury upon the issue of whether defendant was injured by the negligence of plaintiff.

APPEAL by defendant from *Sink, Emergency J.*, November Term, 1955, CASWELL.

Civil action growing out of a collision between automobiles owned and operated by plaintiff and defendant occurring 31 July, 1954, near a highway intersection in the Killquick community of Caswell County.

Each party alleged that the collision was caused solely by the negligence of the other. Plaintiff by his action and defendant by his cross action or counterclaim sought to recover damages for injuries to person and damage to property. Also, conditionally, defendant pleaded contributory negligence on the part of plaintiff in bar of his right to recover.

The issues, submitted without objection, were answered by the jury as follows: "1. Was the plaintiff, Robert Atkins, injured and damaged by the negligence of the defendant as alleged in the complaint? Answer: Yes. 2. Was the defendant, Edward O. Daniel, Jr. injured and damaged by the negligence of the plaintiff, as alleged in the further answer and counter-claim? Answer: No. 3. If so, what amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $5,000.00. 4. If so, what amount, if any, is the defendant entitled to recover of the plaintiff? Answer ....."

From judgment in plaintiff's favor, in accordance with the verdict, defendant appealed, assigning errors.

Brown, Scurry, McMichael & Griffin for plaintiff, appellee.

Pemberton & Blackwell and Sharp & Robinson for defendant, appellant.

PER CURIAM. All the evidence shows that the injuries and damages sustained by both plaintiff and defendant resulted from the collision. Therefore, the ultimate inquiry was to determine the cause of collision.

The court, while not defining contributory negligence *eo nomine*, made it plain to the jury that if the collision was proximately caused by negligence on the part of both drivers, both the first and second issues should be answered, "Yes," and that in such event neither party could recover from the other. The first two issues, under the court's instructions, adequately presented the questions determinative of liability, viz.: Was the collision proximately caused (1) by the sole negligence of defendant, or (2) by the sole negligence of plaintiff, or (3) by the concurring negligence of both defendant and plaintiff? Upon conflicting evidence, the jury resolved the determinative issues in plaintiff's favor.

Careful consideration of appellant's exceptive assignments of error, which relate principally to the charge, fails to disclose any error of law deemed of sufficient prejudicial effect to warrant a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

C. J. PHILLIPS AND WIFE, OPAL H. PHILLIPS, v. AUTO FINANCE COMPANY OF NORTH CAROLINA, INC., A CORPORATION.

(Filed 23 May, 1956.)

APPEAL by plaintiffs from *Crissman, J.*, at 26 September, 1955 Civil Term of GUILFORD, Greensboro Division.

Civil action to recover for penalty for usurious interest allegedly exacted by defendant in connection with sale of a certain automobile by Ingram Motor Company acting as agent for Auto Finance Company.

Defendant, answering, denies all material allegations of the complaint.

Upon trial in Superior Court plaintiffs undertook to offer oral and documentary evidence, much of which was excluded by the trial court over their objection. Motion for judgment as of nonsuit was allowed when plaintiffs rested their case.

Plaintiffs excepted thereto, and from judgment in accordance therewith appeal to Supreme Court and assign error.

Merritt & Haines for Plaintiffs Appellants.

George C. Hampton, Jr., for Defendant Appellee.

PER CURIAM. The record and case on appeal present, in the main, a case of allegation without proof. For instance, there is allegation of agency but no competent proof of it. See *D'Armour v. Hardware Co.*, 217 N.C. 568, 9 S.E. 2d 12. There is oral testimony of declarations of individuals, but no proof that such persons are agents of defendant. And some documents are not properly identified for admission in evidence. Hence in the exclusion of evidence prejudicial error is not made to appear. And taking all of the evidence in the light most favorable to plaintiffs, motion for judgment as of nonsuit was properly granted. The case of *White v. Disher*, 232 N.C. 260, 59 S.E. 2d 798, on which plaintiffs rely is distinguishable from case in hand.

No error.

R. K. CONSTANTIAN, A TAXPAYER OF ANSON COUNTY, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF ANSON COUNTY, v. ANSON COUNTY.

(Filed 6 June, 1956.)

1. Schools § 10b—

Where a bond order designates nine school plant facilities to be financed thereby, constituting one complete program necessary in the judgment and discretion of the school authorities to provide the additional plant facilities for all school children of the county, the fact that the order states that two of the projects are for use of colored children, does not show discrimination against children of the white race in violation of Article IX, section 2, of the Constitution of North Carolina.

2. Schools §§ 10a, 3d—

Under our Constitution it is the duty of the board of county commissioners of each county to provide funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for the constitutional term, and such boards have no authority or responsibility in the administration of school affairs, including the assignment of pupils to particular schools, this being the function of the school authority of each administrative unit.

3. Constitutional Law § 18—

The provision of the Federal Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws," is a limitation upon the exercise of governmental power by a state or state agency.

4. Schools § 1—

No provision of the Federal Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary, this being exclusively a matter of state policy.

5. Constitutional Law § 18: Schools § 3d—

The Federal decision does not require that children of different races be taught in the same schools, but declares only that if a child be excluded from attending the school of his choice, solely on the basis of race, by a state or state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

6. Schools §§ 1, 10b: Constitutional Law § 18—Proscription against enforced segregation in public schools does not affect validity of bonds to provide funds for school facilities.

The mandates of Article IX, sections 2 and 3, of the State Constitution remain in full force and effect after striking, as violative of the Fourteenth Amendment to the Federal Constitution, that portion of the 1875 amendment to section 2 which purports to make mandatory the enforced separation of the races in the public schools of the State. Therefore, each board of county commissioners remains under duty to provide funds for the buildings and equipment necessary for the maintenance and operation

of public schools within the county, and a bond order, approved by the voters, to provide school facilities for all the children of the county, even though it contemplates the maintenance of separate schools for the races, will not be held invalid on the ground that the purpose for which the bonds were authorized cannot be realized, or that there is no authority to provide additional school plant facilities, or that the maintenance of public schools without mandatory provision for enforced separation of the races is unlawful in this State.

7. Constitutional Law § 4—

When a portion of a section of the State Constitution is invalid as violative of the Constitution of the United States, and the remaining portion is independent, complete in itself, and capable of enforcement, the invalid part will be rejected and the valid portion stand.

8. Same—

The Constitution of the United States takes precedence over the Constitution of North Carolina, and in the interpretation of the Federal Constitution, the Supreme Court of the United States is the final arbiter. Constitution of North Carolina, Article I, sections 3 and 5. Constitution of the United States, Article VI.

APPEAL by plaintiff from *Armstrong, J.*, March Term, 1956, ANSON.

Action by plaintiff, a citizen, property owner and taxpayer of Anson County, on behalf of himself and all other taxpayers of said county, to enjoin defendant from issuing and selling $750,000 of capital outlay school bonds.

A bond order adopted 19 May, 1952, by the Board of Commissioners of Anson County, and approved by a majority of the qualified voters of the county in an election held 28 June, 1952, authorized the issuance of $1,250,000 of capital outlay school bonds and the levy of taxes for the payment thereof.

The school plant facilities to be financed by the issuance of said bonds were described in the bond order, in the published notice of election and in the ballot used by the electors, as follows:

"(1) erection of a new elementary school building with gymnasium in Wadesboro, and (2) erection of a new high school building with gymnasium at a suitable location in the northwestern section of the county, and (3) remodeling and reconstruction of existing elementary school buildings, and (4) remodeling and reconstruction of the existing building used for the high school in Wadesboro, and (5) erection of a new building or an addition to an existing building suitable to provide eight rooms for colored children in Wadesboro, and (6) erection of a new building or an addition to an existing building suitable to provide four rooms for colored children in Polkton, and (7) erection of a new building to be used as a teach-

erage, and (8) acquisition of any land necessary for the erection of such new buildings or additions to existing buildings, and (9) acquisition and installation of the equipment necessary for such new or remodeled or reconstructed buildings or additions to existing buildings."

Defendant has issued $500,000 of said bonds. Of the seven *specific* projects, those designated (1), (3) and (6) have been completed; but those designated (2), (4), (5) and (7) have not been completed. Unless restrained, defendant will issue the remaining $750,000 of said bonds and use the proceeds to provide the uncompleted portion of the school plant facilities so authorized.

From these admitted facts, plaintiff draws legal conclusions, controverted by defendant, upon which he bases his right to injunctive relief. Plaintiff's contentions, as to the applicable law, will be stated in the opinion.

After hearing, the court denied plaintiff's application for injunctive relief; and, in accordance with defendant's pleading and prayer for relief, adjudged that "the proposed issuance of the remaining authorized $750,000 of bonds for school plant facilities in Anson County is authorized under law, and all such bonds when issued will in all respects be valid obligations of said county."

Plaintiff excepted and appealed, his sole assignment of error being that the court, in signing said judgment, misapplied the law to the facts.

Bennett M. Edwards for plaintiff, appellant.

Taylor, Kitchin & Taylor and Reed, Holt, Taylor & Washburn for defendant, appellee.

Attorney-General Rodman and Assistant Attorney-General Giles, amici curiae.

BOBBITT, J. The bond order and the election, authorizing the $1,250,000 issue, were approved by this Court in *Parker v. Anson County*, 237 N.C. 78, 74 S.E. 2d 338. Even so, plaintiff now insists that the bond order was and is void on its face because it discriminates against children of the white race in violation of the Constitution of North Carolina, Article IX, section 2. The sole basis for this contention is that the facilities identified in projects (5) and (6) were described as facilities *suitable for colored children*. This contention is clearly without merit.

Unquestionably, it was contemplated that projects (5) and (6) would make available additional plant facilities wherein only colored children would be taught. It was also contemplated that some or all of the

other projects would make available additional plant facilities wherein only white children would be taught. Any other inference would lose touch with reality. The nine projects constituted one complete program, reflecting the judgment and discretion of the school authorities in the three administrative units, designed to provide additional plant facilities for all school children of Anson County.

Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267, and *Bonitz v. School Trustees,* 154 N.C. 375, 70 S.E. 735, relied on by defendant, rather than *Williams v. Bradford,* 158 N.C. 36, 73 S.E. 154, relied on by plaintiff, are more nearly in point. However, the authority of these cases need not be invoked as a basis for decision here; for, based upon any reasonable interpretation thereof, the bond order on its face does not show discrimination against children of the white race.

Having reached this conclusion, there is no need to consider whether plaintiff, on principles of *res judicata,* is precluded by the decision in *Parker v. Anson County, supra,* from now making such contention.

Assuming the original validity of the bonds so authorized, plaintiff contends that, by reason of decisions of the Supreme Court of the United States made subsequent to such authorization, the *purpose* for which the bonds were authorized cannot now be realized. This *purpose,* plaintiff contends, was to finance additional school plant facilities for a public school system wherein the children of the white race and the children of the colored race would be taught in separate schools, the only system then lawful.

Sections 2 and 3, Article IX, Constitution of North Carolina, bear directly on the questions presented. Each section is quoted below.

"Sec. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

As ratified 24 April, 1868, Article IX, section 2, consisted solely of the *first* of the two sentences. The *second* sentence was added by amendment adopted by the Constitutional Convention of 1875, ratified by the people in November, 1876, effective 1 January, 1877. Journal of the Constitutional Convention of 1875; Connor & Cheshire, The Constitution of North Carolina; *Elliott v. Board of Equalization,* 203 N.C. 749, 166 S.E. 918.

"Sec. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the Commissioners of

any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

As ratified 24 April, 1868, Article IX, section 3, was as quoted except the words "four months" then appeared rather than the words "six months." This amendment, submitted by the General Assembly of 1917 (Ch. 192, Public Laws of 1917), became effective upon its ratification by the people in November, 1917. *Elliott v. Board of Equalization, supra.*

These propositions are well established. Article IX, section 2, contains a mandate that the General Assembly provide for a State public school system. Article IX, section 3, contains a mandate that the board of commissioners of each county in the State provide the funds for the buildings and equipment necessary for the maintenance and operation of schools within the county for the constitutional term. *Marshburn v. Brown,* 210 N.C. 331, 186 S.E. 265. Full responsibility for the administration of school affairs and the instruction of children within each administrative unit, including the assignment of pupils to particular schools, rests upon the school authorities of such unit. *Parker v. Anson County, supra,* and cases cited. In short, when the board of commissioners provides the funds for the necessary buildings and equipment, it has no further responsibility or authority. The school authorities within each administrative unit have full responsibility and authority in respect of the school program.

It was the duty of the Board of Commissioners of Anson County to provide the funds for necessary plant facilities. The bond order set forth in express terms that $1,250,000 was needed for that purpose. The Board of Commissioners and the electorate authorized the bond issue to provide the funds necessary for such additional plant facilities. Nothing appears in this record to suggest that the needs are less in 1956 than in 1952. Indeed, the court below incorporated in the judgment a finding of fact, to which no exception was taken, that "additional school plant facilities for the public school system in Anson County are urgently needed now." When the bonds were authorized, the sole purpose in mind was to provide funds to meet the over-all capital outlay needs in respect of all school children of Anson County, white and colored. The school program, as distinguished from plant facilities, was not in issue or involved.

An entirely different question was presented to this Court in *Mauldin v. McAden,* 234 N.C. 501, 67 S.E. 2d 647, and *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890, and *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714, and *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263, and *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484. In those cases, decision turned on whether subsequent findings in the light of changing

educational needs warranted the transfer or reallocation of funds from one project to another within the general purpose (school plant facilities) for which the bonds were authorized. Here there is no suggestion that the funds to be derived from the sale of the unissued bonds ($750,000) are to be transferred or reallocated from one project to another within the general purpose for which the bonds were authorized.

The phrase, *suitable for colored children,* used in connection with projects (5) and (6), connotes nothing beyond the fact that it was then contemplated that these would make available additional plant facilities wherein colored children would be taught. Obviously, physical school plant facilities and equipment are suitable for the teaching of children, irrespective of race or color.

We come now to the contention upon which plaintiff places major emphasis. It is this: When the bonds were authorized, Article IX, section 2, as construed by this Court, contained the *mandatory requirement* that children of the white race and children of the colored race be taught in separate schools. *Puitt v. Commissioners,* 94 N.C. 709; *Lowery v. School Trustees, supra.* Moreover, the validity of such mandatory requirement had the sanction of decisions of the Supreme Court of the United States; for, as late as 1927, *Chief Justice Taft,* speaking for a unanimous Court, had explicitly declared that each state had the right and discretion to determine, in respect of its public school system, whether the children of different races should be taught in the same or separate schools, "the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." *Gong Lum v. Rice,* 275 U.S. 78, 72 L. Ed. 172, 48 S. Ct. 91. However, in 1954 the Supreme Court of the United States declared that the *enforced* separation of Negroes and whites in public schools *solely on the basis of race* denied to Negroes equal protection of the laws (*Brown v. Board of Education of Topeka,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180), and in its 1955 decision applied the proposition so declared to the cases before it (*Brown v. Board of Education of Topeka,* 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753). The bonds were authorized when it was contemplated that children of the white race and children of the colored race would be taught in separate schools in compliance with Article IX, section 2, and not otherwise. Hence, the argument runs, both the bond order and the election were invalidated by the unprecedented action of the Supreme Court of the United States; for, plaintiff insists, if the school authorities cannot operate the schools in compliance with Article IX, section 2, there is no authority to provide additional school plant facilities when no lawful use thereof can be made for school purposes.

The Fourteenth Amendment to the Constitution of the United States provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The limitation is upon the exercise of governmental power by a state or state agency. This is well settled and fundamental.

No provision of the Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary. This is exclusively a matter of state policy. Moreover, in respect of a state public school system, nothing in the *Brown case* requires that children of different races be taught in the same schools. The doctrine therein declared, to be put into effect in specific cases "with deliberate speed" as conditions may warrant, is that no child, whatever his race, may be excluded from attending the school of his choice solely on the basis of race. If so excluded by the state or a state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment as interpreted in the *Brown case.* In substance, this is the interpretation placed upon the *Brown case* by the three-judge district court, composed of *Parker* and *Dobie, Circuit Judges,* and *Timmerman, District Judge,* upon rendering their decision 15 July, 1955, in *Briggs v. Elliott,* 132 F. Supp. 776. No one can now foretell in what localities or in what buildings or to what extent children of the white race and children of the colored race will be taught in the same public schools in North Carolina.

The impact of the decisions in the *Brown case,* in respect of the *operation* of public schools in Anson County, applies equally to the school plant facilities existent prior to the bond order and election, the school plant facilities provided by the bonds sold ($500,000) and the school plant facilities to be provided by the proceeds from the sale of the unissued portion ($750,000) of the authorized issue of $1,250,000. In this respect, there is nothing distinctive about the uncompleted projects for which the bonds were authorized.

If plaintiff's contention were adopted, all authorized (unissued) bonds for school plant facilities, as well as all previously authorized special tax supplements within administrative units, throughout the State, would be invalidated. Applicable legal principles impel the opposite conclusion.

The mandate to the General Assembly (Article IX, section 2), and the mandate to the board of commissioners of each county (Article IX, section 3), discussed above, were part and parcel of the original (unamended) Constitution of 1868. These are the constitutional mandates upon which our public school system is based. See, also, Constitution of North Carolina, Article I, section 27; Article IX, sections 1, 4, 5, 8, 9 and 11. It was the amendment of 1875, which provided that, in

obeying the original mandates, a specific method was required, namely, that "the children of the white race and the children of the colored race shall be taught in separate public schools." Only that portion of the 1875 amendment which purports to make *mandatory* the *enforced* separation of the races in the public schools is now held violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Otherwise, the mandates of Article IX, sections 2 and 3, remain in full force and effect. The provisions thereof, absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the 1875 amendment. They survive the invalidation of the mandatory requirement of enforced separation contained in the 1875 amendment.

Now as in 1952, Article IX, section 2, is a mandate that the General Assembly provide for a State public school system. Now as in 1952, Article IX, section 3, is a mandate to the board of commissioners of each county in the State to provide the funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for the minimum term.

"A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." 82 C.J.S., Statutes sec. 92. Our decisions are in accord. *R. R. v. Reid,* 187 N.C. 320, 121 S.E. 534; *Lowery v. School Trustees, supra.* This well established rule applies equally when a portion of a state constitution or any provision thereof is invalid as violative of the Constitution of the United States.

The final (contradictory) contention of plaintiff is that, assuming that teaching of children of the white race and of the colored race in the same school is now permissible under the decision in the *Brown case,* the issuance of the bonds ($750,000) is for an unlawful purpose under North Carolina law. The fallacy underlying this contention is that the mandatory requirement as to enforced separation, incorporated in Article IX, section 2, by the 1875 amendment, is no longer the law in North Carolina.

Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be, the Constitution of the United States takes precedence

over the Constitution of North Carolina. Constitution of North Carolina, Article I, section 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the *Brown case* is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid.

The Florida Supreme Court, in *Board of Public Instruction v. State,* 75 So. 2d 832, and the Supreme Court of Oklahoma, in *Matlock v. Board of County Commissioners,* 281 P. 2d 169, on similar but somewhat variant factual situations, have reached conclusions generally in accord with the decision of this Court.

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

Affirmed.

NANNIE K. PRICE AND ROBERT D. PRICE, ADMINISTRATRIX AND ADMINISTRATOR, RESPECTIVELY, OF THE ESTATE OF J. W. PRICE, SR., DECEASED, AND NANNIE K. PRICE, WIDOW, INDIVIDUALLY, AND ROBERT D. PRICE AND WIFE, EUNICE PRICE, INDIVIDUALLY, v. NANCY PRICE DAVIS AND HUSBAND, JOE A. DAVIS; KATIE PRICE OLIVER AND HUSBAND, WILLIAM OLIVER; MAMIE PRICE MILEY, GERTRUDE PRICE, JAMES P. PRICE AND WIFE, EDITH PRICE; JOHN W. PRICE, JR., AND WIFE, GLADYS PRICE; EDNA J. PRICE, GUARDIAN OF BERT A. PRICE, INCOMPETENT, AND EDNA J. PRICE, INDIVIDUALLY.

(Filed 6 June, 1956.)

1. Descent and Distribution § 13—

Intestate died survived by four sons and four daughters. Prior to his death each of the daughters executed a release of any right to share in their father's estate for a specified consideration paid them by their father. There was no contention that the consideration failed to represent a fair division of the entire estate or that there was any bad faith, fraud or overreaching on the part of the ancestor. *Held:* The contracts are binding, and each daughter is estopped thereby to claim any part of the estate.

2. Same—

A parent may give to one or more of his children his respective share of the estate without making a division of all his property for distribution among all his children or those who represent them, but if the release executed by a child is for a grossly inadequate consideration or is procured by fraud or undue influence, the consideration for the release should be treated as an advancement and not an estoppel.

PRICE *v.* DAVIS.

APPEAL by defendants Nancy Price Davis and her husband, Joe A. Davis, and Mamie Price Miley, from *Gwyn, J.*, September Term, 1955, of ROCKINGHAM.

This is an action brought under our Declaratory Judgment Act, G.S. 1-253, *et seq.*, by the personal representatives of J. W. Price, Sr., deceased, to which his widow and all of his heirs and next of kin are parties, to wit, four sons and four daughters.

In 1943 and 1944 J. W. Price, Sr., being advanced in age and desiring that his daughters receive their respective portions of his estate during his lifetime, entered into an agreement with his four daughters whereby he paid $6,000.00 to each of them in return for their release of all interest and right of inheritance in his estate. These contracts were substantially identical, and the one executed by the appellant Nancy Price Davis reads as follows:

"I, Nancy Price Davis, of Rockingham County, North Carolina, acknowledge receipt of Six Thousand ($6000.00) Dollars paid to me by my father, J. W. Price, of Price, North Carolina; my said father having heretofore paid to me the sum of $3612.69, and this day is paying the balance of $6000.00, to wit: $2387.31. It is understood and thoroughly agreed by me, that I am to receive no further share from my father's estate, either real, personal or mixed, and I am receiving the aforesaid amounts with full understanding that I am to receive no further amount whatever, it being my father's desire to make the payment before his death in order that I may have the benefit of the money and receive the income from same. This 28th day of July, 1943. NANCY PRICE DAVIS (Seal)" The due execution of each instrument was acknowledged before a Notary Public.

The personal representatives of J. W. Price, Sr., Nannie K. Price, his widow, and Robert D. Price, one of his sons, have requested that they be instructed by the court as to the legal effect of these contracts in order that they may know how to proceed with the administration of the estate.

Bert A. Price, incompetent, through his guardian and wife, Edna J. Price, and Edna J. Price, individually, and the remaining two sons, James P. Price and John W. Price, Jr., together with their respective wives, filed answers. In all these answers the foregoing defendants allege the validity of the contracts entered into between their father and his four daughters, and further allege that the appellants and each of them are estopped to deny the validity of said contracts.

Gertrude Price and Katie Price Oliver, two of the daughters who entered into contracts with their father, J. W. Price, Sr., together with William Oliver, husband of Katie Price Oliver, filed answers in which they request the court to find that such contracts are valid and binding

on them and the estate of their father. Each alleges in her answer that: "At the time she entered into such contract she felt that same was fair and reasonable to her; that it represented an equal distribution of her father's estate at that time."

The appellants filed an answer in which, among other things, they allege that their father made subsequent agreements with them which negatived and rendered null and void the agreements entered into between him and them in July 1943.

This cause was heard on the pleadings and the trial judge held that Nancy Price Davis, Mamie Price Miley, Katie Price Oliver and their respective husbands, and Gertrude Price are barred from participating in the estate of J. W. Price, Sr., by the contracts referred to herein.

Judgment was accordingly entered and the personal representatives of J. W. Price, Sr. directed to proceed to administer and distribute the estate in accord with the judgment. Nancy Price Davis and her husband, Joe A. Davis, and Mamie Price Miley, appeal, assigning error.

Allen D. Ivie, Jr., and Deal, Hutchins & Minor for appellants.

Price & Osborne and J. C. Johnson, Jr., for appellees Nannie K. Price and Robert D. Price.

R. J. Scott and A. D. Folger, Jr., for appellees James P. Price and wife, Edith Price, John W. Price, Jr., and wife, Gladys Price.

Dixon & Dark and Ike F. Andrews for appellee Edna J. Price, individually, and guardian of Bert A. Price.

DENNY, J. The question posed for determination on this appeal is simply this: Are the written agreements executed by the four daughters of J. W. Price, Sr., referred to hereinabove, enforceable and binding upon the respective parties, and are they estopped from further participation in the estate of J. W. Price, Sr., deceased?

In an opinion rendered by this Court in June 1859 in the case of *Cannon v. Nowell*, 51 N.C. 436, *Ruffin, J.* (formerly *Chief Justice*), said: "Heirs take by positive law when the ancestor dies intestate and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties." The appellants are relying upon this decision for a reversal of the judgment entered below.

The above action was one at law. In December 1859 in the case of *McDonald v. McDonald*, 58 N.C. 211 (5 Jones Eq.), 75 Am. Dec. 434, in which Colin McDonald, the plaintiff, sought to set aside a written assignment, executed by him in consideration of the sum of $1,000.00, of all his right, title and interest that he had or might have in the property or estate of Margaret McDonald, as her heir or next of kin, to Daniel McDonald. The Court held that Colin McDonald "did not

have anything which he could assign or transfer to another, either in law or in equity; but he had a right to make a contract to convey whatever interest he might in the future have in his cousin's property; and such a contract, when fairly made upon a valuable consideration, the Court of Chancery will enforce whenever the property shall come into his possession." *Mastin v. Marlow,* 65 N.C. 696; *Watson v. Smith,* 110 N.C. 6, 14 S.E. 640, 28 Am. St. Rep. 665; *Wright v. Brown,* 116 N.C. 26, 22 S.E. 313; *Taylor v. Smith,* 116 N.C. 531, 21 S.E. 202; *Brown v. Dail,* 117 N.C. 41, 23 S.E. 45; *Vick v. Vick,* 126 N.C. 123, 35 S.E. 257; *Boles v. Caudle,* 133 N.C. 528, 45 S.E. 835; *Kornegay v. Miller,* 137 N.C. 659, 50 S.E. 315, 107 Am. St. Rep. 505.

In the case of *Mastin v. Marlow, supra,* decided in 1871, this Court held, "The power of an heir expectant to bind himself by contract in regard to what may descend to him by the death of the ancestor is taken to be settled."

In *Boles v. Caudle, supra,* the Court held that where a contract to convey an interest or expectancy in property is based on a fair consideration, is not procured by undue influence and its enforcement will not be oppressive, if it has been partially performed, its specific performance will be decreed. However, *Connor, J.,* made this salutary statement in commenting upon such contracts: "Contracts for the sale of expectancies and drafts upon the future are not favorites of courts of equity, and will be sustained only when shown by those claiming under them that they are entirely fair and free from any vitiating element. Children should not be encouraged to spend their inheritance in advance, or to speculate upon the death of their fathers. It may be that in these days the evil effects of living upon the future demand a stricter investigation by the courts of contracts of this character. In addition to the evil effect upon the habits and mode of life of the people, such contracts are calculated to weaken the bonds of affection and degrade the most sacred relations of life to a mere pecuniary basis."

While the case of *Cannon v. Nowell, supra,* was decided nearly 97 years ago, it has never been followed. In fact, prior to this appeal, in so far as we have been able to find, it has been cited only once and that was in the case of *In re Reynolds,* 206 N.C. 276, 173 S.E. 789, in which this Court merely referred to the fact that the petitioner contended that the Forsyth judgment and decree in effect changed the infant's status so as to prevent her participation in the testamentary trust set up by her grandfather and grandmother, and cites *Cannon v. Nowell, supra.* The only comment the Court made with reference to the *Cannon case* was as follows: "In 28 A.L.R., p. 433, this case is placed under the minority rule." The Court did not bottom its decision in the *Reynolds case* on *Cannon v. Nowell, supra.*

We think the cases of *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801, and *Coward v. Coward,* 216 N.C. 506, 5 S.E. 2d 537, are in accord with the majority rule on this subject.

In 16 Am. Jur., Descent and Distribution, section 152, page 932, *et seq.*, it is said: "The majority rule is that a release by an heir or distributee, made to the ancestor before the latter's death, where supported by an advancement to the heir or distributee or other consideration and freely and fairly made, is binding on the heir or distributee. The mere fact that the sum which the prospective heir receives from his ancestor in consideration of his agreement to release the latter's estate from all claim which he might have as heir against it proves to be of less value than the amount which he would have received as heir, in the absence of such an agreement, will not defeat the effect of the release as a bar to his participation in the distribution or partition of the estate after the ancestor's death," citing numerous authorities.

Likewise, in 26 C.J.S., Descent and Distribution, section 62, page 1085, *et seq.*, the majority rule is stated in the following language: "It is held by the weight of authority that the release of an expectant share to an ancestor, fairly and freely made, in consideration of an advancement or for other valuable consideration, ordinarily excludes the heir from participation in the ancestor's estate at his death. It is necessary that the person executing the release was at the time competent to contract, that the release was not obtained by means of fraud or undue influence, and that the instrument or transaction in question be sufficient to constitute a release or a contract creating a bar; and the burden of proving want of consideration for the release is on the party asserting such want. . . . An oral promise by the ancestor to ignore or disregard the release is void and unenforceable where the promise was made after the execution of the release and without a consideration."

In *Allen v. Allen, supra,* T. W. Allen and his wife, E. J. Allen, the father and mother of the plaintiff J. W. Allen and the defendants, and grandparents of the plaintiffs other than J. W. Allen, agreed to pool their real estate and to divide it among their children before they died. Deeds were executed to each of the children, but only those executed to their son J. W. Allen and their daughter Hester V. Hendricks were delivered. The deeds executed to the other children were placed in the safe of T. W. Allen and instructions were given to one J. W. Davis, who had access to the safe, to deliver the deeds at the death of the grantors, it being a part of the agreement of division that the grantees in said deeds should not receive their respective shares in the division until after the death of the grantors. This Court held these latter deeds were ineffectual to pass title since they were deeds of gift and not delivered and recorded within the time required by law (*Allen v. Allen,* 209 N.C.

744, 184 S.E. 485). J. W. Allen and the children of Hester V. Hendricks, deceased, contended that they had a right to share in the estate of the grantors notwithstanding the fact that T. W. Allen and Hester V. Hendricks, mother of the plaintiffs other than T. W. Allen, had accepted deeds which purported to be their full share of the real estate owned by their father and mother.

Barnhill, J., now *Chief Justice*, in speaking for the Court in the above case, pointed out that whether there was a division of the lands belonging to T. W. Allen and E. J. Allen among their children was not the decisive feature of the case, but that the controlling feature was the fact that deeds were tendered to J. W. Allen and Hester V. Hendricks for tracts of land belonging to Mrs. Allen as representing the full share of the respective grantees in the lands of both their parents, and held that since they had accepted the deeds as representing their full share of the lands belonging to their father and mother, they were estopped from further participating in the real estate owned by their parents.

In the case of *Coward v. Coward, supra,* William C. Coward and his wife, Mary C. Coward, entered into an agreement to pool their real estate holdings and make a joint division thereof among their children. Deeds were executed and delivered to four of the seven children. The grantors never executed deeds to three of their daughters for the reason such daughters were in no immediate need of land. Mary Coward, the mother of Claude Coward, died in 1930; Claude Coward died in 1931. His children contended that they were entitled to share in the unconveyed real estate owned by Mary Coward at the time of her death. This Court held the facts were sufficient to estop Claude Coward, were he alive, from asserting any claim in the land of his mother, and his children being his sole heirs at law were estopped, as were their ancestor, to assert any claim to a share in the lands of Mary Coward.

In the instant case, there is no contention or allegation to the effect that the contracts entered into by the four daughters of J. W. Price, Sr., were not fair or based on a consideration, which, at the time of their execution, did not represent a fair division of the entire estate, both real and personal, of the ancestor. There is no allegation or contention of bad faith, overreaching or fraud on the part of the ancestor, or disability of any one of the four daughters.

We do not think that in order for a contract of this character to be valid the ancestor must make a division of all his property and distribute it among his children or those who represent them, thereby leaving himself penniless. A parent might be moved to give one or more of his children their full share of his estate because of their financial need, while retaining the remainder of his estate for his own support and maintenance. However, if there is evidence that the consideration

given at the time the release was executed was grossly inadequate, or that it was procured by fraud or undue influence, such consideration should be treated only as an advancement and not as an estoppel. *Mastin v. Marlow, supra.*

In the light of the facts disclosed on this record, the judgment of the court below is

Affirmed.

T. L. CAUSBY, J. Y. HOCKER, M. W. KINCAID, FRED RATLEDGE, AND ON BEHALF OF OTHER RESIDENTS OF THE GUILFORD COMMUNITY, SIMILARLY SITUATED, V. HIGH PENN OIL COMPANY.

(Filed 6 June, 1956.)

1. Injunctions § 4d: Nuisance § 3c—

Plaintiffs' evidence tending to show that the operation of a lawful business by defendant caused the emission of noxious and nauseating odors into the air, polluting the air within a radius of about two miles, and resulting in annoyance and inconvenience and a hazard to health, thus depriving plaintiffs of the healthful enjoyment of their homes, is sufficient to show an abatable private nuisance *per accidens*, regardless of the degree of care or skill exercised by defendant to avoid such injury.

2. Injunctions § 8—

While the judge, upon the hearing of motion for a temporary restraining order, may not decide the cause on the merits, the court must consider and weigh the affidavits and other evidence of the opposing parties for the purpose of ascertaining whether plaintiff has made out an apparent case.

3. Same—

Where plaintiff has made out an apparent case for injunctive relief, the court will ordinarily issue a temporary restraining order when the injury which defendant would suffer from its issuance is slight as compared with the damage which plaintiff would sustain from its refusal if the plaintiff should finally prevail.

4. Injunctions § 4d—

While mere apprehension of a nuisance is insufficient to warrant equitable relief, it is not required that plaintiff wait until some harm has been experienced or show with absolute certainty that it will occur, but injunction will lie upon proof that apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate.

5. Same—

Generally, when the proof tends to show with reasonable certainty that there is a well grounded apprehension of danger to health or life by reason of the threatened use of adjacent property, such user should be restrained until the final hearing.

6. Injunctions § 8—Evidence held sufficient to support order restraining to final hearing operation of business in such manner as to constitute nuisance per accidens.

Plaintiffs' evidence tended to show that the operation of defendant's plant, prior to its destruction by an explosion, constituted an abatable private nuisance *per accidens*, that defendant was rebuilding its plant, and that the operation of the rebuilt plant by the same defendant in the same business would likely result in a continuance of the same nuisance. *Held:* The evidence is sufficient to support the issuance of a temporary order by the court enjoining defendant from operating the rebuilt plant in such manner as to emit the noxious and nauseating odors complained of, but such temporary order should specify that it should be effective only until the final hearing upon the merits.

APPEAL by defendant from *Crissman, J.*, October Civil Term 1955 of GUILFORD.

Civil action instituted on behalf of plaintiffs and other persons similarly situated to abate a private nuisance heard upon a motion for a temporary restraining order.

The essential facts alleged in the complaint appear in the numbered paragraphs which follow.

One. All the plaintiffs own land and reside on it in the immediate vicinity of defendant's refinery for re-refining used motor oil.

Two. The operation of this refinery by the defendant has polluted the air within a radius of about two miles of the refinery with offensive and nauseating odors annoying and discomforting the plaintiffs and injuring their health. Such operations of the refinery have produced physical suffering, discomfort and illness to some of the plaintiffs and others nearby. The odors given off by the refinery are excessive and unreasonable, and are so foul and nauseating as to make the homes of plaintiffs almost uninhabitable, or at least to keep them awake at night. Some children of plaintiffs have had sore throats, the cause of which has been attributed to these odors. The conditions are so bad as to constitute a nuisance in the vicinity.

Three. The refinery in its present location is a dangerous hazard. Recently there was an explosion there which wrecked the refinery, and in which two persons were killed and others injured.

Four. The defendant has begun rebuilding the refinery, and, unless restrained, will again put it into operation and continue the nuisance as before the explosion, depriving the plaintiffs of the healthful enjoyment of their homes, impairing the health of many of them and subjecting them to nauseating odors.

Five. The operations of the refinery are regular and continuous, and plaintiffs do not have an adequate remedy at law, and to permit the nuisance to continue will result in plaintiffs' irreparable injury.

Six. The defendant intends to renew operation of the refinery, when it is rebuilt.

The plaintiffs prayed the following relief: 1. That defendant be enjoined permanently from rebuilding the refinery at its present location, or 2. that it be restrained from operating the refinery in such a manner as to emit foul, nauseating and disagreeable odors causing a nuisance.

The essential allegations of the answer as to the question before us are these:

One. The defendant's oil re-refining plant is located near the center of a large area in which approximately 75% of the land area is devoted to business use as a large oil terminal, including immense facilities for the storage and transportation of petroleum products.

Two. The operation of an oil re-refining plant is a legitimate business.

Three. The operation of its re-refinery plant before the explosion did not emit foul and nauseous odors, and constitute a nuisance.

Four. Its re-refining plant which is now in the course of reconstruction has been built and is being built according to the plans and designs approved and in general use throughout the United States; that said plant so designed and so constructed, when put in operation, definitely and positively will not permit the escape of any obnoxious odors or fumes and that the operation of said plant will create no odor in any manner different from the odor prevalent in said area resulting from the handling of large quantities of petroleum products at the oil terminal.

The plaintiffs made a motion for a temporary injunction. At the hearing of this motion the plaintiffs offered in evidence the complaint, which was treated as an affidavit, and 18 affidavits of persons, who lived nearby defendant's oil re-refinery plant, or within a radius of not more than 2½ miles from it. The evidence in the affidavits tends to support the allegations of the complaint that the operation of the re-refinery plant before the explosion constituted a private nuisance. The affidavit of Mr. & Mrs. J. W. Cummings states they "feel, if the company is permitted to reopen the said plant, the conditions will be equally as bad as they were before, or worse, and that the operation will amount to a general nuisance in the whole community." The affidavits of Mr. and Mrs. Howard Sampson and of Ralph Cummings use identical language. The affidavit of Col. John W. Homewood contains these words: "Affiant verily believes that, if the said company is permitted to re-open the said plant, the conditions will be virtually the same as they were before the plant shut down, and will amount to a public nuisance in the whole community." The affidavit of L. B. Gallimore states: "Affiant further says that, if the defendant High Penn Oil Company is permitted

to re-open this plant and operates as it did before, the conditions in the whole neighborhood will be bad, and, in the opinion of this affiant, will amount to a nuisance."

The defendant offered in evidence its answer to be treated as an affidavit and the affidavit of R. L. Brinson, its President. R. L. Brinson's affidavit gave the location of defendant's re-refinery plant, its payroll, the cost of the materials used at the plant, the amount of its annual sales, the cost of rebuilding, and the number of its employees.

The court found the following facts in its order: The plant of the defendant, when operating before the explosion, was emitting foul, disagreeable and nauseating odors, as set out in the complaint. The defendant is rebuilding the plant, and definitely intends to re-open the plant in the near future. Judging by past performances the court is of the opinion that the nuisance complained of may continue, when operations are resumed, and so holds, as the operators are the same, the ownership is the same, and the business is the same, which was interrupted by the explosion. The court being of the opinion that the plaintiffs should have the relief sought in their motion enjoined the defendant from operating its re-refinery plant in such a manner as to emit the foul, disagreeable and nauseating odors complained of in the complaint.

The defendant appealed, assigning error.

Wm. E. Comer for Plaintiffs, Appellees.

Brooks, McLendon, Brim & Holderness for Defendant, Appellant.

PARKER, J. The appellant states in its brief: "This Court held in a prior case involving the same defendant that an oil re-refiner is a lawful enterprise and for that reason cannot be a nuisance *per se*. *Morgan v. Oil Co.*, 238 N.C. at p. 191." In the same case in the next sentence in the opinion of the Court, after the sentence paraphrased by appellant in its brief, the Court used this language: "The High Penn Oil Company falls into error, however, when it takes the position that an oil refinery cannot become a nuisance *per accidens* or in fact unless it is constructed or operated in a negligent manner."

The case referred to in appellant's brief is *Morgan v. Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682, which was an action to recover temporary damages for a private nuisance and to abate such nuisance by injunction. The Court in the scholarly opinion by *Ervin, J.*, said on p. 191 of our Reports: "Most private nuisances *per accidens* or in fact are intentionally created or maintained, and are redressed by the courts without allegation or proof of negligence;" and later in the same opinion on p. 194 of our Reports the Court said: "A person who intentionally creates or maintains a private nuisance is liable for the resulting injury

to others regardless of the degree of care or skill exercised by him to avoid such injury." Further on in this opinion on p. 195 of our Reports this Court said: "When the evidence is taken in the light most favorable to the plaintiffs, it also suffices to warrant the additional inferences that the High Penn Oil Company intends to operate the oil refinery in the future in the same manner as in the past; that if it is permitted to carry this intent into effect, the High Penn Oil Company will hereafter cast noxious gases and odors onto the nine acres of the plaintiffs with such recurring frequency and in such annoying density as to inflict irreparable injury upon the plaintiffs in the use and enjoyment of their home and their other adjacent properties; and that the issuance of an appropriate injunction is necessary to protect the plaintiffs against the threatened irreparable injury. This being true, the evidence is ample to establish the existence of an abatable private nuisance, entitling the plaintiffs to such mandatory or prohibitory injunctive relief as may be required to prevent the High Penn Oil Company from continuing the nuisance." All the facts in *Morgan v. Oil Co.* occurred before the explosion at the re-refinery plant referred to in the instant case.

The evidence before his Honor amply supports his finding of fact that the operation of the re-refinery plant by the defendant up to the time of the explosion there constituted the existence of an abatable private nuisance, entitling the plaintiffs to such injunctive relief as might be required to prevent the defendant from continuing the nuisance. However, the defendant contends that, since the explosion at the re-refinery plant, it is rebuilding it, so that when it is put in operation it "will not permit the escape of any obnoxious odors or fumes," and that his Honor was in error in basing his restraining order upon an anticipated nuisance without sufficient proof.

In deciding this question it is necessary for us to consider the relevant rules which govern the granting or refusing of an interlocutory injunction. Many of these rules, many of which are relevant here, are set forth in an illuminating opinion by *Ervin, J.*, in *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. In that case *Ervin, J.*, said for the Court: "While equity does not permit the judge who hears the application to decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused . . . The hearing judge considers and weighs the affidavits or other evidence of the opposing parties for the purpose of ascertaining whether the plaintiff has made out an apparent case for the issuance of an interlocutory injunction and whether the granting of an interlocutory injunction would work greater injury to the defendant than is reasonably necessary for the protection of the plaintiff. . . . The hearing judge necessarily refuses an interlocutory injunction if the

plaintiff fails to make out an apparent case for the issuance of the writ. . . . In determining the propriety of issuing an interlocutory injunction, the hearing judge considers and weighs the relative conveniences and inconveniences which the parties will suffer by the granting or the refusing of the writ, citing authorities. An injunction of this nature should be granted where the injury which the defendant would suffer from its issuance is slight as compared with the damage which the plaintiff would sustain from its refusal, if the plaintiff should finally prevail."

The courts are slow to interfere by injunction with the conduct of business enterprises, *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662, but a business enterprise cannot exercise its property rights to establish the existence of an abatable private nuisance, without entitling injured persons to injunctive relief, *Morgan v. Oil Co., supra.*

"The mere apprehension of a nuisance is insufficient to warrant equitable relief, and in order to restrain future acts with respect to the use of a proposed building, it is necessary to set forth facts which show with reasonable certainty that such result would likely follow." *Wilcher v. Sharpe, supra.* As said by *Walker, J.,* in *Durham v. Cotton Mills,* 141 N.C. 615, 54 S.E. 453: "When the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate."

The findings of the judge in the instant case are that the operation of the re-refinery plant by the defendant before the explosion constituted the existence of a private nuisance, that the defendant is rebuilding the plant, and intends to continue its operation, and judging from past performances the court is of the opinion, and so holds, that the nuisance complained of in the past may continue, when operations are resumed, as the operators are the same, the ownership is the same and the business is the same, as before the explosion. If the defendant operates the re-refinery plant in the future, as the evidence shows it has in the past, it seems plain that such operation will result in irreparable injury to plaintiffs. The evidence before his Honor shows that the apprehension of material and irreparable injury is soundly based upon the fact that defendant before the explosion operated its re-refinery plant so as to constitute the existence of an abatable private nuisance, and that, after the plant is rebuilt and put in operation in the same business by the same defendant, there appears reasonable certainty that the former nuisance will be continued to plaintiffs' real and immediate danger.

His Honor did not restrain the rebuilding of the re-refinery plant, but merely enjoined the defendant from operating it, when rebuilt, in

such a manner "as to emit the foul, disagreeable and nauseating odors *complained of in this cause.*" The complaint alleges these odors are actually injuring their health. If the re-refinery plant, when rebuilt, will not permit the escape of any obnoxious fumes or odors of the kind and nature as set forth in the complaint, which defendant alleges in its answer, it is not hurt by the temporary injunction. If it does, and if the plaintiffs should finally prevail, their damage in the interim will be great, if the temporary injunction is vacated.

The reasons for preventing a prospective nuisance are at least as cogent as those for abating a present one. In the latter instance the courts act more readily because they are sure of their ground. The evil is visible. However, the call for protection against an apprehended injury, reasonably certain to befall, is as imperative as that for relief from one now felt. Nor is the complainant required to wait until some harm has been experienced or to show with absolute certainty it will occur. One requirement would make the remedy largely useless, the other impracticable.

The plaintiffs alleged in their complaint, which was offered in evidence as an affidavit, that the noxious odors and fumes from this re-refinery plant when in operation before the explosion actually injured their health. Generally, when the proof tends to show with reasonable certainty that there is a well grounded apprehension of danger to health or life by reason of the threatened use of adjacent property, such user should be restrained until the final hearing. *Cherry v. Williams*, 147 N.C. 452, 61 S.E. 267, where many of our cases are analyzed. Equity does not require a man to stand idle, until his family has sickened and died.

The assignments of error as to his Honor's findings of fact are overruled, for they are supported by competent evidence. The defendant's assignments of error as to the failure of the court to find the facts as contended by defendant are overruled. A person who intentionally maintains a private nuisance is liable for resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury. *Morgan v. Oil Co., supra.*

The judge below restrained the defendant, but did not add the words, *until the final hearing.* The order will be modified to read that the defendant is restrained from operating the re-refinery plant involved in such manner as to emit the foul, disagreeable and nauseating odors complained of in this case *until the final hearing.* The order as thus modified is affirmed.

Modified and affirmed.

ELLER JESSUP, ADMINISTRATOR OF THE ESTATE OF DARRELL LEE JESSUP, DECEASED, v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY, A CORPORATION.

(Filed 6 June, 1956.)

1. Railroads § 5: Negligence § 4b—

Evidence that on infrequent occasions boys boarded and rode moving cars in defendant's yard within a city, without evidence of acquiescence therein by defendant's employees, is insufficient to show an implied invitation to children to do so, there being a distinction between a temptation on the part of a trespasser to enter upon another's property and an invitation on the part of the owner for him to do so.

2. Negligence § 4b—

Where children enter upon lands without invitation or inducement equivalent to an invitation, they are trespassers, and the landowner owes them only the duty not to injure them willfully or wantonly.

3. Same: Railroads § 5—

A railroad company is not under duty to guard every approach to its tracks and trains so as to make its premises child-proof, and may not be held liable for the death of a child who, without express or implied invitation, attempts to board a moving freight car and is killed.

4. Railroads § 5—

A railroad company cannot be held liable for the death of a child killed in attempting to board a moving car on the ground that its employee, who was standing nearby, failed to restrain the child, when the evidence discloses that prior to the accident the boy was in a place of safety where he had a lawful right to be and suddenly lunged at the train in such manner and with such speed that the employee had no opportunity to prevent the injury.

PARKER, J., dissents.

APPEAL by the plaintiff from *Crissman, J.*, 5 December, 1955 Regular Term, GUILFORD Superior Court (High Point Division).

Civil action to recover damages for the wrongful death of Darrell Lee Jessup.

Without regard to the numbered paragraphs, the complaint in substance alleges:

1. The plaintiff's intestate, a boy seven years and nine months of age, was killed by the defendant's freight train in movement over its double track line at Ennis Street in the City of High Point. It was the custom of the defendant to shift freight cars over its lines and over spur tracks at and near Ennis Street—one of the public streets of the city.

2. Children living in the community prior to the accident were in the habit of catching freight cars and riding them for short distances by holding on to the ladders while they were in movement during shifting operations and that this custom and habit of the children were known to the defendant's train crews and other agents and employees. No effort, or an insufficient effort was made to protect these children and warn them of the danger involved.

3. On 30 November the plaintiff's intestate approached the crossing at Ennis Street at a time when freight cars were being moved slowly over the track. At the time, a member of the train crew was standing on the south side of the track near the center of Ennis Street and within a few feet of the track.

4. Plaintiff's intestate approached the track, passed within a few feet of the crew member, and without warning from him attempted to catch next to the last car in the moving train; and in the attempt was killed.

5. The proximate cause of the accident was the negligence of the defendant in permitting children to ride the cars as had become their habit, and in permitting the plaintiff's intestate to attempt to catch the moving car in the presence of the defendant's agent without any effort on his part to prevent the attempt.

The defendant admitted, "On infrequent occasions boys would board defendant's freight train when it was shifting in the High Point yard, but would always board it some distance from stations on said train occupied by the train crews and would always get off before they could be caught. At all times it attempted to prevent children from boarding and riding its train or playing on its right of way." All allegations of negligence were denied.

The only eye witness to the accident who gave evidence in the case was A. S. Hazzard, a witness for the plaintiff. His testimony may be summarized as follows: He was repairing a church roof about 100 to 150 feet from the scene of the accident. At the time the train of about seven cars was crossing Ennis Street at about 10 or 15 miles per hour, four or five small boys, one of whom was Darrell Lee Jessup, approached the crossing at Ennis Street from the south. A member of the train crew was standing within about three or four feet of the passing train, with his back to it, and facing south on Ennis Street. As the boys approached, four of them remained on the right-hand side of the street facing the tracks. The Jessup boy crossed over to the left, and when he was about six feet from the crewman he appeared to lunge at the train, seemed to miss his attempt to catch the ladder, and appeared to bounce back from the train. He had attempted to catch the rear of the next to the last car or the front of the last car as it passed over

Ennis Street. The trainman caught the last car as it passed, climbed to the top and crossed over to the right-hand side. "The kid made a leap for the train" after he passed the trainman. "He was standing there, and lunged like that, he made a quick attempt to get on the train after he passed the trainman."

Charles Carroll, a plaintiff's witness, testified in substance: He is 14 years of age and lived near the crossing. He had ridden the defendant's train at least 10 times. He rode the train for a short distance by grabbing and holding on to the ladder. At one time he observed a member of the crew on the back of the last car. The crewman saw him when he got off. The train was moving. He was never warned to stay off the train. His brother, age 10, had also ridden the train. He had seen Darrell Lee Jessup ride the train before the day of the accident.

Paula Jean Allen testified she is 13 years of age and lived on Ennis Street near the crossing. She had seen children riding the train by hanging on to the ladders; she never saw any trainman when the children were riding, except on one occasion she saw someone in the cab.

Mrs. Havannah Allen testified she lived near the crossing. Small children played along the track most every day when the weather permitted. There is a pathway along the track. She had seen children near the track throwing sticks, papers and bottles under the wheels of the train as it passed. On one occasion a boy left a baby under one year old on the track. The train stopped before it ran over the baby. She had seen members of the train crew on one occasion wave at the children and the children waved back. She did not see the Jessup boy attempt to catch the train. However, she did see another boy, David Carroll, hanging on the side of one car near the front of the train.

At the conclusion of the plaintiff's evidence the court allowed the defendant's motion for judgment of nonsuit. From the judgment according, the plaintiff appealed.

W. B. Byerly, Jr., and Rufus K. Hayworth, Jr., for plaintiff, appellant.

James B. Lovelace for defendant, appellee.

HIGGINS, J. The defendant admitted in the answer that on infrequent occasions boys had boarded and ridden its freight cars in its yard in the City of High Point. Coupled with the admission, however, and as a part of it, is the averment that in boarding the cars the boys did so at a distance from the stations occupied by the train crew, thereby eluding efforts to apprehend them.

The evidence introduced by the plaintiff is sufficient to show that Charles Carroll, age 14, had ridden defendant's train at least on 10

occasions; that on one occasion a member of the crew saw him. His younger brother had also ridden the train. Paula Jean Allen had observed boys riding the train on several occasions, once when a member of the crew was in the cab. Mrs. Havannah Allen testified there was a path along the tracks between street crossings and that children played along that path when the weather permitted. She had seen children throwing sticks and paper under moving cars. At the time of the accident she saw David Carroll hanging onto a freight car near the front of the train, though she did not see the rear of the train.

The evidence, when analyzed, shows about what the defendant admitted: That on infrequent occasions boys boarded and rode moving cars in defendant's yard. The admission of the defendant and the evidence of the plaintiff are not sufficient to charge the defendant with actual notice that children were in the habit of catching defendant's moving freight cars to the extent that permission to do so may be presumed. Children were uninvited and, therefore, at least technical trespassers. The duty owed to trespassers is that they must not be willfully or wantonly injured. That children may be trespassers has been frequently held by this Court. *Ford v. Blythe Bros.*, 242 N.C. 347, 87 S.E. 2d 879; *Briscoe v. Lighting & Power Co.*, 148 N.C. 396, 62 S.E. 600. The law does not require a railway company to guard every approach to its tracks and trains, and to make its premises child-proof. "Actionable negligence exists only when the one whose act causes the injury owes to the injured party a duty, created either by contract or operation of law, which he has failed to discharge. The inducement to enter must be equivalent to an invitation." *Briscoe v. Lighting & Power Co., supra.*

In many of the cases cited by the plaintiff, the injury resulted from hidden dangers. In *Ford v. Blythe Bros., supra,* a pit of live coals under a cover of ashes was left unguarded where small children were known to play. In *Greer v. Lumber Co.*, 161 N.C. 144, 76 S.E. 725, injury resulted to a 10-year-old child riding on the tailboard of a locomotive. However, the engineer knew of its presence and permitted it to ride in a place of danger. In *Vest v. C. & O. R. R. Co.*, 187 S.E. 358, the Supreme Court of West Virginia said: ". . . the long practice of boarding the train with the tacit approval of the practice by the conductor and brakeman imposed on the defendant a duty to anticipate a continuation of the practice and to make reasonable efforts to discourage it." These and other cases cited by the plaintiff do not strengthen his position.

A railway track and a moving train are interesting to boys; so is an apple tree full of ripe fruit. But there is a distinction between a temptation on the part of a trespasser to enter upon another's property and

an invitation on the part of the owner for him to do so. A farmer cannot guard his orchard at all times. A railroad cannot guard its tracks at all times.

The case of *Andrews v. Railway Co.*, 200 N.C. 483, 157 S.E. 431, in its legal aspects is strikingly similar to the case here. The plaintiff, a minor, caught a moving freight car in the City of Raleigh and, while holding to the ladder, was injured by one of the supports as the car passed under a bridge. The complaint alleged that boys from a nearby playground were accustomed to board and ride freight cars; that the custom was known to the defendant; and that the defendant was willfully and wantonly negligent in permitting the practice to continue; that the injury was proximately caused by such negligence in a number of specified respects. The Superior Court sustained the demurrer and this Court affirmed the judgment in a *per curiam* opinion, stating: "We are of the opinion that the complaint does not set forth the breach of any duty the defendant owed to the plaintiff. *Bailey v. R. R.*, 149 N.C. 169, 62 S.E. 912; *Monroe v. R. R.*, 151 N.C. 374, 66 S.E. 315; *Brigman v. Construction Co.*, 192 N.C. 791, 136 S.E. 125."

The plaintiff argues that on the particular facts in this case he is entitled to go to the jury upon the theory that an employee of the defendant was actually present at the crossing and by the exercise of due care could and should have prevented the plaintiff's intestate from attempting to board the train; and that his failure to do so was negligence on the part of the defendant.

At the time the plaintiff's intestate suddenly "lunged" at the train in his attempt to board it, four of his companions were on the opposite side of Ennis Street. They were also near the track—the four boys on the east side and the plaintiff's intestate on the west side of Ennis Street. The Jessup boy attempted to catch the rear of the car next to the last or the front of the last car. At the time, the member of the crew prepared to and did catch the rear end of the last car to take his place as a member of the crew. No doubt at the last moment he was watching the rear of the car preparatory to catching the ladder.

We cannot accept plaintiff's contention it was the duty of the defendant to guard its trains in such manner as to prevent children from attempting to ride its freight cars; but if the contention be accepted, the plaintiff's case must fail in this instance because his own evidence shows a member of the crew was actually present at the crossing and that plaintiff's intestate suddenly lunged at the train in such manner and with such speed that the employee had no opportunity to prevent the injury. Just prior to the unsuccessful attempt which resulted in his death, the boy was in a place of safety where he had a lawful right to be; that is, in Ennis Street. There was nothing to warn the watch-

man that he would suddenly become a trespasser and attempt to board the train. No breach of legal duty on the part of the defendant is shown by the evidence in this record. *Jones v. R. R.*, 199 N.C. 1, 153 S.E. 637; *Vassor v. R. R.*, 142 N.C. 68, 54 S.E. 849; *Murray v. R. R.*, 93 N.C. 92; N. C. L. Rev., Vol. 26, p. 227 (the authorities from many jurisdictions are cited).

In *Harris v. R. R.*, 220 N.C. 698, 18 S.E. 2d 204, it is said: "To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves. *Twist v. Winona & St. P. R. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, 39 N.W. 402."

The judgment of the Superior Court of Guilford County is Affirmed.

PARKER, J., dissents.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. CITY OF GREENSBORO.

(Filed 6 June, 1956.)

1. Utilities Commission § 2—

The Utilities Commission has been given specific authority to fix fares to be charged by intra-urban bus companies. G.S. 62-121.47, G.S. 62-122(1).

2. Utilities Commission § 3—

The Utilities Commission should fix such rate for a public utility corporation as will yield a just and reasonable return upon the value of the property of such utility which is used in connection with the particular service for which the rate is to be fixed. G.S. 62-124.

3. Same: Carriers § 16—

The public utility corporation in question provided public bus transportation and also electricity in a municipality. Its franchise provided that forfeiture by the company of one or more powers granted should result in the forfeiture of the whole. *Held:* The purpose of the provision is to prevent the utility from discontinuing any one of its operations and has no relation to the rates to be charged for the different classes of service, and

therefore, in determining the fare to be charged for bus service, the Utilities Commission properly disregards the value of the utility's electrical properties.

4. Utilities Commission § 5—

A protestant to an order of the Utilities Commission granting an increase in rates may not assert on appeal that the Commission could not grant such increase without a specific finding that petitioner's service was adequate and efficient when protestant does not base this contention on any exception or assignment of error (Rule of Practice in the Supreme Court No. 19 (3)), offers no evidence before the Commission in support of such contention, and gives no notice of such contention as required by G.S. 62-74.

APPEAL by the protestant, City of Greensboro, from *Preyer, J.*, March Term, 1956, of GUILFORD (Greensboro Division).

The Duke Power Company applied to the North Carolina Utilities Commission, hereinafter referred to as Commission, on 28 November, 1955, for authority to increase its cash bus fare rate from ten cents to fifteen cents on its bus system in the City of Greensboro and vicinity, but making no change in the existing fare for school children of four tickets for twenty-five cents, including free transfers. The City of Greensboro filed a protest against the increase.

The Commission held two hearings, one in January and the other in February 1956, at which the applicant introduced evidence tending to show losses sustained under the existing cash fare rate as follows: Net loss to petitioner in the operation of its transportation system in the City of Greensboro and vicinity of $139,278 in 1953; $165,922 in 1954; and $162,856 in 1955.

Protestant introduced evidence tending to show that the financial exhibits of the applicant were substantially correct, but contended that the Commission should consider the Duke Power Company's electric and bus systems in the City of Greensboro as a single unit. The Commission issued an order granting the increase. The protestant filed exceptions and moved for a delay in putting the increase into effect pending an appeal. The motion was denied and the exceptions overruled. The protestant appealed and the record was duly certified to the Superior Court.

Protestant renewed its exceptions and motion in the Supreme Court. Whereupon, "the court having fully examined and considered the record in this cause and having heard argument of counsel, and being of the opinion that the order of the North Carolina Utilities Commission should be affirmed," entered judgment accordingly.

The court entered a separate order denying the requested delay in the effective date of the increase granted by the Commission. The increase in cash fare rate became effective the 1st day of April, 1956.

Protestant appeals, assigning error.

Herman C. Wilson and H. J. Elam, III, for protestant.

King, Kleemeier & Hagan, Joyner & Howison, and Carl Horn, Jr., for appellee.

DENNY, J. This appeal turns upon the determination of the following question: Was the Commission correct in allowing the increase requested by the petitioner, which increase has been determined to be sufficient to produce a return of only 2.9 per cent upon the value of applicant's bus transportation properties used and useful in rendering passenger service in the City of Greensboro and vicinity, without considering the value of its electric properties, since its franchise contains the following provision: "This franchise is granted as an individual unit and forfeiture by the company of one or more powers herein contained shall result in the forfeiture of the whole"?

The protestant concedes that if the Commission was not required to consider the petitioner's electric and bus transportation business as a single unit, it is entitled to the increase requested.

In our opinion, the above provision in the franchise granted by the City of Greensboro to the petitioner has no relation whatever to the question of rates to be charged for the different classes of service rendered pursuant to the franchise. We hold the purpose of the provision was to prevent the petitioner from discontinuing its bus operations in Greensboro and vicinity without surrendering its electric franchise also, or *vice versa.*

The protestant further concedes in its brief that the Commission has been given specific authority to fix bus fares in the City of Greensboro under G.S. 62-121.47 and G.S. 62-122(1). *In re Southern Public Utilities Co.*, 179 N.C. 151, 101 S.E. 619.

A public utility corporation is entitled to a just and reasonable rate of return based upon the fair value of its properties used and useful in rendering the service for which the rate is established. G.S. 62-124.

The last cited statute provides, "In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this Chapter, the Commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge . . ." *Utilities Commission v. Telephone Co.*, 239 N.C. 675, 80 S.E. 2d 643; *Utilities Commission v. State*, 243 N.C. 12, 89 S.E. 2d 727. Certainly the Commission would have no authority under the foregoing statute to include in such valuation for rate making purposes, properties that were not

used in connection with the particular service rendered. Therefore, we hold the Commission was correct in considering the value only of those properties used and useful in connection with the operation of the bus transportation system of the petitioner in the City of Greensboro and vicinity.

Among the numerous authorities in accord with the above view, we cite *Northern P. R. Co. v. North Dakota,* 236 U.S. 585, 59 L. Ed. 735; *Norfolk & W. R. Co. v. Conley,* 236 U.S. 605, 59 L. Ed. 745; *Mt. Carmel Public Utility & Service Co. v. Public Utilities Commission,* 297 Ill. 303, 130 N.E. 693; *Municipal Gas Co. v. Public Service Commission,* 225 N.Y. 89, 121 N.E. 772, P.U.R. 1919C, 364; *Valparaiso Lighting Co. v. Public Service Commission,* 190 Ind. 253, 129 N.E. 13, P.U.R. 1921B, 325; *Detroit v. Detroit-Edison Co.,* 59 P.U.R. (N.S.) 1; *In re City of Barron,* 58 P.U.R. (N.S.) 57; *In re Montana-Dakota Utilities Co.,* 78 P.U.R. (N.S.) 33.

In the case of *Municipal Gas Co. v. Public Service Commission, supra,* the identical question we have before us was before that Court, and *Judge Cardozo,* in speaking for the Court, said: "That a company which sells gas may sometimes sell electricity is one of the accidents of commerce. The fortuitous conjunction of two unrelated functions or activities does not change the rate of profit to be derived from the fulfillment or pursuit of either. The defendants would have us say that the plaintiff, if it makes enough from electricity, must supply its gas for nothing. The legislature had not the purpose, if we assume that it had the power, to bring that result to pass. But the conclusion becomes the surer when we recall that there is another statute limiting the charge for electricity. The plaintiff must make no charge for electricity that is not reasonable and just (Public Service Commission Law, Sec. 65), and if it violates the prohibition, the Public Service Commission will hold it to its duty (Sec. 72). But a reasonable price for electricity does not mean a price that will make amends for unprofitable sales of gas. The legislature did not intend that a burden should be lifted from consumers of one commodity in order that it might be cast upon consumers of the other. Minnesota Rate Cases (*Simpson v. Shepard*), 230 U.S. 352, 421, 435 (57 L. Ed. 1511, 1550, 1556, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729; Ann. Cas. 1916A, 18). In fixing the price of electricity, the plaintiff is not entitled to recoup its losses upon sales of gas. For the same reason, in fixing the price of gas, it is not required to make allowance for the just and reasonable profit which is the limit of permissible return upon its sales of electricity."

Likewise, in the case of *Valparaiso Lighting Co. v. Public Service Commission, supra,* in considering this question, the Court said: "There is no logical or legal connection between an electrical rate and a rate

for gas, and the Commission itself has no power to make a rate for gas dependent upon a rate for electricity. The consumers of gas and electricity may be, and often are, altogether quite different persons, and it would not be reasonable to require one person to pay a high gas rate because somebody else is paying a reduced electrical rate. The rates for gas and electricity ought to be kept entirely separate and apart from each other. Neither one should be made to depend to any extent upon the other, since consumers of one may not be consumers of the other, and it would be wrong to require the consumers of one such commodity to bear the burden that should be borne by the consumers of the other commodity."

The Michigan Public Service Commission held in *Detroit v. Detroit-Edison Co., supra,* "It is a fundamental principle of utility regulation that each type of utility service should be self-sustaining. It is inequitable to allow the losses of one type of service to become a direct burden upon another type of service. Each rate should stand or fall upon its own merits."

The Supreme Court of Illinois, in the case of *Mt. Carmel Public Utility & Service Co. v. Public Utilities Commission, supra,* said: "Where a public utility corporation is engaged in furnishing to the public through various departments of its business, different kinds of service, it cannot be compelled to carry on a branch of its business, which furnishes one kind of service, at a loss, even though at the same time its whole business may be conducted at a profit."

It is also said in 43 Am. Jur., Public Utilities and Services, section 108, page 648, "There must be assigned to each business carried on by a public service corporation, when rates for a specific service are in controversy, that proportion of the total value of the property which will correspond to the extent of its employment in the particular business."

The protesting appellant has undertaken to raise this additional question in its brief: May the Commission grant an increase in rates without making a specific finding that the petitioner's service was adequate and efficient? The question posed is not based on any exception or assignment of error, as required by Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554. Furthermore, the protestant offered no evidence tending to show that the petitioner's bus service in the City of Greensboro and vicinity was inadequate or inefficient, and requested no finding of fact by the Commission on this question. Moreover, in our opinion, the protest filed by the City of Greensboro in this proceeding was not sufficient to constitute such notice as is required by G.S. 62-74 in order to authorize the Commission to consider whether or not the service rendered by the petitioner was adequate or inade-

quate. Therefore, we do not consider the question requires a judicial determination on this appeal. Even so, according to the decisions of many State Utilities Commissions, such question should be made the subject of a separate proceeding, after notice to all parties as to the scope of the hearing. *In re Home Telephone Co.*, P.U.R. 1924A, 253 (Mo. Pub. Ser. Com.); *In re Gravity Water Co.*, 10 P.U.R. (N.S.) 38 (Mont. Pub. Ser. Com.); *In re Tri-County Telephone Co.*, P.U.R. 1930A, 348 (Mich. Pub. Ser. Com.); *Buck v. Judge*, P.U.R. 1919F, 458 (N. Y. Pub. Ser. Com.); *In re Chillicothe Gas Light & Water Co.*, P.U.R. 1916D, 933 (Ohio, Pub. Ser. Com.).

No prejudicial error has been shown by the remaining exceptions assigned as error. Hence, the judgment of the court below is

Affirmed.

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

STATE v. PHILIP NEILL, OLIN SISK AND BILL REYNOLDS.

(Filed 6 June, 1956.)

1. Larceny § 1: Receiving Stolen Goods § 1—

Larceny and receiving stolen goods with knowledge that they had been stolen are separate and distinct offenses, and not degrees of the same offense.

2. Receiving Stolen Goods § 1—

The offense of receiving stolen goods with knowledge that they had been stolen presupposes that the goods had been stolen by someone other than the person charged with the offense of receiving, and the person guilty of the larceny cannot be guilty of receiving.

3. Larceny § 5: Burglary and Unlawful Breakings § 9: Receiving Stolen Goods § 4—

Where the evidence shows that a store had been broken and entered and goods stolen therefrom, the recent possession of the stolen goods raises a presumption of fact that the possessor is guilty of the breaking and entering and the larceny, but such recent possession, nothing else appearing, raises no presumption that the possessor is guilty of receiving the goods with knowledge that they had been stolen.

4. Receiving Stolen Goods § 6—

Evidence that a store was broken and entered and goods stolen therefrom, and that defendants soon thereafter attempted to sell the stolen goods to another, with other evidence tending to show defendants' guilt of the breaking and larceny, is insufficient to support a conviction of defend-

ants of receiving the goods with the knowledge that they had been stolen, and their motions to nonsuit on this count should have been allowed. G.S. 14-71.

5. Criminal Law § 81a—

The Supreme Court can review decisions of the lower courts only on matters of law or legal inference. Constitution of North Carolina, Art. IV, sec. 8.

APPEAL by defendants from *Huskins, J.*, February Term, 1956, of CATAWBA.

This is a criminal prosecution tried upon an indictment charging in the first count that the defendants Bill Reynolds, Olin Sisk and Philip Neill did on 27th November 1955 break and enter Hoyle Grocery Store in Catawba County with the intent to steal, take and carry away the merchandise, etc., of the said Hoyle Grocery Store. The second count charges the defendants with the larceny of 200 cases of beer, one 16-gauge bolt shotgun, one German Luger pistol, one P-38 pistol, one .32 revolver pistol, one .25 automatic pistol, 20 cartons of cigarettes, 3 dozen combs, and $30.00 in silver, of the value of more than $100.00, the goods, chattels and moneys of Hoyle Grocery Store. The third count charges the defendants with receiving the above described goods, chattels and moneys of Hoyle Grocery Store, knowing such goods, chattels and moneys to have been feloniously stolen.

The State's evidence tends to show that Hoyle Grocery Store was duly licensed to sell beer in 1955; that on Saturday night, the 27th of November, 1955, there were in the store several hundred cases of beer, including Blue Ribbon, Schlitz, High Life, and perhaps a small quantity of other brands; that the next night one John Parker, an employee of the store, returned to his sleeping quarters in the back of the store around 10:30 or 11:00 o'clock and found the door lock broken and around 200 cases of beer were missing, together with other items enumerated in the bill of indictment. This witness identified one of the cases of beer that was stolen, which was offered as State's Exhibit No. 1, based on the fact that he had done some computing in pencil on the side of the particular case of beer in connection with the sale of certain other beer, on Saturday, the day before the store was robbed; that he did not sell the case on which his calculations had been made.

Edwin Hoyle testified that he was the owner of Hoyle Grocery Store; that the store was closed on Sunday, 27th November, 1955; that he was in the store on that date around 6:30 p.m.; that the goods reported stolen were in the store at that time, and he identified a certain gun, State's Exhibit No. 2, as among the articles missing. State's Exhibit No. 2, the gun, had been found some time after the robbery by Mr. Will Neill in a wooded area on his premises in Gaston County.

Mr. Neill notified the officers of his discovery and turned the gun over to them. One fingerprint on the gun was identified as being that of the defendant Philip Neill.

One of the State's principal witnesses was Walter Hannon, who ran a small store west of Cherryville in Gaston County in the Fall of 1955. This witness testified that he was a bootlegger while operating his store, engaged in selling both whiskey and beer; that before this robbery these defendants came to his place of business and made inquiry about borrowing a trailer that he had in his possession. That the defendant Neill said he wanted to haul some stuff from up in Catawba. He also said something about knocking over the place known as County Line, which place is at Star Town in Catawba County. The witness told them he would not loan his trailer for anything like that. Two days later he saw the defendants again, and Neill, in the presence of the two other defendants, asked what he was paying for beer. He told him he had been paying $5.50 for regular size and $6.50 for king size, and that he could not handle over ten cases at a time. Neill told him he thought he could bring it to him a little better than that. He told Neill he couldn't use any beer except Schlitz and Budweiser; that on the first Sunday night in December, 1955, he had gone out and when he returned around 11:30 or 12:00 o'clock there were ten cases of Schlitz and Budweiser beer packed up at his door. A few days later the defendants came back and witness inquired of Neill if he had brought the beer and he replied, "Ten cases." That he told him he didn't have but $40.00 and Neill told him that would be all right, he wouldn't worry about getting the rest. The witness testified further that about two days later, around 11:00 o'clock at night, these defendants brought to his place thirty additional cases of beer consisting of Schlitz, Budweiser, High Life, and some other brands; that the beer was unloaded from Neill's car and put into the witness's car, and the defendant Sisk went with him to store it under the floor of his brother-in-law's home. A few days later the witness's place of business was raided by Gaston County officers and they found and seized a couple of cases of beer and some whiskey. This witness requested the officers to let him go alone and bring the unsold portion of the thirty cases of beer he had purchased from the defendants. He was permitted to do so and delivered twenty cases of beer to the officers. The witness denied having bought any Blue Ribbon beer from the defendants. He said he could not identify the State's Exhibit No. 1 as one of the cases he turned over to the Gaston County officers.

The State offered evidence to the effect that the State's Exhibit No. 1, a case of Blue Ribbon beer, was among the cases of beer Walter Hannon turned over to the officers of Gaston County.

The defendants testified in their own behalf and denied that they had broken into Hoyle Grocery Store and also denied they had sold Walter Hannon beer at any time.

The jury returned a verdict of not guilty on the first and second counts, but guilty of receiving stolen goods, knowing them to have been stolen. From the judgment imposed, the defendants appeal, assigning error.

Attorney General Rodman, Assistant Attorney-General McGalliard and Assistant Attorney-General Giles, for the State.

Mullen, Holland & Cooke, and Sigmon & Sigmon, for defendants.

DENNY, J. The question presented for determination on this appeal is whether or not the court committed error in overruling the defendants' motion for judgment as of nonsuit on the third count, which charges the defendants with receiving stolen goods, knowing them to have been stolen.

The crimes of larceny and receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses and not degrees of the same offense. *S. v. Brady*, 237 N.C. 675, 75 S.E. 2d 791; *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906. However, receiving stolen goods is a "sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore, the elements of larceny are not elements of the crime of receiving." *S. v. Martin*, 94 Wash. 313, 162 P. 356.

In Wharton's Criminal Evidence, 10th Edition, Volume 1, section 325b, page 643, the essential elements of the crime of receiving stolen goods which must be proven, are stated as follows: "(a) *The stealing of the goods by some other than the accused;* (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose." (Emphasis added)

In the case of *In re Powell, supra*, *Johnson, J.*, speaking for the Court, said: "It suffices here to note that the crime of receiving presupposes, as an essential element of the offense, that the property in question had been stolen by someone *other than* the person charged with the offense of receiving. Therefore, it is manifest that a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen. If the one is true, the other cannot be."

It is essential to a conviction of the crime charged in the third count of the bill of indictment under consideration that the goods received by the defendants were stolen by another and retained that status until they were delivered to the defendants. *S. v. Collins*, 240 N.C. 128, 81 S.E. 2d 270.

The evidence adduced in the trial below would seem to have been amply sufficient to have warranted a conviction as to each of these defendants on the first two counts. Recent possession of stolen property will ordinarily raise a presumption of fact, tending to show guilt of the possessor on his trial upon an indictment for larceny. *S. v. Hullen,* 133 N.C. 656, 45 S.E. 513; *S. v. Record,* 151 N.C. 695, 65 S.E. 1010, 25 L.R.A. (N.S.) 561, 19 Ann. Cas. 527; *S. v. Neville,* 157 N.C. 591, 72 S.E. 798; *S. v. Anderson,* 162 N.C. 571, 77 S.E. 238; *S. v. Lippard,* 183 N.C. 786, 111 S.E. 722; *S. v. Reagan,* 185 N.C. 710, 117 S.E. 1; *S. v. Williams,* 219 N.C. 365, 13 S.E. 2d 617.

In *S. v. Hullen, supra,* this Court said: "If recent possession of the stolen goods is evidence that defendant committed the larceny, it must also of necessity be evidence of the fact that the defendant broke and entered the house, because it is evident that the larceny was committed in the house by the person who broke and entered it, and there is no evidence that it was committed in any other way." The inference or presumption arising from the recent possession of stolen property, however, without more, does not extend to the statutory charge (G.S. 14-71) of receiving stolen property knowing it to have been stolen or taken. *S. v. Hoskins,* 236 N.C. 412, 72 S.E. 2d 876; *S. v. Larkin,* 229 N.C. 126, 47 S.E. 2d 697; *S. v. Yow,* 227 N. C. 585, 42 S.E. 2d 661; *S. v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814; *S. v. Lowe,* 204 N.C. 572, 169 S.E. 180; *S. v. Best,* 202 N.C. 9, 161 S.E. 535.

In the trial below, the jury was the trier of the facts upon a charge presumably free from error, since it was not brought forward in the case on appeal. *S. v. Record, supra.* We can only review decisions of the courts below on matters of law or legal inference. Constitution of North Carolina, Article IV, section 8.

A careful consideration of all the evidence disclosed by the record leads us to the conclusion that there is no evidence to support the conviction on the third count in the bill of indictment. It follows, therefore, that the motion for judgment as of nonsuit on that count should have been sustained.

Reversed.

CLARENCE W. HINSHAW, TRADING AS BURLINGTON SCRAP IRON AND METAL COMPANY, v. MARVIN R. MCIVER, TAX COLLECTOR OF BURLINGTON.

(Filed 6 June, 1956.)

1. Mandamus § 1—

Mandamus lies to compel the performance of a purely ministerial duty, imposed by law, at the instance of a party having a clear legal right to demand performance, and the remedy is not available to establish a legal

right, or to compel the performance of an illegal or unauthorized act, nor will it issue where the rights of those not parties to the action would be injuriously affected.

2. Municipal Corporations § 36—

One obtaining license under a city ordinance is ordinarily bound by the provisions of the ordinance as to revocation.

3. Same—

A municipality has statutory power to regulate the operation of junk yards within its borders in the exercise of its police powers. G.S. 160-200.

4. Same: Mandamus § 1—

The power of a municipality to enact regulatory ordinances for the protection of the public and to prevent nuisances is not to be forestalled or foreclosed by writ of *mandamus*.

5. Same—

A municipality, after notice and hearing, revoked plaintiff's license to operate a junk yard for violations of its regulations governing the operation of such business. Plaintiff thereafter instituted this action for *mandamus* against the city tax collector, the city not being a party, to compel the tax collector to issue license. *Held:* Plaintiff may not test the validity of the municipal ordinance in this action, and the court correctly denied plaintiff's application for writ of *mandamus*.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Carr, J.*, December Term, 1955, of ALAMANCE.

This was an action to compel the defendant as tax collector of the City of Burlington to issue to the plaintiff license to engage in the business of junk dealer in the City of Burlington for the year beginning 1 July, 1955.

The case was heard by consent upon the pleadings, exhibits and minutes of the City Council of Burlington, from which the following facts were made to appear:

By statute, G.S. 105-102, those engaged in the business of dealing in junk were required to procure a license and to pay to the State an annual tax therefor, and cities and towns were also empowered to levy a license tax on junk dealers not to exceed one-half of that levied by the State. Pursuant to this authority, the City of Burlington levied a license tax of $50 on those engaged in the business of buying and selling junk in the city.

The City of Burlington, also, in 1951 adopted ordinances regulating the use and operation by junk dealers of junk yards, requiring, among other things, that the yard be enclosed by solid fence not less than 8 feet high; that no junk or material be kept on the outside of the fence;

that gates, when not in use be kept closed, and that no bills or placards be affixed or displayed.

It was further ordained that should complaint be made that the operator of a junk yard was violating any of the provisions of these ordinances, the City Council should notify the operator to appear and show cause why his license should not be revoked, and that if the Council found the complaint true, it would have the right to revoke the license of such operator.

In June, 1954, the plaintiff Hinshaw applied for and obtained license to conduct a junk business on Long Street in the City of Burlington. In April, 1955, complaints were made by a number of citizens that plaintiff was not conducting his junk business in accordance with the ordinances. Thereupon the Council notified the plaintiff and conducted a hearing at which plaintiff and his counsel were present. The complaints were supported by the evidence of several witnesses. The plaintiff did not deny violating some of the regulations, but asked the Council not to revoke his license. The Council found that the plaintiff had violated the pertinent ordinances and ordered that his license be revoked. The Council further ordered the closing out of plaintiff's junk business at the locality where he was operating, and entered on the minutes that he be given a reasonable time within which to dispose of the junk on hand and clean up the premises, but it was expressly stated in the resolution that plaintiff should not continue operations and that the extension of time to remove junk would not authorize him to continue to operate as a junk dealer. The plaintiff took no steps to review the action of the City Council.

Thereafter, in June, 1955, plaintiff applied to defendant McIver, city tax collector, for license to engage in the business of junk dealer, presumably at the same location, for the year beginning 1 July, 1955. The application was refused and this action was instituted against the tax collector to compel him to issue the license as applied for. The City of Burlington was not made a party.

Upon consideration of the case as presented, the court held that the plaintiff had not shown a clear right to relief by *mandamus*, and that the validity of the ordinances and actions of the City Council could not properly be tested in this action to which the City of Burlington was not a party. The application for writ of *mandamus* as prayed was denied.

The plaintiff excepted and appealed.

Clarence Ross and Cooper, Latham & Cooper for plaintiff, appellant.

W. D. Madry and W. R. Dalton, Jr., for defendant, appellee.

DEVIN, J. It is settled law in this jurisdiction that *mandamus* will lie to compel the performance of a purely ministerial duty imposed by law, and that the party seeking the writ must have a clear legal right to demand it, and the party sought to be coerced must be under legal obligation to perform the duty. *Bryan v. Sanford, ante,* 30, 97 S.E. 2d 420; *Nebel v. Nebel,* 241 N.C. 491 (499), 85 S.E. 2d 876; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328. "Its purpose is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885. However, the writ will not issue to compel the performance of an illegal or unauthorized act, nor will it issue where the rights of those not parties to the action would be injuriously affected. 55 C.J.S. 35-40. It was held in *Distributing Co. v. Burlington,* 216 N.C. 32, 3 S.E. 2d 427, that *mandamus* would not lie to require issuance of building permit in violation of an ordinance.

To issue the writ as prayed for under the circumstances here made to appear would be to compel the defendant tax collector to violate the ordinances adopted by the City Council of Burlington and to disregard the orders of the Council with respect to this plaintiff's operations at the place where he had been doing business. There was no evidence that the plaintiff had complied with the orders of the Council.

It is disclosed by the admitted records that the City Council acted in accordance with the provisions and procedure set out in the ordinances which in the exercise of its police power the City had adopted, and that it heard evidence of violations of these ordinances by the plaintiff in a public hearing at which the plaintiff and his counsel were present, and found the complaints were true. Thereupon, in the exercise of the power reserved in the ordinance, it revoked the plaintiff's license and ordered his operations to cease. The ordinances and regulations under which the Council acted were in force at the time plaintiff obtained license as junk dealer in 1954. One obtaining license under a city ordinance is ordinarily bound by the provisions of the ordinance as to revocation. *Bluemound Amusement Park v. Milwaukee,* 79 A.L.R. 281. The power of a municipal corporation to enact ordinances and regulations for the better government of the city is conferred by statute, G.S. 160-200. And the power to regulate the operation of junk yards within its borders is within the police power of the city. *McIntyre v. Murphy,* 177 N.C. 300, 98 S.E. 820; *Turner v. City of New Bern,* 187 N.C. 541, 122 S.E. 469; *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29; *Ahoskie v. Moye,* 200 N.C. 11, 156 S.E. 130.

The power to enact regulatory ordinances for the protection of the public and to prevent nuisances is not to be forestalled or foreclosed by writ of *mandamus. Wake Forest v. Medlin, supra.* Violation of the

provisions of ordinances regulating a business for which license is issued affords grounds for revoking the license, and revocation of license for failure to comply with regulations prescribed by the city ordinance is not precluded by statute authorizing penalties for violation. *Prawdzik v. City of Grand Rapids,* 313 Mich. 376, 165 A.L.R. 1165.

Plaintiff apparently acquiesced in the action of the Council in April and May, 1955, and took no steps to review in appropriate proceedings the action of the Council, if he felt aggrieved.

Plaintiff takes the position that in any event he was entitled as a matter of law to require the tax collector to issue him license as a junk dealer, and that the ordinances relied on by the defendant are void. He cites as authority *Ornoff v. Durham,* 221 N.C. 457, 20 S.E. 2d 380, but that case does not help him. In the *Ornoff case* the plaintiff applied to the tax collector of the City of Durham for license as a junk dealer for the year 1941. This was refused on the ground that the City had previously adopted a zoning ordinance which would prohibit use of the locality for conducting a junk business. It appeared, however, that plaintiff had been engaged in the junk business there before the adoption of the zoning ordinance and that the ordinance contained the provision that "any nonconforming use existing at the time of passage of the ordinance may be continued." The case came to the Supreme Court on appeal from the judgment in the Superior Court overruling defendants' demurrer. The ruling below was affirmed and the cause remanded for determination of the issue of fact whether plaintiff had been engaged in the junk business at that place prior to the adoption of the zoning ordinance. In that case it will be noted the City of Durham was made a party, though the validity of the city ordinance was not involved. We have examined the other authorities cited by plaintiff, but they do not militate against the conclusion we have reached on the facts of this case.

We concur in the view of the able judge who heard this case below that under the circumstances here made to appear the plaintiff has not shown a clear legal right to the relief prayed for, and that the Court would not undertake to test the validity of the ordinances and orders of the City of Burlington in an action to which the City was not a party. There was no error in denying the plaintiff's application for writ of *mandamus.*

Affirmed.

JOHNSON, J., not sitting.

The foregoing opinion was prepared by *Devin, Emergency Justice,* while he was serving in place of *Johnson, J.,* who was absent on account

of his physical condition. It is now adopted by the Court and ordered filed.

H. L. COBLE CONSTRUCTION COMPANY v. HOUSING AUTHORITY OF THE CITY OF DURHAM.

(Filed 6 June, 1956.)

1. Bill of Discovery § 7—

G.S. 8-89 is a remedial statute which should be liberally construed.

2. Bill of Discovery § 8—Affidavit for inspection of writings held sufficient.

The issue raised by the pleadings in this action by a contractor against a housing authority was whether the settling of floor slabs, which plaintiff was required to rectify, was due to the fault of plaintiff. Plaintiff made verified motion for inspection of reports made between specified dates by the architect's officers or employees to defendant builder, like reports mailed to or delivered to the Housing Administration, report of a named employee of the Housing Administration, and reports of tests made by defendant, all relative to the cause of the settling of the slabs. Plaintiff further averred that the information was not available to plaintiff from any other source. *Held:* The affidavits disclosed that the documents and papers sought to be inspected are material to the controversy and sufficiently identified them within the requirements of G.S. 8-89.

3. Contracts § 16—

Allegations of plaintiff contractor that flooring slabs constructed by it in accordance with the plans and specifications, settled through no fault of plaintiff, and that plaintiff was required to rectify the settling at large expense, *held* sufficient to state a cause of action in plaintiff's favor against defendant housing authority.

4. Bill of Discovery § 8—

Where plaintiff's verified motion for inspection of writings is sufficient to justify order therefor, the issuance of the order is within the discretion of the court, and its order granting the motion in part and denying it in part will not be disturbed in the absence of a showing of abuse.

APPEAL by defendant from *Hall, J.*, November Civil Term 1955 of DURHAM.

Civil action to recover damages for breach of contract for the construction of 240 housing units and the cost of rebuilding certain structural floor slabs heard on motion of plaintiff for inspection of writings in defendant's possession made, pursuant to G.S. 8-89, after both complaint and answer had been duly filed in the action, which is now pending for trial in the Superior Court of Durham County.

The court below entered an order, in its discretion, granting plaintiff's motion in part, and denying it in part.

Defendant appeals, assigning error.

Brooks, McLendon, Brim & Holderness for Plaintiff, Appellee.

Edwards, Sanders & Everett for Defendant, Appellant.

PARKER, J. The complaint, which has attached to it the contract between the parties and other exhibits, and the answer are made a part of plaintiff's verified motion under G.S. 8-89 for an inspection of books, papers and documents in defendant's possession, or under its control. The defendant filed no answer to the motion.

The verified motion alleges in substance these facts: The plaintiff, in the performance of its contract with the defendant to build for it 240 housing units, constructed in strict compliance with the contract's plans and specifications certain concrete floor slabs, which settled through no fault of its own in the construction. Because of this settling, the defendant stopped the plaintiff from work on the buildings. On 13 October 1952 plaintiff was ordered by the architect in charge of the construction to correct the settling of the floor slabs by methods to be approved by him. A controversy arose between the parties as to the cause of the settling of the floor slabs, and plaintiff refused to proceed with the work of correcting the settling, until it was furnished with plans and specifications by the architect as to how the work should be done. Plaintiff said he would do this work, but without prejudice to insist on payment for such additional work. Afterwards plaintiff was furnished with specifications and plans by the architect to correct the settling, and did the work at a cost of $24,604.40, which defendant has refused to pay. The defendant in its answer alleges that the floor slabs settled because the plaintiff did not comply with the specifications and plans of the contract, and particularly failed to compact the soil under the floor as required by the contract. That the complaint and answer raise an issue as to the cause of the settling of the floor slabs, and as to the necessity to correct such settling, and that evidence in respect thereto is material to the issue raised by the pleadings.

That H. Raymond Weeks, Inc. was the architect and agent of defendant. That defendant constructed the housing project under a contract between it and the U. S. Public Housing Administration. That the contract between plaintiff and defendant provides for certain supervision and control by the Housing Administration, and that final payment to the contractor can only be made upon certificate by the architect and approval of the Local Authority and the Housing Administration: that the Housing Administration shall be informed of all dis-

putes between the contractor and the Local Authority, and that the decision of the contracting officer as to any claim of the contractor shall be approved in writing by the Housing Administration. That during the progress of the work by plaintiff the Housing Administration made frequent inspections of the work done, and inspected and approved the original installation of the floor slabs, and also approved the preparation of new plans in respect to the settling of the floor slabs, and that there was an exchange of information between defendant and its architect and the Housing Administration with respect to the settling of the floor slabs. That the defendant is in possession of books, papers and documents, or copies of them, which contain evidence relating to the merits of the issue raised by the pleadings as to the settling of the floor slabs, which books, papers and documents are specified as follows: Paragraph One, the original reports, or copies of all reports, of inspections made by M. J. Hakan, an employee of H. Raymond Weeks, Inc., or by any other employee of the architect, of the floor slabs installed, or in process of installing, by plaintiff on the housing project described in the pleadings; said inspections are believed to have occurred between 1 October 1952 and 10 December 1952; and said reports are believed to have been furnished to defendant and to the Housing Administration and to disclose the cause of the settling of the floor slabs. Paragraph Two, all written reports, or copies thereof, made by the architect, or any of its officers or employees, to the defendant with respect to the settling of the floor slabs, together with copies of inspection reports and reports of tests made by the defendant, the architect and representatives of the Housing Administration. Paragraph Three, copies of all letters of the architect, or any of its employees, and particularly of W. E. Harris, mailed or delivered to the Housing Administration, transmitting reports of M. J. Hakan, or any other person, in respect to the settling of the floor slabs on this project. Paragraph Four, the originals or copies thereof, of any reports by A. M. Korsmo, an employee of the Housing Administration, in respect to his inspection of the settling of the floor slabs, the plaintiff being informed that Korsmo made an inspection about 4 or 5 September 1952; and also any letters, or copies thereof, making reference to Korsmo's reports. Paragraph Five, copies, or originals, of all memoranda from the Housing Administration to the defendant or to the architect relating to inspections and reports in respect to the settling of the floor slabs, and the work to be done to correct it. Paragraph Six, all correspondence between the Housing Administration, the defendant and the architect, or between any two of them, in respect to the settling of the floor slabs, the cause thereof, and the work to be done to remedy the settling. The motion further states that this application is made in good faith, and that the said

books, documents and papers are not available to plaintiff from any other source.

The court below, in its discretion, entered an order directing the defendant to appear at a certain time and place, and make available to plaintiff for inspection the documents and papers referred to in paragraphs one and two of the motion, as we have numbered them; and also original or copies of a report of inspection made on or about 4 or 5 September 1952 by A. M. Korsmo, employee of the Housing Administration, and furnished to the defendant or its architect, and relating to the cause of the sinking of the floor slabs and of action to be taken to remedy the trouble; and further, copies, or originals, of instructions from the Housing Administration, or its Richmond Field Office, to the defendant, or its architect, relating to inspections and reports in respect to the settling of the floor slabs and the steps to be taken to correct the situation. The application of the plaintiff to inspect other documents and papers not enumerated in the court's order was denied.

G.S. 8-89 is a remedial statute, which should be liberally construed to advance the remedy intended thereby to be afforded to the party to an action pending in the courts of the State. *Dunlap v. Guaranty Co.*, 202 N.C. 651, 163 S.E. 750; *Abbitt v. Gregory*, 196 N.C. 9, 144 S.E. 297.

The verified motion supporting the order for an inspection of documents and papers in the possession of defendant, or under its control has factual allegations setting forth plainly that the documents and papers desired to be inspected are material to plaintiff's cause of action and to the issue raised by the complaint and answer as to the cause of the settling of the floor slabs and as to the necessity to correct such settling, and that they are not available to plaintiff from any other source. The requirement of the statute that the papers and documents sought to be inspected contain "evidence relating to the merits of the action" is satisfied by the verified motion. G.S. 8-89; *Flanner v. Saint Joseph Home*, 227 N.C. 342, 42 S.E. 2d 225; *Dunlap v. Guaranty Co., supra; Evans v. R. R.*, 167 N.C. 415, 83 S.E. 617.

The affidavit supporting an order for inspection of writings under G.S. 8-89 must designate the books, papers and documents sought to be inspected. *Flanner v. Saint Joseph Home, supra.* This Court has said in *Rivenbark v. Oil Corp.*, 217 N.C. 592, 598, 8 S.E. 2d 919: "While a 'roving commission for the inspection of papers' will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. *Bell v. Bank*, 196 N.C. 233; *Dunlap v. Guaranty Co.*, 202 N.C. 651."

The defendant contends that the application for inspection should have been refused for this reason: "There are insufficient averments in the pleadings and in the record to make out a cause of action by the plaintiff against the defendant since no breach of contract is alleged: since there is no cause of action stated or alleged, none of the documents demanded are material." Defendant cites no authority to support his argument. Suffice it to say that defendant's contention is not supported by a study of the complaint.

It is apparent that plaintiff's verified motion discloses facts sufficient to sustain the order entered. Since the affidavit is sufficient to justify the order, whether the judge should grant the order or decline it, was a matter within his discretion. *Star Manufacturing Co. v. R. R.*, 222 N.C. 330, 333, 23 S.E. 2d 32; *Dunlap v. Guaranty Co., supra; Bank v. Newton,* 165 N.C. 363, 81 S.E. 317. The judge exercised his discretion by granting the application for inspection in part and refused it in part. We find no abuse of such discretion on the part of his Honor as to raise a legal question for our decision. The order entered below is

Affirmed.

MRS. U. S. CORNELIUS v. W. H. ALBERTSON.

(Filed 6 June, 1956.)

1. Executions § 2—

The common law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, G.S. 1-315(4), G.S. 1-316, but even so, the trustee must be brought in by supplemental proceeding under G.S. 1-360 *et seq.*

2. Executions § 6—

Since an execution must conform to the judgment, it may not be issued against a stranger to the judgment, and therefore the writ cannot command the sheriff to satisfy the judgment out of property held in trust for the judgment debtor by a person not a party to the suit, either individually or as executor or trustee.

3. Execution § 24—

Where the judgment creditor seeks to have property held in trust for the benefit of the judgment debtor sold in satisfaction of the judgment, the judgment creditor should have execution issued to satisfy the judgment out of the property of the judgment debtor, and after return of such execution unsatisfied, have the trustee brought in and made subject to the jurisdiction of the court by supplemental proceedings under G.S. 1, Article 31. Upon the hearing in such proceeding the question of whether the property

is held in an active trust, and therefore not subject to sale, or held in a passive trust, and therefore subject to sale, may be determined.

4. Execution § 11—

An injunction against levy or execution under a judgment can be obtained only when the judgment debtor has no adequate remedy at law, and where the judgment debtor may move in the cause to recall or withdraw the execution, or stay an execution by *supersedeas*, injunction will not lie.

APPEAL by plaintiff from *Crissman, J.*, in chambers 12 December 1955. GUILFORD.

Motion in the cause by defendant, judgment debtor, to enjoin the plaintiff and the Sheriff of Guilford County from levying upon and selling under an execution, caused to be issued by plaintiff, judgment creditor, property held in trust for defendant.

On 6 March 1952 plaintiff obtained in the Superior Court of Guilford County a judgment against the defendant in the amount of $22,050.00, by reason of the provisions of a deed of separation between them. T. W. Albertson, a resident of Guilford County and father of the defendant, died testate on 29 November 1951, and his will was duly probated on 20 December 1951. T. W. Albertson in his will named his son J. R. Albertson as executor. In Item Three of his will he directed his executor to convert all his personal property into cash, and further directed that his executor shall hold in trust for his son, the defendant, one-fifth part of the cash, and pay to defendant $250.00 each six months, until his one-fifth part shall have been paid in full: he was also directed to pay any necessary bills for medical, drug, and hospital expenses, if incurred by defendant for himself. In Item Four of his will he directed his executor to sell all of his real estate. In Item Five of his will he stated that his executor shall hold in trust for the defendant a one-fifth part of the net proceeds from the sale of real estate belonging to his estate, and pay it to the defendant as directed in Item Three of his will, and upon the defendant's death, the executor shall pay in a lump sum anything that shall be left to defendant's son.

On 24 October 1955 plaintiff had the Clerk of the Superior Court to issue an execution on her judgment for $22,050.00, which execution commanded the Sheriff of Guilford County "to satisfy said judgment out of the real or personal property held in trust for the defendant by John R. Albertson, Trustee under the Will of T. R. (*sic*) Albertson, deceased."

After the issuance of the execution the defendant made a motion in the cause to restrain the plaintiff and the sheriff from levying upon and selling the property held in trust for him. The plaintiff answered the

motion, alleging that the property held in trust for defendant could be levied upon and sold under execution by virtue of G.S. 1-315(4).

The motion was heard by the judge in chambers, and he entered an order finding as a fact that under the provisions of the will of T. W. Albertson, which provisions are set forth in detail, an active trust was created, and ordering that the sheriff of Guilford County, his deputies, etc. be, and they hereby are, permanently enjoined from proceeding with a levy and sale under execution of property held in trust for defendant by the executor of the estate of T. W. Albertson, deceased.

From the order made the plaintiff appeals, assigning error.

Thomas Turner and J. J. Shields for Plaintiff, Appellant.

D. C. MacRae for Defendant, Appellee.

PARKER, J. At common law no property but that to which the debtor has a legal title is liable to be taken under execution against him. *Hardware Co. v. Lewis,* 173 N.C. 290, 92 S.E. 13.

However, in this State G.S. 1-315 states the property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution as hereinafter prescribed, and sub-section 4 of this statute makes it apply to "real property or goods and chattels of which any person is seized or possessed in trust for him." G.S. 1-316 provides that upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, who shall hold the same free from all encumbrances of the trustee. We have held that the provisions of G.S. 1-315(4) and G.S. 1-316 do not apply to an active trust. *Mayo v. Staton,* 137 N.C. 670, 50 S.E. 331; *Hardware Co. v. Lewis, supra; Chinnis v. Cobb,* 210 N.C. 104, 185 S.E. 638.

The writ of execution commands the sheriff to satisfy plaintiff's judgment for $22,050.00 against the defendant out of the property "held in trust for the defendant by J. R. Albertson, Trustee under the Will of T. R. (*sic*) Albertson, deceased," though J. R. Albertson is not a party to the suit either individually or as executor or trustee. Since an execution must conform to the judgment, it follows that it can be issued only against the judgment debtor, and may not be issued against a stranger to the judgment. 33 C.J.S., Executions, sec. 15; 21 Am. Jur., Executions, sec. 31.

G.S. 1-360 *et seq.* provides a procedure when a new person is to be charged by the execution of a judgment on the ground that he has property of the judgment debtor. G.S. 1-360 states that after the issuing or return of an execution against property of the judgment debtor, and upon affidavit that any person or corporation has property of said judg-

ment debtor, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The purpose of such appearance and answer is to ascertain whether he is seized or possessed of any real property or goods, and chattels in trust for the judgment debtor. *Rice v. Jones,* 103 N.C. 226, 9 S.E. 571. The order of the court or judge requiring such person to appear and answer is sufficient to bring him before the court, and to make him subject to its jurisdiction for the purpose of securing the judgment debtor's property—not for the purpose of contesting any right of such person having the same. *Bank v. Burns,* 109 N.C. 105, 13 S.E. 871. G.S. 1-360 provides for the order of examination. G.S. 1-362 provides for the order of condemnation, and reads: "The court or judge may order any property, whether subject or not, to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment." The exception to the statute is not relevant here. When these statutes are read singly, or as an integral part of Article 31, Supplemental Proceedings, Chapter 1, Civil Procedure, of the General Statutes, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law.

A supplemental proceeding under Article 31, of Chapter 1, of the General Statutes is equitable in its nature, *Cotton Co., Inc., v. Reaves,* 225 N.C. 436, 35 S.E. 2d 408, and the provisions of this article are intended to supply the place of a proceeding in equity, where relief was given after a creditor has determined his debt by a judgment at law, and was unable to obtain satisfaction by process of law, *Carson v. Oates,* 64 N.C. 115.

In McIntosh's N. C. Practice and Procedure, p. 864, it is written: "All the debtor's property is liable for his debts except as exempted by law, but only legal interests in tangible personalty and in realty could be reached by execution at law until the right was extended to include equities of redemption and interests under a passive trust . . ."

The plaintiff cannot reach by the execution she had issued the property held in trust for defendant by J. R. Albertson, Executor of the will of T. W. Albertson, deceased, who is a stranger to the suit, but must endeavor to reach it, if she can, by a supplementary proceeding as set forth in Article 31, Supplementary Proceedings, Chapter 1, Civil Procedure, of the General Statutes.

The general rule is that where an injunction is sought to prevent the enforcement of a judgment by execution grounds for equitable jurisdiction must be shown. As a general proposition, where relief sought by an applicant for an injunction against levy or execution can be obtained by motion in the cause, wherein the judgment was obtained, to recall or withdraw the execution, or stay an execution by granting a *supersedeas,* an injunction will be refused, since the legal remedy cannot be considered inadequate. *Finance Co. v. Trust Co.,* 213 N.C. 369, 196 S.E. 340; *Scott Register Co. v. Holton,* 200 N.C. 478, 157 S.E. 433; *Coward v. Chastain,* 99 N.C. 443, 6 S.E. 703; *Parker v. Bledsoe,* 87 N.C. 221; *Parker v. Jones,* 58 N.C. 276; Anno. 171 A.L.R., p. 224; 21 Am. Jur., Executions, p. 268. See the interesting discussion of the novel proposition of asking a court of equity to enjoin the enforcement of one of its own decrees in *Greenlee v. McDowell,* 39 N.C. 481.

The lower court should have refused defendant's motion in the cause for an injunction to restrain the plaintiff from levying upon and selling under the execution the property held in trust for the defendant on the ground that defendant had an adequate remedy at law by a motion in the cause before the Clerk of the Superior Court of Guilford County to recall or withdraw the execution, which commanded the sheriff to levy upon and sell property held in trust for defendant by a stranger to the suit. Such being the case, the question as to whether the trust was active or passive was not before the court below for decision and should not have been passed on, and its finding of fact that the trust created by the will of T. W. Albertson for the benefit of defendant is an active trust is not before us for review.

This proceeding is remanded to the lower court with the direction that it strike out of its order all its findings of fact as to the trust created for the benefit of the defendant, and that it vacate the injunction, and enter an order denying defendant's motion for an injunction.

The defendant can then make a motion in the cause before the Clerk of the Superior Court to recall or withdraw the present execution, which should be allowed.

The plaintiff then, if she so desires, can have the Clerk to issue an execution to satisfy her judgment out of the property of the judgment debtor, and after the issuance of such execution she can by supplementary proceedings, pursuant to G.S. 1-360 *et seq.,* bring J. R. Albertson, holder of the trust estate, before the court and make him subject to its jurisdiction, and present to the court or judge the question as to whether or not the trust estate held by J. R. Albertson for the benefit of defendant, judgment debtor, should be applied to the satisfaction of her judgment.

Error and remanded.

TED TILLMAN v. ERNEST W. TALBERT AND MARION T. TALBERT.

(Filed 6 June, 1956.)

1. Architects § 2—

A person not a licensed architect may make a valid and enforceable contract to provide plans and specifications for a residence not to exceed the value of $20,000. G.S. 83-12.

2. Architects § 3: Contracts § 7: Quasi-Contracts § 1—

Where a person who is not a licensed architect contracts to furnish plans and specifications for a residence costing less than $20,000, and, after he had made preliminary studies, defendant owners direct changes resulting in the designing of a residence of a value exceeding $20,000, *held*, the person so drawing the plans is entitled to recover on a *quantum meruit* for the work performed up to the time that the changes increased the value of the house above $20,000, the subsequent illegal agreement being regarded as a nullity not affecting the previous lawful contract.

3. Appeal and Error § 24—

An assignment of error to the failure of the court in its charge to comply with G.S. 1-180 is broadside and need not be considered.

4. Contracts § 25e: Architects § 3—Evidence held insufficient to show loss to defendants from inability to construct houses simultaneously.

Plaintiff sought to recover on an agreement to furnish plans and specifications for a residence to cost less than $20,000. It appeared that defendants directed changes in the plans so that the cost of the residence exceeded $20,000. *Held:* In plaintiff's action to recover upon *quantum meruit* upon the original valid agreement, nonsuit on defendants' counterclaim for damages on the ground that they had contemplated building two houses on adjacent lots at the same time but that due to increase in cost they were forced to finish one house and then to start construction on the other, resulting in loss from inability to build both houses at the same time, is properly sustained when defendants offer no evidence that the second house was to have been built along the same lines and of the same kind of materials so as to effect a savings from simultaneous construction.

5. Quasi-Contracts § 2—

In an action to recover on a special contract and also upon a *quantum meruit*, plaintiff can abandon the special contract and recover on *quantum meruit* for the reasonable value of his services.

APPEAL by defendants from *Carr, J.*, September-October Term 1955 of ORANGE.

Civil action to recover the balance due on an express contract for furnishing plans for the construction of a residence.

Plaintiff is a builder-designer, and not a licensed architect. The defendants contracted with the plaintiff to furnish them plans for the construction of a residence to cost approximately $18,000.00, and agreed

to pay him for his services 4% of the actual cost of the construction of the residence. Plaintiff worked on the plans for the construction of a residence to cost about $18,000.00, but the plans for an $18,000.00 residence were never completed, because the plans were modified and changed several times to comply with the wishes and requests of the defendants. Finally the plans were satisfactory to the defendants, and delivered to them, but the cost of constructing a residence according to the final plans would exceed $20,000.00. While plaintiff was working on the plans, defendants paid him $144.00 as an advance payment.

The defendants alleged in their answer that plaintiff is not a licensed architect, and that in furnishing plans for the construction of a residence to cost over $20,000.00 plaintiff violated Ch. 83 of the General Statutes, that his contract is illegal, and he can recover nothing.

By permission of the court plaintiff was allowed to file an amended reply to defendants' answer in which he alleged that, if he cannot recover upon his contract as modified and changed at the requests of the defendants, because the final plans called for the construction of a residence to cost over $20,000.00, then he is entitled to recover from the defendants upon *quantum meruit* for work done upon the plans for the construction of a residence to cost about $18,000.00 up to the time that the changes in the plans, made at the requests of the defendants, resulted in plans for the construction of a residence to cost more than $20,000.00.

There was no objection to the issues submitted to the jury. The jury found by its verdict that the plaintiff was entitled to recover from the defendants on *quantum meruit* for work done under a contract between the parties upon the plans for the construction of a residence to cost approximately $18,000.00 up to the time that the changes in the plans, made at the requests of the defendants, resulted in plans for the construction of a residence to cost more than $20,000.00 the sum of $480.00 less $144.00, already paid, which leaves $336.00, with interest.

From a judgment for plaintiff for $336.00, with interest, defendants appeal, assigning error.

James R. Farlow for Plaintiff, Appellee.

William S. Stewart for Defendants, Appellants.

PARKER, J. The defendants assign as error the denial by the court of their motion for judgment of nonsuit. The defendants contend that the plaintiff, who is not a licensed architect, in furnishing plans for the construction of a house for defendant, was acting as an architect, and that he cannot recover on a *quantum meruit,* because the work he did was under a contract illegal because it violated Ch. 83 of the General

Statutes, and that this is true whether the building was to cost less than $20,000.00 or more.

G.S. 83-12 reads in part: "In order to safeguard life, health and property, it shall be unlawful for any person to practice architecture in this State as defined in this chapter, except as hereinafter set forth, . . ." Further on G.S. 83-12 reads in part: "Nothing in this chapter shall prevent any person from selling or furnishing plans for the construction of residence or farm or commercial buildings of a value not exceeding twenty thousand dollars ($20,000.00); provided that such persons preparing plans and specifications for buildings of any kind shall identify such plans and specifications by placing thereon the name and address of the author." The fact that plaintiff made preliminary studies, consulted with the defendants and made changes on the plans at their request for the construction of a house to cost about $18,000.00 would not prevent him from coming within the exception to the statute quoted above: these things would seem to be an essential part of furnishing plans.

Plaintiff could make an enforceable contract, pursuant to G.S. 83-12, to furnish plans for the construction of a residence of a value not exceeding $20,000.00. His recovery on a *quantum meruit* was for the work he did on this enforceable contract up to the time that changes in the plans, made at the repeated requests of the defendants, resulted in the designing of a residence of a value exceeding $20,000.00, and not for any work he did at the requests of defendants on plans for the construction of a building of a value of more than $20,000.00.

A subsequent illegal agreement by the parties cannot affect a previous fair and lawful contract between them in relation to the same subject. The change is regarded as a mere nullity, and as such cannot scathe the original contract. *Wilcoxon v. Logan,* 91 N.C. 449; *Britt v. Aylett,* 11 Ark. 475, 52 Am. Dec. 282; *McCurdy v. Dillon,* 135 Mich. 678, 98 N.W. 746; *Cain v. Bonner, et al.,* 108 Tex. 399, 194 S.W. 1098, 3 A.L.R. 874; 15 A. & E. Ency. Law 932; *Tearney v. Marmiom,* 103 W. Va. 394, 137 S.E. 543; 17 C.J.S., Contracts, sec. 287; Page on Contracts, sec. 2469. See also: *In re Port Publishing Co.,* 231 N.C. 395, 57 S.E. 2d 366.

In *Collier v. Nevill,* 14 N.C. 30, this Court held that if a security is valid in its inception, a subsequent usurious transaction does not avoid it. To the same effect see: *Bost v. Smith,* 26 N.C. 68; *Cobb v. Morgan,* 83 N.C. 211; *Wharton v. Eborn,* 88 N.C. 344; *Rountree v. Brinson,* 98 N.C. 107, 3 S.E. 747; *Webb v. Bishop,* 101 N.C. 99, 7 S.E. 698.

In *Cain v. Bonner, supra,* the Texas Supreme Court said: "A contract originally valid, is not rendered invalid by a subsequent agreement."

The plaintiff made out his case for a recovery on *quantum meruit* without reliance on any work done by him on plans for the construction

of a building of the value of more than $20,000.00, which subsequent work will not bar his recovery on a *quantum meruit* for work done under the original valid contract. 17 C.J.S., Contracts, sec. 276.

The plaintiff rendered services to the defendants under a valid contract, and he may recover the value of his services on a *quantum meruit* as a benefit to the defendants receiving them. The court properly overruled the motion for judgment of nonsuit.

The assignments of error as to parts of the charge as given are overruled, for the reason that prejudicial error is not shown. Further, the assignments of error as to the failure of the court in its charge to comply with G.S. 1-180 are broadside.

The defendants alleged as a counter-claim that they told plaintiff in March 1953 that they proposed to purchase another lot close to the lot they owned on which they proposed to erect at the same time another house, and that by reason of plaintiff's failure to prepare plans for a residence for them to cost about $18,000.00 the defendants were unable to proceed with the erection of the two buildings at the same time, instead they built the residence in which they now live, and that now they are about to begin the erection of a second house, but the cost of erecting houses at different times is greater than the cost of erecting them at the same time would have been, and the defendants have been damaged in the amount of $1,800.00. The defendants offered evidence to the effect that when you construct two houses at the same time a savings can be effected, if the houses are in close proximity and are built along the same lines and of the same kind of material; and that they purchased a second lot in May 1953. The defendants offered no evidence as to the kind of second house they intended to build. At the close of defendants' case, the court granted the motion of plaintiff to nonsuit the defendants' counter-claim for damages in the amount of $1,800.00. The ruling was correct, even if the allegations of the counter-claim are sufficient, which we do not concede.

The other assignments of error are formal and are overruled.

In an action to recover on a special contract and also upon a *quantum meruit,* plaintiff, under our practice, can abandon his special contract, and recover on *quantum meruit* for the reasonable value of his services. *Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371. In *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331, the plaintiff declared on a special contract, void under the Statute of Frauds, and was allowed to recover in *assumpsit* on *quantum meruit.*

In the trial below we find

No error.

RUBY G. HEDRICK v. L. BELLE AKERS AND E. R. LEWELLYN, TRADING AS U-WASH-IT LAUNDRY.

(Filed 6 June, 1956.)

1. Landlord and Tenant § 33: Municipal Corporations § 14a—

A lessee of a part of a building, nothing else appearing, is not under duty to install, maintain or remove a drain pipe across the sidewalk in front of the building, and may not be held liable by a pedestrian for injuries received in a fall over such pipe.

2. Negligence § 5—

A person is under duty to discover and avoid defects and obstructions which he should see in the exercise of due diligence for his own safety, and increase in the hazard because of dirt and rain calls for a corresponding increase in vigilance.

3. Same: Municipal Corporations § 14a—

Defendant landlord installed a 10-inch drain pipe in such manner as to leave it exposed across the entire width of the sidewalk and elevated above the sidewalk from 2 to 3 inches at one end, to 5 inches at the other. Plaintiff fell to her injury over the pipe, and testified that although her eyesight was good, she did not see the hazard because of dirt and rain. *Held:* Nonsuit on the ground of contributory negligence was properly allowed.

4. Negligence § 19a—

Where the facts are admitted or established, the existence of negligence and proximate cause are questions of law for the court.

APPEAL by plaintiff from *Preyer, J.*, 30 January, 1956 Civil Term, GUILFORD Superior Court, High Point Division.

Civil action for damages for personal injury sustained when the plaintiff tripped and fell over an exposed drainage pipe across the sidewalk in the City of High Point. In summary, the plaintiff alleged and introduced supporting evidence as follows: On and prior to 19 March, 1954, the defendant, L. Belle Akers, was the owner of a building on Green Street, located in the business section of High Point. The building was divided into three sections: On the east, a launderette leased to and operated by the defendant E. R. Lewellyn, trading as U-Wash-It Laundry, in the center, a barber shop, and on the west, a sandwich shop operated by the defendant Akers. Some time prior to March, 1954, the defendant Akers had placed a steel drain pipe, 10 inches in diameter and eight to 10 feet in length, across the concrete sidewalk on Green Street. In laying the pipe the concrete was cut, the pipe placed in such manner as to leave it exposed the entire width of the sidewalk. Its elevation above the concrete was two or three inches at the building and gradually increased to about five inches at its highest point. The

pipe had been installed without permission of the city as required by its ordinance. On one side the concrete was broken for several inches along the pipe, which was rusty and its color blended somewhat with the color of the concrete.

Shortly prior to 5:00 p.m. on 19 March, 1954, the plaintiff, in company with her husband and a son and daughter, parked their car a short distance from the sandwich shop of the defendant Akers, walked along the sidewalk, crossed the section where the pipe was placed, and entered the sandwich shop. At about five o'clock, on the way back to the car, the plaintiff tripped over the pipe, fell and sustained painful and serious injuries. As a result she lost time from work and incurred substantial medical bills. At the time of her injury it was daylight. There was a mist of rain. A small amount of dirt and mud had washed onto the sidewalk near the pipe. The plaintiff testified her eyesight was good and that she was keeping a proper lookout, but did not see the pipe. She did not notice the pipe on the way to the sandwich shop.

The defendants filed separate answers in which they denied negligence and pleaded contributory negligence on the part of the plaintiff.

At the close of the plaintiff's evidence, judgment of nonsuit was entered as to both defendants. The plaintiff excepted and appealed.

Haworth & Haworth, by Bryon Haworth,

Lewis J. Fisher, for plaintiff, appellant.

James B. Lovelace, for defendant E. R. Lewellyn, trading as U-Wash-It Laundry, appellee.

J. V. Morgan for defendant L. Belle Akers, appellee.

HIGGINS, J. The evidence shows the defendant Akers owned a building on Green Street. She operated a sandwich shop in one of its three sections. Another tenant occupied the middle section. The defendant Lewellyn, a tenant, occupied the east section. Obligation on his part to provide drainage was neither shown nor admitted. He did not install the pipe. The evidence fails to show he had any duty with respect to, or responsibility for its upkeep, or any authority to remove it. A tenant is not responsible for injuries due to a defective sidewalk in front of a building under lease from the owner where the owner exercises control. 32 Am. Jur., 821, p. 699; *Childress v. Lawrence,* 220 N.C. 195, 16 S.E. 2d 842; *Knight v. Foster,* 163 N.C. 329, 79 S.E. 614. While contributory negligence on the part of the plaintiff will support the judgment of nonsuit as to the defendant Lewellyn; nevertheless, the judgment as to him in the court below must be sustained for the additional reason the evidence fails to show any negligent act or omission on his part, or the breach of any legal duty he owed the plaintiff.

The evidence of negligence on the part of the defendant Akers was sufficient to require its submission to the jury, unless the evidence of contributory negligence on the part of the plaintiff appears so clearly that no other reasonable inference can be drawn from it. *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891. The plaintiff testified she was looking, but did not see the pipe. The question is whether she was negligent in failing to see it. Here are her own words: "It was dirty around there and I didn't know whether there was dirt on the sidewalk, or whether it was concrete, or dirt washed up, or what. . . . I thought the pipe stuck up above the concrete some places as much as five inches and gradually tapered off to less than five inches . . . the pipe which was sticking up above the concrete was about eight or 10 feet in length." The plaintiff did not observe conditions clearly enough to tell the difference between dirt and concrete, although it was daylight and she had good eyes. The mixture of dirt and rain on the sidewalk created an extra hazard which called for a corresponding increase in vigilance.

The conclusion seems inescapable that the plaintiff in this case did not see what she should have seen. "In its present state, the law is not able to protect those who have eyes and will not see." *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598; *Furst v. Merritt*, 190 N.C. 397, 130 S.E. 40. "A person traveling on a street is required in the exercise of due care to use his faculties to discover and avoid defects and obstructions, the care being commensurate with the danger or the appearance thereof." *Welling v. Charlotte*, 241 N.C. 312, 85 S.E. 2d 379. In the *Welling case*, the plaintiff was injured by stepping in a hole in the sidewalk 4½ x 4½ inches square and one inch or slightly more in depth. This Court held that motion for nonsuit should have been allowed upon the ground of contributory negligence. *Walker v. Wilson*, 222 N.C. 66, 21 S.E. 2d 817; *Gettys v. Marion*, 218 N.C. 266, 10 S.E. 2d 799; *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424; *Houston v. Monroe*, 213 N.C. 788, 197 S.E. 571; *Burns v. Charlotte*, 210 N.C. 48, 185 S.E. 443. "He is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect which is visible and obvious." *Pinnix v. Durham*, 130 N.C. 360, 41 S.E. 932.

In the *Welling case*, this Court held the plaintiff should have observed a hole in the sidewalk 4½ inches square and one inch or slightly more deep. In this case, the steel pipe was 10 inches in diameter, eight feet long, and elevated from two inches to five inches above the concrete. The plaintiff should have seen it. Negligence on her part appears as a matter of law. Recovery is denied where contributory negligence is one of the proximate and participating causes of the injury.

". . . What is negligence is a question of law and when the facts are admitted or established the court must say whether it does or does not

exist. 'This rule extends and applies not only to the negligent breach of duty, but also to the feature of proximate cause.' *Hicks v. Mfg. Co.*, 138 N.C. 319, 50 S.E. 703."

The judgment of the Superior Court of Guilford County is Affirmed.

BRYANT L. CATES, BY HIS NEXT FRIEND, S. J. BORLAND, v. GRIFFITH FINANCE COMPANY AND GRIFFITH AUTOMOBILES OF DURHAM, INC.

(Filed 6 June, 1956.)

1. Bill of Discovery § 7b—Plaintiff held entitled to inspect only those records which relate to the subject of the particular action.

It appeared from plaintiff's verified application for an order to inspect books and records of defendants to obtain information to file complaint that plaintiff had purchased an automobile from one defendant with loan of the deferred payments advanced by the other, that plaintiff was required to purchase insurance on the car and life insurance on himself, and asserted that the amount of premiums charged for the insurance and interest charged on the deferred payments were in violation of the insurance and usury laws, and further that defendants acted in concert pursuant to a conspiracy in such violations. *Held:* Upon the facts alleged plaintiff is entitled to examine the records and the named officers of defendants, but only to the extent of the particular sale in question in regard to the purchase price paid or secured, what insurance was required and what premiums were charged and how paid, and as to the existence of an agreement between defendants with respect to the sale and financing of the deferred payments.

2. Same—

Contentions that the individual defendants would refuse to testify on the ground of self-incrimination cannot be made the basis for an order for inspection of writings, since the constitutional question of self-incrimination does not arise until the individuals themselves assert it, and is not presented upon the application for inspection of writings.

APPEAL by defendants from *Mallard, J.*, February, 1956 Term, DURHAM Superior Court.

On 18 April, 1955, the plaintiff, Bryant L. Cates, by his next friend, S. J. Borland, obtained a summons from the Superior Court of Durham County against the defendants and at the same time filed a verified application for an order to inspect books and records of the defendants and, likewise, to examine the president and vice-president of the defendants for information on which to file the complaint. The application states:

"3. That the purpose for which the action is commenced is to recover actual damages, plus $10,000 punitive damages, resulting from an unlawful, wrongful and malicious combination and conspiracy to receive, reserve or charge a greater rate of interest than six per cent (6%), to evade the insurance laws of North Carolina and to otherwise defraud the plaintiff by willfully and wrongfully misrepresenting facts to the plaintiff in connection with the purchase, sale and loan of purchase price for one 1954 Ford two-door automobile, all to the detriment of the plaintiff."

The plaintiff requested the court to order examination of the defendants and their president and vice-president with respect to the matters listed in eight separate paragraphs, of which No. 6 is typical:

"(6) Earned reserves, commissions, rebates and any and all forms of money or credits moving from Globe & Republic Insurance Company of America and any other life or casualty insurance company to the defendants or to any of its officers, directors or agents by reason of the sale of insurance of said companies to persons financing or borrowing money on automobiles from the defendants by any officer, director, employee or agent of said defendants or any person or corporation acting under a contract with the defendants relating to the financing and sale of automobiles to persons financing or borrowing money on automobiles from the defendants or any person or corporation acting under a contract with the defendants relating to the financing and sale of automobiles, for the period of February 1954 and six months prior and six months subsequent thereto."

The clerk ordered the examination substantially as prayed for. Upon appeal the trial court entered findings of fact and signed an order restricting the scope of the examination. The defendants preserved exceptions to the findings of fact and to the court's order, and appealed, assigning errors.

Blackwell M. Brogden for plaintiff, appellee.

E. C. Brooks, Jr., and Gantt, Gantt & Markham for defendants, appellants.

HIGGINS, J. After a careful search through the maze of words in the verified application to inspect the records and to examine the officers of the defendants before pleading, the following appears: The plaintiff, Bryant L. Cates, on 4 February, 1954, was a minor without guardian. The defendant, Griffith Automobiles of Durham, Inc., was a dealer in

automobiles. The defendant, Griffith Finance Company, was engaged in financing automobile purchases. George B. Griffith was president and Maurice D. Waddell was vice-president of both defendants. On 4 February, 1954, Cates purchased a 1954 model Ford automobile from Griffith Automobiles of Durham upon a deferred payment plan and Griffith Finance Company financed the transaction.

It appears by inference that defendants, one or both, required insurance on the automobile and life insurance on the purchaser as additional security for the deferred payment; that the amount of premium charged for the insurance and the amount of interest charged on the deferred payments were in violation of the insurance and usury laws.

The application was made under oath. It recites, and the court found as a fact, it was made in good faith and for the purpose of obtaining information upon which to file the complaint as provided in G.S. 1-568.10. In its broad scope the application is a fishing expedition; and if all the authority is granted, the plaintiff would virtually be given license to fish wherever he could find sufficient water to wet a hook. However, that does not mean his application is entirely without merit. The application in its factual statements is sufficient to support a finding that the plaintiff is entitled to inspect the records of the defendants and to examine their two named officers with respect to the following: The sale of the 1954 Ford automobile, the price charged, when and how paid or secured; what insurance was required, in what company issued, the amount thereof and the premiums charged, and how paid; whether life insurance on the purchaser was required and, if so, the amount thereof and in what company; what premiums were charged and how paid; what agreement, if any, existed between the defendants with respect to the sale and financing of the deferred payments; all relating to the plaintiff's purchase of the 1954 model Ford automobile.

The factual showing made in the verified application seems insufficient to justify or to support findings of fact and an order for examination based thereon, which entitled the plaintiff to exceed the maximum limits herein fixed for the examination. *Thomas v. Trustees*, 242 N.C. 504, 87 S.E. 2d 913; *Jones v. Fowler*, 242 N.C. 162, 87 S.E. 2d 1; *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331.

The plaintiff says his cause of action is for conspiracy to violate the usury and insurance laws and its effect is to defraud him. If the individuals sought to be examined should refuse to testify on the ground their evidence would tend to incriminate them, a constitutional question would be presented. On the present record that question does not arise. The individuals can raise that question. The court cannot raise it for them.

The defendants' assignments of error in so far as they relate to the inspection and examination authorized in this opinion are overruled. In all other respects they are sustained. The decree of the Superior Court of Durham County is modified to permit the plaintiff to inspect the records of the defendants and to examine their named officers within the limits heretofore marked out in this opinion, and not otherwise, As thus modified, the decree is affirmed.

Modified and affirmed.

STATE v. BILL ROWELL.

(Filed 6 June, 1956.)

Criminal Law § 42c: Evidence § 22: Automobiles § 58—

In this prosecution for manslaughter in the death of a passenger in defendant's truck, killed in a collision with another truck, the driver of the other truck testified for the State, and defendant was precluded from eliciting testimony from the witness on cross-examination to the effect that he was then being sued by the estate of the deceased for wrongful death. *Held:* The exclusion of the testimony tending to show the bias or interest of the witness is prejudicial error. *S. v. Hart*, 239 N.C. 709, cited as controlling, there being no difference in principle in a witness suing to recover in another action and a witness being sued for like amount in another action.

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

APPEAL by defendant from *Mallard, J.*, at October-November Criminal Term 1955, of ROBESON.

Criminal prosecution upon a bill of indictment charging defendant with involuntary manslaughter in connection with death of one William Ivey from injuries sustained in a collision between pick-up motor truck operated by defendant, in which Ivey was riding, and a large motor truck operated by Wiley Goins.

The record discloses that upon trial in Superior Court the State offered evidence tending to support the charge against defendant. Among the witnesses for the State Wiley Goins testified, and while under cross-examination was asked this question: "You are now being sued by the estate of W. E. Ivey for $25,000 damages for the wrongful death of W. E. Ivey, are you not?" Objection by the State was sustained, and the witness, in the absence of the jury, was permitted to say: "I got the paper that said so."

To the ruling of the court in excluding the foregoing testimony the defendant excepts. Exception No. 1.

Defendant offered evidence, and as witness in his own behalf gave testimony tending to exculpate him from the charge.

The case was submitted to the jury on testimony so offered, under charge of the court, and the jury returned a verdict of "Guilty as charged in the Bill of Indictment."

And to judgment pursuant to verdict, defendant excepted, and appeals to Supreme Court and assigns error.

Attorney-General Rodman, Assistant Attorney-General Love, and Harvey W. Marcus, Staff Attorney, for the State.

Hackett & Weinstein and L. J. Britt & Son for Defendant, Appellant.

WINBORNE, J. The assignment of error most stressed by appellant on this appeal is based upon Exception No. 1 to the exclusion of the evidence as above set forth. In this connection, "Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." So declared this Court, in opinion by *Ervin, J.*, in *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901.

It is also stated in the *Hart case* that "A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation," citing cases, and that "under this rule, a witness for the prosecution in a criminal case may be compelled to disclose on cross-examination that he has brought, or is preparing to bring a civil action for damages against the accused based on the acts involved in the criminal case," citing cases.

The Attorney-General for the State admits that if the *Hart case* cannot be distinguished on the facts, the above exception and the ruling thereon is error. But the Attorney-General here contends that the factual situation in the *Hart case* is distinguishable from that in the present case. Nevertheless, it is said that "The State admits that: (1) If the estate of W. E. Ivey, Jr., actually goes on trial against the truck driver, Wiley Goins, and (2) if the defendant testifies in the civil action, and (3) if he testifies for the plaintiffs in the civil action, then it is possible that the conviction of the defendant would have some effect upon his credibility as a witness since former conviction can be made the basis of impeachment."

Moreover, it seems that the probability of bias from interest if the witness were suing for recovery of damages in sum of $25,000, on the one hand, and if he were being sued for like amount on the other hand, both arising out of the occurrence for which defendant is charged with crime, presents a difference without a distinction in principle.

And paraphrasing the *Hart case,* the jurors might well have discounted the testimony of the witness Goins in a material manner had they been informed that he was pecuniarly interested in the conviction of the defendant. This being true, the exclusion of the facts relating to the civil action brought against Goins constitutes prejudicial error, for which there must be a

New trial.

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

STATE v. MACK B. THOMPSON, JR.

(Filed 6 June, 1956.)

Criminal Law § 62f—

On appeal from an order of an inferior court putting into effect a suspended sentence, the hearing in the Superior Court must be *de novo*, and where the Superior Court merely finds that there was evidence to support the findings and order of the inferior court, and affirms the order, the cause must be remanded. G.S. 15-200.1.

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

APPEAL by defendant from *Carr, J.*, at October 1955 Term, of ALAMANCE.

Criminal prosecution upon a warrant issued 12 April, 1955 by justice of peace returnable before Municipal Recorder's Court of the city of Burlington, N. C., charging that defendant "did unlawfully and wilfully fail and refuse to provide adequate support for his wife and six minor children while living with his wife."

The record shows (1) that defendant was adjudged guilty, and, by judgment, sentenced to County jail for 12 months, suspended for two years on payment of $25.00 weekly into Clerk's office "for sup. and maintenance of wife and minor children" as stated; (2) that on 14 September, 1955, upon "it appearing that defendant has breached the terms of said judgment, in that he has been convicted of being in arrears in amount of $204.00 in this account," the judge of the Municipal Court entered judgment putting into effect the sentence imposed in

the original judgment; (3) that defendant excepted thereto and appealed to Superior Court, and on appeal, the court finding "that there is evidence to support the order of the Municipal Recorder's Court and the findings of said court," ordered that the judgment of the Municipal Recorder's Court be affirmed, and that defendant be confined to jail and assigned to work on the road . . . "for a term of twelve months"; and (4) defendant excepted thereto, and appeals to Supreme Court and assigns error.

Attorney-General Rodman, Assistant Attorney-General Harry W. McGalliard, and F. Kent Burns, Staff Attorney, for the State.

Barrett & Wood for Defendant Appellant.

PER CURIAM. G.S. 15-200.1 provides that: "In all cases where a suspended sentence theretofore entered in a court inferior to the Superior Court, is invoked by the court inferior to the Superior Court, the defendant shall have the right to appeal therefrom to the Superior Court, and, upon such appeal, the matter shall be heard *de novo*, but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence . . ." See 1951 Session Laws of N. C., Chapter 1038. *S. v. Barrett*, 243 N.C. 686, 91 S.E. 2d 917; *S. v. Davis*, 243 N.C. 754, 92 S.E. 2d 177.

It appearing the instant matter was not heard *de novo* by the Superior court, on appeal thereto, as required by G.S. 15-200.1, the judgment putting the sentence into execution is set aside, and the cause remanded to Superior Court of Alamance County for further hearing in accordance with law.

Error and remanded.

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

HELEN REAVES LAMBERT, ADMINISTRATRIX OF THE ESTATE OF EVAN THOMAS THOMPSON, DECEASED, v. WILLIAM B. BLAND, JR.

(Filed 6 June, 1956.)

Automobiles § 45—

Plaintiff's evidence, considered in the light most favorable to her, *is held* sufficient to justify the submission of the issue of last clear chance in this action involving a collision occurring when defendant's car hit the rear of another car standing on the highway at nighttime without lights.

APPEAL by defendant from *Hall, J.*, January Term, 1956, of CHATHAM.

This is a civil action to recover for the alleged wrongful death of the plaintiff's intestate.

The evidence tends to show that about 12:15 a.m. on 5 April 1954 the 1923 Model T Ford automobile owned by the plaintiff's intestate was parked in the southbound lane of the paved portion of Highway 421 about 2½ miles south of the village of Gulf in Chatham County. The defendant was operating his automobile southwardly on Highway 421 at a speed of from 40 to 50 miles per hour. According to the defendant's evidence, he was meeting another car that did not dim its lights; that he was within 26 feet of the Ford when he first saw it. That at the time of the collision there were no lights burning on the Ford car; that the defendant's car hit the right rear fender and wheel of the car of plaintiff's intestate.

The Highway Patrolman who investigated the collision and made certain measurements before either vehicle was moved, testified that the paved portion of the highway was 20 feet wide and the shoulder on the west side of the highway was 8 feet 5 inches wide. Where the collision occurred the road is level and straight and one can see approximately 500 yards both to the north and to the south. That the intestate's car was on the east side of the highway and it was 26 feet 4 inches from the rear of the intestate's car to the point of impact which occurred on the west side of the highway. The defendant pointed out the blood on the highway where the body of intestate came to rest following the collision, and it was 42 feet from the point of impact. There were skid marks from the point of impact northwardly for 72 feet and tracks leading therefrom to the defendant's car which was in the ditch on the west side of the highway, a distance of about 21 feet from the point where the collision occurred.

The court submitted issues as to negligence, contributory negligence and last clear chance. The jury answered each of the issues in the affirmative, and for the wrongful death of plaintiff's intestate awarded damages in the sum of $500.00 and $865.00 for hospital and medical expenses.

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

Barber & Thompson for appellee.

Benjamin D. Haines and Jordan & Wright for appellant.

PER CURIAM. The defendant's counsel in his oral argument informed the Court that the defendant does not want a new trial. The appellant

insists, however, that plaintiff's intestate was guilty of contributory negligence as a matter of law, and that there is no evidence to support the verdict on the issue of last clear chance.

We concede this is a borderline case. However, when the plaintiff's evidence is considered in the light most favorable to her, as it must be on a motion for nonsuit, we have concluded it was sufficient to carry the case to the jury on the challenged issue. Therefore, the result of the trial below will be upheld.

No error.

J. C. SCARBOROUGH, SR., v. CONSTRUCTORS SUPPLY COMPANY AND CENTRAL DEVELOPMENT COMPANY.

(Filed 6 June, 1956.)

APPEAL by defendant Central Development Company from *Carr, J.*, September Term, 1955, of ORANGE.

Bonner D. Sawyer for appellant.

William A. Marsh, Jr., for appellee.

PER CURIAM. Plaintiff instituted this action to recover possession of two certain lots of land in the town of Carrboro. The first lot was described in the complaint as being in size 175 feet by 120 feet; and the second lot as being 50 feet by 200 feet. The two lots do not adjoin. It was alleged that the defendants were in wrongful possession. Plaintiff and defendants claim under a common source of title. The verdict established that plaintiff was owner and entitled to possession of the first lot, but not of the second lot. The only assignment of error pressed by appellant was the denial by the trial judge of the motion for judgment of nonsuit.

From an examination of the record we conclude that there was sufficient evidence to support the plaintiff's claim to the first lot and that the description in his deed was sufficiently definite to permit parol evidence to identify the land. Appellant's claim of title by adverse possession under color was not sustained.

In the trial we find

No error.

JOHNSON, J., not sitting.

STANLEY M. CARPENTER v. MARY KELLY SHAVER CARPENTER.

(Filed 26 June, 1956.)

1. Judgments § 27b—

Where it appears on the face of the record that the court rendering a judgment was without jurisdiction of the parties or the subject matter, the judgment is a nullity and it may be attacked by any person adversely affected thereby at any time, collaterally, or otherwise.

2. Divorce and Alimony § 3—

In an action for divorce, the truth of the jurisdictional averments required by statute to be set forth in the affidavit is for the determination of the court, even though the judge, in his discretion, may submit such questions of fact to a jury and adopt the jury's findings; but averments referring to the grounds or cause of action for divorce set forth in the complaint, relate to issues of fact for the jury alone. G.S. 50-8.

3. Appeal and Error § 59—

A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case.

4. Judgments § 27e: Divorce and Alimony § 22—

If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, it is voidable but not void, and may be set aside upon motion in the cause by a party to the end that the cause may be retried.

5. Same—

Where, in an action for divorce on the ground of two years separation, defendant appears and files answer admitting the allegations as to the ground for divorce, neither party to the action may thereafter attack the decree for false swearing in regard to the cause or ground for divorce.

6. Judgments § 24: Divorce and Alimony § 22—

A stranger to a divorce decree whose pre-existing rights are adversely affected thereby may attack same on the ground of false swearing in regard to the ground for divorce, but this right of a stranger to attack the decree does not obtain when his interests arise entirely subsequent to the rendition of the decree.

7. Same—

In plaintiff's action to have his marriage declared void on the ground that his spouse's prior decree of divorce from her first husband was void, the plaintiff may not attack the validity of the divorce decree by alleging false swearing or fraud in regard to the ground or cause for divorce upon which the decree was based.

PARKER, J., dissenting.

BARNHILL, C. J., concurs in dissent.

CARPENTER *v.* CARPENTER.

APPEAL by defendant from order of *Hall, Resident Judge,* entered 13 August, 1955, in Chambers, DURHAM.

Action commenced 15 April, 1955, to annul and declare void *ab initio* the purported marriage of plaintiff and defendant on the ground that defendant was incapable of contracting a valid marriage, she then having a living husband from whom she had not been divorced.

This appeal is from the court's ruling on defendant's motion to strike designated portions of the complaint.

Plaintiff's unchallenged allegations are as follows: "1. That he is now and was on April 12, 1947, a resident citizen of the County and State aforesaid, and has been a resident of the State of North Carolina all of his life. 2. That the defendant is a resident citizen of the County and State aforesaid. 3. That on the 12th day of April, 1947, in the City and County of Durham, the plaintiff in good faith entered into a marriage ceremony with the defendant and that subsequent thereto they resided together as man and wife until March 6, 1953."

As to paragraph 6, defendant's motion was to strike the word "purported" each time it appears therein. Paragraph 6, unchallenged except as stated, is as follows: "6. That this plaintiff met the defendant in January of 1947 and thereafter continued his association with her through January, February, March and the first part of April of said year. That relying upon the statements made to him by the defendant that she and her former husband, Floyd N. Shaver, had been divorced and relying further upon the divorce decree entered in the case of the said Mary K. Shaver *v.* Floyd N. Shaver, this plaintiff in good faith, proposed marriage to the defendant, and was accepted by her, and a purported marriage ceremony between this plaintiff and the defendant was entered into between them on the said 12th day of April, 1947. That this plaintiff did not then know, nor does he now know Floyd N. Shaver, former husband of the defendant. That at the time of the purported marriage ceremony between this plaintiff and the defendant, this plaintiff acted in good faith and verily believed that the bonds of matrimony existing between the defendant and her husband, Floyd N. Shaver, had been legally dissolved."

Defendant moved to strike all of paragraph 8, the allegations thereof being as follows: "8. That this plaintiff is informed and believes and upon such information and belief alleges that the purported marriage between him and the defendant is void *ab initio* for that at the time of the said purported marriage ceremony between this plaintiff and defendant, the defendant was then married to Floyd N. Shaver, and that said bonds of matrimony between her and Floyd N. Shaver had not been dissolved by death, valid divorce or otherwise."

Defendant moved to strike all of paragraphs 4, 5 and 7, the allegations of which are summarized below:

1. The divorce action of "Mary K. Shaver *v.* Floyd N. Shaver" was instituted 10 May, 1946. Mary K. Shaver, plaintiff therein, alleged that she and Floyd N. Shaver, defendant therein, were married on 21 June, 1927; that they lived together as man and wife until 1 January, 1944, when they separated by mutual consent and continuously thereafter lived separate and apart; and that on 27 May, 1946, Floyd N. Shaver answered the complaint, admitting said allegations and joining in the prayer for relief.

2. The "said divorce action was heard before a Judge and Jury on May 27, 1946, and on the basis of the allegations contained in the complaint and the admissions contained in the answer and the testimony of plaintiff and witnesses offered by her, a judgment purporting to dissolve the bonds of matrimony existing between the said Mary K. Shaver and the said Floyd N. Shaver was entered . . ."

3. ". . . after the purported marriage ceremony between this plaintiff and the defendant, they resided together as man and wife until March 6, 1953, at which time the defendant abandoned this plaintiff and has since lived separate and apart from him." Since the abandonment of plaintiff by defendant on 6 March, 1953, plaintiff "has ascertained from reliable sources that the defendant, Mary Kelly Shaver Carpenter, was not legally divorced from her husband, Floyd N. Shaver." Plaintiff alleges further that the allegations and evidence upon which said divorce decree were obtained were false; that defendant and Shaver had not separated by mutual consent on 1 January, 1944, but in fact had lived together as man and wife during 1944, 1945 and part of 1946; that plaintiff's said allegations and evidence constituted a fraud on the Superior Court of Durham County; and that the divorce decree predicated thereon is void *ab initio.*

The court denied defendant's said motion in its entirety. Defendant excepted and appealed.

Reade, Fuller, Newsom & Graham and Oscar G. Barker for plaintiff, appellee.

Haywood & Denny for defendant, appellant.

BOBBITT, J. It is noted that defendant's appeal was docketed before the effective date of Rule 4(a). 242 N.C. 766 (Appendix). Docketed as #671, Fall Term, 1955, it was carried over and docketed as #668, Spring Term, 1956.

Defendant's motion, as related to paragraphs 6 and 8, was properly denied. These allegations contain no specific reference to the divorce action or decree.

It is important to gain a true perspective of the precise question for decision. To do so, we must bear in mind the matters stated below.

The action is for annulment of the marriage. To obtain this relief, plaintiff attacks the divorce decree. This action concerns its validity as between plaintiff and defendant, that is, whether it constitutes a bar to plaintiff's action. If plaintiff should prevail, the judgment would decree that the marriage, not the divorce decree, was void. As between themselves, the parties to the divorce action would not be directly affected by such judgment. Indeed, Shaver, defendant in the divorce action, is not a party herein.

The allegations challenged by defendant's motion attack the divorce decree solely on the ground that it is based on false swearing in pleading and in testimony relating to whether the Shavers had separated and thereafter lived separate and apart continuously for two years or more next preceding 10 May, 1946, the date the divorce action was commenced. The allegations imply that, upon the face of the judgment roll, the divorce proceedings, including the decree, were in all respects regular, disclosing that the court had jurisdiction both of the parties and of the subject matter. At least, nothing to the contrary is alleged; and no point is involved here as to defects, jurisdictional or otherwise, appearing on the face of the judgment roll. Nor is it now alleged that the plaintiff in the divorce action was not in fact a *bona fide* resident of North Carolina for the time required to confer jurisdiction on the court.

There is no question but that the divorce decree is valid if in fact the Shavers separated on 1 January, 1944, and lived separate and apart continuously thereafter. Such separation constituted a recognized ground for absolute divorce. G.S. 50-6.

The precise question is this: Can plaintiff attack collaterally the divorce proceedings and the decree, for the purpose of nullifying such decree in so far as it affects his marriage, by offering evidence tending to show that, contrary to what appears on the face of the judgment roll, the Shavers had not been separated for the requisite statutory period and that therefore the decree is void as to him because based on perjury in respect of the ground for divorce? If so, the allegations must stand; otherwise, they must be stricken. G.S. 1-153; *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660.

Admittedly, if plaintiff can attack the divorce decree at all he must do so (collaterally) in an independent action; for, as held this day, he is a stranger to the divorce action and cannot intervene therein and attack the divorce decree by motion in the cause. *Shaver v. Shaver, post,* 309. But it should be borne in mind that the only question before us is whether plaintiff can collaterally attack the divorce decree *on the ground alleged,* not whether plaintiff can attack collaterally the divorce decree on other grounds. Incidentally, cases such as *McCoy v. Justice*, 199 N.C. 602, 155 S.E. 452, and *Horne v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1, in which "extrinsic" fraud and "intrinsic" fraud are distin-

guished, relate to the proper procedure in each instance by *a party* to the original action.

The question before us is one of first impression in this jurisdiction. However, for the purpose of drawing the question into clearer focus, consideration of certain of our decisions seems appropriate.

Prior to *Williams v. North Carolina,* 317 U.S. 287, 87 L. Ed. 279, 63 S. Ct. 207, North Carolina did not recognize the *jurisdiction* of the courts of a foreign state, albeit the state of the plaintiff's domicile, to render a divorce decree valid and enforceable in North Carolina, against a resident of this State who did not appear in the action and was only constructively served with notice of its pendency. Numerous decisions to this effect are cited in the opinions in *S. v. Williams,* 220 N.C. 445, 17 S.E. 2d 769. They are based on the early North Carolina decision in *Irby v. Wilson,* 21 N.C. 568, and the later United States decision in *Haddock v. Haddock,* 201 U.S. 562, 50 L. Ed. 867, 26 S. Ct. 525. It was so decided in *Pridgen v. Pridgen,* 203 N.C. 533, 166 S.E. 591, an action by a second husband for annulment of his purported marriage to the defendant based on her alleged incapacity to contract a valid marriage, she having a living husband. She relied upon a divorce decree obtained in Georgia by her first husband when she resided in North Carolina. The jurisdiction of the Georgia court was predicated solely on service of summons by publication. Hence, it appeared on the face of the judgment roll that the Georgia court had not acquired jurisdiction of the defendant. The *Pridgen case* is direct authority for the proposition that in such annulment action the purported divorce may be attacked collaterally when it appears *on the face of the record* that the court granting such decree had no jurisdiction of the person of the defendant. Although not an annulment action, it was held in the basic case of *Irby v. Wilson, supra,* that a Tennessee divorce decree, entered under similar circumstances, was subject to collateral attack, it appearing *on the face of the record* that "it was not an adjudication between any parties," since the Tennessee court had no jurisdiction of the person of the defendant.

Unquestionably, when it appears *on the face of the record* that a court has no jurisdiction, either of the person or of the subject matter, any judgment it attempts to render is a nullity and so may be attacked by any person adversely affected thereby, at any time, collaterally or otherwise. *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124; *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315.

In *Rodriguez v. Rodriguez,* 224 N.C. 275, 29 S.E. 2d 901, *Guerin v. Guerin,* 208 N.C. 457, 181 S.E. 274, *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283, *Fowler v. Fowler, supra,* and cases cited, it appeared *on the face of the record* that the court had not obtained jurisdiction of the person of the defendant. In the *Rodriguez* and *Fowler cases,* the

attempted service by publication was held fatally defective because the affidavit did not comply with the requirements of G.S. 1-98. When the summons is by publication, no jurisdiction is acquired over the person of the defendant unless it is made to appear by affidavit that everything necessary to dispense with personal service has been done. *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144.

Moreover, when service of summons by publication is based on a false and fraudulent affidavit, the court acquires no jurisdiction of the person of the defendant; and, upon motion in the cause by the party upon whom no process has been served, the court will set aside the judgment. *Hatley v. Hatley,* 202 N.C. 577, 163 S.E. 593; *Fowler v. Fowler, supra.* The same rule applies when the judgment is apparently regular, the judgment roll showing service or appearance when in fact there was none. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311. And when the judgment roll, save the judgment itself, was lost, the record failed to disclose service; and a party to the judgment was permitted to attack it collaterally by showing that no summons was ever served on her. *Downing v. White,* 211 N.C. 40, 188 S.E. 815. Too, letters of administration were revoked, upon motion of a person adversely affected thereby, upon proof of facts establishing that the power to grant such letters was not *within the jurisdiction* of the clerk who issued them. *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240.

In such cases, the motion raises questions of fact; and the court has the power and the duty to hear evidence and find the facts, subject to review, determinative of its jurisdiction. *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Aycock v. Cooper,* 202 N.C. 500, 163 S.E. 569.

Likewise, a decree of absolute divorce will be declared void if the court was without power or jurisdiction to render it because of the insufficiency of the facts found by the jury, when this appears *on the face of the record.* Such decree may be attacked directly by motion in the cause, *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7, or collaterally, *Saunderson v. Saunderson,* 195 N.C. 169, 141 S.E. 572.

Here the jurisdiction of the Superior Court of Durham County of the person of the plaintiff and of the defendant of the divorce action is not in controversy. And, if the plaintiff had a cause of action for absolute divorce, that court had jurisdiction to try it. It is not alleged that the issues answered by the jury were insufficient to support the decree. Rather, it is urged that in North Carolina the causes for divorce and the prerequisites for jurisdiction are statutory, *Ellis v. Ellis, supra;* that the filing of the affidavit required by G.S. 50-8 is a prerequisite to jurisdiction; and that, if an essential averment therein is sufficient on its face but false in fact, even though it relates solely to the alleged cause for divorce, such falsity destroys the foundation on

which the jurisdiction of the court depends and any decree of absolute divorce based thereon is void for lack of jurisdiction of the subject matter.

There is no allegation here that the affidavit on its face did not comply fully with G.S. 50-8. Of course, if the affidavit is insufficient on its face, or if no affidavit was filed, a different question would be presented; for such jurisdictional defect would appear on the face of the record. Furthermore, such facts could be shown in support of the allegations of paragraph 8 of the complaint. We assume, for present purposes, that plaintiff filed with her complaint an affidavit which on its face met the requirements of G.S. 50-8.

This proviso of G.S. 50-8 is significant: "Provided, however, that if *the cause for divorce* is two years separation then it shall not be necessary to set forth in the affidavit that *the grounds for divorce* have existed at least six months prior to the filing of the complaint, . . ." (Italics added.) This is an exception to the statutory requirement in respect of the other *causes for divorce,* or *grounds for divorce,* prescribed by G.S. 50-5; for then the affidavit, except under emergency circumstances not relevant here, must set forth "that the facts set forth in the complaint, *as grounds for divorce,* have existed to his or her knowledge at least six months prior to the filing of the complaint." (Italics added.) The statute, G.S. 50-10, denies, and requires findings of fact by a jury, only as to "the material facts in every complaint." G.S. 50-8 required that the jurisdictional facts as to plaintiff's residence be set forth in the affidavit, not in the complaint. In the complaint, the cause of action, or ground for divorce, is alleged. True, the approved practice has been to submit to the jury an issue as to residence of plaintiff (or defendant). With reference to such practice, we call attention to the rule that the trial judge, in his discretion, *may* submit questions of fact to a jury and adopt its findings. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246; *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500. In short, the statutes referred to draw a distinction between jurisdictional facts and the material facts constituting the cause of action or ground for divorce.

G.S. 50-8, as of 1946, will be found in G.S., Vol. 2. Subsequent amendments appear in G.S., Vol. 2A, recompiled in 1950, Session Laws 1951, Ch. 590; Session Laws 1955, Ch. 103. We note this because the statute was rewritten and substantially amended, particularly by the Act of 1951. As related to the Shaver divorce, we look to the statute in force in 1946.

By reason of The Code, sec. 1287, later G.S. 50-8, the court acquired no jurisdiction unless the plaintiff filed *with his complaint* an affidavit containing the required statutory averments. The filing of this affidavit was mandatory. Unless the accompanying affidavit contained

all essentials, the court had no jurisdiction; and, such defect appearing on the face of the record, this Court, upon motion then made for the first time or *ex mero motu,* dismissed the action. *Nichols v. Nichols,* 128 N.C. 108, 38 S.E. 296; *Hopkins v. Hopkins,* 132 N.C. 22, 43 S.E. 508; *Clark v. Clark,* 133 N.C. 30, 45 S.E. 342; *cf. Hodges v. Hodges,* 226 N.C. 570, 39 S.E. 2d 596.

But, "when the proper affidavit is made the court acquires jurisdiction of the cause." *Kinney v. Kinney,* 149 N.C. 321, 63 S.E. 97. This Court has recognized the distinction between the material facts constituting the cause of action to be alleged in the complaint and the jurisdictional facts required to be set forth by affidavit. *Williams v. Williams,* 180 N.C. 273, 104 S.E. 561. An averment required in the affidavit, but not in the complaint, does not present an issue for jury determination. "The pleadings in the action present the issue which should be submitted to a jury." *Kinney v. Kinney, supra.*

G.S. 50-8 required that the affidavit contain an averment "that the facts set forth in the complaint are true to the best of affiant's knowledge and belief." The facts so set forth are the material facts relating to the cause for divorce. These allegations go to the merits of the cause of action. They raise an issue of fact for the jury. The court cannot finally determine them at the original trial of the cause or at any subsequent time. The question confronting us is this: After the jury has determined the issue upon the original trial, what are the rights of a party or of a stranger, respectively, to attack the judgment on the ground that the verdict and judgment were procured by false testimony?

It is true that we find in our decisions, notably *Woodruff v. Woodruff,* 215 N.C. 685, 3 S.E. 2d 5; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154, and *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227, statements which, considered apart from the factual situations under consideration, tend to support plaintiff's contention. But we are mindful of the apt expression of *Barnhill, J.* (now *C. J.*): "The law discussed in any opinion is set within the framework of the facts of that particular case . . ." *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10.

In the *Woodruff, Young* and *Henderson cases,* the summons was by publication. The defendant had no knowledge of the pendency of the action until after trial and judgment. In the *Woodruff* and *Young cases,* the motion was *to set aside* the divorce decree. It was predicated, at least in part, upon the falsity of plaintiff's allegations and testimony as to two years separation, the alleged cause for divorce. In the *Woodruff case,* upon which the *Young* and *Henderson cases* are based, this Court stated: "A complaint in a divorce action accompanied by a false statutory affidavit, knowingly made, is as fatal as a complaint without the affidavit." But it must be borne in mind that in the *Woodruff* and

Young cases the matter then before the court was whether, upon the findings of fact made or to be made by the trial court, the divorce decree should be set aside and the defendant permitted to file answer and contest the case before a jury on the issue relating to two years separation.

Clearly, the court could not make *a final* determination of this issue. Determination thereof had to be by jury in the divorce action. The court's determination, based on its findings of fact, extended only to the setting aside of the divorce decree, to the end that the case stand for retrial as a contested case, *not dismissed for lack of jurisdiction* of the subject matter. Thus, its factual determinations, made upon consideration of such motion, did not destroy or oust the jurisdiction of the court. Rather, they constituted the basis for setting aside the divorce decree so as to permit the court to exercise its jurisdiction over the parties and the subject matter and try the issue under circumstances where each party had opportunity to prosecute or defend the case before a jury. In effect, the setting aside of the divorce decree was analogous to the allowance of a motion to set aside a judgment on the ground of surprise, excusable neglect, etc., under G.S. 1-220. In the *Henderson case,* the approved finding of fact that the plaintiff had not been a resident of North Carolina for the requisite period to invoke the jurisdiction of the court was in itself a sufficient basis for declaring the decree void for lack of jurisdiction, the defendant having entered a special appearance. Thus, in relation to the facts presented, the *Woodruff, Young* and *Henderson cases* have our full approval.

Where fraud on the court deprives the defendant of due process, that is, due notice and opportunity to defend, and hence of jurisdiction of the person of the defendant, the court, upon sufficient findings, will set aside the decree. *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138.

Fraud that relates only to the merits between the parties—the issues joined by the pleadings—is considered differently from fraud that prevents a defendant from presenting his defense. If a judgment is to be declared void, so as to mark a final adjudication of the rights of the parties, there is an unbroken line of decisions of this Court to the effect that this may be accomplished only when it appears that the witness who swore falsely has been convicted of perjury. *Dyche v. Patton,* 56 N.C. 332; *Moore v. Gulley,* 144 N.C. 81, 56 S.E. 681; *Mottu v. Davis,* 153 N.C. 160, 69 S.E. 63; *Williamson v. Jerome,* 169 N.C. 215, 85 S.E. 300; *Kinsland v. Adams,* 172 N.C. 765, 90 S.E. 899; *McCoy v. Justice, supra.* To what extent, if any, this rule is impaired by *Horne v. Edwards, supra,* we need not now decide. Reference to these cases is made solely to point up the distinction between the setting aside of a judgment to the end that opportunity to defend will be given the defendant and a final adjudication of the rights of the parties.

Our conclusion is this: As against challenge on the ground of false swearing, by way of pleading and of evidence, *relating to the cause* or *ground for divorce*, a divorce decree, in all respects regular on the face of the judgment roll, is at most *voidable*, not void. *Shammas v. Shammas*, 9 N.J. 321, 88 A. 2d 204. Upon motion in the cause, and upon sufficient findings of fact made by the court incident to its determination thereof, the divorce decree may be set aside; but, when set aside, the jurisdiction of the court is not destroyed. Rather, the court will continue to exercise its jurisdiction and retry the case.

"The power to hear and determine a cause is jurisdictional." *Grossman v. Grossman*, 315 Ill. App. 345, 43 N.E. 2d 216. "Jurisdiction of a court to hear and determine a cause does not depend upon actual facts alleged but upon authority to determine the existence or nonexistence of such facts and render judgment according to such finding." *People v. Prystalski*, 358 Ill. 198, 192 N.E. 908, quoted in *Grossman v. Grossman, supra.*

Apparently, this Court has considered no cause, in respect of a motion to set aside a divorce decree, regular on the face of the judgment roll, where the defendant was personally served with summons, or made a general appearance, or had actual knowledge or notice of the pendency of the action.

We must now consider whether plaintiff, a second spouse, can attack the Shaver divorce decree on the ground alleged.

While it does not appear in *this record* that Shaver, defendant in the divorce action, has remarried, it does appear affirmatively that he filed answer in the divorce action and admitted the allegations of the complaint as to two years separation. Under the facts alleged, both reason and weight of authority impel the conclusion that neither party to the divorce action could now attack the decree and thereby nullify the marriage of plaintiff and defendant. Annotation: 12 A.L.R. 2d 153; see also, Restatement of the Law, Conflict of Laws, sec. 112. Consequently, this action is distinguishable from cases where the marital status of a second spouse is in jeopardy and subject to be nullified if the aggrieved party in the divorce action should elect to take action to set aside the decree.

As to general principles applicable to collateral attack of a judgment by a stranger, these excerpts from Freeman on Judgments, Fifth Edition, Vol. 1, will suffice. Sec. 318: "The rule is correctly stated in Cowen, Hill and Edwards' note 291 to Phillipps on Evidence, as follows: 'Judgments of any court can be impeached by strangers to them for fraud or collusion; but no judgment can be impeached for fraud by a party or privy to it.' " Sec. 319: "It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would

be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment." Sec. 258: "To permit third persons to become interested after judgment, and to overturn adjudications to which the original parties made no objection, would encourage litigation, and disturb the repose beneficial to society." Sec. 322: "The legitimate province of collateral impeachment is void judgments."

Manifestly, plaintiff had no pre-existing right nor was he prejudicially affected when the divorce decree was entered. He could not have attacked it prior to his marriage to defendant. When he married defendant, he relied upon the divorce decree. He may rely upon it now. Can he attack it on the ground alleged?

Decisions in other jurisdictions, each to be considered within the framework of the facts, reach diverse conclusions. Annotations: 120 A.L.R. 815; 140 A.L.R. 914; 12 A.L.R. 2d 717; 17 Am. Jur., Divorce and Separation sec. 485; 27 C.J.S., Divorce sec. 173; and supplements. Also, see 34 Michigan Law Review 959 *et seq.*, "Attack on Decrees of Divorce."

The cases cited below indicate some of the divergent lines of authority:

1. In *Old Colony Trust Co. v. Porter,* 324 Mass. 581, 88 N.E. 2d 135, 12 A.L.R. 2d 706, it was held that strangers to the divorce decree, beneficiaries under a will nullified by the second marriage, if valid, could challenge the decree on jurisdictional grounds (residence) as persons whose interests were *then* adversely affected thereby. Also, see *Smith v. Foto,* 285 Mich. 361, 280 N.W. 790, 120 A.L.R. 801, where a second spouse was permitted to challenge the decree on jurisdictional grounds (residence).

2. *Du Pont v. Du Pont,* 47 Del. 231, 90 A. 2d 468, applying the Texas law, reviewed the Texas decisions and concluded that thereunder a judgment is absolutely void and subject to collateral attack only when the court entering the judgment lacked jurisdiction over the subject matter or parties and *that lack of jurisdiction appears upon the face of the record.* Thus, under Texas Law, in this annulment suit, it was held that the spouse had no right to attack a Texas judgment on the ground that perjured testimony relating to the cause for divorce was the basis for the divorce decree.

3. In *Thomas v. Lambert,* 187 Ga. 616, 1 S.E. 2d 443, it was held generally that a domestic divorce decree cannot be collaterally attacked as void unless its invalidity appears on the face of the record.

4. In *Shammas v. Shammas, supra,* it was held that a divorce decree based on perjured testimony relating to the cause for divorce was voidable, not void; and the legal representatives of the deceased wife, who had married a divorced man, were denied the right to attack on the

ground of alleged perjured testimony the divorce he had obtained from his first wife.

It should be noted that most, if not all, of the cases where collateral attack by a second spouse, or his legal representatives, has been allowed in other jurisdictions, the attack has been on the jurisdiction of the court, specifically that plaintiff was not domiciled in the state of the divorce forum or had failed to reside there for the requisite time to confer jurisdiction upon the courts of that state. Collateral attack is denied in most, if not all, of the cases wherein perjured testimony relating to the ground for divorce has been the basis of attack.

In the *Shammas case,* the reasons for decision given by *Justice Brennan* are, in part, as follows:

"On August 26, 1948 she (the deceased second wife) married Shammas, when, if the divorce decree was valid, she assumed the marital status with him. As the result of this status she had no interest adverse to Mary Shammas (the first wife), the respondent in the divorce suit, and certainly none adverse to Shammas. This status, which it must be assumed Mary Koodray Shammas (the deceased second wife) then desired to exist and acted upon, could only be maintained if the divorce decree was supported. She thus had no interest at the time prejudiced by the decree and the law therefore gave her no standing to make a direct attack upon the decree in her lifetime, and this apart from the effect of her pre-marital knowledge, disclosed in the evidence, of the allegations that Shammas had contracted a bigamous marriage with Bahia Deeb. As she was without standing to make a direct attack, it necessarily follows that her administrators have none. . . .

". . . It is insufficient answer to say that by letting the decree stand the court gives the appearance of sanctioning an alleged fraud. When the instant petition was filed ample time remained to initiate a criminal prosecution of Charles Shammas for perjury. In the circumstances presented it was a mistaken exercise of discretion to set aside this decree and in effect to render a judicial determination that Mary Koodray Shammas lived in a manifest state of adultery with Charles Shammas, with the additional possible consequence of irregularizing the status of the present husband, if any, of Mary Shammas. These are consequences more deleterious to decency, good morals and the welfare of society than the lesser evil of letting the judgment rest."

Accepting the challenged allegations as true, we reach these conclusions: (1) that the divorce decree at most is voidable, not void; (2) that, being immune from attack by either party to the divorce decree, plaintiff may rely upon it now without jeopardy to his marital status; and (3) that plaintiff will not be heard now to attack it on the ground of alleged perjury relating to *the cause for divorce.*

Admittedly, plaintiff knew of defendant's marriage to Shaver. Defendant told him of this marriage and of her divorce; and plaintiff relied, so he alleges, not only upon her statement but upon the divorce decree. Continuing to rely thereon, they lived together until 6 March, 1953, when, so he alleges, she abandoned him. His investigations began *after* they became estranged. Then he was informed and believes, so he alleges, that the divorce decree was obtained on false allegations and evidence as to two years separation. It is noted that when this action was commenced, plaintiff could have obtained an absolute divorce from defendant on the ground of two years separation, *unless* in fact such separation was caused by his own wrongful conduct and not by her wrongful abandonment of him. If plaintiff can prevail in this action, he can eliminate the question as to the cause of separation between plaintiff and defendant. One thing is plain. Their separation was not caused by the presently alleged invalidity of her divorce decree.

If plaintiff, after living with the defendant as man and wife for nearly six years, can now raise and litigate the issue as to two years separation of defendant and Shaver next preceding 10 May, 1946, the alleged cause for divorce, it would be equally possible for him to do so were the alleged cause for divorce adultery, impotence, or any other of the causes for divorce prescribed by G.S. 50-5. If so, notwithstanding the subsistence of a relationship as husband and wife for many years, a divorced person who remarries would need to have the witnesses stand by to guard against a possible future attack relating to the cause for divorce initiated by his or her then (actual) spouse *in case they became estranged.* Such a state of affairs would be intolerable.

When, in such case, a second spouse can rely upon the divorce decree, we think the sounder view is to require him to do so rather than permit him to attack it at his election, depending on the fortunes or misfortunes of the marriage. We must be mindful of his status where he chooses to maintain the validity of the divorce decree rather than to attack it. It would seem that if this plaintiff has a just grievance, such arises, not on account of the divorce decree and his marriage, but on account of matters arising during the subsistence of such marriage.

As stated above, defendant's motion, as related to paragraphs 6 and 8, was properly denied, and the court's ruling in relation thereto is affirmed; but the court should have allowed defendant's motion to strike all of paragraphs 4, 5 and 7, and as to these paragraphs, the court's ruling in relation thereto is reversed. It is ordered that the costs on this appeal be paid, one-half by plaintiff and one-half by defendant.

Affirmed in part.

Reversed in part.

PARKER, J., dissenting: This is a civil action to annul and to have adjudged void *ab initio* a purported marriage between the plaintiff and the defendant on the alleged ground that the defendant had a living husband by a preceding marriage at the time the ceremony of marriage between the plaintiff and the defendant was celebrated, heard upon a motion to strike part of the complaint.

G.S. 51-3 provides: "All marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void." G.S. 50-4 is codified under Chapter 50, Divorce and Alimony, of the General Statutes, and is entitled "WHAT MARRIAGES MAY BE DECLARED VOID ON APPLICATION OF EITHER PARTY," and reads: "The Superior Court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to the second proviso contained in Section 51-3." This proviso has no application to bigamous marriages.

To obtain relief from the obligations of a marriage, which he contends is bigamous, the plaintiff attacks the divorce decree rendered in the case of *Shaver v. Shaver*. If plaintiff cannot maintain this action, he may be, and probably will be, required to pay alimony to the defendant who has contracted a bigamous marriage with him, and his person, earnings and property may be subject to the pains and penalties of an alimony decree without due process of law.

According to the allegations of the complaint asked to be stricken, the defendant obtained in the Superior Court of Durham County for the cause set forth in G.S. 50-6 a decree of absolute divorce from her former husband, Floyd N. Shaver, on the ground that she and Floyd N. Shaver had lived separate and apart for two years, when in fact she and Floyd N. Shaver during the said two-year period had lived together as man and wife almost continuously. The complaint further alleges that Floyd N. Shaver filed an answer in her divorce action against him admitting the truth of the allegations of her complaint that they had lived separate and apart for two years, and that her divorce from Floyd N. Shaver is void and "is the result of a misrepresentation and fraud upon the Superior Court of Durham County and should be set aside and declared null and void." Carpenter's complaint further alleges "that the purported marriage between him and the defendant is void *ab initio* for that at the time of the said purported marriage ceremony between this plaintiff and defendant, the defendant was then married to Floyd N. Shaver, and that said bonds of matrimony between her and Floyd N. Shaver had not been dissolved by death, valid divorce or otherwise."

The record in the instant case does not state whether or not Mrs. Shaver filed an affidavit with her divorce complaint in *Shaver v. Shaver,* as required by G.S. 50-8. On the date that the instant case was argued before us, there was argued the case of Mary K. Shaver (the defendant here) *v.* Floyd N. Shaver. The same counsel appeared in that case as appeared in the instant case. The opinion in *Shaver v. Shaver* is handed down contemporaneously with the opinion in *Carpenter v. Carpenter.* The instant case and *Shaver v. Shaver* involved the validity of the same divorce decree. In the record in *Shaver v. Shaver* this is the affidavit that Mary K. Shaver (the defendant here) filed with her complaint, which is the identical complaint set forth in the instant case and which affidavit reads as follows:

"NORTH CAROLINA
DURHAM COUNTY

MARY K. SHAVER, being duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and that the same is true of her own knowledge, save and except those matters and things therein stated upon information and belief, and as to those she believes it to be true; that the said complaint is not made out of levity or by collusion between husband and wife, and not for the mere purpose of being freed and separate from each other, but in sincerity and truth, and for the causes mentioned in the complaint; that the facts set forth in the complaint as grounds for plaintiff's divorce have existed to her own knowledge for at least two years prior to the filing of this complaint; that this plaintiff has been resident of the State of North Carolina for a period of more than six months next preceding the filing of this action.

MARY K. SHAVER.

Subscribed and sworn to before me this 9th day of May 1946.

CARRIE B. STRAUGHN
Notary Public (SEAL)

My commission expires: May 6, 1948."

In my opinion, the court should take judicial notice of its own records in respect to this affidavit filed with her complaint in that inter-related proceeding, particularly where the issues are the same, or are practically the same, and the inter-related case is specifically referred to in the instant case. *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. If judicial

notice is taken of this affidavit, and if Mrs. Shaver did file an affidavit with her complaint, it was, according to the allegations of Carpenter's complaint, a false affidavit knowingly made, and the court had no jurisdiction to grant her a decree of divorce. *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154. If judicial notice is not taken of this affidavit, and if Mrs. Shaver filed no affidavit with her complaint, it was equally fatal, and the court had no jurisdiction to grant her a decree of divorce. *Woodruff v. Woodruff,* 215 N.C. 685, 3 S.E. 2d 5. This affidavit affirmatively appears on the face of the record in the divorce action of *Shaver v. Shaver,* which the plaintiff is assailing in the instant action.

Causes for absolute divorce are statutory in North Carolina. G.S. 50-5 and G.S. 50-6; *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7.

If the allegations of Carpenter's complaint asked to be stricken are true, did the Superior Court of Durham County have jurisdiction to try the action of *Shaver v. Shaver,* and grant Mrs. Shaver, the defendant here, a decree of absolute divorce?

This Court said through *Winborne, J.,* in *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227: "Under this statute (G.S. 50-6), in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years; and (2) the plaintiff, husband or wife, shall have resided in the State of North Carolina for a period of one year. These two requirements are jurisdictional. *Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154; *Sears v. Sears,* 92 F. 2d 530. If either one or the other of these elements were not existent, the court would not have jurisdiction to try the action, and to grant a divorce. And if the court has no jurisdiction over the subject matter of the action, the judgment in the action is void. A void judgment is one which has a mere semblance, but is lacking in some of the essential elements which would authorize the court to proceed to judgment. *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283; *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311."

Barnhill, J., (now *C. J.*) said for the Court in *Woodruff v. Woodruff, supra:* "It is well established in this Court that the affidavit the statute (G.S. 50-8) requires in connection with a complaint for divorce is jurisdictional. *Holloman v. Holloman,* 127 N.C. 15, 37 S.E. 68; *Nichols v. Nichols,* 128 N.C. 108, 38 S.E. 296. A complaint in a divorce action accompanied by a false statutory affidavit, knowingly made, is as fatal as a complaint without the affidavit."

In *Young v. Young, supra, Devin, J.,* speaking for the Court said: "In an action for divorce the affidavit required by the Statute in connection with the complaint is jurisdictional, G.S., 50-8, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the judgment is

by motion in the cause." In speaking of a motion in the cause as the correct procedure, the opinion has reference to a motion made by a party to the divorce decree, and not to a stranger to it.

We have consistently held that in an action for divorce under our statutes the affidavit required to be filed with the complaint by G.S. 50-8 is jurisdictional, and a complaint accompanied by a false statutory affidavit whereby a fraud and imposition is practiced upon the court and jurisdiction is apparently acquired, when jurisdiction is in fact lacking, and the court was procured by such fraud and imposition practiced upon it to exercise jurisdiction, which it would not have exercised, and had no authority to exercise, if the true facts had been disclosed, is regarded as insufficient to give the court jurisdiction to render a valid decree of divorce. A decree of divorce entered under such circumstance is void. *Holloman v. Holloman,* 127 N.C. 15, 37 S.E. 68; *Nichols v. Nichols,* 128 N.C. 108, 38 S.E. 296; *Martin v. Martin,* 130 N.C. 27, 40 S.E. 822; *Hopkins v. Hopkins,* 132 N.C. 22, 43 S.E. 508; *Johnson v. Johnson,* 142 N.C. 462, 55 S.E. 341; *Grant v. Grant,* 159 N.C. 528, 75 S.E. 734; *Woodruff v. Woodruff, supra; Young v. Young, supra.*

Mrs. Shaver's affidavit attached to her complaint is a vital part of the record in that case. Carpenter's complaint here alleges that in the divorce case of *Shaver v. Shaver,* the defendant Floyd N. Shaver filed an answer admitting all the allegations of his wife's complaint to be true. According to the allegations of Carpenter's complaint, Mrs. Shaver by false allegations in her complaint, to which she attached a false statutory affidavit, that she and her husband had lived separate and apart for two years prior to the institution of her action, and her husband Floyd N. Shaver by filing a verified answer in the divorce action falsely admitting the allegations of his wife to be true, practiced a fraud and imposition upon the Superior Court of Durham County whereby that Court apparently acquired jurisdiction to hear and determine her divorce action, when in truth and in fact jurisdiction was lacking, and that Court was procured by such fraud and imposition and collusion of her and her husband Floyd N. Shaver to exercise jurisdiction and grant her a divorce, which jurisdiction the Superior Court of Durham County had no authority to exercise, and which it would not have exercised, if the true facts had been disclosed. If Carpenter can prove as true those allegations in his complaint, the divorce decree in *Shaver v. Shaver* rendered by the Superior Court of Durham County is utterly void. Carpenter's attack on the divorce decree is based upon false swearing in the verified pleadings, fraud and collusion, which false swearing, fraud and collusion prevented the Superior Court of Durham County from having jurisdiction over the subject matter of the action of *Shaver v. Shaver.*

This question is presented: Can the plaintiff Carpenter, the second spouse of Mary Kelly Shaver Carpenter, annul his marriage to her in an action instituted for that purpose, if he can prove that the decree of absolute divorce rendered in *Shaver v. Shaver* was void and a nullity, and at the time of the purported marriage between him and Mary Kelly Shaver, she had a living husband, Floyd N. Shaver, from whom she was not validly divorced?

In passing upon that question we must bear in mind the clear distinction in the rules of law as to parties and privies to a judgment and strangers to a judgment. We must also bear in mind the rules of law where the judgment is void by reason of lack of jurisdiction in the court rendering it.

I agree with the statement in the majority opinion that "cases such as *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452, and *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1, in which 'extrinsic' fraud and 'intrinsic' fraud are distinguished, relate to the proper procedure in each instance *by a party* to the original action." Those cases have no application here for the reason that Carpenter is a stranger to the action of *Shaver v. Shaver.*

It is elementary that ordinarily only parties and privies are bound by a judgment. *Thomas v. Reavis,* 196 N.C. 254, 145 S.E. 226; *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321; 30 Am. Jur., Judgments, Sec. 220.

In *Thomas v. Reavis, supra, Stacy, C. J.,* said for the Court: "Judgments are binding on parties and their privies as to all issuable matters contained in the pleadings, but they are not binding on strangers to the proceeding or those who have had no opportunity to be heard."

"It is a well settled general rule that whenever the rights of third persons are affected they may collaterally attack a judgment for fraud committed by one party or for collusion of both parties." 31 Am. Jur., Judgments, Sec. 596, where many cases are cited in support of the text. The rationale of the rule is that the party to the principal case is a stranger to the judgment rendered in the previous action, where he was not directly interested in the subject matter thereof, and had no right to make defense, adduce testimony, cross-examine witnesses, control the proceedings, or appeal from the judgment.

A challenge to jurisdiction may be made at any time. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748; *Anderson v. Atkinson,* 235 N.C. 300, 69 S.E. 2d 603; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Johnson v. Finch,* 93 N.C. 205, 208.

It is well established law that a void judgment is no judgment, is a nullity without life or force, no rights can be based thereon, and it can be attacked collaterally by anyone whose rights are adversely affected by it. *Reid v. Bristol,* 241 N.C. 699, 86 S.E. 2d 417; *Casey v. Barker,*

219 N.C. 465, 14 S.E. 2d 429; *Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 802.

A judgment is void when there is a want of jurisdiction by the court over the subject matter of the action. *Clark v. Homes,* 189 N.C. 703, 708, 128 S.E. 20; *Hanson v. Yandle,* 235 N.C. 532, 70 S.E. 2d 565.

In *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311, *Barnhill, J.,* (now *C. J.*) said for the Court: A void judgment may "be disregarded and treated as a nullity everywhere. It is *coram non judice.*" Further on in the opinion it is said: " 'A nullity is a nullity, and out of nothing nothing comes' . . . 'The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid.' "

Stacy, C. J., said for the Court in *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283: " 'But a void judgment is no judgment, and may always be treated as a nullity.' A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions."

In *Stafford v. Gallops,* 123 N.C. 19, 31 S.E. 265, the Court said: "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars anyone, and all proceedings founded upon it are worthless."

In 17 Am. Jur., Divorce and Separation, Sec. 481, it is said: "A judgment or decree of divorce which is void for want of jurisdiction is generally subject to collateral attack, notwithstanding a subsequent marriage or the death of the party by whom the divorce was procured." In 17 Am. Jur., Divorce and Separation, Sec. 484, it is said: "It is generally held and recognized that a stranger may collaterally attack a decree of divorce for want of jurisdiction in the court entering it where his property rights are injuriously affected thereby." See also: *Adams v. Adams,* 154 Mass. 290, 28 N.E. 260, 13 L.R.A. 275.

The majority opinion relies upon *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124; *Rodriguez v. Rodriguez,* 224 N.C. 275, 29 S.E. 2d 901; *Guerin v. Guerin,* 208 N.C. 457, 181 S.E. 274; *Harrell v. Welstead, supra; Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315, to support its statement that Carpenter cannot maintain his action because the lack of jurisdiction does not appear on the face of the record. In all of these cases the motion to set aside the judgments were made by parties to the actions.

However, the going is rough in the majority opinion, when it attempts to get around the cases of *Henderson v. Henderson, supra; Young v. Young, supra,* and *Woodruff v. Woodruff, supra.* In *Young v. Young,* it is held that a party to a divorce decree can obtain relief when there is a false statutory affidavit, which is jurisdictional, by showing the jurisdictional defect by extrinsic evidence. The holding in

Young v. Young merely reiterates the law as laid down in *Holloman v. Holloman, supra; Nichols v. Nichols, supra; Martin v. Martin, supra; Hopkins v. Hopkins, supra; Johnson v. Johnson, supra; Grant v. Grant, supra,* and *Woodruff v. Woodruff, supra.* It does not seem to me to be sound law or sound public policy to permit a party to the cause in a divorce action to show by extrinsic proof the falsity of the statutory affidavit, which is jurisdictional, and to deny such permission to an utter stranger to the divorce decree who is in a position like Carpenter.

The case of *Pridgen v. Pridgen,* 203 N.C. 533, 166 S.E. 591, is directly in point as to the right of Carpenter to maintain his action. In the *Pridgen case* the second headnote in our Reports states: "Where a wife attempts to marry again when no valid divorce *a vinculo* had been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. C.S. 1658, 2495." C.S. 1658 is now G.S. 50-4, and C.S. 2495 is now G.S. 51-3. The Court said: "Between void and voidable marriages the law recognizes a distinction which applies to the status of the parties before the marriage relation is dissolved. A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Schouler's Marriage, etc., sec. 1081; *Johnson v. Kincade,* 37 N.C. 470; *Crump v. Morgan,* 38 N.C. 91; *Williamson v. Williams,* 56 N.C. 446; *Taylor v. White,* 160 N.C. 38. In *Gathings v. Williams,* 27 N.C. 487, the principle is stated in these words: 'where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is want of age ("want of age" being obiter, *Koonce v. Wallace,* 52 N.C. 194), or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court. For, although in such case there may be a proceeding in the ecclesiastical court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void *ab initio,* and no civil rights can be acquired under such a marriage. It is said to be no marriage, but a profanation of marriage, and the *factum* is a nullity.' The General Assembly has provided that all marriages between persons either of whom has a husband or wife living at the time of such marriage shall be void, and that the aggrieved party may seek relief in the Superior Court, which has succeeded to the functions of the ecclesiastical courts of England. C.S. 1658, 2495; *Gathings v. Williams, supra; Johnson v. Kincade, supra; Setzer v. Setzer,* 97 N.C. 252; *Watters v. Watters,* 168 N.C. 411. The plaintiff accordingly brought suit, not for divorce, but to have the marriage relation between the defendant and himself adjudged void from the beginning, on the ground that at the time their

marriage was solemnized the defendant had a husband living. *Taylor v. White, supra.*"

In 120 A.L.R. there is an elaborate comment note beginning on page 815, entitled "Attack on divorce decree by second spouse of party to divorce." In this note are cited a number of cases where the right to attack is sustained, and where the right to attack is denied. Among the cases where the right to attack is sustained, there is cited on page 819 our case of *Pridgen v. Pridgen, supra.*

In 12 A.L.R. 2d there is an annotation captioned "Standing of Strangers to Divorce Proceeding to attack validity of Divorce Decree," beginning on page 717 and ending on page 748. On pages 733-734 of this annotation a list of cases is given where the second spouse has a standing to attack the divorce decree, and here again is cited our case of *Pridgen v. Pridgen, supra.*

In *Williams v. Williams,* 63 Wis. 58, 53 Am. Rep. 253, this is the headnote in the American Reports Series: "J. took R. to wife in 1860, and very soon permanently deserted her. In 1864 J. married the plaintiff. In 1868 J. and the plaintiff separated. In 1870 while living near J. the plaintiff publicly married W. Subsequently the plaintiff got a divorce against J. by default for desertion. *Held,* in this action for dower in the estate of W., (1) that the presumption was against the validity of the marriage of 1864; (2) that the plaintiff was not estopped from showing that that marriage was void." In the opinion the Court said: "The marriage between the plaintiff and Jones being absolutely void *ab initio,* it was good for no legal purpose, and its invalidity may be maintained in any proceeding in any court between any parties, whether in the life-time or after the death of the supposed husband or wife, or both, and whether the question arises directly or collaterally. (Citing authorities.) It is otherwise where the marriage is voidable merely."

In *Old Colony Trust Co. v. Porter,* 324 Mass. 581, 88 N.E. 2d 135, 12 A.L.R. 2d 706, it was held the executor of a will apparently revoked by a subsequent marriage of the testatrix, may, for the purpose of showing the invalidity of such marriage, collaterally attack a divorce decree previously granted the new spouse without jurisdiction. In its opinion the Court said: "The industry of counsel has supplied us with a number of cases from other jurisdictions, apparently representing the weight of authority, which in general support the principle of collateral attack for want of jurisdiction upon decrees of divorce by persons not parties to the divorce proceedings whose rights would be impaired if effect were given to the decrees as against them." The Court then cites a long list of cases in support of its statement, and then gives a shorter list of cases taking a different view.

In *Williams v. North Carolina,* 325 U.S. 226, at page 230, 89 L. Ed. 1577, at page 1582, 157 A.L.R. 1366, at page 1369, the Court said: "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. Citing authorities. But those not parties to a litigation ought not to be foreclosed by the interested actions of others . . ."

It is well established law that in criminal prosecutions, such as for bigamy, adultery or fornication, the State has a right to impeach the validity of a foreign decree divorcing the defendant from a former spouse, where such decree is relied upon by the defendant as a matter of defense. *S. v. Williams,* 224 N.C. 183, 29 S.E. 2d 744, affirmed in *Williams v. North Carolina,* 325 U.S. 226, 89 L. Ed. 1577; *S. v. Herron,* 175 N.C. 754, 94 S.E. 698; Anno. 12 A.L.R. 2d, page 734.

A rule "which, in the absence of elements of estoppel chargeable to him personally, denies to a party the right to attack a divorce decree otherwise subject to attack, solely because he is the second spouse of the divorced party contracting the second marriage, places upon him (or her) the obligations of a valid second marriage, without at the same time entitling him (or her) to its benefits, and places the enjoyment by him (or her) of such benefits at the mercy of third persons." Anno. 120 A.L.R., page 817.

The plaintiff Carpenter was in no sense a party to the divorce proceeding in *Shaver v. Shaver* so as to become bound thereby, or in privity with the parties to that divorce action. According to Carpenter's complaint he did not meet Mrs. Shaver until the year after her divorce decree from Floyd N. Shaver. Carpenter could not participate in the trial of the divorce action of *Shaver v. Shaver,* and he could not have appealed from it: he was a stranger to it. He took no part in the divorce case. He was in no way concerned in the result of it at the time, and would never have become concerned, if he had not afterwards married Mrs. Shaver. Carpenter's interests are materially affected. If the allegations of his complaint asked to be stricken are true and he cannot have his day in court to prove them, he is put under obligation to support a woman who is not in law his wife, and who had no capacity to contract a marriage with him. He may be required to pay alimony and maintenance to one who has a prior living husband legally undivorced. A decree of divorce rendered by a court without jurisdiction is void, and ought not to be recognized or enforced, and especially where the court is led to exercise jurisdiction by perjury and fraud of one of the parties. A court should be vigilant to see that the forms of judicial sanctity are not used as a cloak for fraud and injustice. We have held this day that Carpenter cannot attack the validity of the divorce decree

in *Shaver v. Shaver* by a motion in the cause. *Shaver v. Shaver, post,* 309, 93 S.E. 2d 614. If the allegations of Carpenter's complaint are true, and if he cannot assail the divorce decree in *Shaver v. Shaver,* by an independent action, Mrs. Shaver, who is the legal wife of Floyd N. Shaver, may compel him to support her, and may compel him to pay her alimony, and a formal decree of absolute divorce by the Durham County Superior Court will be the means which will enable her to perpetrate such an injustice. A court cannot be converted into a shield to protect fraud. The subject matter of this suit is the validity of the purported marriage between Carpenter and the defendant. If Carpenter cannot assail in any way in our Courts this void judgment materially affecting his rights, there will be a denial of his constitutional right of due process of law. In *Galpin v. Page,* 18 Wall. 350, 368, 369, 21 L. Ed. 959, 963, *Mr. Justice Field* said for the Court: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination."

The gist of plaintiff's action to annul his purported marriage to Mrs. Shaver is based upon the fraud and perjury perpetrated by the defendant on the Superior Court of Durham County in procuring it to exercise jurisdiction in the divorce action of *Shaver v. Shaver,* which it would not have exercised, and had no jurisdiction to exercise, if the true facts had been disclosed. In my opinion, the very carefully reasoned opinion in *Pridgen v. Pridgen, supra,* is right in holding that a second spouse may annul in an action instituted for that purpose his purported marriage with a wife on the ground that the divorce decree obtained by his wife purporting to dissolve her former marriage was void and a nullity, no elements of estoppel chargeable to Pridgen personally appearing. And no elements of estoppel chargeable to Carpenter personally appearing in the instant case I think that the Court should follow the *Pridgen Case* here. We are not confronted by the question of a second spouse, by his own acts, taking an active part in the divorce proceeding. If a second spouse should be held to be estopped on that ground to impeach the validity of the decree, it is not authority for a general proposition that a second spouse, who was a complete stranger to the divorce decree, has no standing to challenge its validity. The complaint states a cause of action, which the plaintiff has a right to maintain. The allegations of his complaint asked to be stricken are relevant and material.

I cannot agree with the conclusions reached in the majority opinion that, accepting the challenged allegations of Carpenter's complaint as true, the divorce decree in *Shaver v. Shaver* at most is voidable, and not void, and that Carpenter will not be heard to attack the divorce decree.

Carpenter alleges in his complaint that he learned that Mary K. Shaver was not legally divorced from her husband, Floyd Shaver, after she abandoned him, Carpenter. "The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it . . . A person may not predicate an estoppel in his favor on, or assert such estoppel for the purpose of making effective, obtaining the benefit of, or shielding himself from the results of, his own fraud, violation of law, wrongful act, or other inequitable conduct in the transaction in question . . ." 31 C.J.S., Estoppel, Sec. 75. If the allegations of Carpenter's complaint are true, Mrs. Shaver cannot by estoppel preclude Carpenter from assailing her divorce decree procured by her perjury and fraud. If Carpenter were permitted his day in court and proved the allegations of his complaint, the unfortunate situation in which Mrs. Shaver would find herself would be of her own making. At the time of her divorce decree Carpenter did not know her. If the challenged allegations of Carpenter's complaint are true, Mrs. Shaver did a wrong to Carpenter when she married him for the reason that she was still married to Floyd N. Shaver. Certainly, if Mrs. Shaver seeks to recover alimony from Carpenter, due process and the law of the land require that Carpenter some day, somewhere, must have an opportunity in court to be heard on his allegations that Mrs. Shaver contracted a bigamous marriage with him. "The words of Webster, so often quoted, that 'by the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions." *Powell v. Alabama*, 287 N.S. 45, 77 L. Ed. 158, 84 A.L.R. 527.

In writing this dissenting opinion I have assumed that the allegations in the complaint asked to be stricken are true. If the plaintiff could have a trial, he might fail completely to prove these allegations. But, whether he can or not, in my opinion, he has a right to have his day in court before a judge and jury.

I vote to affirm the ruling of the lower court.

BARNHILL, C. J., concurs in this dissent.

MARY K. SHAVER v. FLOYD N. SHAVER.

(Filed 26 June, 1956.)

1. Divorce and Alimony § 22: Judgments § 24—

A person who is neither a party nor a privy to an action has no standing to vacate the judgment by a motion in the cause.

2. Appeal and Error § 2—

Where it appears upon the face of the record that the party moving to vacate a judgment was neither a party nor a privy to the action, the Supreme Court will take notice of the fatal defect *ex mero motu* and order the motion dismissed.

APPEAL by plaintiff and defendant from *Hall, J.*, October Term, 1955, DURHAM.

Motion in the cause by Stanley M. Carpenter, second spouse of plaintiff, to have declared void the decree of absolute divorce entered herein 27 May, 1946.

The divorce action and decree were in all respects regular on the face of the record. The cause for divorce was two years separation. G.S. 50-6. Upon the jury's verdict establishing two years separation, the decree was entered.

Carpenter's motion attacks the decree on the ground that in fact plaintiff and defendant had not lived separate and apart continuously for two years prior to 10 May, 1946, the date the divorce action was commenced; that plaintiff's affidavit, complaint and testimony, in this respect, were false; and that by reason of such perjury, the Superior Court of Durham County, which apparently acquired jurisdiction, in fact had no jurisdiction and would not have attempted to exercise jurisdiction if the true facts had been disclosed.

Plaintiff and defendant, appearing specially for that purpose only, moved to dismiss Carpenter's motion on the ground that they had not been properly served with notice of said motion.

This appeal is from the court's order overruling the said motions made by plaintiff and defendant.

Haywood & Denny for plaintiff Mary Shaver Carpenter, appellant.

Oscar G. Barker and Reade, Fuller, Newsom & Graham for Stanley M. Carpenter, movant.

Ludlow T. Rogers for defendant Floyd N. Shaver, appellant.

PER CURIAM. The movant, Carpenter, is a stranger to this cause. He is neither party nor privy.

The general rule is that a stranger to the record, who is neither a party nor a privy to the action, unless authorized by statute, ordinarily has no standing to vacate a judgment by a motion in the cause. *Smith v. New Bern*, 73 N.C. 303; *Edwards v. Phillips*, 91 N.C. 355; *Johnson v. Johnson*, 142 N.C. 462, 55 S.E. 341; *In re Bank*, 208 N.C. 509, 181 S.E. 621; 49 C.J.S., Judgments, p. 540; 31 Am. Jur., Judgments sec. 722; Annotations: 99 A.L.R., p. 1310; 12 A.L.R. 2d, p. 727.

This fatal defect appears on the face of the record. This being so, it is immaterial whether notice of hearing on Carpenter's motion was properly served on plaintiff and defendant. This Court takes notice *ex mero motu* that Carpenter cannot proceed with his motion and will order it dismissed. *Cf. Garrison v. Williams,* 150 N.C. 674, 64 S.E. 783; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

In accordance with this opinion, the lower court will enter an order dismissing Carpenter's said motion.

Docketed as #674, Fall Term, 1955, this appeal was carried over and docketed as #666, Spring Term, 1956. This appeal, and the appeal in *Carpenter v. Carpenter, ante,* 286, this day decided, were argued together at Fall Term, 1955. As will be observed, in *Carpenter v. Carpenter,* an independent action for annulment, Carpenter (the movant herein) undertakes to attack collaterally the same divorce decree.

Reversed.

MARY K. SHAVER v. FLOYD N. SHAVER.

(Filed 26 June, 1956.)

Appeal and Error § 12—

Where appeal is taken from the refusal to dismiss a motion in the cause to set aside a judgment, the lower court is without jurisdiction, pending the appeal, to order a hearing on the motion. G.S. 1-134.1.

APPEAL by plaintiff and defendant from *Hall, J.,* in Chambers, 16 December, 1955 (December Criminal Term) of DURHAM.

This cause came on for hearing before his Honor, Hall, J., on 19 October 1955 in Durham Superior Court, upon a motion made in behalf of Stanley M. Carpenter, the second spouse of the plaintiff herein, to set aside the divorce decree entered in the Superior Court of Durham County, North Carolina, on 27 May 1946, dissolving the marriage bonds between Mary K. Shaver and Floyd N. Shaver. Among other things, the movant prayed for the court, acting upon its own motion, to make inquiry into the truth of the allegations made in the pleadings upon which the divorce judgment was entered and that the court set aside and declare said judgment null and void.

The respective attorneys appearing for the plaintiff and the defendant herein made a special appearance and moved to dismiss the motion in the cause on the ground that the court had not acquired jurisdiction over the parties, both being nonresidents of North Carolina. The court denied the respective motions to dismiss and both the plaintiff and

defendant appealed to the Supreme Court, assigning error (see *Shaver v. Shaver, ante,* 309).

Notwithstanding the appeal to the Supreme Court, his Honor issued an order on 21 October 1955 directing the plaintiff Mary K. Shaver (now known as Mary K. Carpenter and Mrs. Stanley M. Carpenter) and the defendant Floyd N. Shaver to appear before him in Chambers in the Durham County Courthouse in Durham, North Carolina on 12 December 1955 at 2:30 p.m. and show cause, if any there be, why the judgment of divorce heretofore entered in this cause on 27 May 1946 should not be vacated, set aside and declared null and void and of no further effect, for the reason that the court had not acquired jurisdiction of the subject matter of the action. Thereupon, the court directed that notice of service of process be made by publication.

The respective attorneys for the plaintiff and the defendant again made a special appearance and moved to dismiss the order to show cause on two grounds: (1) that the cause was then pending in the Supreme Court, said cause having been argued in that Court on 29 November 1955, and no opinion having been rendered by said Court and certified to the Superior Court, the Superior Court was without jurisdiction to proceed in the cause; and (2) that the notice which was served upon the respective parties was not a proper one and the Superior Court had not acquired jurisdiction over the parties.

Apparently without expressly ruling on the motions to dismiss the order to show cause, his Honor proceeded to hear the matter on the same *ex parte* affidavits and other evidentiary matter presented to his Honor in Chambers in Durham on 18 October 1955 by the same counsel who made the original motion in the cause on behalf of Stanley M. Carpenter and who appeared in his behalf in the Supreme Court when this cause was argued at the Fall Term 1955 of the said Court, and who are now designated in the judgment below as friends of the court. On the evidence thus presented, his Honor proceeded to find facts and to enter a judgment to the effect that the judgment of divorce referred to hereinabove was void *ab initio* for that plaintiff and defendant had not lived separate and apart for two years next preceding the institution of the action, as alleged in the complaint.

The plaintiff and defendant gave notice of appeal in open court and applied for a writ of *certiorari* to the end that the appeal might be considered in connection with the pending appeal in the same cause. The writ was allowed and the appeal heard on 28 February 1956 on both the plaintiff's and defendant's assignments of error.

Emery B. Denny, Jr., and Egbert L. Haywood for plaintiff.

Ludlow T. Rogers for defendant.

Reade, Fuller, Newsom & Graham, appearing as Amici Curiae, appellees.

PER CURIAM. It is apparent that the movant, Stanley M. Carpenter, was seeking the identical relief in his motion in the cause that his Honor purported to grant pursuant to his order to show cause in his judgment entered 16 December 1955. The plaintiff and the defendant having theretofore appealed to the Supreme Court from the denial of their motions to dismiss for lack of jurisdiction, pursuant to the provisions of G.S. 1-134.1, we hold that the Superior Court was without power to proceed in the cause pending disposition of the appeal in this Court. *Harris v. Fairley,* 232 N.C. 555, 61 S.E. 2d 619; *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492. A permissible appeal to this Court brings up the whole case. *Bledsoe v. Nixon,* 69 N.C. 81; *Isler v. Brown,* 69 N.C. 125; *Combes v. Adams,* 150 N.C. 64, page 70, 63 S.E. 186; *S. v. Casey,* 201 N.C. 185, 159 S.E. 337.

It follows, therefore, that the judgment entered by his Honor in the court below on 16 December 1955, purporting to vacate and set aside the decree of divorce entered in this cause on 27 May 1946, is a nullity and the same is hereby vacated and set aside.

Error.

VIRGINIA LAMM HAYES AND HUSBAND, J. F. HAYES; BESSIE H. LAMM; ZELMA LAMM POYTHRESS AND HUSBAND, T. M. POYTHRESS, AND TEMPIE ANN HAYES, AN INFANT APPEARING HEREIN BY HER NEXT FRIEND, J. W. HARRISON, v. EUNICE WILLIAMSON DECKER RICARD AND FREE WILL BAPTIST ORPHANAGE, INC.

(Filed 26 June, 1956.)

1. Actions § 6—

The nature of an action is determined by the issues arising on the pleadings and by the relief sought, and not its denomination by either party.

2. Ejectment § 10: Quieting Title § 1—

Where title to land is in controversy and plaintiff seeks to recover possession from defendant and for an accounting of rents and profits, the action is one in ejectment and not merely to remove cloud upon title.

3. Ejectment § 15—

In an action in ejectment plaintiffs must recover on the strength of their own title.

4. Ejectment § 17—

In an action in ejectment in which the pleadings raise the issue of title, it is error for the court to discharge the jury and enter judgment declaring plaintiffs to be the owners and ousting defendant from possession.

5. Evidence §§ 13, 32—

Where a party claiming under a deceased person examines the attorney for the deceased in respect to the execution and delivery of deeds to the land in controversy and the consideration therefor, such examination constitutes a waiver of the rule that communications between attorney and client are privileged and also a waiver of G.S. 8-51 in respect to communications or transactions with a decedent, and the other party is entitled to cross-examine the attorney as to such transactions. However, the waiver does not apply to other and independent transactions.

6. Deeds § 4—

Consideration sufficient to support a conveyance is not confined exclusively to the payment of money, but the discharge of a debt or obligation of the grantor, accepted as such by the grantee, is sufficient consideration to support a conveyance.

7. Bill of Discovery § 6: Evidence § 32—

A pre-trial examination of a witness under G.S. 1-568.1, *et seq.*, in regard to a transaction or communication with a decedent is a waiver of the protection afforded by G.S. 8-51 to the extent that either party may use it upon the trial.

8. Evidence § 32—

Where a party waives provisions of G.S. 8-51 by examining a witness in regard to transaction or communication with a decedent, such waiver continues throughout the proceedings, including a second trial of the same cause.

9. Estoppel § 10—

Plaintiffs claiming as devisees under a will are bound by an estoppel which could have been asserted against their testator, and evidence tending to show an estoppel *in pais* against the testator is competent against plaintiffs.

APPEAL by the defendant Eunice Williamson Decker Ricard from *Bone, J.*, December 1955 Civil Term, WILSON Superior Court.

The complaint alleged the purpose of this civil action is to remove cloud upon the title to a certain specifically described tract of farm land containing 62.70 acres, located in Wilson County. The plaintiff Bessie H. Lamm is the widow, and the plaintiffs Virginia Lamm Hayes and Zelma Lamm Poythress are daughters of Grover T. Lamm, deceased. J. F. Hayes and T. M. Poythress are the husbands of the daughters. The Free Will Baptist Orphanage is a North Carolina corporation with its place of business in the Town of Middlesex.

Grover T. Lamm died on 14 December, 1952, leaving a last will in which he devised certain specifically described lands to his wife and daughters with certain limitations and conditions attached. The will did not specifically describe the land in controversy but it did contain a residuary clause devising to the plaintiffs, and contingently to the

orphanage, all the testator's lands not otherwise disposed of. The orphanage declined to become a plaintiff and was made a defendant.

The plaintiffs alleged in substance that about 12 April, 1945, Grover T. Lamm purchased from Nana Louise Parker, Annie Parker Phillips and Ellis Elma Phillips the land in controversy and had the title conveyed to R. A. Stamper. On 3 April, 1945, R. A. Stamper and wife executed and delivered a fee simple deed to Grover T. Lamm, who entered into possession. The deed was filed for record at 3:00 p.m. on 23 December, 1952, after Mr. Lamm's death. There appears of record a paper writing dated 7 September, 1946, purporting to be a quit-claim deed from R. A. Stamper and wife to the defendant Eunice Williamson Decker (now Ricard) purporting to convey to her all the grantor's right, title and interest in the Parker or Phillips farm. The deeds are made a part of the complaint.

Plaintiffs further alleged in substance that the quit-claim deed under which the defendant Decker (now Ricard) claims is invalid for that (1) she is not a purchaser for value; (2) the conveyance was without consideration and in fact was never delivered; (3) at the time of its execution the grantor had no interest to convey; (4) even if delivered, the quit-claim deed was without consideration and not registered within two years from the date of its delivery; that the defendant's quit-claim deed constitutes a cloud upon the plaintiffs' title which they are entitled to have removed. Finally, the plaintiffs alleged that the defendant Ricard is in the wrongful possession of the land in controversy and wrongfully withholds possession from them; that she has received and is receiving the rents and profits of the value of $3,000 per year. Plaintiffs asked the following relief:

1. That the quit-claim deed be declared null and void and canceled of record.

2. That plaintiffs be declared to be the owners of the land in controversy.

3. That defendant Ricard be ousted from possession and be required to account for rents and profits.

4. That a receiver be appointed to take charge during the pendency of this action.

The defendant Ricard, by answer, alleged in substance:

1. That she is the owner and in the lawful possession of the land in controversy.

2. That the plaintiffs are estopped to claim or assert any title or interest in the land in controversy by reason of the acts, conduct and deeds of Grover T. Lamm, the plaintiffs' predecessor in title, for that:

a. He placed her in possession as owner.

b. He recognized her as owner and allowed her to make valuable improvements under the assurance that her title was good.

c. He assured her he had taken all necessary legal steps to make her title good to the end that no person claiming under him could disturb her title or possession.

d. He was the actual owner, though he had the naked legal title taken in the name of Stamper, his agent, and when he procured his agent to convey the land to this defendant by the quit-claim deed, the same was in law and in effect the quit-claim deed of the principal, Grover T. Lamm, and that the plaintiffs claiming under Grover T. Lamm are estopped to deny the validity of his deed.

For a further defense, the defendant Ricard alleged: When she was a child 15 years of age, Grover T. Lamm seduced her and from that time until he had the deed executed to her and placed her in possession of the farm that he had cohabited with her. For and in consideration of past cohabitation and past injury to her when she was a child, he caused the deed to be executed in furtherance of an agreement to that effect between them. And if the deed did not execute their contract, she is entitled to have the same specifically performed. She accepted Stamper's deed to her in lieu of a fee simple deed without warranty which Grover T. Lamm executed and acknowledged and delivered to her. This she surrendered at his request so that his name would not appear in the conveyance to her. He assured her he had delivered a deed to Mr. W. A. Lucas which made her title unassailable.

The plaintiffs, by reply, denied the material averments of the answer and alleged in substance that the defendant Ricard is estopped to deny the title of Grover T. Lamm by having become a tenant; and that she and her family are now holding over as tenants. The plaintiffs' predecessor in title made no contract in writing to convey the land in controversy; that more than three years and more than 10 years have elapsed since the defendant's alleged cause of action accrued, and that the same is barred by the statute of limitations.

The defendant Free Will Baptist Orphanage filed answer admitting the allegations of the complaint and joined in the plaintiffs' prayer for relief. It denied the material allegations of the defendant's further defense.

Upon the trial, the plaintiffs introduced the following deeds: (1) From Nana Louise Parker, Annie Parker Phillips and husband, to R. A. Stamper, dated March 24, 1945; (2) from R. A. Stamper and wife to Grover T. Lamm, dated April 30, 1945, (this is plaintiffs' Exhibit No. 1); (3) quit-claim deed from R. A. Stamper and wife, dated September 7, 1946, to the defendant Ricard, the latter for the purpose of attack, (plaintiffs' Exhibit No. 4). The plaintiffs also introduced the will of Grover T. Lamm, dated March 30, 1950.

W. A. Lucas, a witness for the plaintiffs, testified on direct examination: He was Mr. Lamm's attorney and friend for more than 40 years. He is one of the executors under Lamm's will. He kept in his office a manuscript folder containing Mr. Lamm's papers. He represented Mr. Lamm in the purchase of the land in controversy; paid to Parker and Phillips the balance of the purchase price after deducting a small amount to satisfy judgments. The Parker and Phillips deed was made to R. A. Stamper, a real estate broker who acted as agent for Mr. Lamm. Stamper paid nothing toward the purchase price totaling $12,000, all of which was paid by Mr. Lamm, "and no part of it was paid by anybody else." Shortly after the conveyance Stamper and his wife executed and acknowledged a fee simple warranty deed conveying the farm to Grover T. Lamm. The deed, introduced as plaintiffs' Exhibit No. 1, was delivered to the witness either by Mr. Lamm or by Mr. Stamper at Mr. Lamm's direction. The deed was kept by the witness, unregistered, at Mr. Lamm's direction. The witness delivered the deed to the plaintiff, Virginia Lamm Hayes, who is an executrix of the will. She filed it for registration. The witness also had and kept in his possession the quit-claim deed from R. A. Stamper and wife to the defendant Ricard, which was introduced as plaintiffs' Exhibit No. 4. The witness delivered the deed to the grantee Ricard shortly after Mr. Lamm's death. The defendant filed it for registration at 10:15 a.m. on December 23, 1952.

The plaintiffs' counsel stated it was not their purpose to interrogate the witness about anything that transpired between him and his deceased client and between him and his testator, and on behalf of the plaintiffs he claimed the privilege of all communications between the witness and Grover T. Lamm on account of the relationship of attorney and client and on account of the further fact that Grover T. Lamm is now dead.

Defendant's counsel sought to cross-examine Mr. Lucas about the circumstances relating to the execution and delivery to him of the deeds, plaintiffs' Exhibit No. 1, from the Stampers to Lamm, and No. 4, from the Stampers to the defendant Ricard, about which he testified on direct examination. Upon the plaintiffs' objection, the court excluded the following evidence: Mr. Stamper or Mr. Lamm left with him plaintiffs' Exhibit No. 1 from Stamper to Lamm, and that he prepared a deed conveying the same tract of land from Lamm to the defendant Ricard; and that the deed was a fee simple deed without warranty; that Mr. Lamm duly executed the deed, duly acknowledged it and left it with the witness with the following memorandum in the handwriting and signed by Grover T. Lamm: "August 8, 1945. W. A. Lucas, Trustee. In case of death before this transaction is settled it is

my request that you settle it and have this deed put on record at once. Grover T. Lamm." Later on, Mr. Lamm took up this deed and placed in its stead the quit-claim deed from the Stampers to the defendant to be delivered to the defendant Ricard in case Mr. Lamm did not close the transaction before his death.

The witness knew that Mr. Lamm bought the land in question for the defendant and that she was in possession of it. The witness had no instructions as to the delivery of the deed from Stamper to Mr. Lamm except those given him at the time of its delivery; that is, that he was to have it recorded at the same time he had Lamm's deed without warranty to the defendant recorded. The purpose of the whole transaction was to have title to the farm placed in the defendant Ricard on condition he did not change his instructions, and he never did change them. "In discussing with me some objection Miss Williamson (the defendant Ricard) had about the deed from him to her that he didn't want the deed to be direct from him to Miss Williamson, anyway, and he would rather have it come some other way, and he discussed the question of the conveyance being made to some third person and have them convey it and as a solution he asked Mr. Stamper to execute a quit-claim deed inasmuch as he had never had the deed from Stamper to himself recorded, and that the transaction would be handled in that way; and that is the reason it was substituted for the other." . . . "He said this woman had lived on his farm since she was a rather young girl and that he had been going with her and having relations with her for many years and he felt probably he had kept her from marrying and having a family and home of her own, and it was on his conscience and he was trying to do for her something which would compensate her for the injury he thought he had already done her."

All the foregoing evidence developed on cross-examination was offered, objected to by the plaintiffs on two grounds: That the communications were privileged because of the relationship of attorney and client, and because they were personal transactions with Mr. Lamm, now deceased. The objections were sustained and all the evidence excluded. The exclusion of this testimony is the basis of assignments of error Nos. 10 to 30, inclusive.

On re-direct examination by plaintiffs' counsel, which was also taken in the absence of the jury, Mr. Lucas testified: "I think the general knowledge among his friends at all times pertinent to the controversy, that is, at the time of making his will and all other documents, that the defendant was his mistress . . . It was my understanding that the relationship of paramour and mistress continued for many years. One of the reasons that the transactions were handled as they were handled was to avoid having Grover T. Lamm's name appear on the public records in any connection with this woman."

At the conclusion of the plaintiffs' evidence the defendant Ricard moved for judgment of nonsuit and excepted to the court's refusal to grant it. She testified that she had been in possession of the farm since 1946 and lived on it until about two years ago when she placed her father and mother in possession as her tenants; that she had a deed in her possession for the farm other than the Stamper deed. The court, on objection, refused to permit her to testify with respect to the deed without warranty which Mr. Lamm delivered to her and which she surrendered to him so that the Stamper deed could be substituted for it. During the argument over the admissibility of this evidence, the defendant introduced before the court the record of a previous trial of this cause (resulting in a mistrial in November 1954) at which the plaintiffs called her as an adverse witness and examined her with respect to the transactions with Mr. Lamm concerning the deeds, as well as their relationship. The court considered this prior adverse testimony but sustained the objections and refused to permit the defendant to testify to the transactions. The defendant duly excepted.

The defendant offered R. A. Grady as a witness who would have testified but for the plaintiffs' objection, which the court sustained, that he wrote policies of insurance on the buildings located on the Phillips property. First the policies were issued to Grover T. Lamm who gave instructions about how the policies should be issued. Later on, Mr. Lamm had the policies issued in the defendant Ricard's name and part of the time Mr. Lamm paid the premiums and part of the time Eunice paid them. "Mr. Lamm told me that Mr. Will Lucas had a deed that he had executed to Eunice and at all times he expressed to me that the property was Eunice's." The defendant excepted to the court's exclusion of the testimony.

Numerous other witnesses offered to testify to statements made by Mr. Lamm to the effect that the farm belonged to Eunice and that Mr. Lucas had her deed. All this evidence was excluded on objection and in each instance the defendant excepted. Tax records of Grover T. Lamm for the years 1949 and 1951 were introduced, showing he did not list the farm for taxes.

At the conclusion of all the evidence the court, on motion of the plaintiffs, withdrew the case from the jury and rendered judgment: (1) That defendant Ricard's claims, counter-claims and alleged causes of action be nonsuited; (2) that the cloud upon the plaintiffs' title be removed and to that end the defendant's quit-claim deed be canceled of record; (3) that subject to the terms of the will of Grover T. Lamm the plaintiffs and the defendant Free Will Baptist Orphanage are the owners and entitled to the possession of the land in controversy; (4) that the defendant Ricard be removed from possession; (5) that the

plaintiffs recover of the defendant Ricard the sum of $2,907.01, rents and profits during the time she was in possession. (The above amount was agreed upon and stipulated by the parties in the event of recovery by the plaintiffs.)

To the various rulings of the court and the judgment in accordance with the rulings, the defendant Ricard duly excepted and appealed, assigning errors.

Gardner, Connor & Lee,
By: Cyrus F. Lee, for defendant Eunice W. Ricard, appellant.
Lamb, Lamb & Daughtridge,
By: V. F. Daughtridge,
Cooley and May,
By: Hubert E. May, for plaintiffs, appellees.

HIGGINS, J. At the outset it is necessary to determine whether this action is simply to remove cloud upon title or whether it is a suit in ejectment. The nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought.

The plaintiffs alleged they are owners and entitled to possession of the land in controversy; that the defendant claims under a void conveyance; and that she is in wrongful possession and is unlawfully receiving the rents and profits. They asked that they be declared to be the owners; that the defendant's conveyance be canceled; that her possession be declared to be wrongful and that she be ousted and be required to account for rents and profits; and that a receiver be appointed pending the controversy.

The defendant denied the plaintiffs' claim of ownership, alleged title in herself and that she is lawfully in possession and lawfully receiving the rents and profits.

Analysis of the pleadings fixes this as an action in ejectment. *Baldwin v. Hinton,* 243 N.C. 113, 90 S.E. 2d 316; *Brite v. Lynch,* 235 N.C. 182, 69 S.E. 2d 169; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Vick v. Winslow,* 209 N.C. 540, 183 S.E. 750; *Satterwhite v. Gallagher,* 173 N.C. 525, 92 S.E. 369; *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Hines v. Moye,* 125 N.C. 8, 34 S.E. 103; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. We quote from the *Baldwin case, supra:* ". . . but where, as here, the defendants are in actual possession and plaintiffs seek to recover possession, the action is in essence in ejectment."

The cases cited and relied upon by the plaintiffs to sustain their argument that this is simply an action to remove cloud upon title do not sustain their position. *Ely v. New Mexico and Arizona R. R.,* 129 U.S.

291, decided by the Supreme Court of the United States, was an action to remove cloud upon title. The plaintiff alleged (1) it was the owner; (2) the defendants claimed an interest adverse to the plaintiff; (3) that the defendants owned no interest. The plaintiff asked (1) that defendants be required to set forth their claim, (2) that a decree be entered that plaintiff's title is good and that the defendants have no interest, (3) that an injunction issue barring the defendants asserting any further claim. The defendants demurred and the demurrer was sustained by the Supreme Court of Arizona. The Supreme Court of the United States reversed. The allegations of the complaint, admitted by the demurrer, are only that the plaintiff is owner and that defendants actually have no interest but are attempting to assert an interest.

In *Pressly v. Walker*, 238 N.C. 732, 78 S.E. 2d 920, the plaintiffs alleged that as trustees of the Reformed Presbyterian Synod they are entitled to hold church property for the benefit of local congregation and that after a division in their Sardis Church the defendants and others took possession and claimed ownership and use of the property; that their possession is wrongful. The defendants demurred. Judge Pless overruled the demurrer and on appeal this Court affirmed. The allegations of the complaint, deemed admitted, were sufficient to entitle the plaintiff to remove the cloud.

In the case of *Barbee v. Edwards*, 238 N.C. 215, 77 S.E. 2d 646, the plaintiff brought an action to remove as a cloud upon his title a trustee's deed made 18 years after a purported sale under a deed of trust. The plaintiff claimed to have paid the amount due before the sale. At the close of the plaintiff's evidence a judgment of involuntary nonsuit was entered. The plaintiff's cause of action was based on the invalidity of the trustee's deed on the ground the purported sale was made after the amount due the *cestui que* trust had been paid in full and the right to sell thereby destroyed. This Court reversed the judgment of nonsuit and in the opinion, *Justice Johnson* said: "Here the plaintiff neither alleges nor attempts to prove that the defendant is in possession. The defendant's possession, if any there be, is left for the defendant to prove under his special pleas. *The plaintiff asks nothing by way of accounting and redemption.*" (Emphasis added.) His showing entitled him to proceed under G.S. 41-10 to remove the cloud.

In the case of *Speas v. Woodhouse*, 162 N.C. 66, 77 S.E. 1000, the plaintiff sought to remove cloud upon title and to restrain waste. The dispute arose over the legal effect of a partition deed executed to a husband and wife by the latter's brother in the division of land they inherited from their father. The plaintiff claimed as heir of the deceased wife. The defendant, the surviving husband, claimed by right of survivorship. This Court held: "The deed did not convey and create

any new estate, but only operated to sever the unity of possession between the tenants in common. . . . It (the land) constituted the wife's separate estate and she could not be deprived of it by the fact that in a deed from her brother her husband was named as co-owner," and that the plaintiff was entitled to have the deed removed as a cloud upon her title.

Analysis of the foregoing cases cited by the plaintiffs serves to emphasize the fact that the case at bar is more than an action to remove a cloud upon title—that it contains all the essentials of an action in ejectment. In this, as in all ejectment cases, the plaintiffs must recover on the strength of their own title.

"Where, in an action for the recovery of land and for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to the title of the plaintiff and as to the trespass by the defendant—the burden of proof as to each being on the plaintiff. *Mortgage Co. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642." "In such an action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin, supra." Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627.

In this case the burden of establishing title, therefore, is on the plaintiffs. In discharging the jury, entering judgment, declaring the plaintiffs to be the owners, and in ousting the defendant from possession of the land in dispute, the able trial judge committed error which makes it necessary to send the case back to the Superior Court of Wilson County for a jury trial. Ordinarily, it would be unnecessary to say more. However, we deem it not inappropriate to discuss some of the other questions raised by the assignments of error in the hope that the discussion will facilitate the trial.

More than 300 exceptions were taken to the exclusion of evidence. Manifestly, to discuss them *seriatim* would extend this opinion beyond reasonable bounds. The most that can be hoped for is to point out for the guidance of the attorneys and the court somewhat indefinite boundary lines separating competent from incompetent evidence. Left, however, to the trial court is the responsibility of ruling on objections to specific questions and answers as the occasion may require.

The plaintiffs examined Mr. Lucas as to the purchase of the Phillips farm by Mr. Lamm and the payment of the full purchase price by him, "and that no part of it was paid by anyone else." He testified he kept a file of Mr. Lamm's papers. Among others, plaintiffs' Exhibit No. 1, the deed from Stamper to Lamm; and plaintiffs' Exhibit No. 4, the quit-claim deed from the Stampers to the defendant Ricard. The witness further testified he delivered Exhibit No. 1 to the plaintiff, Mrs.

Hayes, and Exhibit No. 4 to the defendant Ricard. He testified that Stamper was a real estate broker and acted as agent of Mr. Lamm.

At the time of the purchase of the farm, payment of the purchase price, the execution and delivery of the deed, Mr. Lucas was attorney for Mr. Lamm. At the time he testified in the trial, he was one of the executors of Mr. Lamm's will. When the plaintiffs elected to examine this witness about the purchase, payment of the purchase price, the execution and delivery of the deeds, that Stamper acted as agent, they waived their right to keep their communications privileged. It became the right of the defendant to cross-examine the witness and to introduce pertinent evidence of other witnesses relating to those matters. The rule, with citation of authority, is thus stated by Wigmore: "A privileged person would seldom be found to waive if his intention not to abandon could alone control the situation. There is also the objective consideration that when his conduct touches a certain point of disclossure, fairness requires that his immunity shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must be final. . . .

"The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all communications to the attorney on the same matter; for the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter is to abandon it in the former." Wigmore on Evidence, Vol. 8, 3rd Ed., sec. 2327.

The examination of Mr. Lucas, attorney and executor, with respect to the purchase of the Parker-Phillips farm, etc., was likewise a waiver of G.S. 8-51 with respect to the matters about which he testified. However, the waiver did not extend to other and independent transactions. *Sanderson v. Paul*, 235 N.C. 56, 69 S.E. 2d 156; *Batten v. Aycock*, 224 N.C. 225, 29 S.E. 2d 739; *Walston v. Coppersmith*, 197 N.C. 407, 149 S.E. 381; *Pope v. Pope*, 176 N.C. 283, 96 S.E. 1034; *Phillips v. Land Co.*, 174 N.C. 542, 94 S.E. 12.

It follows, therefore, that the trial court committed error in excluding so much of the cross-examination of the witness Lucas as related to the transaction about which he testified on direct examination. The direct examination made it competent for the defendant Ricard to testify and to present other evidence with respect to the transaction involved in Mr. Lucas' direct testimony. That waiver continues until the end of the case. "A waiver at one stage of the trial should be final for all future stages." Wigmore on Evidence, Vol. 8, 3rd Ed., sec. 2328.

Mr. Lucas stated the full consideration for the farm was paid by Mr. Lamm "and no part was paid by anybody else." The plain impli-

cation is the defendant Ricard paid nothing. With that statement in evidence against her she had the right to show what consideration she paid. The law recognizes that under certain conditions the term "consideration" sufficient to support a conveyance is not confined exclusively to the payment of money. If Mr. Lamm recognized he owed a debt to the defendant and it was his intention to pay the debt by having a tract of land conveyed to her, and she accepted the land in satisfaction of the debt, such would be sufficient consideration for the conveyance. Mr. Lucas would have testified on cross-examination, if permitted, that prior to the execution of the deed to the defendant Mr. Lamm executed a will in which he made substantial bequest for the defendant's benefit; and that after the deed was executed and the defendant placed in possession of the farm the will was changed and the bequest left out. The evidence was competent as tending to show that Mr. Lamm recognized his obligation to the defendant and that the obligation was discharged by the conveyance.

The record discloses that the plaintiffs adversely examined the defendant Ricard for the purpose of obtaining evidence for use in the trial as provided in G.S. 1-568.1 to 1-568.16. That examination is a waiver of the protection afforded by G.S. 8-51 to the extent that either party may use it upon the trial. *Andrews v. Smith*, 198 N.C. 34, 150 S.E. 670.

Likewise, if the plaintiffs at the former trial called the defendant Ricard as an adverse witness, examined her in detail about her relations with Mr. Lamm as the record tends to disclose, such examination also would seem to be a waiver of G.S. 8-51 and would open the door for the defendant to testify in another trial in respect to the matters about which the plaintiffs examined her. They cannot force her to disclose facts favorable to them at one stage and thereafter deny her the right to disclose them when pertinent to her defense at another stage. *Norris v. Stewart*, 105 N.C. 455, 10 S.E. 912; *Meroney v. Avery*, 64 N.C. 312.

The defendant Ricard alleged that by the acts, conduct and deeds of Grover T. Lamm the plaintiffs are estopped to deny her title and right to possession of the farm described in her deed; and that they are likewise estopped to assert and set up, in opposition to her title, the deed from the Stampers to Mr. Lamm. The plaintiffs claim as devisees under Mr. Lamm's will. They therefore stand in his shoes. They can assert no better claim than he could were he the plaintiff. *Coward v. Coward*, 216 N.C. 506, 5 S.E. 2d 537. "He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title and thus takes it with the burden attached." *Watford v. Pierce*, 188 N.C. 430, 124 S.E. 838.

The evidence offered and excluded tends to show that Stamper, agent, held only the naked legal title; that Grover T. Lamm was the equitable

owner. So that when Stamper and wife, under the direction of Lamm, executed the quit-claim deed to the defendant Ricard the deed in legal effect became Lamm's deed and may be treated as such.

The defendant Ricard offered evidence of matters *in pais* which tended to support her claim of estoppel. Its exclusion was error.

Reversed.

STATE v. EMMA SIMPSON.

(Filed 26 June, 1956.)

1. Criminal Law §§ 52, 91—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and contradictions and discrepancies in testimony of the State's witnesses are for the jury to resolve.

2. Criminal Law § 31d—

The assumption in a hypothetical question of the existence of a vital fact not supported by evidence, is ground for a new trial.

3. Homicide § 25—Circumstantial evidence held insufficient to be submitted to the jury in this prosecution for murder.

The evidence tended to show that deceased had two bullet wounds in his body, that at least two or three minutes elapsed between the time the first and second shots were fired, and that a person other than defendant fired the first shot. The circumstantial evidence was sufficient to be submitted to the jury as to whether defendant had the pistol when the second shot was fired and also that the second shot penetrated the right side of the victim's chest, but there was no evidence as to when the deceased fell or when he died, or which of the two wounds caused death, and the evidence excluded any assumption that defendant and the person who fired the first shot acted in concert. *Held:* Nonsuit should have been allowed for want of any substantial evidence that the shot fired by defendant caused or contributed to the death, whether the deceased was dead when the pistol was fired the second time being left in the realm of conjecture.

4. Homicide § 16—

In a prosecution for homicide arising out of a shooting, the State must prove that the shot fired by defendant was a proximate cause or a concurring or an accelerating cause of the deceased's death.

APPEAL by defendant from *Carr, J.*, April Term, 1956, ROBESON.

Criminal prosecution based on indictment charging Northrup McNair and Emma Simpson with the first degree murder of Danzy Simpson, wherein the State asked for no greater verdict than guilty of murder in the second degree.

At their trial at April Term, 1955, McNair was represented by counsel. Defendant had no counsel. At the close of the State's evidence, upon motion of his counsel, the case was nonsuited as to McNair. The court, this defendant being without counsel, entered in her behalf a motion for judgment of nonsuit. The motion was overruled. Thereupon, defendant testified in substance that McNair shot and killed her husband. The State then used McNair as its witness against defendant. No motion for judgment of nonsuit was entered in this defendant's behalf at the close of all the evidence. As to this defendant, there was a verdict of guilty of murder in the second degree. From the judgment pronounced, she appealed to this Court. A new trial was awarded for the reasons stated in *S. v. Simpson*, 243 N.C. 436, 90 S.E. 2d 708. Whether, as to her, judgment of nonsuit should have been entered at the close of all the evidence, was not considered. No motion therefor had been made.

At her second trial, this defendant was represented by counsel. She did not testify. The evidence consisted solely of that offered by the State. Summarized, it is set out below.

Danzy Simpson, the deceased, and his wife, Emma Simpson, the defendant, lived near St. Pauls in a house of at least two rooms, referred to as the front room and the back room or kitchen. A "homemade" door was between the two rooms. Swindell Black and Aleen Black, his wife, and their 4-year-old son, were then living with the Simpsons. They had been there about three weeks. Aleen Black is McNair's sister.

At an undisclosed hour on Friday, 18 February, 1955, Danzy came home from his work. He wanted to stay home and take a bath. Emma, Swindell and Aleen wanted to go to Tink Ray's place, a piccolo joint, on the other side of town. They left Danzy at home, with the 4-year-old boy, and walked the mile and a half to Tink Ray's place. Nothing had occurred at the Simpson home to indicate friction or ill feeling.

They met McNair and Dell Lewis, whom they knew, at Tink Ray's place. Nothing of significance occurred there, so far as the evidence discloses, unless it be McNair's admission that he then had with him his loaded pistol, concealed in his hip pocket. Dell agreed to take them home in his car. They left shortly after 10:00 p.m. Dell drove first to the house of McKinnon, his cousin, where all got out and stayed awhile. Nothing of significance occurred at McKinnon's house, so far as the evidence discloses. Upon leaving McKinnon's house, near midnight, Dell drove up to and beyond the Simpson house and stopped. Swindell and Aleen had been riding in the back seat. Dell was driving, Emma was to his right, McNair was to her right, these three on the front seat. McNair got out and made way for Emma to get out. The house was

dark. Danzy and the 4-year-old boy were in bed together. It is noted that all of these persons, except McNair, originally a codefendant, are usually referred to herein by their given names.

Dell, McNair and Swindell testified for the State. As to the facts stated above, there is no material conflict in their testimony. As to what occurred thereafter, there are contradictions and discrepancies.

1. *Entry into the Simpson house.* Swindell's version: Emma went to the door and called Danzy. He did not answer. The front door was fastened on the inside with a crosspiece latch. Emma went to the woodpile. There she got an axe and came back and struck the front door and knocked it open. She went into the house, carrying the axe with her. McNair's version: Emma went straight to the woodpile and got the axe, omitting any reference to her going first to the front door and calling Danzy. Dell's version: He saw no axe then. Emma went straight to the back of the house, went in the back door, then came through the house and opened the front door from the inside.

2. *Emma's quarrel with Danzy.* Emma turned on the ceiling light in the front room. She called to those at the car to come in. They did so. Meanwhile, Emma had gone to the bed in which Danzy and the boy were lying. The cover was up to Danzy's waist. He was wearing long-handle underwear, nothing else. Swindell's version: Emma was upbraiding Danzy for not opening the door, he protesting that he had been asleep; also, she was saying *something* to him about money. Dell's version: Emma was saying that Danzy had some money she hadn't got and had to have. McNair's version was in accord with that of Dell, with the addition that Emma was "cussing" him for a "Damn s.o.b." All agree that she was on top of Danzy, beating him in the face with her fists; that they tussled on the bed, he trying to get her off of him; and that, finally, she got off or he pushed her off. She then went into the kitchen, closing the door between the two rooms. Meanwhile, Danzy, clothed as stated, had gotten up and was standing in the front room near the kitchen door.

3. *The barrage from the kitchen.* From the kitchen, Emma struck the door with an axe, the blade going through the door. Danzy grabbed the protruding axhead and jerked the axe through the split in the door. Thereafter, all agree, Emma, from the kitchen, threw glass jars, plates, cups, etc., into the front room, and while this was in progress the one light, in the ceiling of the front room, went out. Swindell's version: Emma told everybody to leave before she went into the kitchen; also, the first jar thrown by her knocked out the burning light bulb. Dell's version: Emma, upon opening the kitchen door and just before the barrage of dishes, etc., the light in the front room being on, screamed: "All of you s.o.b.'s get out"; also, shortly thereafter the light went out. Mc-

Nair's version: Emma threw dishes, etc., for two or three minutes before the light went out; also, when the light went out, Emma said: "All of you s.o.b.'s get out of here."

4. *The first shot.* Dell's version: When the light went off, he went straightway to the front door, some 6½ to 7 feet from where he had been. No one else was there. He heard a pistol fire as he was putting his foot on the outside step. Shortly after Emma and Danzy had started fussing, McNair was standing there in the front room, with his pistol in his hand. Nobody had done anything to him. Swindell's version: When the pistol fired, he was on his way from the front room into the kitchen to get a new light bulb. McNair's version: He got his pistol out when Emma *and* Danzy told him to get out and hit him; this was about 15 minutes after he got there; he was about "middleway" the room; he started to leave; he was about two feet from the front door when Emma *and* Danzy assaulted him, Emma then having an axe and Danzy a chair; he was hit on the head by the chair and the axe came down on the chair, knocking him down, addling him. When he was so hit the pistol fired, while in his hand, without any intention on his part to fire it; it fired once while in his possession; he got up, this taking about a minute, and left; he didn't see Dell or Dell's car; the pistol fired only once while he was there; he walked to his home, about a mile; he first missed his pistol when he got home; he had left the Simpson house before the light came back on. He testified: "When I left the house, Danzy was standing near the bed."

5. *The second shot.* Dell and McNair both testified that they heard only one shot. Dell left the premises before McNair. Dell's version: Leaving the house, he went directly to his car. The windows were up. In starting his car, it "made a noise like a car ordinarily does." He backed it around, causing his car lights to shine against the front door. It was open. Emma was standing in the door. McNair, standing on the ground or on the step, was facing her. His hands were braced against the doorframe. He could see only the back of McNair's hands. He saw no pistol, heard no conversation. In this condition of affairs, he drove away. Only Swindell's testimony bears expressly on the second shot. Swindell's version: He was on his way back from the kitchen to the front room when the pistol fired a second time; two or three minutes elapsed between the two shots; after the light went off, Emma came into the front room, but he did not hear her say anything; his testimony is silent as to what occurred, if anything, between Emma and Danzy, on the one hand, and McNair on the other; McNair was standing in the door when he last saw him before the light went out; after the second shot, he managed to remove the broken light bulb and insert the new one, so that again there was light in the front room.

6. *Danzy's death revealed.* The scene, when the light came on, is described by Swindell. Dell and McNair were not there. The little boy was in bed. Aleen, Swindell's wife, was on "the long chair in there; she was asleep; she was drunk to start with. She was asleep when it happened. She was still asleep when the lights went out." The front door was open. It opened inward. Emma was coming from behind this door; she had the pistol in her hand, wrapping it in a grey (identified) shirt. She was from five to eight feet from Danzy. He was lying on the floor, dead. He was spread out, "with his feet right up 'side of the door"—his feet near the front door. Danzy then had on a brown (identified) shirt and a pair of overalls. One suspender of the overalls was on, the other loose. Not over two buttons of the shirt were fastened.

7. *Investigation by officers.* About 2:00 a.m. Saturday, 19 February, 1955, Deputy Sheriff Hendrix, a State's witness, and two others, started an investigation. The record does not disclose who sent for them. They "met" Emma and Swindell, who were standing in a neighbor's yard some 300 yards from the Simpson home. When they drove up, Emma started towards the car. She handed to Hendrix the (identified) "grey looking piece of a shirt." (Hendrix testified: "Emma stated Northrup shot her husband and there was the gun." Since the witness had not been asked what, if anything, Emma said, the court properly instructed the jury to disregard Emma's statement.) Hendrix opened partly the piece of shirt and found the .22 pistol, the death weapon. Later, upon close examination of the pistol, he found two empty (fired) cartridges, with odor of freshly burned powder. Going to the Simpson house, he found the light on in the front room. Broken dishes and like debris were scattered over the floor. Danzy's position on the floor was substantially as described by Swindell, his feet being approximately two feet inside the front door. Danzy had on a pair of overalls, the bib not fastened; the brown (identified) shirt, the second button from the bottom being the only one fastened; underneath the shirt he had on white, long, winter underwear. Under the central portion of Danzy's body was the latch off of the front door, "a piece of tobacco stick about 12 inches long with a nail in the center." Approximately half way from his belt to his shoulders he found an axe, the handle being under his left shoulder. As to wounds: There was a small spot of blood and a hole in his underwear; when he pulled the underwear back he saw, opposite the hole, a bullet wound, with blood around it, about three inches from the point of his shoulder and approximately an inch to an inch and a half down from the top of his shoulder; there was no corresponding hole in the brown shirt; about three inches below his right armpit on the right side of Danzy's chest, he discovered another bullet wound, with blood around it; opposite this wound there was a bullet

hole both in the underwear and in the brown shirt; there were powder burns around this hole. *With a pencil,* he probed the two wounds. Inserting the pencil in the shoulder wound, it went straight in, approximately an inch and a half and then struck bone. *He could not tell where the bullet lodged.* Then, probing the chest wound, "the pencil went straight into the body from the outside, turned into the inside of the chest wall, went between two ribs, . . . indicating that the bullet had pierced the inner wall of the chest." *He could not tell where the bullet lodged.* Both bullets lodged somewhere in Danzy's body.

8. *Miscellaneous.* (1) Swindell testified that he had been drinking. He testified that Emma had not been drinking, so far as he knew. Except as to Aleen, Swindell and Emma, no inquiry was made as to whether the others had been drinking or were drunk. (2) As its final evidence, the State recalled Swindell. He *then* testified that the next morning (Saturday) he had a conversation with Emma in which Emma said: ". . . if I tell anything on her or talk, she would get me later; if I tell anything about what happened. She did not tell me how she would get me, nor what she would get me with."

9. *Cause of death.* The State offered Dr. D. E. Ward, a medical expert. He had not at any time seen Danzy's body. His testimony on direct examination relates solely to a hypothetical question and his answer, to wit, "Q. . . . Doctor, if this jury should find from the evidence and beyond a reasonable doubt that on or about February 19, 1955, Danzy Simpson, male person, apparently in good health, was shot with a .22-caliber pistol, that the bullet entered his right side at a point some few inches immediately below the center of his armpit and ranged straight into his chest cavity, and that blood exuded from that wound, and that Danzy Simpson then fell down and died—if the jury should find that beyond a reasonable doubt from the evidence—do you have an opinion satisfactory to yourself as to what the cause of death of Danzy Simpson was? A. Yes, I do. Q. What is your opinion as to the cause of death? A. My opinion would be that the man died from internal hemorrhage due to rupture or puncture of blood vessels, or heart, in the chest cavity." Upon cross-examination, the doctor was first advised as to the shoulder wound. With reference thereto, he testified as follows: "Of course, we don't know where the bullet went after it hit the bone. It is entirely possible that the bullet could have ricocheted. If one probed and did not find the bullet, it is possible and more than likely that the bullet did ricochet. Assuming as a fact that the probe reached the bone and the bullet was not located, then it is more than likely that the bullet would have ricocheted. Such ricocheted bullet could have caused death. If such bullet entered the body of the deceased under the circumstances we have just assumed, and

another bullet entered the body of the deceased under the circumstances described by the Solicitor in his hypothetical question, the only way to determine definitely which bullet killed the deceased would be to perform an autopsy. You would want to know the position of each bullet."

Based upon the foregoing testimony, the jury returned a verdict of guilty of murder in the second degree. Judgment was pronounced thereon, imposing a prison sentence of not less than 20 nor more than 25 years, from which defendant appealed, assigning errors.

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

Charles G. McLean for defendant, appellant.

BOBBITT, J. These facts are undisputed. The death weapon was McNair's .22-caliber pistol. It fired twice. Two bullets lodged in Danzy's body. McNair had the pistol when it fired the first time.

These questions arise: Did defendant have the pistol when it fired the second time? If so, under what circumstances did it fire? Which shot, the first or the second, caused Danzy's death?

Defendant demurred to the evidence and moved for judgment as of nonsuit. G.S. 15-173. On such demurrer and motion, the evidence must be considered in the light most favorable to the State. Contradictions and discrepancies in the testimony of State's witnesses are to be resolved by the jury. *S. v. Robinson*, 229 N.C. 647, 50 S.E. 2d 740.

No autopsy was performed. No medical expert examined Danzy's body. Where each bullet ultimately lodged is not disclosed. Assuming the competency upon this record of the testimony of the deputy sheriff, of undisclosed qualifications as to probes made by him and what was indicated thereby, the evidence is somewhat less than satisfactory in the investigation of a matter of such great consequence. It indicates the wisdom of such legislation as Ch. 972, Session Laws of 1955, relating to Postmortem Medicolegal Examinations.

Furthermore, the evidence is silent as to fingerprints on the pistol. Some time after the second shot, and after Swindell had replaced the light bulb and there was light in the front room, Emma was wrapping the pistol in a piece of grey shirt. No one saw the pistol in her possession before that time. She made no attempt then or later to conceal it. Presumably, the State contended that she was wiping her fingerprints from the pistol. If there were *no* fingerprints thereon, this contention would have support; for, had she wiped fingerprints from the pistol, McNair's fingerprints as well as her own would have been removed. On the other hand, if investigation had disclosed McNair's fingerprints on the pistol and these alone, this would have been a strong circum-

stance in Emma's favor. Nothing was done to aid the jury as to this significant aspect of the case.

Considering the circumstantial evidence in the light most favorable to the State, under the rule as recently stated in *S. v. Stephens, post,* 380, we are constrained to hold that the evidence was sufficient to be submitted to the jury as to whether Emma had the pistol when the second shot was fired. Credible or incredible, there is evidence tending to exclude the hypothesis that one of the others in the room then had the pistol. McNair testified that he must have dropped it, when it fired the first time, albeit he knew it not until he had reached his home.

Moreover, applying the same rule, we are constrained to hold that the evidence was sufficient for submission to the jury as to whether the second shot penetrated the right side of Danzy's chest. Credible or incredible, all witnesses have testified that when the light went out in the front room Danzy was wearing only the long underwear. The State's theory is that Danzy put on the overalls and brown shirt *after* the light went out and *after* he had been wounded by the first shot. It taxes credulity to the utmost to picture Danzy, while wounded and under circumstances of violent commotion and of utter darkness, maneuvering to locate and to put on (at least partially) his overalls and brown shirt. The scene was such that one would not suppose that he was then moved by a sense of delicacy because insufficiently clad. Even so, the evidence posed a jury question.

The hypothetical question assumed a finding by the jury beyond a reasonable doubt of this vital fact, namely, "that Danzy Simpson then fell down and died." There is no evidence as to when Danzy fell or as to when he died, that is, within the period between the first shot and the time the light was replaced in the front room. All that the evidence discloses is that when the light was replaced, some time after the second shot fired, Danzy was on the floor, dead, with two bullets lodged in his body. True, McNair ventured to testify that when he left the house, "Danzy was standing near the bed." With the room in complete darkness, this would indicate extraordinary vision. The location of the bed, with reference to the front door, is not disclosed. And be it remembered that McNair's testimony is that he was two feet from the front door when Emma and Danzy assaulted him and the pistol fired the first time. However that may be, the undisputed testimony of Swindell is that two or three minutes elapsed between the first and second shots; and Swindell gave no testimony as to when Danzy fell or under what circumstances. Incorporation in the hypothetical question of an assumed finding as to this vital fact, of which there was no evidence, would be ground for a new trial. *S. v. Holly,* 155 N.C. 485, 71 S.E. 450; Stansbury, North Carolina Evidence, sec. 137.

However, we have reached the conclusion that defendant's demurrer to the evidence should have been sustained and the case dismissed as of nonsuit.

There is no evidence that Emma and McNair were acting in concert. *S. v. Barber,* 197 N.C. 554, 149 S.E. 857. The testimony of McNair expressly negatives any such idea. His testimony is positive that both Emma and Danzy ordered him out of their house and were actively attacking him to make him leave. An appreciable period of time elapsed between the two shots, if the evidence is considered in the light most favorable to the State. According to McNair, he was out of earshot when the pistol fired the second time. The two shots were independent of each other.

Of course, if the second shot was the sole cause of Danzy's death, or was a contributing proximate cause thereof, or accelerated his death, the case against this defendant would rest on different principles. *S. v. Scates,* 50 N.C. 420; *S. v. Hambright,* 111 N.C. 707, 16 S.E. 411; *S. v. Medlin,* 126 N.C. 1127, 36 S.E. 344; *S. v. Everett,* 194 N.C. 442, 140 S.E. 22. But here, the question is whether Danzy was dead or alive when the pistol fired the second time.

It was incumbent upon the State to establish that the bullet wound inflicted when the pistol fired while in possession of defendant was the proximate cause or a concurring or an accelerating proximate cause of Danzy's death. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; *S. v. Everett, supra.* We are constrained to hold that the evidence adduced by the State, which discloses that the medical expert could not determine in the absence of an autopsy which of the two wounds caused death, and in the absence of evidence as to when Danzy died or as to when and under what circumstances he fell to the floor, leaves in the realm of conjecture the question as to whether Danzy was dead when the pistol fired the second time. *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Carter,* 204 N.C. 304, 168 S.E. 204. Whatever else it may be, it is not criminal homicide to shoot a dead body.

Having reached this conclusion, we need not consider whether the circumstantial evidence was sufficient to warrant the instructions to the jury as to the presumptions that arise when one person *intentionally* shoots another and thereby proximately causes his death. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

It seems appropriate to observe that no serious harm would likely have occurred were it not for the fact that the loaded pistol, then concealed in his hip pocket, was brought into the Simpson house by McNair. According to Dell's testimony, McNair had it in his hand soon after the original fuss between Emma and Danzy had started. It

seems natural that both Danzy and Emma should want him out of the house immediately. Whoever had the pistol when it fired the second time, McNair was responsible for its presence and availability if not for its use.

Reversed.

REBECCA M. BLEVINS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM W. BLEVINS, v. WILLIAM H. G. FRANCE, NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., JAMES F. CHESTNUTT, DIXIELAND SPEEDWAYS, INC., AND J. &. W. CORPORATION.

(Filed 26 June, 1956.)

1. Games and Exhibitions § 4—

Evidence to the effect that defendants were engaged in the business of promoting, arranging and conducting automobile stock car racing, that the race in question was started while intestate's car was stalled on the track, and that the starting officials knew, or should have known, of the perilous and helpless condition of intestate, *is held* sufficient to be submitted to the jury on the question of defendants' concurrent negligence.

2. Same: Negligence §§ 4½, 11—

Evidence that officials of a stock car race started a race inadvertent to the fact that intestate's car was stalled on the track is insufficient to establish wilful or wanton injury so as to preclude the defense of contributory negligence.

3. Negligence § 4½—

An act constitutes wilful negligence when it involves a deliberate purpose not to discharge some duty assumed by contract or imposed by law and necessary to the safety of the person or property of another; it is wanton when done of wicked purpose or in reckless indifference to the rights and safety of others.

4. Negligence § 19c—

When plaintiff's own evidence establishes defendants' plea of contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, nonsuit is proper.

5. Negligence § 11—

Contributory negligence need not be the sole proximate cause of injury or death in order to bar recovery, but suffices for this purpose if it be a proximate cause or one of them.

6. Same—

A person *sui juris* is under duty to use ordinary care for his own protection, the degree of care being commensurate with the obvious danger.

7. Same—

A party may not recover for injuries resulting from a hazard which he helps to create.

8. Negligence § 14½: Games and Exhibitions § 4—

Where the car of a participant in a stock car race, while following the lead car around the track preliminary to the race, stalls near the first bend, and, the motor being so rebuilt that a battery could not turn it over, is restarted by being pushed with another car, and stalls again about the middle of the back stretch, and thus remains in a helpless condition until struck by one of the racing cars, *held* the negligence of the driver in continuing to circle the track after his motor stalled the first time, instead of driving to a safety zone, contributed to the emergency, and thus precludes the application of the docrine of sudden emergency.

9. Negligence § 11: Games and Exhibitions § 4—Doctrine of rescue held inapplicable under the evidence in this case.

Where the car of a participant in a stock car race, while following the lead car around the track preliminary to the race, stalls near the first bend, and, the motor being so rebuilt that a battery could not turn it over, is restarted by being pushed with another car, and stalls again about the middle of the back stretch, and thus remains in a helpless condition until struck by one of the racing cars, *held* the contention that its driver stayed in the car after it stalled the second time in an endeavor to get it off the track and thus avoid the peril to the other racers, and that therefore his failure to leave the car should be governed by the doctrine of rescue, is untenable in the absence of evidence as to whether in fact he did remain in the car in the hope of getting it pushed off, or whether he tried to get out of the stalled car and was struck before he had time to do so.

10. Negligence § 19c: Games and Exhibitions § 4—Contributory negligence of participant in stock car race held to bar recovery for his death in collision.

Where the car of a participant in a stock car race, while following the lead car around the track preliminary to the race, stalls near the first bend, and, the motor being so rebuilt that a battery could not turn it over, is restarted by being pushed with another car, and stalls again about the middle of the back stretch, and thus remains in a helpless condition until struck by one of the racing cars, *held* the negligence of the driver in continuing to circle the track after his motor stalled the first time, instead of driving to a safety zone, when he knew the start of the race was imminent, discloses contributory negligence on his part as the sole reasonable conclusion, and nonsuit was proper in an action to recover for his death in the collision.

11. Evidence § 8: Torts § 9a—

Whether a release from liability in consideration of permission to enter an automobile stock car race and in consideration of benefits for injury or death under the plan provided by the promoters of the race, bars recovery for the death of a participant killed in a collision during the race, is a matter of affirmative defense, upon which defendant promoters have the

burden of proof, and nonsuit may not be entered on such affirmative defense when it is not established by plaintiff's evidence.

12. Games and Exhibitions § 1—

An automobile stock car race held in conformity with Chapter 177, Session Laws of 1949, is a lawful contest.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Williams, J.*, January Civil Term 1956 of CUMBERLAND.

Civil action to recover damages for an alleged wrongful death.

Plaintiff's evidence tended to show these facts:

On the night of 19 September 1953 a 220 miles Sportsmen's Modified Stock Car Race was conducted at the Raleigh Speedways by defendant J. & W. Corporation, which had a lease from Dixieland Speedways, Inc. The J. & W. Corporation conducted the race under license and sanction of defendant National Association for Stock Car Auto Racing, Inc., which hereafter will be designated as NASCAR. NASCAR officials handled the scoring, starting, stopping and pit work of the races. These officials are licensed by NASCAR, and they are usually paid by the corporations or persons conducting the race. The defendant William H. G. France and James F. Chestnutt were officers of the J. & W. Corporation, and the official program of the race listed them as directors of the race. The J. &. W. Corporation posted the prize money for the race, hired the officials and publicity man, ordered the tickets, paid all taxes, and were responsible for the conduct of the race and all bills. The purse and point fund total for that night was $15,000.00, and $9,300.00 was paid out on this race. The starter for the race was Alvin Hawkins, who had been licensed by NASCAR. He was engaged as starter by France, and had a contract with J. &. W. Corporation for this race.

On the premises of Dixieland Speedways, Inc. is a mile oval asphalt track about 50 to 60 feet wide, which has safety zones so cars can get off the track. There were lights lighting the track and grandstand. A loud-speaker was installed at the track. The weather was hot and clear, and there was not any dust to prevent spectators from clearly seeing the race. About 12 to 13 thousand spectators were in the stands and about 1,000 in the infield.

About sixty stock cars were entered in and engaged in this race. One of the participants was William W. Blevins, plaintiff's intestate. Blevins was 24 years old. He was in charge of the body shop of N. W. Horne's garage, working on a commission basis. Horne testified: "He was a body man. They didn't make them no better." He had made in this work about $7,000.00 twelve months before his death. He had

been in 7 or 8 races before the one in which he was killed. In a prior race he had been involved in an accident, and his car turned over. His wife had spoken to him about the risks he was taking in these races. His wife had seen every race he had been in. She testified: "I don't remember if I had ever seen Bill race before in the car in which he was racing this night that he was killed."

The car Blevins had in this race had a rebuilt V-8 Mercury motor, which he worked on all night prior to the race in which he was killed. The motor was rebuilt so strong that a battery was not sufficient in voltage to start it. When Blevins started this car, he had to have it pushed off each time. Lots of racing cars have to be pushed off. The door was held while racing with a leather band. If one wanted to get out he could snap the band in a second. It would take five seconds, something like that, for the driver to unfasten his safety belt, unsnap the band on the door, and get out of the car.

In the starter's stand was the starter Alvin Hawkins and an honorary starter, E. G. "Cannonball" Baker, who actually operated the flags to start and conduct the race under the supervision of Hawkins. When the race was called, the participating cars lined up in depth three abreast with the lead car driven by France opposite the starter's stand. Blevins' car was pushed off to start it. When the cars were lined up, they were put in motion by the starter's flag, and led by the pace car driven by France, proceeded around the track at a slow speed. Blevins' car stalled near the first bend. A car pushed it and it started off, and went around the track and stopped again about the middle of the back stretch. France and the racing cars behind him circled the track, and when France passed the starter's stand he gave a signal indicating one more lap around the track before starting the race. As the cars approached the starter's stand the second time a voice over the loud speaker said "There is a car on the track: don't start the race." This was said three times. The starter dropped the green flag starting the race. Almost simultaneously with the dropping of the flag the drivers gunned their motors, which made a loud noise that was heard a long ways. The racing cars roared away. The last cars had to travel the entire north turn, come down in front of the grandstand and make their south turn before they got to Blevins' car. The first cars had already made the north turn and were practically in front of the grandstand. From the start of the roar of the race until the first cars came around to the Blevins' stalled car, approximately 30 to 40 seconds elapsed according to one witness, a few seconds according to another. Just before the race began a car was behind Blevins' car, which was stalled the second time, and headed in a position to push him. When the race started this car behind Blevins' car pulled off onto a safety apron.

Several of the racing cars went by Blevins' car, but a car driven by one Midkiff ran into the rear of Blevins' car. There was an explosion. Fire flamed from the Blevins' car. Blevins was killed, either by the collision or by fire.

At the close of plaintiff's case, the court sustained a motion for nonsuit made by Dixieland Speedways, Inc., and overruled a similar motion of the other defendants.

The defendants denied any negligence on their part, and pleaded as defenses contributory negligence, assumption of risk, insulating negligence of Midkiff and certain releases signed by the deceased Blevins prior to the race. The defendants offered in evidence the following written instruments signed by the deceased Blevins:

One. An application by him to NASCAR for license as a race track driver, dated 7 June 1953.

Two. A Benefit Plan Registration issued by NASCAR based upon his driver's license issued to him by NASCAR on 16 June 1953. This paper begins: "The undersigned hereby applies for registration in the Benefit Plan of Competitor Liaison Bureau of NASCAR, Inc. in accordance with NASCAR rules." The paper gives his name, residence, age, occupation, name of wife and child, and designates them as beneficiaries. Then the paper signed by Blevins contains this language:

> "I expressly understand and agree that upon issuance of NASCAR license to me, and upon payment of fees required by NASCAR, I will be entitled only to the benefits provided by the Benefit Plan of Competitor Liaison Bureau of NASCAR, INC., for injuries (including death) I might sustain in NASCAR-sanctioned racemeets or other events pursuant to the contract between NASCAR and Competitor Liaison Bureau of NASCAR, Inc., and the insurance carrier and upon presentation of proofs required.
>
> "It is further understood and agreed that the foregoing shall be and constitutes the limit of liability for any injuries (including death) that I may incur, provided claim is filed within 30 days of accident.
>
> "In consideration of the acceptance by NASCAR of my license application and issuance of license, and in consideration of the foregoing, I do hereby release, remise and forever discharge NASCAR, the promoters presenting races or other events under NASCAR sanction, and the owners and lessees of premises in which NASCAR sanctioned races or other events are presented, and the officers, directors, agents, employees and servants of all of them, of and from all liability, claims, actions and possible causes of action whatsoever that may accrue to me or to my heirs, next of kin and personal representatives, from every and any loss, damage and injury (including death) that may be sustained by my person and property

while in, about, and en route into and out of premises where NASCAR sanctioned races or other events are presented.

"I have read and fully understand the foregoing.

(s) WILLIAM W. BLEVINS (L.S.)
(Signature)."

Three. A release as follows:

"R E L E A S E

NASCAR Track—Raleigh, N. C.
Date —Sept. 19, 1953.

IN CONSIDERATION of receiving permission from J. & W. Inc. to enter upon the premises of this speedway, the receipt of such permission being hereby acknowledged, and in further consideration of receiving permission to participate, when qualified either as a driver, mechanic, owner, attendant, or in any other capacity, in any race held at these premises, the receipt of such permission being also hereby acknowledged, each of the undersigned hereby releases NASCAR, the licensed promoter, and its agents, officers, servants, and employees, of and from any and all liability, claims, demands, actions, and causes of action whatsoever, arising out of or related to any loss, damage, or injury, including death, that may be sustained by any or each of the undersigned, or any property of any or each of the undersigned, while in, on, or upon these premises, or any premises leased to, owned by, sanctioned by, or under the control or supervision of NASCAR, or en route to or from these premises, or any other premises leased to or under the control or supervision of NASCAR.

"Each of the undersigned being duly aware of the risks and hazards inherent upon entering upon said premises and/or in participating in any races held at said premises, hereby elects voluntarily to enter upon said premises, knowing their present condition and knowing that said condition may become more hazardous and dangerous during the time that each of the undersigned is upon the said premises. Each of the undersigned hereby voluntarily assumes all risks of loss, damage, or injury, including death, that may be sustained by any or each of the undersigned, or any property of any or each of the undersigned while in, on or upon said premises.

"This release shall be binding upon the distributees, heirs, next of kin, executors and administrators of each of the undersigned.

"In signing the foregoing release, each of the undersigned hereby acknowledges and represents:

(a) That he has read the foregoing release, understands it, and signs it voluntarily;

(b) That he is over 21 years of age and of sound mind;

(c) That he is not an agent, servant, or employee of NASCAR, and/or any of the agents, officers, servants, or employees of the promoter;

(d) That he is an independent contractor and assumes and takes all responsibility for all charges, premiums and taxes, if any, payable on any funds he may receive as a result of his activities, including, without limiting the generality of the foregoing, social security taxes, unemployment insurance taxes, compensation insurance, income taxes and withholding taxes.

"IN WITNESS WHEREOF, each of the undersigned has hereunto set his hand and seal this 19th day of September 1953.

SIGNATURE	PITT PASS NO.
* * *	* * *
50 BILL BLEVINS	0611"

(This form was also signed by approximately 50 others).

Four. Official agreement between NASCAR and Alvin Hawkins stating that he is not an employee of NASCAR, and setting forth his duties as an official starter.

Mrs. Blevins testifying for herself as plaintiff said that after her husband's death, pursuant to the Benefit Plan Registration issued to her husband by NASCAR, she received a cheque in the sum of $3,000.00 as a death benefit, but did not cash the cheque.

At the close of all the evidence all the defendants, other than Dixieland Speedways, Inc., whose motion for nonsuit had already been allowed, moved for judgment of nonsuit which was granted. The plaintiff did not appeal as to Dixieland Speedways, Inc.

From the judgment of nonsuit entered as to all the other defendants, the plaintiff appealed, assigning error.

Dickson Phillips and Sanford, Phillips & Weaver for Plaintiff, Appellant.

Tally, Tally & Brewer and Long, Ridge, Harris & Walker for Defendants, Appellees.

PARKER, J. The plaintiff alleges in her complaint five acts of negligence. She alleges that the defendants were jointly, severally and concurrently negligent and careless in that they wilfully, wantonly and intentionally (1) failed to treat the unpaved portion of the track to hold down dust, and failed to provide a safe track on which said race could be run in reasonable safety, and (2) appointed an inexperienced man, well knowing him to be inexperienced, to control the race as

starter. The plaintiff has offered no evidence at all to support the above two allegations as to negligence. The other three allegations as to acts of negligence are to the effect that the defendants started the race when they knew, or by the exercise of due care could have known, that the deceased Blevins was in a dangerous, exposed and helpless condition, and that they knew, or by the exercise of due care could have known, that he was apt to be killed, if the race was started.

The official program listed defendants France and Chestnutt as directors of the race. France engaged the starter of the race, and drove the pace car. Plaintiff's evidence taken in the light most favorable to her, as we are required to do on a motion for nonsuit, is sufficient to make out a case of actionable negligence against the defendants on the theory that all of them were engaged in the business of promoting, arranging and conducting the race and were guilty of concurrent negligence. *Midkiff v. National Ass'n. for Stock Car Auto Racing,* 240 N.C. 470, 82 S.E. 2d 417; *Fairmont Union Joint Stock Agr. Ass'n. v. Downey,* 146 Ind. 503, 45 N.E. 696; *Association v. Wilcox,* 4 Ind. App. 141, 30 N.E. 202.

However, considering the evidence in the same light, it is not sufficient to establish wilful or wanton injury so as to preclude the defense of contributory negligence. *Brendle v. R. R.,* 125 N.C. 474, 34 S.E. 634; *Fry v. Utilities Co.,* 183 N.C. 281, 111 S.E. 354; 38 Am. Jur., Negligence, sec. 178. This Court said in *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36: "An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitener,* 93 N.C. 590; *S. v. Lumber Co.,* 153 N.C. 610), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson, supra.* 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.' Thompson on Negligence (2 Ed.), sec. 20, quoted in *Bailey v. R. R.,* 149 N.C. 169. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers,* 121 N.C. 519; *Bailey v. R. R., supra.* A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.,* 186 N.C. 704, 706."

We are now confronted with the question of contributory negligence on the part of plaintiff's intestate. When the defendant pleads contributory negligence, and the plaintiff's evidence establishes such 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. *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361.

Plaintiff's negligence to bar recovery need not be the sole proximate cause of injury or death. It suffices, if it contributes to his injury or death 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; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783.

This Court said in *Mintz v. Murphy,* 235 N.C. 304, 314, 69 S.E. 2d 849: "The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided."

Plaintiff's evidence shows plainly these facts: Her intestate, 24 years old, was a body man in charge of the body shop of N. W. Horne's Garage, and skilled sufficiently in such work to have made at it $7,000.00 the year before his death. He voluntarily participated the night of his death in the dangerous sport of automobile racing, hazardous to life and limb, as a contestant for the prize money offered by the promoters of the race. He had participated before in 7 or 8 such races, and in one his racing car turned over. He willingly took his part in such a race with about sixty other racing cars, and knew the dangers that inhered in it so far as they are obvious and necessary. The timorous may stay at home. The car he had on the track for the race had a rebuilt V-8 Mercury Motor, which he had worked on all night prior to the night of his death. The motor was rebuilt so strong that the battery did not have sufficient voltage to start the motor. To start the motor the car had to be pushed off. Knowing this fact his car was pushed off and with about sixty other racing cars he began to follow France around the track in the pace car preliminary to the start of the race. Near the first bend his car stalled. The clear inference is that his rebuilt motor finished the night before was not properly functioning. A car pushed him off starting his motor again, and instead of driving off the track into a safety zone, he started to circle the track well knowing that the start of the race with about sixty cars was imminent. About the middle of the back stretch his car stalled and stopped again. He could have unsnapped his safety belt and the band on the car door, and have stepped out and reached a place of safety in a few seconds. He remained in his stalled car. With sixty racing cars the drivers in the cars behind the leaders could not see the stalled car until the leaders swerved around it. When the green flag dropped, the drivers gunned their motors, which made a loud noise, and the racing cars

roared away. In their path was his stalled automobile, a hazard that he created after his car had stalled the first time and had been pushed off by driving it some distance on the track until it stalled again instead of driving onto a safety zone, and this hazard not only resulted in his death but also in the death of Midkiff, who ran into his stalled car. "A plaintiff will not be permitted to recover for injuries resulting from a hazard he helped to create." *Blake v. Tea Co.*, 237 N.C. 730, 75 S.E. 2d 921.

This is not a case where a motor stalls suddenly without warning leaving a car in a dangerous situation. Here Blevins had had warning when the motor stalled on the track at the first bend.

The plaintiff contends that the doctrine of sudden emergency should be applied to Blevins' failure to get out of his car after it stalled on the back stretch. This "principle is not available to one who by his own negligence has brought about, or contributed to the emergency." *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593. That Blevins was negligent, after his car stalled at the first bend, and was pushed off, in continuing to circle the track until his motor stalled in the back stretch, instead of driving to a safety zone, is plain. This negligence brought on, or contributed to the sudden emergency.

The plaintiff further contends that Blevins "realized that a terrible danger was presented, not only to it (his car) and himself, but to all the cars and their drivers coming on; the only way for it to be got off the track was for him to guide it off, either under its own power or by propulsion from another car; when he left it, the die would be cast; accordingly, he is entitled to the extremely reasonable inference that he stayed with the car to get it off the track to prevent collision, this is bolstered by the uncontradicted testimony that another car came in behind him in position to push." When the race started, this car behind Blevins' car pulled off onto a safety apron. Plaintiff invokes the rescue doctrine set forth in *Alford v. Washington*, 238 N.C. 694, 78 S.E. 2d 915; *Norris v. R. R.*, 152 N.C. 505, 67 S.E. 1017; 38 Am. Jur., Negligence, sec. 228. This is not a case of one who sees a person in imminent and serious peril caused by the negligence of another. The "terrible danger" of Blevins' stalled car was a peril Blevins created by his own negligence. When the green flag dropped, we do not know the speed of the racing cars as they approached Blevins' car, the time it took the leading cars to reach his car, and the evidence does not show whether Blevins had time to get out of his car after the race started before the racing cars began to pass. Whether he tried to get out of his car or not, the evidence does not show. It may be that he tried to get out, and his car was struck before he could do so. It may be that he did not try to get out, but stayed in the car hoping that it would be pushed off so that he could participate in the race for the prize money, as he did

when it first stalled, or could get it off the track. It is all conjecture and speculation. There is no evidence, or any reasonable inference to be drawn therefrom, to support the contention that the rescue rule applies.

The evidence showing that Blevins drove on the track for the race of about sixty cars a car that he spent the prior night in rebuilding the motor, that the car could not be started unless it was pushed off, that in the preliminary circling of the track by these cars in preparation for the race his car stalled on the first bend, that it was pushed off, and that he knowing the start of the race was imminent did not drive his car to a place of safety, but continued to circle the track until his car stalled again about the middle of the back stretch, and that in a matter of seconds the race began and a racing car ran into his car killing him and the driver of the other car, shows contributory negligence on Blevins' part so clearly that no other conclusion can reasonably be drawn therefrom, and such negligence contributed to his death as a proximate cause, or one of them. To defeat a recovery Blevins' negligence need not be the sole proximate cause of his death. *Sheldon v. Childers, supra; Moore v. Boone, supra.*

The serious questions argued in the briefs, as to whether the Release and Benefit Plan Registration signed by Blevins and asserted as an affirmative defense by the defendants are valid and enforceable and bar plaintiff's action, are not presented for decision in our consideration of the judgment of nonsuit entered, for the reason that plaintiff's evidence does not establish the truth of this affirmative defense as a matter of law. The burden of proof of this affirmative defense is upon the defendants, and these instruments were offered in evidence by the defendants. Under such circumstances no matter how clearly the affirmative defense appears in the evidence of the defendants a judgment of nonsuit may not be entered based on such affirmative defense. *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742.

In *NASCAR, Inc. v. Blevins*, 242 N.C. 282, 87 S.E. 2d 490, there was an unsuccessful attempt to have the Court pass on the Benefit Plan Registration here under the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.* The Court did not rule on it for, as presented, the question was moot.

The automobile race at Raleigh Speedways in which Blevins was killed was a lawful contest. Chapter 177, 1949 Session Laws of North Carolina, prohibits motor-cycle and motor vehicle races on Sunday in Wake County. *S. v. Chestnutt*, 241 N.C. 401, 85 S.E. 2d 297. The race in which Blevins was killed was stopped at midnight.

Likewise the contract of the starter of the race with NASCAR was introduced in evidence by the defendants.

The judgment of nonsuit entered below is
Affirmed.

HIGGINS, J., not sitting.

PAUL H. RIDGE, AS EXECUTOR OF THE ESTATE OF LOTTIE RASCOE McMILLAN IVEY v. VIRGINIA FITCH BRIGHT AND INVESTORS MUTUAL, INC.

(Filed 26 June, 1956.)

1. Estates § 17—

A remainder in personal property after a life estate may be created by deed or other proper written instrument. G.S. 39-6.2.

2. Trusts § 3a—

The creator and trustee of an *inter vivos* trust may be one and the same person.

3. Same—

It is not required that a completely executed voluntary trust *inter vivos* be supported by consideration.

4. Same—

The settlor-trustee of an *inter vivos* trust in personalty may retain possession of the personalty.

5. Same—

An *inter vivos* trust in personalty under which the settlor-trustee retains the power to revoke the trust, reserves a life interest therein, and also reserves the power to sell any part of the *res* for her own benefit during her lifetime, with further provision that the legal title should pass to the beneficiary upon the death of the settlor, is not an attempted testamentary disposition of the *res* but is a valid trust, since the instrument transfers an immediate nonpossessory interest to the beneficiary, subject to divestment by the settlor.

6. Same—

The creator of a revocable *inter vivos* trust in personalty does not revoke the trust by a will which devises or bequeaths property to the beneficiary of the trust, since, in the absence of provision in the instrument to the contrary, the right of revocation must be exercised before the death of the settlor.

APPEAL by plaintiff from *Hall, J.*, February Term, 1956, of ALAMANCE.

This is an action instituted on 3 January 1956 by Paul H. Ridge, executor of the estate of Lottie Rascoe McMillan Ivey, against the

defendants, for a declaratory judgment to determine whether the capital stock purchased by Lottie Rascoe McMillan (Ivey) of Investors Mutual, Inc. is an asset of her estate or belongs to the defendant, Virginia Fitch Bright, her niece, under the terms of the revocable trust agreement executed by Lottie Rascoe McMillan on 25 October 1949.

Lottie Rascoe McMillan purchased 234.742 shares of the capital stock of Investors Mutual, Inc. on the above date. She thereafter married one Ivey. The certificate No. 157961, representing the above shares of stock, was issued to "Lottie R. McMillan, as trustee for Virginia F. Bright," and was in the safe deposit box of the late Lottie Rascoe McMillan Ivey in the Security National Bank, Burlington, North Carolina, together with her last will and testament, at the time of her death.

The trust agreement referred to above was designated as Exhibit A and made a part of the complaint which reads as follows:

"DECLARATION OF TRUST-REVOCABLE. I, the undersigned, having purchased or declared my intention to purchase certain shares of capital stock of Investors Mutual, Inc. (the Company), and having directed that the certificate for said stock be issued in my name as trustee for Mrs. Virginia F. Bright, as beneficiary, whose address is 703 Wicker St., Greensboro, N. C., under this Declaration of Trust, DO HEREBY DECLARE that the terms and conditions upon which I shall hold said stock in trust and any additional stock resulting from reinvestment of cash dividends upon such original or additional shares are as follows:

"(1) During my lifetime all cash dividends are to be paid to me individually for my own personal account and use; provided, however, that any such additional stock purchased under an authorized reinvestment of cash dividends shall become a part of and subject to this trust.

"(2) Upon my death the title to any stock subject hereto and the right to any subsequent payments or distributions shall be vested absolutely in the beneficiary. The record date for the payment of dividends, rather than the date of declaration of the dividend, shall, with reference to my death, determine whether any particular dividend shall be payable to my estate or to the beneficiary.

"(3) During my lifetime I reserve the right, as trustee, to vote, sell, redeem, exchange or otherwise deal in or with the stock subject hereto, but upon any sale or redemption of said stock or any part thereof, the trust hereby declared shall terminate as to the stock sold or redeemed, and I shall be entitled to retain the proceeds of sale or redemption for my own personal account and use.

"(4) I reserve the right at any time to change the beneficiary or revoke this trust, but it is understood that no change of beneficiary and no revocation of this trust except by death of the beneficiary, shall

be effective as to the Company for any purpose unless and until written notice thereof in such form as the Company shall prescribe is delivered to the Company at Minneapolis, Minnesota. The decease of the beneficiary before my death shall operate as a revocation of this trust.

"(5) In the event this trust shall be revoked or otherwise terminated, said stock and all rights and privileges thereunder shall belong to and be exercised by me in my individual capacity.

"(6) The Company shall not be liable for the validity or existence of any trust created by me, and any payment or other consideration made or given by the Company to me as trustee or otherwise, in connection with said stock or any cash dividends thereon, or in the event of my death prior to revocation, to the beneficiary, shall to the extent of such payment fully release and discharge the Company from liability with respect to said stock or any cash dividends thereon. Dated Oct. 25, 1949. LOTTIE R. MCMILLAN"

The last will and testament of the testatrix was designated as Exhibit B and made a part of the complaint. The testatrix, after devising her home in Burlington, together with its contents, to Virginia Walker Oakley, made five specific bequests in money aggregating $5,900.00, and gave her automobile to her niece, Virginia Fitch Bright. She then devised and bequeathed all the rest and residue of her property to six named individuals, Virginia Fitch Bright being one of them.

This cause was heard by consent by the trial judge, without a jury, upon the pleadings, including the attached exhibits and an agreed statement of facts. In the statement of facts, among other things, we find, "6. At no time prior to the death of Lottie Rascoe McMillan Ivey did she change the beneficiary, withdraw any of the trust property, sell, redeem, exchange or otherwise deal with the trust property (except to receive all cash dividends paid and possibly exercise voting rights), or revoke or otherwise terminate the 'Declaration of Trust-Revocable' unless the execution of her last will and testament on July 29, 1955, constitutes a revocation.

"11. That there are approximately 2,800 owners of capital stock in the defendant Investors Mutual, Inc. within the State of North Carolina, and which shareholders in said Investors Mutual, Inc. own shares in said Company in the approximate value of $12,000,000; that approximately 60% of the number of shareholders of Investors Mutual, Inc. within the State of North Carolina and approximately 60% of the dollar value of shares in Investors Mutual, Inc. owned by North Carolina stockholders are subject to provisions identical to those set forth in the 'Declaration of Trust-Revocable' in this cause. This identical form of Declaration of Trust involved in this action has been in use by Investors Mutual, Inc. in North Carolina and in the United States since shortly after 1940 when the Company was organized."

The trial judge being of the opinion that a valid *inter vivos* trust in the 234.742 shares of capital stock of Investors Mutual, Inc. purchased by Lottie R. McMillan was created by the terms of which the beneficiary, Virginia F. Bright, is now entitled to all the right, title and interest in and to said capital stock, and the trial judge being of the further opinion that no revocation of said trust occurred, entered judgment accordingly.

The plaintiff appeals, assigning error.

Long, Ridge, Harris & Walker for appellant.

Sanders & Holt for appellee, Virginia F. Bright.

Brooks, McLendon, Brim & Holderness for appellee, Investors Mutual, Inc.

By: Hubert F. Humphrey.

DENNY, J. It is not contended that the instrument under consideration was executed in the manner required by law so as to be valid as a testamentary disposition of the shares of stock involved. Consequently, the question to be determined is whether the instrument created a valid *inter vivios* trust which entitled Virginia Fitch Bright to the stock upon the death of the settlor-trustee, Lottie Rascoe McMillan Ivey. However, in making this determination we must consider (1) whether upon the execution of the so-called trust instrument, the defendant, Virginia Fitch Bright, acquired an interest in the subject matter of the trust; or (2) whether the settlor retained such control over the subject matter of the trust as to render it invalid as a trust but only an attempted testamentary disposition.

The appellant contends that the instrument under consideration is invalid because under our decisions, *Speight v. Speight,* 208 N.C. 132, 179 S.E. 461; *Nixon v. Nixon,* 215 N.C. 377, 1 S.E. 2d 828, and *Woodard v. Clark,* 236 N.C. 190, 72 S.E. 2d 433, a limitation over, after a life estate, in personal property is void. While we do not concede that these cases are controlling on the facts in this case, it is well to note that the restriction upon the right to create a remainder in personal property after a life estate by deed, or other written instrument, has been eliminated by Section 1, Chapter 198 of the Session Laws of 1953, codified as G.S. 39-6.2, which reads as follows: "Any interest or estate in personal property which may be created by a last will and testament may also be created by a written instrument of transfer."

In creating an *inter vivos* trust, the creator and the trustee may be one and the same person. Bogert on Trusts and Trustees, Volume 1, section 41, page 270; Scott on Trusts, Volume 1, section 18, page 143; Restatement of the Law on Trusts, Volume 1, section 18, page 68; 90 C.J.S., Trusts, section 210(b), page 137; 54 Am. Jur., section 116, page

101. Likewise, in creating a trust *inter vivos*, "where there is a completely executed voluntary contract to establish a trust and nothing further remains to be done by the grantor to transfer the title, the relation of trustee and *cestui que trust* is established and the equitable rights growing out of such conveyance in trust, although made without consideration, will be recognized and enforced, since it is considered as an executed gift, needing no other consideration." 89 C.J.S., Trusts, section 28, page 746, *et seq.* "Consideration is not necessary to the creation of a trust, or, in other words, consideration is not necessary to a trust that is executed in the sense of being perfectly created, whether by declaration or transfer." 54 Am. Jur., Trusts, section 41, page 51, *et seq.*

In Bogert on Trusts and Trustees, Volume 1-A, section 202, page 254, *et seq.*, it is said: "The modern law is clearly to the effect that the existence of consideration is not necessary to the establishment of a trust, either by the transfer to a trustee of real or personal property, or by way of declaration of a trust of real or personal property. In order that the trust be enforceable, it is not necessary that there be any transaction which would amount to the giving of consideration if the trustee were treated as a promissor under a contract. It is not an essential feature of the trust creation that the settlor has received a benefit from the trustee, *cestui*, or another, or that benefits have moved from the settlor, *cestui*, or another, to the trustee. . . . If the settlor has otherwise effectively completed the trust, the fact that he has received nothing in return for the transfer of the equitable or legal and equitable property interest is immaterial. . . ."

Moreover, when the owner of personal property, in creating a trust therein, constitutes himself as trustee, it is not necessary as between himself and the beneficiary that he should part with the possession of the property. *Warner v. Burlington Fed. Sav. & L. Asso.*, 114 Vt. 463, 49 A. 2d 93, 168 A.L.R. 1265; *Cohen v. Newton Savings Bank*, 320 Mass. 90, 67 N.E. 2d 748, 168 A.L.R. 1321.

As to the reservation of the power to revoke or modify a trust, the general rule in this respect is stated in section 57.1, Scott on Trusts, Volume 1, page 336, *et seq.*, as follows: "It is well settled that the reservation by the settlor of a power to revoke the trust does not of itself make the trust testamentary. It is also settled . . . that the reservation by the settlor of a life interest does not make the trust testamentary. Does the reservation of a life interest together with a power of revocation have any greater effect? It seems clear that it does not. If the owner of property transfers it in trust to pay the income to the settlor for life and on his death to pay the principal to others, the settlor reserving also power to revoke the trust at any time as long as he lives,

it is held that the trust is not testamentary." The foregoing view is supported by almost countless decisions, among them we cite: *Becker v. St. Louis Union T. Co.*, 296 U.S. 48, 80 L. Ed. 35; *United B. & L. Asso. v. Garrett*, 64 F. Supp. 460; *Cleveland Trust Co. v. White*, 58 Ohio App. 339, 16 N.E. 2d 588, aff. 134 Ohio St. 1, 15 N.E. 2d 627, 118 A.L.R. 475; *Cohen v. Newton Savings Bank, supra; National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E. 2d 113; *Farkas, Adm'r. v. Williams and Investors Mutual, Inc.*, 5 Ill. 2d 417, 125 N.E. 2d 600; *Pinckney v. City Bank Farmers Trust Co.*, 249 App. Div. 375, 292 N.Y.S. 835; *In re Sheasley's Trust*, 366 Pa. 316, 77 A. 2d 448; *In re Shapley's Trust*, 353 Pa. 499, 46 A. 2d 227, 164 A.L.R. 877; *Goodrich v. City National Bank*, 270 Mich. 222, 258 N.W. 253; *In re Brunswick's Estate*, 143 Misc. Rep. 573, 256 N.Y.S. 879; *Witherington v. Herring*, 140 N.C. 495, 53 S.E. 303; Anno.: 32 A.L.R. 2d 1270, *et seq.*

In the last cited case, *Clark, C. J.*, said: "A power of revocation may, however, be reserved and is perfectly consistent with the creation of a valid trust. If never exercised during the lifetime of the donor and according to the terms in which it is reserved, the validity of the trust remains unaffected. 28 Am. and Eng. Enc. (2 Ed.), 900, 950; *Stone v. Hackett*, 78 Mass. 227; *Kelley v. Snow*, 185 Mass. 288; 1 Beach Trusts, sec. 81, and cases cited." *Waldroop v. Waldroop*, 179 N.C. 674, 103 S.E. 381; *Shannonhouse v. Wolfe*, 191 N.C. 769, 133 S.E. 93; *King v. Richardson* (4th C.C.A.), 136 F. 2d 849.

Also in the case of *Farkas, Adm'r. v. Williams and Investors Mutual, Inc., supra*, the Supreme Court of Illinois held the identical declaration of trust which is involved in this appeal, to be a valid *inter vivos* trust.

It is further said in the above cited section in Scott on Trusts, that "It is immaterial whether the settlor reserves simply a power to revoke the whole trust at one time or whether he reserves also a power to revoke the trust as to any part of the property from time to time." *Bear v. Millikin Trust Co.*, 336 Ill. 366, 168 N.E. 349, 73 A.L.R. 173; *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N.E. 716; *Goodrich v. City Nat. Bank & Trust Co., supra; Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E. 2d 238, 18 A.L.R. 2d 1006.

It seems to be the generally accepted view, however, that where the settlor or creator purportedly transfers property in trust, and reserves not only a life estate therein but also the power to control the trustee as to the details of the administration of the trust, the purported trustee is a mere agent of settlor and there is no valid *inter vivos* trust, and the disposition in so far as it is intended to take effect after his death, is testamentary and is invalid unless the requirements of the statutes relating to the execution of wills are complied with. Re statement of the Law on Trusts, Volume 1, section 57(2), page 175; *Application of*

Cerchia, 279 App. Div. 734, 108 N.Y.S. 2d 753; *In re Tunnell's Estate,* 325 Pa. 554, 190 A. 906; *Burns v. Turnbull,* 266 App. Div. 779, 41 N.Y.S. 2d 448; *Atlantic Nat. Bank v. St. Louis Union Trust Co.,* 357 Mo. 770, 211 S.W. 2d 2.

The appellant insists that the case of *Application of Cerchia, supra,* is on all fours with the case under consideration. We do not so construe it. While the opinion does not contain a copy of the writing interpreted by the New York Court, the Court does state, "The writing relied upon as creating a trust of the securities does not accomplish that purpose. It manifests no intention on the part of the settlor to impose any enforceable duties upon himself as trustee. In the absence of such an intention no trust is created. Restatement, Trusts, Sec. 25." We interpret section 25 of the Restatement of the Law on Trusts, Volume 1, page 76, *et seq.,* which is the only authority cited in the opinion, to mean that mere precatory words, generally speaking, are not sufficient to manifest an intention to create a trust.

There can be no doubt about the intention of the settlor, Lottie R. McMillan, to create a trust with her niece Mrs. Virginia F. Bright as the beneficiary thereof. She caused the certificate representing the stock to be issued by the defendant corporation, Investors Mutual, Inc. to herself as trustee for the named beneficiary. She then declared the terms and conditions upon which she would hold the stock and any additional stock resulting from reinvestment of cash dividends upon such original or additional shares. The terms and conditions do not provide for her to hold title to the securities individually as settlor, but as trustee. *Farkas, Adm'r. v. Williams and Investors Mutual, Inc., supra.* We think this trust instrument, when rightly construed, means (1) that during her lifetime as trustee she was to pay to herself individually, for her own personal account and use, the cash dividends paid on the stock. However, if she, as trustee, purchased additional stock by reinvesting the cash dividends, such stock was to become a part of the principal of the trust and subject to its terms; (2) that upon her death, the legal title to all stock held in the trust was to pass to the beneficiary; (3) that during her lifetime she reserved to herself not individually but as trustee, the right to vote, sell, redeem, exchange, or otherwise deal in or with the stock subject to the trust, and upon the sale or redemption of such stock or any part thereof, the trust was to terminate as to the stock sold or redeemed—that is, such stock was to be free of the trust and she was to have the right to retain the proceeds from the sale or redemption thereof for her own personal or individual account or use; and (4) the settlor reserved the right to change the beneficiary or revoke the trust. But no change of the beneficiary or revocation of the trust, except the death of the beneficiary before the

death of the settlor, was to be effective as to the Company for any purpose unless or until written notice thereof in such form as the Company might prescribe was delivered to the Company at its Minneapolis office.

It is stipulated that the settlor never changed the beneficiary, withdrew, sold, redeemed, exchanged or otherwise dealt with the trust property (except to receive and use the cash dividends paid on the stock and possibly exercise voting rights), or revoke or otherwise terminate the trust unless the execution of her last will and testament constitutes a revocation.

The fact that the legal title to the stock held in trust was not to pass to the beneficiary until the death of the settlor, did not make the instrument testamentary. The view generally accepted with respect to such reservations as those outlined above is stated by Bogert on Trusts and Trustees, with numerous supporting authorities, in Volume 1, section 103, page 481, *et seq.* as follows: "The grantor frequently provides that he shall be entitled to possession of the *res* for his life, or shall be a life beneficiary of the trust created, and reap the profits through the trust. Neither of these clauses shows an intended will. While they express desire that the ultimate *cestuis* shall not possess and enjoy until after the death of the grantor, they do not exclude the immediate transfer of a nonpossessory interest.

"Neither the reservation of a power to revoke the trust and take back the *res*, nor the retention of a power to modify the trust and change the beneficiaries, makes the document testamentary (citing among other cases *Thompson v. McDonald*, 22 N.C. 463). These clauses are held to show merely that the present interest passing to the *cestuis* is subject to divestment at the hands of the grantor. They do not prove that no interest passes immediately to the *cestuis*.

"A trust is not made testamentary by the coupling together of a life interest in the settlor and a power in him to revoke or by the joinder to these two factors of the power to alter the trust."

We concede that in a trust where the settlor is also the trustee, it is difficult to determine whether the trustee is acting as an individual or as trustee in determining when to sell or redeem the stock held in the trust or any part thereof. Even so, if it be conceded that the settlor and not the trustee was the movant in causing the exercise of such power, had the power been exercised, such action would not represent any greater reservation of power in the settlor than the unqualified power to revoke the trust. *Cramer v. Hartford-Conn. Trust Co.*, 110 Conn. 22, 147 A. 139, 73 A.L.R. 201; *Wilson v. Fulton Nat. Bank*, 188 Ga. 691, 4 S.E. 2d 660; *Bear v. Millikin Trust Co., supra; Jones v. Old Colony Trust Co., supra; In re Shapley's Trust, supra; National Shaw-*

mut Bank of Boston v. Joy, supra. And, as heretofore pointed out, such latter reservation is not fatal to an *inter vivos* trust.

The facts in the case of *Wescott v. Bank,* 227 N.C. 39, 40 S.E. 2d 461, cited by the appellant, are distinguishable from those in the instant case. There, this Court held, and properly so, that "there was no evidence of a transfer or assignment of a present beneficial interest in the fund deposited in the defendant Bank."

It is further contended that the last will and testament of Lottie Rascoe McMillan Ivey revoked the trust involved herein. We do not concur in this view. In the absence of the reserved right to revoke an *inter vivos* trust by will, the mere fact that the settlor makes a will and devises or bequeaths property to the beneficiary of the trust, the will does not revoke the trust. A will does not become effective until death, while ordinarily the power to revoke a trust, unless the trust instrument provides otherwise, must be exercised before the death of the settlor. *Witherington v. Herring, supra; Leahy v. Old Colony Trust Co., supra; Gray v. McCausland,* 314 Mass. 743, 51 N.E. 2d 441, 149 A.L.R. 1059; *National Shawmut Bank of Boston v. Joy, supra; Brown v. International Trust Co.,* 130 Colo. 543, 278 P. 2d 581; *In re Lyon's Estate,* 164 Pa. Super. 140, 63 A. 2d 415; *Mayer v. Tucker,* 102 N. J. Eq. 524, 141 A. 799.

We hold the instrument under consideration created a valid *inter vivos* trust, and upon the death of the settlor the 234.742 shares of the capital stock of Investors Mutual, Inc., became the absolute property of the beneficiary, Mrs. Virginia F. Bright, she being one and the same person as the defendant Virginia Fitch Bright.

The judgment of the court below is

Affirmed.

LESTER LOWE v. DEPARTMENT OF MOTOR VEHICLES.

(Filed 26 June, 1956.)

1. Arrest and Bail § 3—

A highway patrolman has the right to arrest without a warrant a person whom he sees driving at a high and unlawful rate of speed. G.S. 20-141, 20-183.

2. Assault § 8a—

The provisions of G.S. 14-34 that the intentional pointing of a pistol at any person constitutes an assault are subject to the qualification that such intentional pointing of a pistol must be done without legal justification.

3. Arrest and Bail § 5—

An officer, in making a lawful arrest, is not justified in pointing a loaded weapon at the person to be arrested except in good faith upon necessity, real or apparent. G.S. 14-34.

4. State § 3b—Evidence held to sustain finding that shooting of plaintiff by highway patrolman was result of negligence.

The evidence was to the effect that a highway patrolman saw a car driven by plaintiff proceeding at an excessive and unlawful speed on the highway, that after a chase at high speed, at one time during which the cars collided while traveling abreast 90 miles an hour, plaintiff stopped his car, that none of the occupants attempted to leave or offered or threatened resistance, that the patrolman stopped his car parallel thereto, immediately got out and with a loaded pistol pointing toward plaintiff ran around the front of his car, hit his leg on the bumper, which had been bent forward in the collision, and fell against plaintiff's car, causing the weapon to discharge, thereby inflicting serious injury to plaintiff. *Held:* The evidence is sufficient to support the findings and conclusions of the Commission that plaintiff's injury was caused by the actionable negligence of the patrolman, and the award of damages under the State Tort Claims Act is upheld notwithstanding the Commission's misapprehension of law that a warrant was necessary for the arrest and that the pointing of the pistol by the officer was negligence irrespective of justification, it being apparent that the crucial findings were not affected by the errors.

5. State § 3e: Appeal and Error § 49—

The judgment of the Commission upon a hearing under the State Tort Claims Act will not be set aside on the ground that the findings were made under a misapprehension of the applicable law when it is apparent that such errors did not affect the result.

BARNHILL, C. J., dissents.

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

Proceeding before North Carolina Industrial Commission under State Tort Claims Act. G.S. 143-291 *et seq.*

The appeal is from a judgment affirming an award of damages to plaintiff in the amount of $8,000.00 on account of serious and permanent injuries resulting from a bullet wound in his neck, negligently inflicted by a State Highway Patrolman acting within the scope of his employment by defendant.

The judgment is based on findings of fact and conclusions of law made by a Deputy Commissioner, adopted by the full Commission and affirmed by the court, to wit:

"FINDINGS OF FACT"

"1. That N. C. Highway 268, in Wilkes County, North Carolina, runs generally in an easterly direction from the Town of North Wilkesboro

to the Town of Roaring River; that the said highway is 22 feet in width and is a 'roller coaster' type road; that Campbell's Garage is situate on the south side of said highway, approximately seven miles from North Wilkesboro; that there is a parking lot in front of the said garage, which is approximately fifty feet wide and seventy-five feet in length.

"2. That during the afternoon of 7 November 1953, the Highway Patrol of Wilkes County was notified by radio that there were three armed escapees of the Watauga County Prison Camp reportedly in Wilkes County; that one Patrolman Thomas C. Goodman, a member of the State Highway Patrol in Wilkes County, received this said message.

"3. That shortly after darkness, about 6:30 p.m. on 7 November 1953, the plaintiff, who was driving a 1951 Ford automobile belonging to one Odell Billings, was proceeding along the said highway within the town limits of North Wilkesboro in an easterly direction toward Roaring River on N. C. Highway 268; that at the time there were four other persons riding with the plaintiff; that the said Odell Billings was riding on the front seat between the plaintiff and one Robert Cole; that two men by the names of Lonnie Buchanan and Horace Byrd were riding in the rear seat.

"4. That, as the plaintiff approached the said city limits, he was driving at a high rate of speed; that, at the time, Patrolman Thomas C. Goodman, who was then 'on duty' as a member of the North Carolina State Highway Patrol, was sitting in his 1953 Plymouth patrol car near the said highway, a short distance within the said town limits.

"5. That after the plaintiff passed the said patrolman, operating the car at a high rate of speed as heretofore set forth, the patrolman immediately gave pursuit; that as the plaintiff proceeded along the said highway, he increased the speed of the car he was driving to approximately 90 miles per hour, that at the time Patrolman Goodman was sounding his siren and his red light and spotlight were burning; that as the two cars were about four miles from North Wilkesboro, Patrolman Goodman overtook the pursuing *(sic)* car and drove up beside it, but due to the fact that the two cars were meeting oncoming traffic, the said Patrolman had to decrease his speed and drop back behind the plaintiff's car; that after the approaching traffic had passed, he again drove his car up beside the plaintiff's car; that at the time the two cars were traveling at a speed of approximately 90 miles per hour; that the patrolman then steered his car toward the plaintiff's car, endeavoring to crowd the latter off the highway; that a collision resulted between the two cars, that as a result of the collision, the right front bumper of the patrol car was bent forward into an L-shape, the forward-most point of the bent bumper being aproximately 15 inches in front of the car.

"6. That Patrolman Goodman, in the course of his employment with the defendant as a highway patrolman, pursued speeders at such high rates of speed on the average of three or four times a month.

"7. That after the collision, the plaintiff again drove ahead of the patrolman; that the patrolman then, for the third time, drove up beside the plaintiff's car; that the plaintiff then commenced to decrease his speed and drove (to his right) up into the parking area of the said Campbell's Garage and stopped his car about 15 feet from the said highway; that the patrol car was stopped about two feet (to the left) from and parallel with the car the plaintiff was driving; that, as the patrol car was stopped, the front of the same was about even with the middle of the left door of the plaintiff's car.

"8. That Patrolman Goodman immediately got out of his car, pulled his .38 caliber pistol from his holster, cocked the same to a 'full cock,' negligently pointed it at the car in which the plaintiff was riding, and ran around the front of his car to the left door of the plaintiff's car; that he had the gun 'full cocked' and pointed at the plaintiff's car during the entire time that he was running around his car; that his eyes were on the occupants of the other car; that at no time did he look where he was going; that as he was passing the right front of his patrol car, one of his legs struck the said bent bumper and he fell forward; that, as he fell, the gun was discharged; that the patrolman did not fall to the ground, but fell against the plaintiff's car; that the window of the left door of the car in which plaintiff was sitting was closed; that the bullet penetrated the window and struck the plaintiff in the neck just below the left ear; that the said Patrolman Goodman at no time had a warrant for the arrest of the plaintiff or any person riding with him.

"9. That, from the time he started pursuing the plaintiff until after the plaintiff was shot, as heretofore set forth, Patrolman Goodman was an employee of the Department of Motor Vehicles, an agency of the State of North Carolina, and was acting during the entire time within the scope of his employment.

"10. That the said bullet lodged in the third cervical vertebra of the plaintiff, causing a complete paralysis; that the plaintiff subsequently underwent an operation for the removal of the bullet and a laminectomy of the second, third and fourth cervical vertebrae was performed; that the plaintiff is still paralyzed as a result of the said wound; that he is still unable to feed himself; that he has been in the hospital on nine occasions since 7 November 1953; that he has already incurred hospital and medical expenses exceeding the sum of $2300.00; that he will incur further hospital and medical treatment as a result of the said injury; that he has suffered excruciating pain as a result of the wound and will continue to suffer in the foreseeable future; that it is doubtful that he

will ever be able to walk again; that as a result of the said bullet wound, which was inflicted as a result of the said negligence of Patrolman Goodman, the plaintiff has been damaged in an amount much in excess of the sum of $8,000.

"Based upon the findings of fact, the Deputy Hearing Commissioner makes the following—

"CONCLUSIONS OF LAW"

"1. In order for the plaintiff to recover of the defendant, under the Tort Claims Act, it is necessary that he show, from the preponderance of the evidence, that the damages suffered by him were the result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on his part. G.S. 143-291.

"2. G.S. 14-34 reads as follows: 'If 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.' In the case of *State v. McLean,* 234 N.C. 283, at p. 286, *Justice Valentine,* citing cases, stated, 'The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se,* and renders one civilly liable in damages, if its violation proximately results in injury to another; for, in such case, the statute or ordinance becomes the standard of conduct or the rule of the prudent man.'

"Certainly, there is no question but what G.S. 14-34 was enacted to prevent injury to persons. Patrolman Goodman violated this statute in pointing his pistol at the plaintiff and the inhabitants of the car *unless* he was acting within his legal rights as an officer of the law in such use of his weapon. From a review of the decisions of our Court, it is apparent that the patrolman had no authority to so use his gun. An officer of the law, in seeking to arrest *for a misdemeanor,* cannot assault the misdemeanant with his pistol. *State v. Sigman,* 106 N.C. 728. There is no question but what the plaintiff's conduct in operating his car, as heretofore set forth, amounted to no more than a misdemeanor. (Italics added.)

"3. In pointing his gun at the plaintiff, *as heretofore set forth,* Patrolman Goodman was negligent *per se* and such negligence was the sole proximate cause of the injuries received by the plaintiff. (Italics added.)

"4. Negligence was defined in the case of *Mikeal v. Pendleton,* 237 N.C. 690, as 'a failure to perform some duty imposed by law. It is doing other than, or failing to do, what a reasonably prudent man would

have done under the same or similar circumstances. In short, negligence is a want of due care; and, in determining whether due care has been exercised in any given situation by the party alleged to have been negligent, reference must be had to the facts and circumstances of the case, and to the surroundings of the party at the time, and he must be judged by the influence which those facts, and his surroundings, would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated.'

" 'The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others upon coming in contact with them. The degree of care must be commensurate with the dangerous character of the article.' *Luttrell v. Mineral Company*, 220 N.C. 782, and cases cited. 'One who has in his possession or under his control an instrumentality exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury thereby.' 56 Am. Jur., p. 1007.

"Certainly in endeavoring to make the arrest, Goodman did not use that high degree of care required by law in running toward the plaintiff's car in the night-time, not looking where he was going, with his pistol fully cocked and pointed toward the plaintiff's car's inhabitants. It cannot be said that the officer acted as a reasonably prudent man under the same or similar circumstances. Instead of taking exceptional precautions to prevent an injury to the unknown persons of the car, he threw caution to the winds and by his gross negligent conduct left a young man afflicted for life.

"5. That there was negligence on the part of Patrolman Goodman in pointing his fully cocked pistol at the plaintiff's car and running toward it, *as heretofore set forth;* that such negligence was the sole proximate cause of the injuries suffered by the plaintiff; that Patrolman Goodman, at the time, was an employee of the Department of Motor Vehicles, an agency of the State of North Carolina; that the said employee was acting within the scope of his employment. (Italics added.)

"6. That there was no contributory negligence on the part of the plaintiff."

Defendant appealed, assigning as error designated portions of the findings of fact and conclusions of law and the judgment predicated thereon.

Allen, Henderson & Williams for plaintiff, appellee.

Attorney-General Rodman, Assistant Attorney-General Love and Harvey W. Marcus, Member of Staff, for defendant, appellant.

BOBBITT, J. Careful consideration of the evidence impels the conclusion that there was competent evidence to support the particular findings of fact made by the Commission and its ultimate finding or conclusion that plaintiff's injuries were caused by the actionable negligence of defendant. Hence, assignments of error challenging the sufficiency of the evidence to support the findings of fact are overruled.

The more serious question is whether the Commission made its ultimate finding or conclusion of actionable negligence under misapprehension of the applicable law. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324.

Negligence is a mixed question of fact and of law. *McCrowell v. R. R.,* 221 N.C. 366, 20 S.E. 2d 352, and cases cited. In a jury trial, the presiding judge declares and explains the law arising on the evidence in the case. G.S. 1-180. Guided by such instructions, the jury resolves the disputed factual elements. By its verdict, the jury declares the ultimate finding.

The Commission makes both findings of fact and conclusions of law. When dealing with a composite such as negligence, it might be possible by deft discrimination to isolate the element of fact from the element of law; but, since each permeates the whole concept, ordinarily the findings of fact reflect the legal aspect and the conclusions of law reflect the factual aspect. Such a situation obtains here. Finding of fact No. 8 includes a finding that the patrolman *negligently* pointed his pistol at the car in which plaintiff was riding. Conclusion of law No. 4 sets forth factual details and the factual conclusion that the patrolman failed to exercise due care under the circumstances.

The Commission found that the patrolman had no warrant for the arrest of plaintiff or any person riding with him. All the evidence, including that of the patrolman, supports this finding. But appellant contends that under the Commission's findings, the patrolman "found" plaintiff violating the provisions of G.S., Ch. 20, Art. 3, specifically G.S. 20-141. It is true that in such case, as appellant contends, the patrolman was clothed with legal power to arrest plaintiff for the violation of G.S. 20-141, a misdemeanor under the statute relating to motor vehicles, "on sight or upon warrant." G.S. 20-183; *S. v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100. However, it does not appear that the absence of a warrant, insofar as an arrest for the misdemeanor was concerned, was given any significance by the Commission.

Appellant contends that the Commission, in conclusions of law Nos. 2 and 3, did not state accurately the applicable law; and that the ultimate finding of actionable negligence was predicated, in whole or in part, upon the erroneous conclusion that in pointing his gun at the plaintiff, under the circumstances set forth, the patrolman was guilty of negligence *per se.*

If *any person* intentionally points a pistol at *any person,* this action is in violation of G.S. 14-34 and constitutes an assault. *S. v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568. Moreover, such action, being in violation of the statute, is negligence *per se;* and if the pistol accidentally discharges, the injured person may recover damages for actionable negligence.

We agree with appellant that the literal provisions of G.S. 14-34 are subject to the qualification that the intentional pointing of a pistol is in violation thereof only if done wilfully, that is, without legal justification. A different interpretation would contravene the manifest intention of the General Assembly. *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410; *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505; *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960.

Even so, legal justification must be made to appear, whether it be an individual who intentionally points a pistol at his assailant in the exercise of a perfect right of self-defense or an officer who does so in good faith in the discharge of his official duty and when necessary or apparently necessary either to defend himself or to make a lawful arrest or otherwise to perform his official duty. But the mere fact that he is an officer engaged in the performance of *an* official duty does not perforce exempt him from the provisions of the statute.

When the pistol fired, the car operated by plaintiff had stopped. The occupants were aware that an officer was in pursuit. None of the occupants attempted to leave. No resistance was offered or threatened. The patrolman made no call that the occupants of the car get out nor did he give notice that they were under arrest. No word was spoken. *Immediately,* when the car stopped, he got out of the patrol car, with his pistol cocked and pointed in the direction of the car plaintiff was driving; and in running towards that car with his pistol so pointed, without observing what was in his path, he tripped and the gun fired. This is the purport of the findings. Moreover, the uncontradicted evidence is to that effect.

There is no finding of fact to the effect that the patrolman had reasonable grounds for the belief that the occupants of the car were armed or desperate men. Nor is there a finding of fact that the patrolman's conduct was necessary or reasonably appeared to be necessary to defend and protect himself from bodily harm. Nor is there a finding of fact that the patrolman believed or had reasonable ground to believe that the men in this car were the escapees (they were not) from the Watauga County Prison Camp. Moreover, there was no request for such findings. On the contrary, both in the findings of fact and in conclusion of law No. 4, the Commission made manifest its determina-

tion that the circumstances did not justify the action of the patrolman. We must keep in mind that the patrolman's conduct is to be considered in relation to actionable, not culpable, negligence. Hence, we strike from the last sentence of paragraph 4 these words: ". . . he threw caution to the winds and by his gross negligent conduct left a young man afflicted for life." If warranted by the evidence, which is not conceded, it is not material to plaintiff's right to recover for actionable negligence.

While the general statement of legal principles may have been incomplete in that the Commission did not discuss the qualification, namely, that G.S. 14-34 did not apply to a person acting with legal justification, we think it appears plainly that the Commission rejected appellant's contention as to legal justification and found that the patrolman *without legal justification* pointed his pistol at plaintiff or at the car in which he was riding, and that this act, considered with his other conduct at the time, constituted actionable negligence.

U. S. v. Polk, 199 F. 2d 889, relied on "very heavily" by defendant, is factually distinguishable. In that case, a federal officer was pursuing through the woods a man who fled from the site of an illicit distillery. The officer's pistol accidentally discharged when he jumped a ditch. There was no finding of fact that the officer had pointed the pistol intentionally at the man or in his direction. In short, the cited case is not regarded as controlling in relation to the facts here presented.

We conclude that the evidence supports the particular findings; that the particular findings support the ultimate conclusion that plaintiff's injuries were caused by defendant's actionable negligence; and that the findings made dispel the idea that they were based in any material aspect on misapprehension of the applicable law. Indeed, the findings negative legal justification for defendant's conduct in pointing the pistol. Hence, the judgment of the court below is

Affirmed.

BARNHILL, C. J., dissents.

GEORGE P. WRIGHT AND VERNIE D. WRIGHT v. MERCURY INSURANCE COMPANY, A CAPITAL STOCK COMPANY OF ST. PAUL, MINNESOTA.

(Filed 26 June, 1956.)

1. Insurance § 50—

Where insured declares on the policy as written and defendant insurer files answer giving notice that it would rely upon transfer of an interest in

the insured vehicle to another without endorsement on the policy as required by its terms, and use of the vehicle beyond a 50-mile radius of the stated place of principal garaging in violation of provisions in the policy, insured, in the absence of a reply setting up waiver or estoppel by insurer of such provisions, is not entitled to introduce evidence thereof, and, plaintiff's own evidence showing a violation of these provisions, nonsuit is proper.

2. Estoppel § 11a—

If plaintiff seeks to rely upon a waiver or an estoppel *in pais* or an equitable estoppel affecting the real and substantial merits of the matter in controversy and has an opportunity to plead it, and the facts constituting a waiver or estoppel do not appear in the pleadings of the parties, he must specially plead it, and if he does not do so, evidence to prove it is not admissible over objection.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *Patton, Special Judge,* November Civil Term 1955 of RANDOLPH.

Civil action to recover upon an automobile liability insurance policy issued to George P. Wright upon a Ford dump truck on 8 September 1951.

The Ford truck on 22 July 1952 had a collision with a tractor-trailer and was practically demolished. The defendant denied liability under the policy, and tendered into the office of the Clerk of the Superior Court the sum of $109.73, being $93.99 pro rata refund of the unearned premium upon said policy, together with the sum of $15.74 interest thereon computed at the rate of 6% per annum from 30 January 1952 to the date of the tender, in order that the court may direct refund of said unearned premium to George P. Wright or such other person as may be lawfully entitled thereto.

At the close of the plaintiffs' evidence the court allowed the defendant's motion for judgment of nonsuit. Whereupon, the court entered a judgment of involuntary nonsuit, and in the judgment *by consent of the defendant* ordered the Clerk of the Superior Court to pay plaintiffs the sum of $109.73 tendered into the Clerk's office by the defendant.

Plaintiffs appeal, assigning error.

Moody & Moody and Ottway Burton for Plaintiffs, Appellants.

Jordan & Wright and Charles E. Nichols for Defendant, Appellee.

PARKER, J. This case involves the coverage of an insurance policy on a Ford dump truck. The appeal challenges the acts of the court below in (1) allowing the defendant's motion for nonsuit at the close of plaintiffs' evidence and (2) excluding testimony offered by plaintiffs.

The allegations of the complaint are substantially as follows:

One. On 8 September 1951, in consideration of a premium of $129.30 paid to it, defendant issued its policy of collision insurance to George P. Wright on a 1951 Ford dump truck, a copy of which policy is attached to the complaint marked Exhibit A, and made a part thereof. The policy expired on 8 March 1953. It contained a notice of a lien to Associates Discount Corporation, and contained a loss payable clause to it.

Two. About 30 January 1952 George P. Wright transferred ownership of this truck to Vernie D. Wright upon the latter's agreement to assume the monthly installments on the lien held by Associates Discount Corporation, and upon the further agreement to permit George P. Wright and the lien holder to hold the certificate of title to the truck and to be jointly entitled to the immediate possession of the truck in the event of default in the installment payments, because the lien holder refused to release George P. Wright from liability upon its lien. On 30 January 1952 plaintiffs through Associates Discount Corporation gave to defendant notice of this change of interest.

Three. On 22 July 1952 while said policy was in full force and effect, the Ford dump truck suffered a collision loss within the terms and provisions of the policy. The truck was damaged in the amount of $1,799.00, which sum the defendant has contracted to pay plaintiffs under the policy less $100.00. The plaintiffs have made demand upon the defendant for payment under the terms of the policy, which demand the defendant has refused.

The defendant filed an answer admitting the receipt of the premium and the issuance of the policy to George P. Wright. The defendant further admitted in its answer that on 30 January 1952 George P. Wright transferred ownership of the Ford dump truck to Vernie D. Wright, but alleged that it had no knowledge of the transfer of ownership until after the collision on 22 July 1952. In its answer it denied that the truck suffered a collision loss within and covered by the terms, conditions and provisions of its policy. The defendant further answering the complaint and as further defenses thereto alleged:

One. The policy of insurance issued by the defendant to George P. Wright provided, among other things, as follows: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." The policy also provided as follows: "11. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by its

President, Vice President, Secretary, or Assistant Secretary." The defendant did not at any time endorse upon the said policy its consent to any assignment thereof to Vernie D. Wright, or any other person. The policy further provided in the declaration as follows:

"Item 5. LOSS PAYEE: Any loss hereunder is payable as interest may appear to the insured and Associates Discount Corporation, Greensboro, N. C.

"Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as stated herein: No exceptions."

The defendant alleges that it is not liable for the payment of any amount by reason of the damage to the Ford dump truck which occurred on 22 July 1952, because George P. Wright, the insured in said policy, was not the sole owner of said vehicle, and the defendant had no notice or knowledge of said change of ownership, and the policy had not been legally transferred and assigned to any other person in the manner required by the terms and provisions of said policy.

Two. Since George P. Wright divested himself of the ownership of said truck on or about the 30th day of January 1952, and since the policy was not transferred or assigned to Vernie D. Wright, the policy ceased to afford any coverage on the truck as of the date the same was transferred by the insured, George P. Wright, and the defendant herewith tenders into the registry of the Clerk of the Court the sum of $109.73, being $93.99 pro rata refund of the unearned premium upon said policy, together with the sum of $15.74 interest thereon computed at the rate of six (6%) per cent per annum from January 30, 1952, to the date of said tender, in order that the Court may direct refund of said unearned premium to George P. Wright or such other person as may be lawfully entitled thereto. The policy of insurance had attached thereto, and made a part thereof, a certain limitation of use endorsement as follows:

"LIMITATION OF USE ENDORSEMENT—
COMMERCIAL AUTOMOBILES.

"In consideration of the premium at which the policy designated below is issued, it is represented by the Insured that no regular and frequent trips of commercial vehicles described in such policy are or will be made during the policy period to any location beyond a 50 mile radius from the limits of the city or town of principal garaging of such vehicles.

"Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or

limitations of the undermentioned policy, other than as above stated.

"This endorsement shall take effect on the 8th day of September 1951. Attached to and forming part of Policy No. 332-02195 issued to George P. Wright of Staley, N. C. by the Mercury Insurance Company, St. Paul, Minnesota. Not valid until countersigned by an authorized agent of Company at Greensboro, N. C. this 8th day of September 1951.

A. B. JACKSON
President.

(s) C. C. WIMBISH,
Agent."

The policy provided that the insured truck would be principally garaged at Route #1, Staley, N. C. The defendant, from information and belief, alleges that during the spring and summer of 1952 the Ford dump truck was regularly and frequently used on trips to locations beyond a 50 mile radius of Route #1, Staley, N. C., and that at the time of the collision alleged in the complaint this truck was at a point more than 50 miles from Route #1, Staley, N. C., which trip was one of the regular and frequent trips upon which the truck was used beyond said 50 mile radius. Therefore, the breach of the representation set forth in the limitation of use endorsement deprives the plaintiffs, as well as all other persons, firms and corporations, of the right to make any recovery for damages to this truck arising out of the accident of 22 July 1952, even if said policy of insurance was otherwise in full force and effect, which is again denied.

The plaintiffs filed no reply to defendant's answer. The complaint is their sole pleading.

The plaintiffs introduced in evidence the insurance policy attached to their complaint. Their evidence tends to show these facts: On or about 30 January 1952 George P. Wright, the insured and a man 77 years old, transferred and assigned his ownership of the Ford dump truck to his son Vernie D. Wright, but the consent of the defendant to such assignment was never endorsed on the policy. The declaration of George P. Wright, the insured, attached to the policy stated the Ford dump truck will be principally garaged at Route #1, Staley, North Carolina. The policy provides, "by acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance." Vernie D. Wright never used this truck for hauling stone

around the vicinity of Staley. In part of 1952 he hauled stone with this truck from a stone crusher at Kings Mountain, which is west of Charlotte and about 100 miles from Staley. Also in 1952 Vernie D. Wright hauled crushed rock with this truck for several months in Durham. For six weeks immediately prior to the collision of the Ford dump truck with a tractor-trailer on 22 July 1952, which practically destroyed it, and on that date, Vernie D. Wright was engaged in the business of hauling crushed stone regularly and frequently with this Ford dump truck for Floyd Roach from Midland to various road projects, all being beyond a radius of 50 miles from Route #1, Staley, North Carolina. He testified that this work for Floyd Roach "was a continuous, regular operation." When Vernie D. Wrght was hauling crushed rock for Floyd Roach this truck, when not in use, was kept in the yard of the house in Stanfield, where he boarded. His wife and baby lived at Staley, and he went home most week-ends. The wreck occurred about 16 miles from Stanfield.

The policy of insurance contains a provision that this policy applies only to losses, which are sustained during the policy period, while the automobile is owned, maintained and used for the purposes stated as applicable thereto in the declaration.

The plaintiffs contend that there was a waiver of, or an estoppel to claim the benefit of, the limitation of use endorsement on the policy by the defendant. In support of this contention the plaintiffs offered testimony of Vernie D. Wright, which was excluded from the jury upon objection of the defendant. If Vernie D. Wright had been permitted to testify before the jury he would have said as follows: He had a conversation with C. C. Wimbish, agent of the defendant, prior to the issuance of the collision insurance policy he is bringing suit on. He went to Wimbish to insure his truck, and asked him what kind of insurance he needed. Wimbish asked him what he was going to haul. He told him he would never be 50 miles away from the crusher, called that home. Wimbish said a 50 mile radius would be good enough, just so he didn't get 50 miles out of the radius in hauling. Wimbish told him no matter where he garaged the truck just so he didn't haul 50 miles from there.

The plaintiffs also offered evidence, which was excluded from consideration of the jury upon objection by defendant for the purpose of showing a waiver of, or an estoppel to claim the benefit of, the policy provision by the defendant that an assignment of interest under this policy shall not bind the company until its consent is endorsed thereon.

The answer of defendant gave the plaintiffs notice that it was relying upon a violation of the limitation of use endorsement on the policy as a defense, and also upon the provision of the policy as to assignment of interest as a defense. The plaintiffs had ample opportunity to file a

reply to defendant's answer and to allege a waiver of such limitation of use by the defendant and an estoppel of the defendant to claim the benefit of such endorsement, and also to allege a similar plea as to the policy's provision as to an assignment of interest. They failed to do so, and relied entirely on their complaint, which neither states nor makes any reference at all to any facts to show a waiver or an estoppel on the part of the company as to this limitation of use endorsement, and as to the provision as to assignment of interest. The allegation in the complaint that plaintiffs through Associates Discount Corporation gave to defendant notice of the change in interest as to the Ford dump truck is not a pleading of waiver of, or an estoppel to claim the benefit of, the assignment of interest provision by defendant.

The rule is well settled in this jurisdiction, and it seems to be the majority rule elsewhere, that, if the insured relies upon a waiver or an estoppel *in pais* or an equitable estoppel affecting the real and substantial merits of the matter in controversy and has an opportunity to plead it, and the facts constituting a waiver or estoppel do not appear in the pleadings of the parties, he must specially plead it, and if he does not do so, evidence to prove it is not admissible over objection. *Manufacturing Co. v. Assurance Co.*, 110 N.C. 176, 14 S.E. 731, 28 Am. St. Rep. 673; *Upton v. Ferebee*, 178 N.C. 194, 100 S.E. 310; *Laughinghouse v. Ins. Co.*, 200 N.C. 434, 157 S.E. 131; *Lamb v. Staples*, 236 N.C. 179, 72 S.E. 2d 219; *Distributors Packing Co. v. Pacific Indemnity Co.*, 21 Cal. App. 2nd 505, 70 P. 2d 253; *Cohen v. Metropolitan Life Ins. Co.*, 32 Cal. App. 2nd 337, 89 P. 2d 732; *Purefoy v. Pacific Automobile Indemnity Exchange* (Supreme Court of Cal.), 53 P. 2d 155; *Neese v. Milwaukee Mechanics' Ins. Co.*, 84 Ga. App. 473, 66 S.E. 2d 172; *Hyder v. Metropolitan Life Ins. Co.* (Supreme Court of South Carolina), 190 S.E. 239; Appleman Insurance Law and Practice, Vol. 20, sec. 11845; Richards Law of Insurance, 4th Ed., sec. 141; Annotations 120 A.L.R. pp. 8 *et seq.*, entitled Pleading Waiver, Estoppel and *Res Judicata;* 29 Am. Jur., Insurance, sections 1422 and 1427; 19 Am. Jur., Estoppel, sections 179, 181 and 182; 56 Am. Jur., Waiver, sections 18 and 19.

In *Midkiff v. Ins. Co.*, 197 N.C. 139, 147 S.E. 812, and in *Midkiff v. Ins. Co.*, 197 N.C. 144, 147 S.E. 814, the original transcripts of the records in each case on file in the office of the Clerk of the Supreme Court show that the plaintiffs in each case filed a reply to the answer expressly pleading waiver.

The assignments of error as to the exclusion of evidence are without merit, for the reason that plaintiffs have not pleaded waiver or estoppel, though they had ample opportunity to do so, and facts constituting a waiver or estoppel do not appear in the combined pleadings of the parties. "Proof without allegation is as ineffective as allegation with-

out proof." *McKee v. Lineberger,* 69 N.C. 217, 239. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

Plaintiffs' suit is upon the policy as written. *Burton v. Ins. Co.,* 198 N.C. 498, 152 S.E. 396. Plaintiffs' evidence shows unequivocally that the Ford dump truck, a commercial vehicle, while engaged in regular and frequent trips beyond a 50 mile radius from Route #1, Staley, North Carolina, had a collision with a tractor-trailer beyond a 50 mile radius from Route #1, Staley, North Carolina. Therefore, the policy excludes coverage by its express terms. *Insurance Co. v. Wells,* 226 N.C. 574, 39 S.E. 2d 741; *Person v. Tyson,* 215 N.C. 127, 1 S.E. 2d 367; *McCabe v. Cas. Co.,* 209 N.C. 577, 183 S.E. 743; *Pothier v. New Amsterdam Cas. Co.,* 4 Cir. 1951, 192 F. 2d 425; *Virginia Surety Co. v. Vernie D. Wright, et al,* 114 F. Supp. 124. See *Johnson v. Casualty Co.,* 234 N.C. 25, 65 S.E. 2d 347.

The judgment of nonsuit entered below is

Affirmed.

JOHNSON, J., not sitting.

HENRY L. NANCE v. HORACE FIKE AND HOWARD NANCE.

(Filed 26 June, 1956.)

1. Evidence § 19—

Where a party testifies as a witness in his own behalf, it is competent for the opposing party to show his general reputation as bearing on his credibility as a witness.

2. Assault and Battery §§ 3, 13: Homicide § 22—

Even in those instances in which an opposing party's reputation as a violent and dangerous fighting man is competent upon the question of self-defense, only testimony as to his general reputation for such traits is admissible, and the admission of hearsay evidence as to particular incidents is prejudicial.

3. Same—

As an exception to the general rule that testimony as to the general reputation of a party is not admissible as substantive evidence, a defendant pleading and offering evidence of self-defense in assault cases, criminal and civil, may offer as substantive evidence, under the general rules applicable in homicide cases, testimony tending to show the bad general reputation of his alleged assailant as a violent and dangerous fighting man and of defendant's knowledge of such general reputation.

4. Same—

Testimony of the general reputation of defendant's alleged assailant is competent upon defendant's plea of self-defense upon the question of the existence or nonexistence of a reasonable apprehension by defendant as to imminent bodily harm, and therefore such testimony is competent only when defendant has knowledge of such general reputation, and further, such testimony should be in response to interrogations as to the assailant's reputation as a violent and dangerous fighting man and not in regard to his reputation for "quarrelsomeness," "troublemaking," "high-temperedness," "disorder," "disturbances," etc.

5. Same—

Where, in an action for assault and battery, both parties rely upon self-defense, but plaintiff offers no evidence that either of defendants had a bad reputation as a violent and dangerous fighting man, defendants' evidence to the effect that each of them had a good reputation for peacefulness and quietness is incompetent, since such evidence is admissible solely in rebuttal of evidence of bad general reputation.

6. Assault and Battery § 3—

The evidence in this action for civil assault *is held* sufficient to warrant the submission of the case to the jury.

APPEAL by plaintiff from *McKeithen, Special J.*, October Term, 1955, MONTGOMERY.

Plaintiff seeks to recover compensatory and punitive damages on account of alleged assault and battery.

The action arose out of a difficulty originating between plaintiff and defendant Nance in which defendant Fike came to the aid or to the rescue of defendant Nance. Blows were inflicted by fists and by axe handles. This occurred in Troy, North Carolina, on 4 March, 1954, in the place of business of Montgomery Hardware Company, Inc.

The entire capital stock of the hardware company was owned by four members of one family, brothers and sisters, to wit, defendant Nance, the Secretray-Treasurer and General Manager, Mrs. Callie Nance Smitherman, Mrs. Ethel Nance Fike, mother of defendant Fike, and plaintiff, each owning one-fourth. The four stockholders were the directors. In addition to his status as stockholder, plaintiff was a salaried employee. Defendant Fike was a salaried employee. As indicated, defendant Fike is the nephew of the two brothers, plaintiff and defendant Nance.

Prior to 4 March, 1954, there had been much friction between plaintiff and defendant Nance; but, in view of the disposition made of this appeal, the details of such friction and as to what occurred on the occasion of the alleged assault need not be set forth.

Plaintiff offered evidence tending to show that defendants wilfully assaulted him. Defendants offered evidence tending to show that plain-

tiff wilfully assaulted defendant Nance. Plaintiff and defendant Nance each contended that he acted solely in self-defense. Defendant Fike contended that originally he acted solely in defense of defendant Nance, his uncle and the General Manager of the business, and thereafter also in his own defense. Each party contended that he used no more force than was or reasonably appeared to be necessary for the purposes of defense.

The jury, answering separate issues, found that neither of the defendants assaulted plaintiff as alleged in the complaint, and did not reach the issues relating to damages. From judgment in defendants' favor, based on the verdict, plaintiff appealed. His assignments of error include those relating to the admission, over plaintiff's objection, of certain testimony, set forth in the opinion.

Little, Brock & McLendon and Bynum & Bynum for plaintiff, appellant.

R. L. Brown and David H. Armstrong for defendants, appellees.

BOBBITT, J. Mr. E. L. Wallace, a director of the Bank of Montgomery, offered as defendants' witness, was permitted, over plaintiff's objection, to testify as set out below.

On *direct* examination, he testified that the general reputation of each defendant, for peacefulness and quietness, was good; and that the general reputation of plaintiff, for high-temperedness, turbulence and violence, was bad.

On *redirect* examination, he testified, in part, as follows: "Q. Have you ever heard the Bank Directors discuss Mr. Henry Nance's reputation for turbulence, disorder and violence? A. Yes, sir, I have. Q. What has been their remarks to you concerning that? That is what reputation is based on. A. Well, I've heard Mr. Harris, the Cashier, say— Q. Go ahead. A. He has had some talk with Mr. Harris about considering loans and number of things about the Bank and Mr. Harris' statement to me was that he dreaded to see him come in, that he talked so rough he couldn't get along well with him, and things like that, in the Bank. Q. Haven't you actually been in a Directors' meeting when the plaintiff Henry Nance caused a commotion and disturbance? A. Yes, sir, he had been over at the stockholders' meeting. He asked to be put on as a Director, and a few things like that, and the Bank didn't see fit to do it, and he raised a little fuss."

The testimony of Mr. Wallace, as to what Mr. Harris had told him and as to what occurred when the stockholders of the bank refused to make him a director, was incompetent. Each party having testified, it was competent to show his general reputation as bearing on his cred-

ibility as a witness. *Morgan v. Coach Co.,* 228 N.C. 280, 45 S.E. 2d 339; *Lumber Co. v. Atkinson,* 162 N.C. 298, 78 S.E. 212. In fact, this was done. If evidence as to "peacefulness and quietness" or as to "high-temperedness, turbulence and violence" was competent for any purpose, a subject discussed below, only testimony as to general reputation for such traits was admissible. Stansbury, North Carolina Evidence, sec. 110, and decisions cited. *A fortiori,* hearsay evidence as to particular incidents was incompetent.

We regard the error in admitting the quoted testimony of Mr. Wallace as sufficiently prejudicial to require a new trial. However, other assignments of error, in respect of the admissibility of evidence, should be noticed.

Ordinarily, evidence of prior threats and of incidents of violence on prior unrelated occasions are competent only if the defendant was present or had knowledge thereof prior to the alleged assault. *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316. Since the evidence upon the next trial may be different in these respects, we refrain from discussing the proper application of this rule to evidence of this character in the record now before us.

In addition to Mr. Wallace's testimony, defendants were permitted to elicit testimony from their other witnesses to the effect (1) that the general reputation of each defendant for peacefulness and quietness was good, and (2) that the general reputation of plaintiff for turbulence and violence was bad. As to the latter, the questions varied considerably as to the traits involved, *i.e.,* often the word "violence" was omitted; and the examiner joined with the word "turbulence" such words as "quarrelsomeness," "troublemaking," "high-temperedness," "disorder," "disturbances." Indeed, the word "turbulence" was the only word used consistently.

Prior to *S. v. Turpin,* 77 N.C. 473 (1877), in homicide cases involving a plea of self-defense, except where the evidence was wholly circumstantial, testimony as to the general reputation of the deceased as a man of violence was held incompetent. *Ruffin, C. J.,* in *S. v. Barfield,* 30 N.C. 344, had said: "The law no more allows a man of bad temper and habits of violence to be killed by another, whom he is not assaulting, than it does the most peaceable and quiet of men." And the reasoning was that, since the fact and not the fear of an assault extenuated the killing, such testimony was foreign to the issue. He regarded such testimony as having a tendency to divert the jury from the real issue, thereby causing a verdict based largely on the prior general reputation of the combatants rather than on what transpired upon the occasion of the fatal encounter.

Since the evidence in the case at hand is positive and direct as to what occurred on the occasion of the alleged assault, we pass without

discussion decisions to the effect that "where the evidence is wholly circumstantial, testimony of the violent character and threats of the deceased, even if unknown to the prisoner, are admissible as tending to show the inherent probabilities of the transaction." *S. v. Byrd,* 121 N.C. 684, 28 S.E. 353; *S. v. Blackwell, supra; S. v. Hensley,* 94 N.C. 1021; *S. v. Turpin, supra; S. v. Tackett,* 8 N.C. 210.

Since *S. v. Turpin, supra,* where there is evidence tending to show that the killing was in self-defense, the defendant may offer evidence tending to show the bad general reputation of deceased as a violent and dangerous fighting man and the defendant's knowledge thereof. If and when the defendant offers such evidence, but not otherwise, the State may offer evidence (in rebuttal) tending to show the general reputation of the deceased as a man of peace and quiet. *S. v. Champion,* 222 N.C. 160, 22 S.E. 2d 232; *S. v. Carraway,* 181 N.C. 561, 107 S.E. 142; *S. v. Blackwell, supra.* The evidence is competent as bearing upon the reasonableness of the defendant's apprehension or belief that what he did was necessary to prevent death or great bodily harm. *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620, and cases cited. For the same reason, evidence of prior threats made by the deceased and communicated to the defendant are competent. *S. v. Carraway, supra; S. v. Blackwell, supra.*

Moreover, our decisions are to the effect that such testimony as to the general reputation of the deceased as a violent and dangerous fighting man, may relate to some peculiar trait in respect of violence or some condition under which he became violent, *e.g.,* when drunk, if the evidence in the case on trial discloses the exhibition of such trait or the existence of such condition. *S. v. Carraway, supra; S. v. Sumner,* 130 N.C. 718, 41 S.E. 803; *S. v. McIver,* 125 N.C. 645, 34 S.E. 439.

Generally, the legal principles relating to self-defense are equally applicable when the prosecution is for assault. *S. v. Nash,* 88 N.C. 618; *Saunders v. Gilbert,* 156 N.C. 463, 72 S.E. 610; *S. v. Elmore,* 212 N.C. 531, 193 S.E. 713. *Ashe, J.,* in *S. v. Nash, supra,* says: "And whatever will excuse a homicide, will of course, excuse an assault and battery." In either case, no more force may be used than is or reasonably appears to be necessary for the purpose of defense.

Yet in *S. v. Kimbrell,* 151 N.C. 702, 66 S.E. 614, an assault case, this Court, after referring to the rule as to prior communicated threats in homicide cases, held that such evidence was not admissible in assault cases. *Walker, J.,* dissented. Limited approval of *S. v. Kimbrell, supra,* will be found in *S. v. Gibson,* 193 N.C. 487, 137 S.E. 417; but in that case no question of self-defense was involved. Thereafter, in 1933, such evidence was made admissible by statute in all cases of assault, assault and battery, and affrays, wherein deadly weapons are

used and serious injury is inflicted. Ch. 189, Public Laws of 1933, now G.S. 14-33(c). However, apart from the statute, since the identical questions are involved, we see no sufficient reason for the distinction made in this respect in *S. v. Kimbrell, supra,* between homicide cases and assault cases; and that case may be considered withdrawn as authority for the proposition stated.

Smithwick v. Ward (1859), 52 N.C. 64, 75 Am. Dec. 453, an assault case, would seem authority that the testimony now under consideration was incompetent. Certainly, this is true in the absence of a plea of self-defense and supporting evidence. Annotations: 64 A.L.R. 1029; 154 A.L.R. 121. But in *Smithwick v. Ward, supra,* neither the case as reported nor the original record on appeal discloses whether the defendants pleaded self-defense. It may be inferred that the evidence profferred by defendants, similar to that offered by defendants here, was solely for the purpose of minimizing plaintiff's recovery of punitive damages.

We conclude that in assault cases, criminal and civil, when the defendant pleads and offers evidence of self-defense, he may then offer, under the rules applicable in homicide cases, evidence tending to show the bad general reputation of his alleged assailant as a violent and dangerous fighting man and of his knowledge of such general reputation. In rebuttal, the State or plaintiff may offer evidence tending to show the prosecutor's or plaintiff's good general reputation as a peaceful and quiet man.

The foregoing is an exception to the general rule that testimony as to the general reputation of a party is not admissible in a civil action as substantive evidence. 32 C.J.S., Evidence sec. 423; 20 Am. Jur., Evidence sec. 319; Stansbury, North Carolina Evidence, sec. 103, and decisions cited. As to the general rule applicable in criminal cases: *Marcom v. Adams,* 122 N.C. 222, 29 S.E. 333; Stansbury, North Carolina Evidence, sec. 104, and cases cited.

While this exception seems fully justified, we are mindful of the cogent reasoning of *Ruffin, C. J.,* in *S. v. Barfield, supra.* A person of ordinary firmness would have reasonable grounds to apprehend that he was in danger of suffering *bodily harm* only if he knew the bad general reputation of his alleged assailant as a *violent* and *dangerous fighting man.* Consequently, the question should be so restricted. Such words as "quarrelsome," "troublemaking," "high-temperedness," "disorder," "disturbances," tend to divert rather than aid the jury in determining the crucial issue, that is what occurred on the particular occasion; for their probative force tends more strongly to show that plaintiff was generally obnoxious and so ought to have been beaten

rather than to show that defendant acted to defend himself from bodily harm in the exercise of his legal rights.

The word "turbulence" is used often in other jurisdictions. Annotations: 64 A.L.R. 1029; 154 A.L.R. 121. It appears infrequently in our decisions. If used alone as a synonym for "violence," the witness is less apt to understand its import. If used in conjunction with "violence," in a phrase such as "turbulence and violence," it may do no harm for the sense in which it is used is clarified by the word "violence," which in reality is the key word. The formula "violent and dangerous fighting man," firmly established in the homicide cases, is approved. There should be no material departure therefrom. The existence or nonexistence of a reasonable apprehension as to *imminent bodily harm* is the subject to which such evidence relates.

Plaintiff contended that he acted in self-defense. However, he offered no evidence that either of the defendants had a bad general reputation as a violent and dangerous fighting man. Whether, in relation to the issues submitted, it would have been competent for him to have done so, is not material here. In any event, defendants' evidence, available only by way of rebuttal, to the effect that each of the defendants had a good general reputation for peacefulness and quietness, was incompetent.

Since a new trial is awarded for the reasons stated, there is no need to discuss the other assignments of error. In this connection, however, we note defendants' contention that plaintiff's evidence was not sufficient to warrant submission of the case to the jury and that judgment of nonsuit should have been entered; but full consideration of the evidence impels us to the opposite conclusion.

New trial.

STATE v. HURLEY DUNCAN.

(Filed 26 June, 1956.)

1. Homicide § 25—

The State's evidence tended to show that defendant committed an assault and battery on his victim, that some three days after the assault the victim was taken to the hospital, that he was discharged after some seven days in the hospital, and that, while waiting to leave the hospital, he became ill, and died almost immediately. There was medical expert testimony that the cause of death was an embolism and that the unlawful assault was the cause of the embolism. *Held:* The evidence was sufficient to establish the *corpus delicti* and was sufficient to overcome defendant's motion for nonsuit.

2. Criminal Law § 5—

Evidence of defendant's mental condition before and after the commission of the offense, as well as at the time thereof, is competent upon his defense of insanity provided the inquiry bears such relation to his condition at the time the offense was committed as to be worthy of consideration in respect thereto.

3. Same—

An adjudication, pursuant to G.S. 122-84, that defendant was without sufficient mental capacity to undertake his defense, entered about a month after the time of the commission of the offense, although not conclusive, is competent in evidence for the consideration of the jury on defendant's defense of insanity.

JOHNSON, J., not sitting.

APPEAL by defendant from *Carr, J.*, October Term 1955 of CHATHAM.

Criminal prosecution on a bill of indictment charging murder in the first degree of J. M. Culbertson.

The jury convicted the defendant of murder in the second degree.

From judgment of imprisonment the defendant appeals, assigning error.

William B. Rodman, Jr., Attorney General, and Claude L. Love, Assistant Attorney General, for the State.

Dixon & Dark for Defendant, Appellant.

PARKER, J. On 13 December 1946 J. M. Culbertson, a man 66 years old and in good health and good physical condition, had plowed his horses nearly all day in a field in front of his home and had sown 26 acres of small grain. In the afternoon he came staggering to his home and fell down. He got up and went into the house. He had multiple fractures of the left arm, a broken right arm, cuts on his forehead, scalp and left hand and multiple bruises on his body, chiefly on both arms. The cut on his forehead was a ragged two-inch cut, and there were deep lacerations of the scalp. Blood was running all over his face. He was carried to a local doctor that afternoon and the next day, and the day following to Watts Hospital in Durham.

He was admitted to Watts Hospital on 16 December 1946, where he stayed until 23 December 1946. When he signed out of the hospital, he walked out the front door and sat on the porch to wait for his automobile. While waiting on the porch he became ill, and was carried immediately into the examining room of the hospital, where he gave a few gasps and died. An autopsy was performed on his body. Dr. R. B. Rainey, an orthopedic surgeon at the hospital, attended J. M. Culbertson, while a patient there. Dr. Rainey, a witness for the State,

testified that, in his opinion, J. M. Culbertson's death was caused by a blood clot in the lung, or embolism, which cut off the blood supply to his lungs, making it impossible for him to breathe. He further testified that he had an opinion satisfactory to himself as to what produced this blood clot, that caused his death: "My opinion is that the inactivity and the injuries in a person of his age were the main factors producing the blood clot. I did not find any other conditions about his body, except the injury just described, which were likely and calculated to produce the blood clot: my opinion is that the formation of the blood clot would have been very unlikely without the injuries."

In the field where J. M. Culbertson was ploughing there were seen the day after he was assaulted tracks of a man who had come into the field and the print of a man's body lying in freshly ploughed ground. The tracks came into the field from the woods and went back to the woods. The tracks were all around the print of the man's body.

In December 1946 the defendant was arrested by T. T. Elkins, a deputy sheriff, shortly after J. M. Culbertson's death. Elkins asked defendant why he whipped Mr. Culbertson. The defendant replied, "Mr. Culbertson kept talking about him, and he wanted to dry him up."

In December 1946, and after 13 December, Raymond Clapp saw the defendant in the yard at the Siler City Mills. He and defendant were friends. He asked the defendant why he beat Mr. Culbertson with a stick, why didn't he take his fists and give him a good whipping and get it over with. The defendant stood and looked at the ground, and then asked Clapp who told him. Clapp replied that J. M. Culbertson's son Wrenn had just told him about it.

A. L. Brooks in December 1946 was jailer of Chatham County. He heard Sheriff Andrews question defendant in jail about the stick he hit Mr. Culbertson with. The defendant replied "the stick will never be found," or "you cannot find the stick." Brooks testified defendant used some of these words, I would not say exactly which ones.

The defendant assigns as error the refusal of the court to allow his motion for judgment of nonsuit. The evidence for the State tends to show that the death of J. M. Culbertson proximately resulted from defendant's unlawful assault upon him, or to phrase it differently that the unlawful assault was the cause of the embolism that caused death. This evidence was ample to establish the *corpus delicti.* As to the cause of death in homicide cases see: *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; 40 C.J.S., Homicide, sec. 11. The evidence offered by the State is of sufficient probative value or force to sustain a conviction, and consequently to overcome the challenge of the motion for nonsuit. *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272.

The defendant contends that he did not kill J. M. Culbertson, and also contends that at the time of the alleged offense he was insane, which insanity was caused by active syphilis involving his brain and spinal cord.

The bill of indictment was found by the Grand Jury at the January Term 1947 of the Superior Court of Chatham County. At this same term upon the arraignment of the defendant upon the bill of indictment charging him with first degree murder it was suggested to the court that the defendant is insane and without sufficient mental capacity to undertake his defense or to receive sentence after conviction. The defendant was present in court with his counsel. Whereupon, at this same term of court the trial judge, pursuant to G.S. 122-84, impanelled a jury and had an inquisition in regard to defendant's mental condition. The following issue was submitted to the jury: "Is the defendant insane and without sufficient mental capacity to undertake his defense or to receive sentence in this case?" The jury answered the issue Yes. Then the trial judge, pursuant to G.S. 122-83 and G.S. 122-87, ordered that the defendant be committed to the State Hospital at Raleigh, and there be confined, cared for and treated under its rules and regulations, until discharged therefrom according to law, and, if his sanity is restored, he shall be returned to this court for further proceedings under the bill of indictment.

The defendant offered in evidence this adjudication of insanity, which is recorded in "Judgment Docket R, page 235, R-712, State v. Hurley Duncan, which judgment was entered by Judge W. C. Harris at the January Term 1947 of Chatham County Superior Court, and docketed January 14, 1947" in the office of the Clerk of the Superior Court. The State objected to its introduction. The objection was sustained. The defendant excepted to its exclusion, and assigns it as error. The State offered no evidence that the defendant had recovered or had been restored to sanity. G.S. 122-87.

To determine the issue as to whether the defendant was insane at the time of the alleged commission of the offense evidence tending to show the mental condition of the accused both before and after the commission of the act, as well as at the time of the act charged, is competent, provided the inquiry bears such relation to the person's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto. It would be impracticable to limit the evidence to such condition at the exact time. *McCully v. State*, 141 Ark. 450, 217 S.W. 453; *Oborn v. State*, 143 Wis. 249, 126 N.W. 737, 31 L.R.A. (NS) 966; 1 McClain on Crim. Law, p. 136; 20 Am. Jur., Evidence, p. 324. In *Bond v. State*, 129 Tenn. 75, 165 S.W. 229, the Court said: "Evidence of his conduct and condition before, at the time of, and subse-

quent to the doing of the thing charged is admissible to enable the jury to arrive at a proper conclusion as to the defendant's mental status at the time he did the thing complained of." In Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 233, it is said: "Courts are today universally agreed that both prior and subsequent mental condition, within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue."

The rule is well established that in criminal cases, when insanity is relied on as a defense, an adjudication declaring the defendant to be an insane person made prior to the alleged offense or subsequent to the alleged offense for which the defendant is being tried is not conclusive of the insanity of the defendant at the time of the inquisition, and is admissible in evidence for the consideration of the jury on the issue as to whether or not he was insane when the offense was committed, provided the time of the adjudication bears such relation to the person's condition of mind at the time of the crime as to be worthy of consideration in respect thereto. *Poole v. State,* 212 Ark. 746, 207 S.W. 2d 725; *McCully v. State, supra; State v. St. Clair* (Missouri Supreme Court—1953), 262 S.W. 2d 25, 40 A.L.R. 2d 903; *Davidson v. Com.,* 171 Ky. 488, 188 S.W. 631; *Smedley v. Com.,* 139 Ky. 767, 127 S.W. 485; *State v. McMurry,* 61 Kan. 87, 58 P. 961; *Wheeler v. The State,* 34 Ohio St. 394, 32 Am. Rep. 372; *Hempton v. State,* 111 Wis. 127, 86 N.W. 596; *People v. Farrell,* 31 Cal. 576; *State v. Glindemann,* 34 Wash. 221, 75 P. 800, 101 Am. St. Rep. 1001; *Bond v. State, supra; Reeves v. State,* (Ala.) 65 So. 160; *Sherrill v. People,* 75 Col. 401, 225 P. 840; 23 C.J.S., Crim. Law, sec. 924; Annos. 7 A.L.R. 568 and 68 A.L.R. 1309; Wharton's Criminal Evidence, 12th Ed., Vol. I, p. 436; 20 Am. Jur., Evidence, p. 324. Here there is no question as to remoteness of the adjudication: on that subject see Annos. 7 A.L.R., pp. 571-573 and 590, and 68 A.L.R., pp. 1311-1312 and 1316.

In Wigmore on Evidence, 3rd Ed., sec. 1671, pp. 678-679, it is said: "There is not, therefore, and never has been, any doubt as to the admissibility of an *inquisition* of lunacy, in any litigation whatever, to prove the person's mental condition at the time; the only controversy has been whether it is conclusive, *i.e.* whether it is to be regarded as a judicial proceeding and a judgment *'in rem,'* binding upon all persons whatsoever. No distinction is made for *criminal* cases, the inquisition being equally admissible to prove the accused's insanity. There also arises for it the question whether the person's mental condition *at the time* of the inquisition is evidence of his condition at the time in issue; that is merely a question of the relevancy of the fact evidenced by the inquisition and not of the admissibility of the inquisition."

In 3 Taylor on Evidence, sec. 1674, it is said: "In general, a judgment *in rem* furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments *inter partes,* or to inquisitions in lunacy, inquisitions *post mortem,* or other inquisitions, which though regarded as judgments *in rem,* so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence. An inquisition in lunacy, for instance, though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry."

In *McCully v. State,* (Ark.), *supra,* the defendant was being tried for incest, and offered an adjudication of the probate court committing the defendant to an insane asylum. The original transcript on *McCully v. State* shows (1) that the indictment charged the offense to have been committed on 15 January 1918, and (2) that the defendant was committed to the asylum on 14 July 1918. The trial court refused to admit the probate record in evidence, but the Supreme Court of Arkansas reversed the trial court, and held that the record of commitment to an asylum was admissible on the issue of insanity. What the original transcript shows is set forth in *Poole v. State* (Ark.), *supra.*

This Court in civil cases has recognized the rule that adjudications of insanity are competent in evidence. *Armstrong v. Short,* 8 N.C. 11; *Johnson v. Kincade,* 37 N.C. 470; *Christmas v. Mitchell,* 38 N.C. 535; *Rippy v. Gant,* 39 N.C. 443; *Parker v. Davis,* 53 N.C. 460; *Johnson v. Ins. Co.,* 217 N.C. 139, 7 S.E. 2d 475; *Sutton v. Sutton,* 222 N.C. 274, 22 S.E. 2d 553.

The bill of indictment gives the name of the deceased as J. M. Culbertson. Everywhere else in the record the deceased is referred to as J. T. Culbertson or Tilley Culbertson. His son Wrenn Culbertson testified that his father's name was Tilley Culbertson. It is plain that all these names refer to the same person: the defendant makes no contention to the contrary. If and when this case is tried again, the defendant should be tried upon a bill of indictment that alleges the correct name of the deceased. *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154.

The record of his adjudication of insanity at the January Term 1947 of the Superior Court of Chatham County offered by the defendant for the purpose of tending to show that he was insane at the time of the inquisition is admissible in evidence for the consideration of the jury on the issue as to whether or not he was insane when the alleged offense was committed in December 1946. For the prejudicial error of rejecting it, the judgment of the court below is reversed and a new trial ordered.

New Trial.

JOHNSON, J., not sitting.

STATE v. O'BERRY STEPHENS.

(Filed 26 June, 1956.)

1. Criminal Law § 52a(3)—

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct or circumstantial, or a combination of both.

2. Criminal Law § 81f—

An appeal from refusal of defendant's motion to nonsuit in a case in which the State relies upon circumstantial evidence presents the question whether the record, considered in the light most favorable to the State, discloses substantial evidence of all material elements constituting the offense for which the accused was tried.

3. Criminal Law § 52a(3)—

Whether there is substantial evidence, direct or circumstantial, of each essential element of the offense, is a question of law for the court; whether circumstantial evidence points unerringly to defendant's guilt and excludes every other reasonable hypothesis, is a question of fact for the jury.

4. Homicide § 25—

Evidence tending to show that, on the day before the fatal explosion, defendant procured dynamite, fuse and cap, that shortly after the defendant left the kitchen where his wife was working, an explosion occurred from an explosive placed underneath the stove, together with evidence of conflicting statements made by defendant, and evidence tending to show motive and that defendant failed to make any effort to assist his wife, who was mortally wounded in the explosion, until a neighbor arrived, *held* sufficient to overrule defendant's motion for nonsuit in a prosecution for murder.

5. Homicide § 30—

Where the evidence tends to show defendant's guilt of murder, the jury's verdict of guilty of manslaughter, even though evidence of manslaughter is lacking, will not be disturbed on appeal, the verdict being favorable to defendant.

APPEAL by the defendant from *Mallard, J.*, November 1955 Term, ROBESON Superior Court.

Criminal prosecution upon a bill of indictment charging the defendant with the murder of his wife, Edna Anna Stephens. The offense is alleged to have occurred on August 20, 1955.

The evidence of the State tended to show the following: The defendant and the deceased lived in a one-story frame house in the Town of Lumberton. The back porch to the house had been enclosed as a kitchen. About 5:30 a.m. on Saturday, August 20, 1955, a violent explosion completely wrecked the kitchen, leaving only the floor. Mr. Brisson, who lived next door, heard the explosion and went to the scene where he found the defendant with a water bucket trying to put out a small fire in the corner of what had been the kitchen. He arrived at the scene within about three to five minutes after the explosion. The outside walls to the kitchen had been demolished and the roof had been blown several feet from the foundation. Mrs. Stephens was under the roof calling for help. The witness raised up a corner of the roof and the defendant pulled his wife out. Her left leg was blown completely off below the knee and her right leg was practically blown off at the knee. She had the odor of kerosene on her clothes, her hair was slightly singed, and there were burns on her arms and legs. The defendant held her in his arms until the ambulance came. She died from the effects of the injuries at one o'clock on the day of the explosion.

The defendant stated he got up, lighted the burners in the kerosene cook stove, put on his shoes and left the room to feed his chickens. At the time he left, his wife was at the frigidaire a few feet from the stove. While feeding the chickens in the lot a short distance from the kitchen, the explosion occurred.

An officer found a piece of burned-out dynamite fuse about two or three inches long near the kitchen. The explosion blew a hole in the floor, breaking one of the wood sleepers, and blew a hole in the dirt directly under the stove. The two kerosene tanks in the stove had not exploded, though bent apparently by the explosion. Each had a small quantity of kerosene in it after the explosion. The stove was of the cabinet type and the side walls extended all the way to the floor.

The officers collected all available parts of the stove, sent them to the technical laboratory of the Federal Bureau of Investigation in Washington, where George A. Berley, an expert in explosives, examined the parts and from them reconstructed the stove. The examination disclosed that the damaged parts of the stove were bent upwards. After qualifying as an expert in explosives, Mr. Berley testified: "In my opinion the explosion occurred or originated under the stove rather than in the stove itself." The explosion could not have occurred in the kerosene containers in the stove.

When questioned, the defendant denied having obtained, or having made any effort to obtain dynamite.

James R. Freeman was called in by an officer and made the statement in the defendant's presence that he, at the request of the defend-

ant, obtained two sticks of dynamite, a piece of fuse and one dynamite cap, and delivered them to the defendant about five o'clock on the afternoon preceding the explosion. The defendant replied, "Boy, would you tell a story like that on me?" Freeman testified in the case that he delivered the dynamite to the defendant who said he wanted it to blow up a stump.

John A. Parnell, a salesman at Lumberton Trading Company, testified the defendant sought to buy two sticks of dynamite from the store on the day preceding the explosion but that the store did not sell less than a case. "He just wanted two sticks to blow up a stump for a woman."

The State introduced a written statement signed by the defendant in which he admitted he procured the two sticks of dynamite, one cap and one piece of fuse about 10 or 12 inches long from the Freeman boy to blow up a stump for a woman who lived close to the "weave mill." He was unable to identify either the woman or the boy who brought the message. He stated he took the dynamite, wrapped in a piece of paper, fuse and cap, also separately wrapped, and placed them on the windowsill in the kitchen; that his wife knew they were there, but said they would be all right since there were no children around. He stated his wife was in the kitchen when he left to feed the chickens and that he was in the chicken lot when the explosion occurred.

The State introduced evidence tending to show that the defendant had an affair with another woman who had threatened to quit him for the reason that he was married.

At the conclusion of the State's evidence the defendant moved for judgment as of nonsuit, and excepted when the court overruled the motion. The defendant rested without offering evidence, renewed the motion, which was again overruled, and the defendant again excepted. The jury returned a verdict of guilty of manslaughter. From a judgment of imprisonment for not less than 15 nor more than 20 years, the defendant appealed, assigning as error the refusal to grant the motions for judgment as of nonsuit.

William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

L. J. Britt, McLean & Stacy, for defendant, appellant.

HIGGINS, J. The assignment of error relied upon challenges the sufficiency of the evidence to go to the jury and to sustain the verdict of manslaughter. The defendant does not contend that error was committed, either in the admission or exclusion of evidence, or in the court's charge.

Admittedly, this is a case of circumstantial evidence. The defendant argues, therefore, that it was the duty of the trial court to analyze and weigh the evidence and to sustain the motion for judgment as of nonsuit unless the evidence, when so weighed and analyzed, points unerringly to the guilt of the accused and excludes every other reasonable hypothesis. The argument does not distinguish between the function of the court and the function of the jury. When the evidence is closed and the defendant moves for a directed verdict of not guilty, or demurs to the evidence, or moves for judgment of nonsuit, (the three being for all practical purposes synonymous) the trial court must determine whether the evidence taken in the light most favorable to the State is sufficient to go to the jury. That is, whether there is substantial evidence against the accused of every essential element that goes to make up the offense charged. If the trial court so finds, then it is its duty to overrule the motion and submit the case to the jury. Otherwise, the motion should be allowed. If the motion is overruled, it becomes the court's duty to charge the jury that in making up its verdict it must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis. It is the duty of the jury to weigh and analyze the evidence and to determine whether that evidence shows guilt beyond a reasonable doubt.

When a case comes here on exception to the refusal of the trial court to sustain the motion to dismiss, the rule applicable to this Court is the same as that applicable to the trial court. Taking the evidence in the light most favorable to the State, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion. The rule for this and for the trial court is the same whether the evidence is circumstantial or direct, or a combination of both.

We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the

court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. *S. v. Simpson, ante,* 325; *S. v. Duncan, ante,* 374; *S. v. Simmons, supra; S. v. Grainger,* 238 N.C. 739, 78 S.E. 2d 769; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Johnson, supra.*

In this case the defendant procured dynamite, fuse, and cap on the day preceding the explosion. This he at first denied, but later admitted when confronted with the witnesses from whom he procured them. The officer found a spent fuse near the scene of the explosion. Reconstruction of the stove from its pieces showed the explosion occurred under, and not in it. The force of the explosion made a hole in the floor and in the ground beneath it. Kerosene in both tanks of the stove indicated the kerosene did not explode. The defendant was present in the kitchen immediately before and was absent at the exact time of the explosion. The evidence showed an apparent motive and it also showed a lack of effort to assist his wife until a neighbor arrived. The character and extent of Mrs. Stephens' injuries, together with other circumstances, indicated she was killed by a charge of dynamite. The facts and circumstances point strongly to the crime of murder.

Evidence of manslaughter is lacking. The defendant, however, cannot complain that "the jury, by an act of grace," has found him guilty of a lesser offense. "Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed." *S. v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738; *S. v. Roy,* 233 N.C. 558, 64 S.E. 2d 840; *S. v. Matthews,* 231 N.C. 617, 58 S.E. 2d 625; *S. v. Harvey, supra; S. v. Robertson,* 210 N.C. 266, 186 S.E. 247.

The record discloses

No error.

WILLIE MACFARLANE v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION.

(Filed 26 June, 1956.)

1. State § 3a: Statutes § 10—

While ordinarily a statute has prospective effect only, the State Tort Claims Act, by express provision, is retroactive as to those claims listed therein. Ch. 1059, sec. 1, Session Laws of 1951.

2. State § 3a—

Under the State Tort Claims Act, a claim for damages for injuries proximately caused by negligence of a State employee while engaged in the discharge of his duties as such shall be tried under the common law rules in tort actions founded on negligence as any other claim of like nature between private individuals would be tried, subject to the limitations prescribed in the Act. G.S. 143, Art. 31.

3. Torts § 9a—

The release of one joint tort-feasor releases them all.

4. Master and Servant § 22a—

When the injured person sues the servant and recovers, he may not thereafter recover against the master a sum greater than the verdict against the servant.

5. State § 3a—

Where a person injured by the alleged negligence of a State employee while engaged in the discharge of his duties as such, recovers from the employee an amount in excess of the maximum recovery under the State Tort Claims Act, and releases the employee from any and all other or future liability, his subsequent action against the State under the State Tort Claims Act is properly dismissed.

APPEAL by plaintiff from *Fountain, J.*, February Term 1956, LEE.

Claim for damages for personal injuries under the Tort Claims Act.

In May 1949 one Robert J. Wheeler was employed by the defendant and was operating an automobile with trailer attached which belonged to the State along Highway 1 north of Sanford. He was then about the business of his employer. As his automobile passed the automobile belonging to plaintiff, who was traveling on the same highway, the trailer became detached and crashed into plaintiff's automobile, causing him to suffer serious bodily injury which materially interferes with the discharge of his duties as a professional golf teacher. The accident occurred on 23 May 1949.

Thereafter, on 23 April 1950, plaintiff instituted in the District Court of the United States for the Eastern District of North Carolina an action against the said Wheeler for damages for personal injuries sustained as a proximate result of said collision. The parties to that action

reached a compromise settlement of plaintiff's claim under which Wheeler, or his insurance carrier, paid plaintiff $9,715, and plaintiff executed an accord and satisfaction and full release of the said Wheeler and his insurance carrier for all claims arising out of said accident.

At the meeting of the General Assembly in 1951, a bill was introduced which, if enacted, would have required the State to pay to the plaintiff $25,000 in satisfaction of the damages sustained by him. Bills of like import were introduced in behalf of other claimants. The committee of the General Assembly to which these bills were referred prepared and introduced a bill which was finally adopted, known as ch. 1059, Session Laws 1951. This Act has been codified as G.S. 143, art. 31, and has become known as the Tort Claims Act.

Plaintiff filed his claim with the Industrial Commission which at the hearing ascertained the facts relative to the suit by plaintiff against Wheeler, the employee of the State and the one who was primarily liable. The Industrial Commission, having concluded that plaintiff, by accepting full settlement from Wheeler and in executing a release, had thereby released the State which was liable only under the doctrine of *respondeat superior,* and had accepted as full settlement from the employee an amount in excess of any recovery the Commission could allow the plaintiff in the cause, signed judgment dismissing the action. The claimant appealed to the Superior Court. The findings of fact and the judgment entered before the Industrial Commission were in all respects ratified and affirmed by the court below, and plaintiff excepted and appealed.

E. C. Bryson for plaintiff appellant.

Attorney-General Rodman, Assistant Attorney-General Love, and F. Kent Burns of staff for defendant appellee.

BARNHILL, C. J. Ordinarily an Act of the General Assembly is only prospective in effect. Here, however, the Act is retroactive as to plaintiff and certain others named therein. The newly created court is expressly directed to consider their claims.

The General Assembly in 1951, by adopting ch. 1059, Session Laws 1951, now codified as General Statutes ch. 143, art. 31, granted a qualified or limited waiver of its immunity against suits for personal injury or property damage; created the Industrial Commission a court to hear the cause of any person who claims that he has been injured or his property has been damaged by the negligence of a State employee while such employee is engaged in the discharge of his duties; limits the amount of recovery to a maximum of $8,000; and provides that on appeal to the Superior Court the appeal shall be heard by the judge

without a jury. It prescribes no rules or regulations to be followed by the newly established court in hearing such claims, nor does it limit or prescribe the procedure except as noted. That is to say, it does not undertake to alter either the substantive or adjective law of North Carolina as applied in this State in cases founded on allegations of negligence except that the claim must originate in the newly established court, must be heard on appeal without a jury, the burden to negative contributory negligence is placed on the claimant, and the recovery allowed must not exceed $8,000.

Except as noted, the law of negligence, contributory negligence, estoppel, the liability of an employer under the doctrine of *respondeat superior*, and other provisions of the law of negligence are not mentioned in the Act. It is apparent then that the General Assembly intended that a claim for damages for injury proximately caused by the negligence of a State employee while engaged in the discharge of his duties as such shall be tried under the common law rules in tort actions founded on negligence as any other claim of like nature between private individuals would be tried, subject to the limitations prescribed in the Act. We must accept this as being implicit in the language of the Act itself.

There is but one alternative: The General Assembly created a new court, granted a limited waiver of immunity, and agreed to submit the State to limited liability, but left the Industrial Commission—the new court—without any standard to guide it in arriving at the amount to be paid. If we accept this alternative, it would mean that we would be compelled to strike down the Act for the reason the General Assembly has not prescribed the standards under which tort claims against the State shall be heard.

Surely the General Assembly did not intend that the new court should make awards in its discretion. It intended that claims shall be decided under some law. If so, then what law?

We are firmly of the opinion—and so hold—that the Legislature intended that the Industrial Commission on the original hearing and the Superior Court on the hearing on appeal are each bound by the law of negligence, both substantive and adjective, as such common law rules and doctrines appear in the numerous decisions of this Court, subject only to the limitations stipulated in the Act.

Under the common law rules, the release of one joint tortfeasor releases all other joint tortfeasors. *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805; *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659; *Smith v. Thompson*, 210 N.C. 672, 188 S.E. 395. Likewise, when the injured person sues the servant and recovers, he may not thereafter recover against the master a sum greater than the verdict against the employee.

Bullock v. Crouch, 243 N.C. 40; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570, and cases cited.

Here the plaintiff (1) has recovered from the employee an amount in excess of the maximum he could be awarded against the State, and (2) has released the active tortfeasor from any and all other or further liability. Hence the judgment entered by the court below must be

Affirmed.

CITY OF SANFORD v. SOUTHERN OIL COMPANY.

(Filed 26 June, 1956.)

1. Municipal Corporations § 33—

Where notice of appeal from assessment for street improvements is not given until more than ten days after the assessment roll had been made final, the appeal is properly dismissed, G.S. 160-89, and *certiorari* is not available.

2. Administrative Law § 4—

Where a statute provides procedure for an appeal from an administrative agency or court inferior to the Superior Court, the procedure must be followed, and *certiorari* cannot be used as a substitute for an appeal either before or after the time for appeal has expired, but will lie only in proper cases when it is impossible for the aggrieved party to perfect his appeal during the time allowed by the statute.

3. Same—

Certiorari will lie when the aggrieved party, through no fault of his own, is unable to perfect his appeal within the time allowed by statute, and there is merit in his exceptions to the action of the administrative agency or inferior court.

4. Same—

A writ of *certiorari* may be used as an ancillary writ to require a lower court or administrative agency to send up to the Superior Court records, papers, documents, and other matter necessary to dispose of the appeal.

JOHNSON, J., not sitting.

APPEAL by defendant from *Williams, J.,* September Term 1955, LEE.

Petition by the owners of a majority of the lineal feet (other than railway company) of property abutting on Moore Street, addressed to the Board of Aldermen of plaintiff to have said street paved. The sufficiency of the petition was investigated and approved, whereupon the Board of Aldermen of plaintiff passed a resolution creating Street Im-

provement District Number 305 for the purpose of making the improvement applied for, half the cost to be prorated among the abutting property owners.

On 7 April 1954 notice was served on defendant, owner of 72.5 feet of the frontage on the street to be improved, of the creation of said district and of the work to be done and of the fact that one-half of the cost would be apportioned among the abutting property owners.

Thereafter the contract for said improvement was executed, the work was done, and the assessment roll was prepared.

On 19 November 1954 plaintiff notified defendant to appear before the Board of Aldermen on 7 December for the purpose of making known any exceptions to the special assessment and all the property owners were notified that final action on the assessment would be taken at said meeting.

On 7 December 1954 the Board of Aldermen of plaintiff met for the consideration of the final assessment roll. The hearing not having been completed at that time, the meeting was recessed until 9 December 1954, at which time the assessments were duly approved and made final. Defendant appeared at the meetings on 7 December and 9 December and made various and sundry protests and objections.

On 24 December 1954 the defendant had served on the clerk of the Board of Aldermen of plaintiff a statement of facts on appeal in accordance with G.S. 160-89. While the record contains a notice of appeal dated 17 December 1954, it is not made to appear that this notice was ever served on plaintiff or on any official thereof. Plaintiff in its brief does state, however, that the notice was included in the statement of facts on appeal served on it on 24 December 1954, more than ten days after the assessment roll had been made final.

On 10 January 1955, plaintiff moved the court that the appeal of the defendant be dismissed.

On 26 September 1955, a hearing was had in the court below on the motion to dismiss. Defendant, at that time, moved for a writ of *certiorari*. The court issued the writ and considered the records and papers filed with the court below pursuant thereto. On 8 October 1955, the court dismissed the attempted appeal of the defendant and affirmed the assessments made by the Board of Aldermen, including the assessment against the defendant. From the judgment of dismissal the defendant appealed.

Gavin, Jackson & Gavin for plaintiff appellee.
Dixon & Dark and J. W. Hoyle for defendant appellant.

BARNHILL, C. J. The statute, G.S. 160-89, grants abutting property owners in a street improvement project such as the one here involved

the right of appeal to the Superior Court. The defendant failed to perfect his appeal from the final order of the Board of Aldermen of plaintiff affirming the assessment roll. The judge below so found, and there is no exception to the finding made. The appeal was properly dismissed.

When the applicable statute provides an appeal from an administrative agency or an inferior court to the Superior Court, the procedure provided in the Act must be followed. A writ of *certiorari* cannot be used as a substitute for an appeal either before or after the time for appeal has expired. In proper cases an appellant may apply for a writ of *certiorari* when it is impossible for him to perfect his appeal during the time allowed by the statute. But the writ should not be allowed until or unless the application therefor makes it appear that (1) the aggrieved party cannot perfect the appeal within the time provided by the statute, (2) his inability to perfect his appeal within the time allowed is not due to any fault on his part, and (3) there is merit in his exceptions to the action of the administrative agency or inferior court, as the case may be. *In re Stokley,* 240 N.C. 658, 83 S.E. 2d 703; *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *Taylor v. Johnson,* 171 N.C. 84, 87 S.E. 981; *Todd v. Mackie,* 160 N.C. 352, 76 S.E. 245.

The writ of *certiorari* may likewise be used as an ancillary writ to require a lower court or administrative agency to send up the Superior Court records, papers, documents, and other matter necessary to dispose of the appeal. *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 357; *Russ v. Board of Education,* 232 N.C. 128, 59 S.E. 2d 64; *Belk's Department Store, Inc., v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897.

Here the judgment recites that the cause was heard on application for a writ of *certiorari* for which the defendant did not apply until more than eight months after his time for appeal had expired. The court below advisedly denied the application and dismissed the action.

There is further reason why the judgment entered in the court below must be affirmed. The General Assembly, by the adoption of c. 582, Session Laws 1955, "in all respects approved, legalized and validated" all proceedings had in the street improvement project here involved, including the final assessment roll. We have heretofore held that such validating legislation is permissible and serves to cure any defect in the proceedings and to validate the assessments made. *Gallimore v. Thomasville,* 191 N.C. 648, 132 S.E. 657, and cases cited; *High Point v. Clark,* 211 N.C. 607, 191 S.E. 318; *Crutchfield v. Thomasville,* 205 N.C. 709, 172 S.E. 366.

For the reasons stated the judgment entered in the court below must be

Affirmed.

JOHNSON, J., not sitting.

IN THE MATTER OF THE WILL OF J. E. HOLCOMB.

(Filed 26 June, 1956.)

1. Trial § 6—

G.S. 1-180 denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts.

2. Same—

The court, after interrogating a witness in regard to his knowledge of the signature of the decedent, at issue in the case, stated that as far as the court was concerned the witness knew decedent's signature. *Held:* The endorsement of the veracity of the witness by the court constitutes prejudicial error.

APPEAL by propounder from *Mallard, J.*, September Term 1955, COLUMBUS.

Caveat proceeding.

The deceased, J. E. Holcomb, the alleged testator, was for many years a widower. Mrs. Walker, the propounder, was a widow who lived in the same community as the deceased. They associated with each other for thirteen or fourteen years prior to 16 May 1954, the date the alleged testator died.

The evidence tends to show that on 5 May 1953, the deceased undertook to execute the paper propounded in the presence of two witnesses and then deposited the paper writing in the lock box of one of the witnesses for safekeeping. Both witnesses died prior to the death of the alleged testator. This paper writing directs that Elta Gore Walker shall be paid the sum of $8,000 out of the estate of the testator. This is the only dispositive provision in the will.

After the death of the deceased, Mrs. Walker, on 13 July 1954, probated the paper writing as the last will and testament of J. E. Holcomb in common form. Thereafter the two children of the deceased filed a caveat contending that the signature of the alleged testator as it appears on said paper writing is a forgery.

After the propounder had offered her evidence in chief, the son of deceased, one of the caveators, testified in their behalf. During the progress of his examination the following occurred:

"Q Now, I will ask you whose signature appears at the bottom of that check?

A My father's.

Propounder objects unless he saw him write it. He can state as to his opinion as to whose signature it is.

COURT: What question did he ask him?

(Question was read.)

COURT: Mr. Holcomb, do you know your father's signature.

A I do.

COURT: Have you seen your father sign his name?

A I have.

COURT: You know your father's signature when you see it?

A Yes, sir.

COURT: AS FAR AS I AM CONCERNED HE KNOWS HIS FATHER'S SIGNATURE. THE OBJECTION IS OVERRULED.

BROWN: I WITHDRAW THE OBJECTION."

This witness thereafter testified that a number of checks signed in the name of J. E. Holcomb bore his signature, and it was admitted that he would testify that the signature on each of fourteen checks produced was genuine. Thereafter the witness testified that the name appearing as the maker of the will offered for probate is not in the handwriting of his father, that it is a forgery.

The jury answered the issues submitted in favor of caveators, and the propounder appealed.

Joe W. Brown and Nance, Barrington & Collier for propounder appellant.

Powell, Lee & Lee for caveator appellees.

BARNHILL, C. J. G.S. 1-180 denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts. This statute has been applied in many cases and under varying circumstances. The cases appearing in our books on the subject are too numerous to undertake to cite. However, *In re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482, is almost on all fours. See also *Hyder v. Battery Co., Inc.,* 242 N.C. 553, 89 S.E. 2d 124, and the multitude of other cases appearing in the Code Annotation to G.S. 1-180 and in Michie's N. C. Digest.

No doubt the trial judge, in making the remark, "As far as I am concerned he knows his father's signature," spoke somewhat spontaneously, and he temporarily forgot or overlooked the fact that the jury heard what he had said. Even so, his remark constitutes an unequivocal endorsement of the veracity of the witness, a caveator. That it was harmful to propounder is apparent. The jury answered the issues in favor of the caveators.

Perhaps it might have been better if the judge had withdrawn a juror and ordered a new trial, thus saving the time and expense of an appeal to this Court. Be that as it may, a new trial was not ordered, and the propounder presents the question here by exception duly noted and an assignment of error duly made. We must perforce hold the same for prejudicial error and grant the propounder a new trial. It is so ordered.

New trial.

WILLIAM BRADSHAW, ADMINISTRATOR OF THE ESTATE OF JIMMIE LOUIS BRADSHAW, v. STATE BOARD OF EDUCATION.

(Filed 26 June, 1956.)

State § 3d—

Where there is competent evidence tending to support the finding and conclusion of the Industrial Commission that there was no negligence on the part of the State employee in question, order of the Commission denying relief under the State Tort Claims Act is properly affirmed. G.S. 143-291, G.S. 143-292.

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

BOBBITT, J., dissenting.

APPEAL by claimant from *Carr, J.*, at October 1955 Term, of ORANGE.

Proceeding instituted before the North Carolina Industrial Commission under State Tort Claims Act, Article 31 of Chapter 143 of General Statutes, on claim of William Bradshaw, Administrator of the Estate of Jimmie Louis Bradshaw for recovery of State Board of Education, a State agency, damages in the sum of $8,000 for alleged wrongful death of Jimmie Louis Bradshaw, on 24 January, 1952, by reason of negligence of one Herbert Atwater, Jr., bus driver in operation of school bus as per affidavit dated 7 January, 1953, received by the Commission 9 January, 1953,—heard 29 April, 1954.

The record shows:

That on 20 September, 1954, Commissioner Bean entered an order in which it is recited that the case was first heard before him at Hillsboro, N. C., on 29 April, 1954, and that sometime after the hearing, plaintiff's attorney made a motion that the case be reset to take additional testimony; that the defendant's attorney objected, but that the hearing Commissioner ordered the case reset before Deputy Commissioner Hugh M. Currin on 26 August, 1954; and that testimony then taken before this Deputy has been transcribed and submitted to the Hearing Commissioner, who would file an opinion upon all the competent evidence in the case.

And, upon facts found, *inter alia*, that the school bus driver was not negligent at the time complained of, the Hearing Commissioner, from all the competent evidence in this case, concluded as a matter of law that there was no negligence on the part of an employee of the State resulting in damages to the claimant within the purview of G.S. 143-291 to 300.

Thereupon, "based upon all the findings of fact and conclusions of law," the Hearing Commissioner entered order that "there being no negligence, this claim shall be, and is hereby dismissed . . ." (Signed) J. W. Bean, Commissioner.

Claimant appealed to Full Commission for review for reasons stated, and after hearing upon review the Full Commission, being of opinion that the assignments of error were without merit, and should be overruled, adopted as its own the findings of fact, conclusions of law, and order of Commissioner Bean, and ordered that the result reached by him be in all respects affirmed.

Claimant filed twenty-one certain exceptions thereto, and appealed to Superior Court of Orange County. And on hearing at October Term 1955, upon such appeal, the parties agreed that judgment might be rendered out of the County and out of term at the convenience of the court. Thereafter on 13 January, 1956, the Judge entered judgment in which it is recited that the court has examined the exceptions filed by claimant and the evidence set out in the record; that the court deems it unnecessary for a proper disposition of the plaintiff's appeal to rule on all of plaintiff's exceptions, and finds that exceptions 7, 8 and 11 are essential to disposition of the appeal, and overrules No. 7, and sustains 8 and 11; that it appears that the findings of the Commission that the bus driver of the defendant was not negligent to which exception No. 7 relates is the essential finding upon which the decision turns: that "it further appears that two suppositions arise on the circumstantial evidence upon which plaintiff relies to show negligence, (1) that plaintiff's intestate was where he could have been seen by the driver and the driver failed to keep a proper lookout and did not see him, and (2) that said intestate was not where the driver could have seen him in the exercise of due care when the bus passed, and in playing he came in contact with the rear part of the bus after the driver had passed him." Then the judgment continues: "The burden being upon the plaintiff to prove actionable negligence, the court, in view of the two suppositions arising on the evidence as aforesaid, is unable to find that there is no evidence to support the finding of the Commission, which the court must do if the decision is not affirmed. The Commission is authorized to find the facts. If there is any evidence to support the finding the decision must be affirmed. It is, therefore, ordered that the decision and order of the

Industrial Commission denying the relief prayed for by the plaintiff be affirmed."

Plaintiff claimant excepts to the action of the court in overruling Exception No. 7, and to declining to rule on all 29 exceptions, and excepts to the judgment and appeals therefrom to Supreme Court, and assigns error.

James R. Farlow for plaintiff appellant.

Attorney-General Rodman, Assistant Attorney-General Love, and Harvey W. Marcus, Staff Attorney, for defendant appellee.

WINBORNE, J. In considering points presented on this appeal, it is pertinent to note that G.S. 143-291 provides that the North Carolina Industrial Commission, constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, and other agencies of the State, shall determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted; and that if the Commission finds that there was such negligence on the part of a State employee acting within the scope of his employment which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid.

And pertaining to appeal from determination of a claim by the Commission, it is provided in G.S. 143-292 that such appeal shall be heard by the Industrial Commission, sitting as a Full Commission, on the basis of the record in the matter and upon oral argument of the parties, and said Commission may amend, set aside, or strike out the decision of the Hearing Commissioner and may issue its own findings of fact and conclusions of law.

And, in respect to appeal to the Superior Court by either the claimant, or the State, it is provided in G.S. 143-293 that the "appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them."

Applying these provisions of the statutes to the case in hand, the Industrial Commission has found as a fact and concluded as a matter of law that there was no negligence on the part of the employee, bus driver, of the State, resulting in damages to the claimant within the

purview of G.S. 143-291 to 300, and the Superior Court being unable to find that there is no evidence to support the finding of the Commission, conclusion reached by it follows as a matter of course. Hence the judgment of Superior Court affirming the decision and order of the Industrial Commission was proper.

Let it be noted that the statute has been amended since the date of the occurrence on which the present claim arose.

Moreover error is not made to appear in other assignments.

And in view of decision reached, it is deemed unnecssary to consider the appeal by the State, or any point raised in connection therewith.

Affirmed.

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

BOBBITT, J., dissenting: The ultimate finding of the Full Commission was that the driver of the school bus was not negligent. In my opinion, the particular findings of fact show that this conclusion was reached under a misapprehension as to the applicable principles of law. *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324.

It is first noted that the Full Commission found that "there is no evidence in the record that the school bus struck the Bradshaw boy." If this were correct, the conduct of the bus driver, negligent or otherwise, had no causal relation to the boy's death. But the court, correctly I think, sustained plaintiff's exceptive assignment of error as to this finding. The denial of plaintiff's right to recover was sustained on the ground that the ultimate finding of "no negligence" was permissible and that the Full Commission had so found.

Quoted below are paragraphs 6 and 7 of the findings of fact:

"6. That on January 24, 1952, at approximately 3:30 P.M. the said Herbert Atwater, Jr., was driving the school bus on Church Street in a northerly direction and turned at the intersection of Church Street and McMaster Street onto McMaster Street in a westerly direction; that Church Street and McMaster Street intersect; that the intersection is not a complete intersection but both streets dead-end at the intersection forming a sharp curve; that vehicles traveling over the sharp curve had a tendency to drive on the inside of the curve, forming a one-way traffic lane on the inside of the center of the curve; that McMaster Street dead-ends at a school building approximately 500 feet from the sharp curve; that on the inside of the sharp curve was a bank approximately three feet high and on this bank was shubbery and honeysuckle vines approximately two feet higher than the bank; that on the inside curve approximately three feet from the inside ditch was a mudhole.

"7. That the school bus in traveling around the curve, the rear wheel of the bus passed through the outer edge of the mudhole from the inside

of the curve; that the bus traveled after passing the curve approximately seventy-five feet before stopping; that the reason for the bus driver stopping the bus was that the children on the bus called his attention to the fact that a child was lying in the edge of the street near the curve; that after the bus stopped, Jimmy Louis Bradshaw was found lying at the end of the mudhole on McMaster Street with his head in the direction the bus was traveling; that when the doctor arrived some few minutes later he pronounced the child, Jimmy Louis Bradshaw dead; that the doctor found Jimmy Louis Bradshaw had a concussion above his left ear on the head."

Uncontroverted evidence, as to the background facts, is to the effect that Church Street was a dirt street and that McMaster Street was a dirt or dirt and gravel street. Each was not less than 24 feet wide, from ditch to ditch. The State Highway Patrolman, who made the investigation, summed it up in these words: "The area where the two streets came together was rather large but the path the traffic followed was on the inside of the intersection. The inside of the intersection had been cut off or worn off. *There was ample width for two vehicles to pass each other at any point.*" (Italics added.)

It may be conceded that, in driving to the left of the center of Church Street and of McMaster Street, the bus driver was doing what others were accustomed to do in making this left turn from Church Street to McMaster Street. It may be further conceded that, because he did so, he was unable to see the child at or near the mud puddle.

Suppose a motorist had been traveling east on McMaster Street and made a right turn to proceed south on Church Street. Would there be any doubt as to the bus driver's fault if a head-on collision had occurred?

Can the fact that motorists were accustomed to do as the bus driver did set at naught statutory provisions otherwise applicable? I think not. The background facts and the particular findings of fact, in my opinion, impel the conclusion that the bus driver operated the school bus in violation of G.S. 20-146 and G.S. 20-153(a) and (b) and was therefore guilty of negligence *per se*. For this reason, I vote to remand for further consideration as to whether such negligence proximately caused the boy's death. *McGill v. Lumberton, supra.*

ARNOLD HARRISON NUCKLES v. SECURITY NATIONAL BANK OF GREENSBORO, D. L. GALLAGHER, TRUSTEE, MAIZIE BISHOP HUDSON, AND MAIZIE BISHOP HUDSON, GUARDIAN AD LITEM OF DONALD LEE NUCKLES AND ARNOLD HARRISON NUCKLES, JR., MINORS.

(Filed 26 June, 1956.)

APPEAL by plaintiff from *Crissman, J.*, October Term 1955, GUILFORD.

Civil action to enjoin the foreclosure of a deed of trust to defendant trustee which secures the payment of a note in the amount of $6,000 payable to defendant Bank.

Plaintiff and *feme* defendant, being husband and wife, entered into a separation agreement under the terms of which plaintiff agreed to deposit with defendant Bank the sum of $6,000 in trust to be used to defray the expenses of a college education for the two sons of the marriage and under which the *feme* defendant conveyed certain real property to plaintiff. When time for payment of the $6,000 arrived, plaintiff did not have available that sum of money. In lieu thereof he executed a note payable to defendant Bank, secured by mortgage on the real property which he procured under the separation agreement. There was default in the payment of the note and the trustee proceeded to foreclose. Thereupon, plaintiff instituted this action to enjoin said sale. He attacks both the separation agreement and the trust to be created thereunder and seeks to have them invalidated. The two infant defendants, acting through their mother as guardian *ad litem*, moved the court for an order allowing them to intervene. The cause was heard on this motion. The parties waived trial by jury and submitted the cause to the judge on facts agreed. The temporary injunction was dissolved, a permanent injunction was denied, and the motion was allowed. Plaintiff excepted and appealed.

George A. Younce and James R. Spence for plaintiff appellant.

Cooke & Cooke and Cahoon & Alston for defendant appellees.

PER CURIAM. The three assignments of error contained in the record are feckless. The infant defendants are beneficiaries under the trust and are necessary parties to the final determination of the action. The judgment entered is fully sustained by the facts agreed and found by the court, and no error appears on the face of the record. Therefore, the judgment entered in the court below must be

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1956

STATE v. DAVID CANNON.

(Filed 19 September, 1956.)

1. Judgments § 20—

A court has the inherent power and duty to correct the mistakes of its clerk or other officers, or supply defects or omissions in its records in order to make its records speak the truth, and no lapse of time will debar the court of the power to discharge this duty. Thus it may be performed by another presiding judge at a subsequent term.

2. Same—

The power of a court of record to amend or supply omissions in its minutes should be exercised with care and caution, and proof of the omission or defect should be clear and satisfactory, but parol evidence is competent in this jurisdiction upon motion to amend, though such evidence is not admissible to correct a court record when such record is collaterally attacked.

3. Same—

In the exercise of its power to amend and correct its records, the court is authorized only to make the record correspond to the actual facts, and cannot, under the guise of amendment, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.

4. Same—

Where, upon motion of the solicitor to correct and amend the minutes of the court, the court finds upon supporting evidence that defendant's plea and the return of a verdict of guilty by the jury were omitted from the minutes through inadvertence and oversight and that the proceedings were in all respects regular, such findings are conclusive.

5. Habeas Corpus § 2—

In *habeas corpus* proceedings, the court has jurisdiction to discharge defendant only when the records disclose that the court did not have jurisdiction of the offense or of the person of defendant, or that the judgment imposed was not authorized by law, but the writ is not available as a substitute for appeal to correct errors of law, nor may defendant be discharged for irregularities in the record which may be corrected by amendment and which do not render the proceeding void.

6. Same—

Where the records disclose that a judgment regular in all respects was imposed by a court having jurisdiction of the offense and the person of defendant, such judgment is not void, and the omissions from the record of defendant's plea and the return of the verdict of the jury can be supplied by amendment. Therefore, decree in the *habeas corpus* proceeding that the judgment was void is beyond the jurisdiction of the court in such proceeding, and the decree is not binding upon the State.

7. Judgments § 20—

Where, upon motion to amend and correct the minutes of the court, the court, upon findings of fact supported by the evidence, orders the records amended to speak the truth, the records stand as though the correct entries had been made at the time. Thus, when the record as corrected is in all respects regular, the defendant cannot be entitled to his discharge, and so much of the judgment correcting the minutes which purports to re-sentence the defendant will be set aside.

JOHNSON, J., not sitting.

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

APPEAL by defendant from *Pless, J.*, April Term, 1956, of MACON.

The facts essential to a disposition of this appeal are as follows:

1. At the August Term 1951 of the Superior Court of Macon County a true bill of indictment was returned against David Cannon, charging him with a crime against nature. Docket entries show that upon the call of the case, attorneys for the State and the defendant agreed that because of the nature of the case it was in the public interest for the courtroom to be vacated during the trial of the case of all parties except court officials and witnesses in the case. Docket entries also show that prayer for judgment was continued until the December Term of the court.

2. The next docket entry made in the case appears in the minutes of the December Term 1951, which shows judgment imposing a sentence on the defendant of not less than 20 nor more than 25 years in State's Prison to begin at the expiration of the two consecutive (actually concurrent) sentences of 15 years each imposed on 15 May 1946 in Wilson County Superior Court. Commitment under the Macon County sentence was issued on 4 December 1951.

3. The concurrent sentences imposed in the Superior Court of Wilson County expired on 22 February 1956 and the defendant began serving his Macon County sentence on that date.

4. The defendant, on 3 March 1956, applied to the Honorable Walter J. Bone for a writ of *habeas corpus,* alleging that his imprisonment and restraint were illegal in that the record failed to show that a verdict was rendered in the case or that he had entered any plea to the charge in the bill of indictment. The writ was duly issued by Judge Bone and made returnable on 27 March 1956 before the Honorable William Y. Bickett, Judge Presiding over the March Term 1956 of the Superior Court of Lee County.

5. Upon the hearing of the return to the above writ, judgment was entered to the effect that since the records in Macon County did not show that David Cannon entered a plea of guilty or *nolo contendere,* or that a jury returned a verdict of guilty against him, judgment entered at the December Term 1951 in Macon County was void and that the defendant was entitled to be discharged from the custody of the State Highway and Public Works Commission, and ordered the return of the defendant to Macon County to answer the charge contained in the bill of indictment. He was placed in custody of the Sheriff of Lee County, pending the posting of bond in the sum of $10,000.00 for his appearance at the next Term of Criminal Court in Macon County.

6. The defendant, David Cannon, appeared before the Honorable J. Will Pless, Jr., Judge Presiding at the April Term 1956 of the Superior Court of Macon County, being the term to which he was required to appear under the judgment entered in the *habeas corpus* proceeding and under the terms and provisions of his appearance bond.

7. The solicitor on behalf of the State made a motion to correct and amend the minutes of the August Term 1951 of the Superior Court of Macon County with respect to the case of *State v. Cannon.* The court heard evidence, including testimony of the attorneys who represented David Cannon at the time of his trial in Macon County in August 1951. Upon the evidence adduced, the court found the following facts:

"The defendant was placed on trial on the bill of indictment appearing in the minutes and records of the court and entered a plea of not guilty; thereupon a jury was regularly chosen and impaneled, evidence was offered, and, after deliberation, the jury returned a verdict of guilty as charged in the bill of indictment. This verdict was received and accepted by the Presiding Judge, the Hon. J. C. Rudisill.

"The Clerk of the Superior Court at that time was Miss Kate McGee . . ., and she, together with other ladies in the courtroom, were excluded from the trial because of its nature; and the court reporter, a lady, was also excluded, and the proceedings were not transcribed.

Because of the absence of the court reporter and the Clerk of the Court at the time of the rendering of the verdict, the minutes of the term, through inadvertence and oversight, failed to show the composition of the jury, or the proceedings and verdict as are usually done; but the court finds as a fact that the proceedings were in all respects regular, and that the defendant was present at the trial and was represented by counsel of his selection; that the prayer for judgment was continued from the August Term 1951, at which the Hon. J. C. Rudisill was the Presiding Judge, to the December Term, 1951, at which time Judge Rudisill was also Presiding Judge, and sentence was pronounced, as appears in the record."

From the foregoing findings of fact, the court ordered that the minutes of the August Term 1951 be and they were amended in accord with the above findings.

Upon the amended minutes, the court held that the judgment pronounced at the December Term 1951 of the Superior Court of Macon County was valid and in all respects regular, but in deference to the ruling of Judge Bickett the court thereupon pronounced judgment as of the December Term 1951 in the exact terms of the sentence imposed by Judge Rudisill, except Judge Pless directed that "insofar as the court has authority to do so," the sentence imposed be computed from the December Term 1951 of the Macon County Superior Court rather than from the date of the completion of the concurrent sentences imposed by the Superior Court of Wilson County.

From the foregoing judgment the defendant appeals, assigning error.

Attorney-General Rodman, Assistant Attorney-General Love, for the State; R. Brookes Peters, General Counsel, and Parks H. Icenhour, for the State Highway and Public Works Commission.

Jones, Reed & Griffin and C. Banks Finger for defendant.

DENNY, J. The defendant raises these questions on this appeal:

1. Did Judge Pless, on the motion of the State made at the April Term 1956 of the Superior Court of Macon County, have the power to correct the minutes of the August Term 1951 of said court?

2. Was oral evidence competent in support of the motion of the State to correct said minutes?

3. Are the findings of fact incorporated in the judgment entered by Judge Pless supported by the evidence offered in support of the above motion?

4. Is the judgment of his Honor, Bickett, J., entered on the hearing in the *habeas corpus* proceeding in the cause, decreeing that the judgment of his Honor, Rudisill, J., entered in said cause at the December

Term 1951 of the Macon County Superior Court, was void, binding upon the State?

5. Is the judgment of his Honor, Judge Pless, entered at the April Term 1956 of the Macon County Superior Court in this cause, valid?

6. Is the defendant, on the record in this appeal, entitled to be discharged from custody?

We will consider these questions in the order stated.

1. It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty. 14 Am. Jur., Courts, sections 141, 142, and 143, page 351, *et seq.;* 21 C.J.S., Courts, section 227(b), page 423; McIntosh, N. C. Practice and Procedure, Second Edition, Volume 2, section 1711, page 161; *Galloway v. McKeithen,* 27 N.C. 12, 42 Am. Dec. 153; *Phillipse v. Higdon,* 44 N.C. 380; *Mayo v. Whitson,* 47 N.C. 231; *Foster v. Woodfin,* 65 N.C. 29; *Walton v. Pearson,* 85 N.C. 34; *Brooks v. Stephens,* 100 N.C. 297, 6 S.E. 81; *Ricaud v. Alderman,* 132 N.C. 62, 43 S.E. 543; *R. R. v. Reid,* 187 N.C. 320, 121 S.E. 534; *Oliver v. Highway Commission,* 194 N.C. 380, 139 S.E. 767; *S. v. Tola,* 222 N.C. 406, 23 S.E. 2d 321; *S. v. Maynor,* 226 N.C. 645, 39 S.E. 2d 833; *Gagnon v. United States,* 193 U.S. 451, 48 L. Ed. 745.

This Court has quoted with approval many times the statement contained in the opinion of *Ruffin, J.,* in the case of *Walton v. Pearson, supra,* which is as follows: "It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records, as made. This power of a court to amend its records has been too often recognized by this Court, and its exercise commended, to require the citation of authorities—other than a few of the leading cases on the subject. See *Phillipse v. Higdon,* 44 N.C. 380; *Foster v. Woodfin,* 65 N.C. 29; *Mayo v. Whitson,* 47 N.C. 231; *Kirkland v. Mangum,* 50 N.C. 313."

2. The power to amend or supply omissions in minutes of a court of record should be exercised with care and caution. "The proof of the defect should be clear and satisfactory, . . . but in this state it is left to the court to determine by any satisfactory evidence that the mistake was made, and the action of the court is not subject to review." McIntosh, N. C. Practice and Procedure, Second Edition, Volume 2,

section 1711, page 161, *et seq.;* 14 Am. Jur., Courts, section 145, page 353; *Mayo v. Whitson, supra; Beam v. Bridgers,* 111 N.C. 269, 16 S.E. 391; *Creed v. Marshall,* 160 N.C. 394, 76 S.E. 270; *Holton v. Lee,* 173 N.C. 105, 91 S.E. 602; *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794.

Parol evidence is competent in this jurisdiction in support of a motion to correct the minutes or to supply an omission in the minutes of a court of record. However, such evidence is not admissible to contradict a court record when such record is collaterally attacked. *R. R. v. Reid, supra; S. v. Tola, supra.* Furthermore, in the exercise of power to amend the record of a court, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred. 30 Am. Jur., Judgments, section 94, page 866.

3. The findings of fact incorporated in the judgment entered by Pless, J., at the April Term 1956 of the Superior Court of Macon County, are supported by clear and satisfactory evidence. In fact, the defendant has not at any time denied that he pleaded to the bill of indictment; that a jury was duly impaneled, or that it returned a verdict of guilty and that the verdict was accepted by the court. He declined to offer any evidence in the hearing below, although he was given the opportunity to do so. He relies solely upon his right to a discharge on the fact that the minutes of the court, prior to their amendment, were not complete in that they did not contain a recital of the plea, the impaneling of the jury, and the verdict, which fact was found by Bickett, J., and upon which he held the judgment was void. Judge Bickett, however, did not find that no plea was entered; that a jury was not impaneled, or that the jury did not return a verdict of guilty.

4. Our statute, G.S. 17-4, subsection 2, provides that an application to prosecute the writ in a *habeas corpus* proceeding shall be denied, "Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree."

It is said in 39 C.J.S., Habeas Corpus, section 15, page 448, *et seq.:* "Where the restraint is under legal process, mere errors and irregularities which do not render the proceeding void are not ground for relief by *habeas corpus,* because in such cases the restraint is not illegal, but for incurable, radical and fatal defects plainly and indisputable manifest of record, relief should be granted even on *habeas corpus,*" citing among numerous authorities, *S. v. Edwards,* 192 N.C. 321, 135 S.E. 37.

In the last cited case it is said: "It is well settled that, in *habeas corpus* proceedings, the court is not permitted to act as one of errors and appeals, but the right to afford relief, on such hearings, arises only

when the petitioner is held unlawfully, or on a sentence manifestly entered by the court without power to impose it. The judgment must be void as distinguished from erroneous. . . . Speaking to the question in *United States v. Pridgen,* 153 U.S. 48, the Court said: 'Under a writ of *habeas corpus,* the inquiry is addressed not to errors, but to the question whether the proceedings and judgment rendered therein are, for any reasons, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the prisoner is confined, is void, he is not entitled to his discharge.' Again, in *People v. Liscomb,* 60 N.Y. 559, *Allen, J.,* delivering the principal opinion, said: 'If there was no legal power to render the judgment or decree, or issue the process, there was no competent court and consequently no judgment or process. All is *coram non judice* and void. . . . In other words, upon the writ of *habeas corpus,* the court could not go behind the judgment, but upon the whole record, the question was whether the judgment was warranted by law and within the jurisdiction of the court.' "

It is also said in *Ex parte McCown,* 139 N.C. 95, 51 S.E. 957, 2 L.R.A. (N.S.) 603: "We cannot decide whether there was any merely erroneous ruling of the court or any irregularities with respect to judgment and procedure, as the writ of *habeas corpus* can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over the person or the cause or some other matter rendering the proceedings void, as this is the only ground of collateral attack. The law in this respect has been definitely settled, we believe, by all the courts."

In 39 C.J.S., Habeas Corpus, section 26, page 478, *et seq.,* it is said: ". . . it is the general rule, which in some states has been declared by statutes which have been held to be constitutional, and to be merely declaratory, and not in derogation, of the common law, that, where the trial court, as a court of competent jurisdiction, had jurisdiction of the offense and of the person of defendant, and power to render the particular judgment or sentence, it cannot be collaterally attacked in *habeas corpus* proceedings, . . . and, if nothing has happened since the rendition of the judgment to entitle the prisoner to his release, the court should decline, for want of jurisdiction, to discharge the prisoner, and an order of discharge under such circumstances is void." *People v. Nierstheimer,* 401 Ill. 260, 81 N.E. 2d 900; *People v. Fardy,* 378 Ill. 501, 39 N.E. 2d 7; *Eberwein v. Eberwein,* 193 Md. 95, 65 A. 2d 792; *Graham v. Squier* (C.C.A. 9th Cir.), 132 F. 2d 681.

In the case of *Eberwein v. Eberwein, supra,* the record of the court did not show how the petitioner plead, or whether he was tried by the

court below or that the case was disposed of on a plea of guilty. Even so, the court held the petitioner was not entitled to have his petition for writ of *habeas corpus* granted.

In the instant case, before the minutes were amended, the record shows that a true bill of indictment had been returned against the defendant; that the case was called for trial; that the solicitor representing the State and the attorneys representing the defendant agreed that because of the nature of the case the courtroom should be cleared of all persons except court officers and witnesses in the case. The next entry shows that prayer for judgment was continued to the December Term of the court and that the defendant should remain in the custody of the State Prison Department until that time. The docket at the December Term shows a judgment imposed which was regular in all respects. There can be no question about the Superior Court having jurisdiction of the offense and of the person of the defendant, and the power to render the judgment imposed. Consequently, any omissions in the minutes of the court with respect to the procedure followed during the course of the trial could be supplied by amendment.

In light of these facts, we hold that the judgment in question was not void, and, therefore, could not be successfully attacked in a *habeas corpus* proceeding. Relief may be granted in a *habeas corpus* proceeding when the records of the court disclose that the court did not have jurisdiction of the offense or of the person of the defendant, or that the judgment imposed was not authorized by law. Such facts appearing on the face of the record are incurable and cannot be corrected by amendment.

We have held, under the questions previously discussed herein, that Judge Pless had the power to amend and correct the minutes of the August Term 1951 of the Superior Court of Macon County so as to make them speak the truth, and that his findings were supported by competent evidence. It follows that the record in this case, as amended, stands as if it had never been defective, or as if the entries had been made at the proper term. *Galloway v. McKeithen, supra; Phillipse v. Higdon, supra; Mayo v. Whitson, supra.*

In view of the authorities cited herein and our disposition of the first four questions posed, we hold that the order entered by Bickett, J., in the *habeas corpus* proceeding is not binding on the State, but that the sentence imposed by Rudisill, J., at the December Term 1951 of the Superior Court of Macon County, has been at all times since its imposition, in all respects, valid and binding on the defendant.

5. Accordingly, so much of the judgment of his Honor, Pless, J., as purports to re-sentence the defendant, is hereby set aside, but in all other respects it is affirmed.

6. In our opinion, the defendant, on the facts revealed on this record, is not entitled to be discharged from custody. Therefore, he will be remanded to the State's Prison to serve the sentence imposed on him at the December Term 1951 of the Superior Court of Macon County.

Modified and affirmed.

JOHNSON, J., not sitting.

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

STATE v. REDMAN EARL CRISP.

(Filed 19 September, 1956.)

1. Homicide § 16—

An intentional killing with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice.

2. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

3. Homicide § 25—

Where the State's evidence tends to show an intentional killing with a deadly weapon, it is sufficient to be submitted to the jury on the charge of murder in the second degree, notwithstanding defendant's evidence in conflict tending to show that the shooting was by accident or misadventure.

4. Same: Criminal Law § 52a (2)—

Where defendant contends that though the evidence may be sufficient to be submitted to the jury as to the offense of manslaughter, it is insufficient to support a verdict of guilty of murder in the second degree, defendant should request instructions that the jury could not return a verdict for any higher offense than manslaughter, and motion for judgment of nonsuit is not the proper way to present this contention.

5. Criminal Law § 42c—

The exclusion of testimony of a statement inconsistent with the testimony of a witness, offered for the purpose of impeaching the credibility of the witness, will not be held for prejudicial error when it is not made to appear whether the witness or another made the inconsistent statement, and defendant does not again proffer the impeaching testimony after such other person had testified for the State.

6. Criminal Law § 50f—

While counsel are entitled to argue to the jury the whole case as well of law as of fact, and are to be given wide latitude in making their arguments to the jury, the court properly restrains counsel from arguing to the jury

a point of law which, by admission of counsel, is entirely irrelevant to the case.

7. Homiicide § 27b—

Where the State offers evidence of an intentional killing with a deadly weapon, an instruction that the burden is on defendant to establish matters in mitigation or excuse to the satisfaction of the jury unless they arise out of the evidence against him, *is held* without error, defendant being entitled to show matters in mitigation or excuse from the State's evidence, if he can, as well as from that offered by himself.

8. Homicide § 27e—

The court's instruction as to the legal provocation which will reduce murder in the second degree, established by proof of an intentional killing with a deadly weapon, to manslaughter, *held* sufficiently full.

9. Same—

The court's definition of the terms unlawful act, culpable negligence and proximate cause as they relate to the crime of manslaughter *held* without error in the case, the charge not being objectionable on the ground that the jury were left free to consider ordinary rather than culpable negligence in determining defendant's defense of killing by accident or misadventure.

JOHNSON, J., not sitting.

DEVIN and RODMAN, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Burgwyn, Emergency Judge,* January Term 1956 of BRUNSWICK.

Criminal prosecution on a bill of indictment charging the defendant with murder in the first degree of James A. Ferreri.

At the outset of the trial the solicitor for the State announced in open court that he would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree or manslaughter, as the facts might appear.

The defendant pleaded Not Guilty. Verdict: Guilty of murder in the second degree.

From judgment of imprisonment in the State's prison, the defendant appeals.

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

Aaron Goldberg, Rountree & Rountree, and S. B. Frink for Defendant, Appellant.

PARKER, J. At the close of the State's evidence the defendant made a motion for judgment of nonsuit, which the court overruled, and renewed such motion at the end of all the evidence, which the court

refused. The defendant assigns this as error. However, he does not contend under this assignment of error that the court should have nonsuited the State, but that the court erred in not limiting the jury's consideration of the evidence to the offense of manslaughter alone.

The State's evidence presented these facts: On the night of 15 March 1955 James A. Ferreri, a 17 year old boy, Robert Hopper and Michael John Pollack, two 16 year old boys, were hitchhiking through North Carolina to Florida. A man gave them a ride in his car from Wilmington to the junction of Highways 74-76 and 17, which is about five miles south of Wilmington in Brunswick County. Here these three boys got out of the car about 11:30 p.m. They had no money, and no weapons, but did have some baggage. On Highway 17 at or near the junction there is a motel on one side of the highway, and on the other side is the residence of the defendant and an automobile garage and showroom and used car lot belonging to the defendant. In the used car lot the defendant had a number of used cars. Ferreri and Hopper went on the used car lot to find an automobile in which to spend the night: Pollack remained on the highway to see if they could get another ride. The door of the first car Ferreri and Hopper came to was open. They slammed its door, and walked down a couple of rows of cars. They opened the fifth or sixth car they came to, and put their baggage in the front seat. Ferreri called Pollack, saying "Mickey, come on down, we have found a place we can stay for the night." All three got in the back seat. Ferreri was on the left behind the steering wheel.

After they had been in the car a short time, they saw two men walking through the used car lot, and searching the cars by flashing a light into each car as they passed. When these two men reached the car the boys were in, one of them, D. N. Parker, said to the other, the defendant, "there are some boxes in the front seat of this car." The defendant flashed a light in the back seat saying "there they are," and began beating on the car's left door saying "open the door." Ferreri got up, unlatched and opened the door and sat back on the seat. The defendant had a flashlight in one hand and a pistol in the other. The defendant began asking questions as to what they were doing in the car, were they trying to steal it, who they were, etc. Ferreri had his hands up with nothing in them and was trying to answer the questions. The defendant pushed his pistol in Ferreri's face, who fell to the back of the seat, turned his head and covered his face. The defendant fired his pistol, and the bullet entered the back of Ferreri's head, went through his brain and skull, came out of his forehead and imbedded itself in the back of the car. Ferreri died as a result of this penetrating wound.

The boys had nothing in their hands at the time of the shooting and had made no threatening motions, nor used any menacing language. No one was touching the defendant, when he fired the pistol. When the

defendant fired, he was standing on the ground leaning in the car, and at the time the pistol was 2½ or 3 feet from Ferreri.

The defendant's evidence presented these facts: D. N. Parker, who worked at the motel, telephoned the defendant about 12:45 a.m. that someone was tampering with his automobiles on the used car lot. The telephone call waked the defendant from sleep. He put pants and a coat over his pajamas, shoes on his feet, picked up a flashlight and pistol, and left his home to go to the used car lot. Parker joined him on the way. They found the three boys in the back seat of one of the defendant's cars. As they approached the car, its door came open. The defendant flashed a light in the car on the boys, and asked what they were doing in the car. No one answered. He asked, why they didn't get out, get in the road and move off. The defendant was standing by the car. Ferreri drew back to hit the defendant. When he did, the defendant drew his pistol from his pocket, and fired it "across the ground" to scare him. When the pistol fired, Ferreri grabbed him with both hands, and pulled him down on his chest on the floorboards of the car. At that time this is the defendant's testimony as to what occurred: "What happened then was that the gun exploded—in what direction I don't know. I did not point the gun at him. I never shot at anybody or aimed at anybody. I did not shoot him." Ferreri released the defendant when the pistol fired. Only two shots were fired. On cross-examination the defendant testified Ferreri had a big lug wrench in his hand.

The defendant states in his brief: "The defendant denied firing the pistol, which resulted in the death of James Ferreri, claiming at all times it was an accidental shooting."

The defendant offered in evidence a torn pajama shirt, which he and his wife testified was not torn when he left home, and which he testified Ferreri tore when he pulled him in the car.

The evidence, considered in the light most favorable to the State, shows that the defendant intentionally killed James A. Ferreri with a deadly weapon, to-wit a pistol, by shooting him in the back of his head. An intentional killing with a deadly weapon raises two presumptions against the killer: first, that the killing was unlawful, and second, that it was done with malice. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Howell,* 239 N.C. 78, 79 S.E. 2d 235; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869. And murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Street,* 241 N.C. 689, 86 S.E. 2d 277; *S. v. Benson, supra.*

The trial court correctly submitted to the jury the question as to whether or not the defendant was guilty of murder in the second degree, and the State's evidence is amply sufficient to support the verdict.

The defendant admits in his brief the State's evidence, if believed by the jury, made out a case of manslaughter. A motion for judgment of nonsuit is not the proper way to raise the defendant's contention. *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. Jones,* 222 N.C. 37, 21 S.E. 2d 812. If the defendant had properly raised his contention by requesting the judge to instruct the jury that they could not return a verdict for any higher offense than manslaughter, *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387, his contention is without merit.

The State's witness Hopper testified that he and Pollack were in the back seat of the car, when Ferreri was shot. The State rested its case without calling Pollack as a witness. For purposes of impeachment because of a prior inconsistent statement the defendant asked his witness Patrolman Seth Thomas "what those boys told you with reference to where they were standing at the time he shot." Upon objection by the State the defendant was not permitted to answer in the presence of the jury, but was permitted to whisper his answer to the court reporter, which was as follows: "The boys testified to me that they were standing at the right front, or the left front, of the automobile, facing into the right side of that car approximately 18 feet away from the one in which the shooting took place. Both were present and both were hearing what was said." The court stated it excluded the evidence, because the witness could not tell which witness made the statement. Immediately prior to the asking of this question defendant's counsel had asked the witness Thomas several questions as to what Hopper or Pollack said to him, when Thomas could not say which one made the statement. The judge stated he thought the evidence was inadmsisible for the reason that the witness could not say which boy made the statement, and then asked the solicitor for the State this question: "If I understand it correctly, you intend to put the other one on the stand, do you sir?" Solicitor Burney replied "Yes sir." Whereupon counsel for the defendant who was examining Thomas said: "I would like to withdraw this witness, and I would like to ask the court that I be allowed to recall him to testify if Pollack is not put on. I would like to recall him for the purpose of getting it in the record if Pollack is not put on by the State." The court replied: "Of course you can." The defendant assigns the exclusion of this evidence as error.

In rebuttal the State called Pollack as a witness, and his testimony was Hopper and he were in the back seat of the car when Ferreri was shot. When the State rested after its rebuttal evidence, the defendant recalled Patrolman Thomas to the stand. Thomas was permitted to testify as follows: One or the other of the boys, as to which one told me I don't know, told me that the defendant was standing about 18 feet from the car in which Ferreri was and on its right hand side, when he shot Ferreri. It seems plain that, if defendant's counsel had asked

Thomas when he was recalled to the stand, what one of the boys said in the presence of the other as to where they were when Ferreri was shot, the judge would have admitted it. For some reason defendant's counsel did not ask such a question, which he had asked Thomas before. Such being the facts before us, we hold that the exclusion of this evidence is not sufficient to justify a new trial.

After the argument to the jury of counsel for the private prosecution, the judge dismissed the jury from the courtroom, and made this statement to defendant's counsel: "Gentlemen, inviting your attention to the arguments in this case, I understand from the line of questioning by defendant's counsel that the defendant contends, and contends only, that this death of the deceased was caused by accident or misadventure. You do not in any-wise plead self-defense?" One of defendant's counsel replied: "That is right." One of defendant's counsel in his argument to the jury said: "Let me read to you the law about self-defense." The judge said: "No. I am going to charge the jury there is only one defense to this." Counsel for defendant said: "The object of this is to answer Mr. Brown" (counsel for private prosecution) "when he said we changed our defense. I would like the record to show that I wanted to read from *S. v. Frizzelle,* 243 N.C. 49, 89 S.E. 2d 725." The judge said: "The court would have permitted this argument had not counsel stated in open court that this killing occurred through accident and not through self-defense." The defendant states in his brief that the defendant has contended at all times that the shooting was accidental. The defendant assigns as error the refusal of the trial court to permit his counsel in his argument to the jury to read from the case of *S. v. Frizzelle, supra.*

The decision in the *Frizzelle Case* discusses one question of law: the right of self-defense. By reason of the statement of defendant's counsel in open court to the presiding judge and the statement in his brief, the law of self-defense was irrelevant to the case, and had no application to the facts.

G.S. 84-14 provides that "in jury trials the whole case as well of law as of fact may be argued to the jury." Counsel have wide latitude in making their arguments to the jury. *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656; *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. In *S. v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323, it is said: "The right of counsel to state in his argument to the jury what he conceives the law of the case to be has been upheld in numerous decisions of this Court."

Counsel did not conceive the right of self-defense to be the law of the case. The injection of the law of self-defense could only lead to confusion in the minds of the jury. Broad and comprehensive as the provisions of G.S. 84-14 are, they do not permit counsel to read to the jury decisions discussing principles of law which are irrelevant to the case

and have no application to the facts in evidence. *Conn v. R. R.*, 201 N.C. 157, 159 S.E. 331, 77 A.L.R. 641; *S. v. Buchanan*, 216 N.C. 709, 6 S.E. 2d 521; *Tindall v. State*, 99 Fla. 1132, 128 So. 494; *Key v. Carolina & N. W. Ry. Co.*, 150 S.C. 29, 147 S.E. 625; *People v. Lapara*, 181 Cal. 66, 183 P. 545; 23 C.J.S., Crim. Law, Sec. 1110, Argument on Law of Case. The court did not err in preventing defendant's counsel from reading the *Frizzelle Case* to the jury.

The court instructed the jury that when it is proven or admitted that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against him: first, that the killing was unlawful, and second, that it was done with malice, and an unlawful killing with malice is murder in the second degree. The law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether. The court then charged as follows: "The burden is on the defendant only to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him." The defendant assigns as error the last nine words only of the above quoted sentence.

In *S. v. Quick*, 150 N.C. 820, 64 S.E. 168, this Court said: "In all indictments for homicide, where the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in second degree), unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him."

The facts and circumstances upon which the defendant relies to show mitigation or excuse or justification, he can show, if he can, from the whole evidence, as well that offered by the State, as that offered by himself. *S. v. Bright*, 215 N.C. 537, 2 S.E. 2d 541; *S. v. Gregory, supra; S. v. Wilcox*, 118 N.C. 1131, 23 S.E. 928.

This assignment of error is without merit. The court used the exact words set forth by this Court in the *Quick Case*.

The defendant assigns as error that part of the charge which refers to the legal provocation which will reduce murder in the second degree to manslaughter. The words excepted to are almost a literal use of the words set forth in *S. v. Benson, supra*, on the subject. Under this assignment of error the defendant contends that the charge was inadequate in that the court did not instruct the jury to consider all the facts, particularly as they appeared to the defendant, "in determining whether there was sufficient lawful provocation to set the defendant's mind into

a *brevis furor* of unsettling passion so as to reduce the homicide from murder in the second degree to at least manslaughter." The court did instruct the jury substantially on this subject, which instructions cover more than a page in the Record, immediately before the part assigned as error, and a great part of this part of the charge is taken verbatim from *S. v. Merrick,* 171 N.C. 788, 88 S.E. 501. This assignment of error is overruled.

The defendant further assigns as error that the court failed to declare, explain and define the terms unlawful act and culpable negligence as they relate to the crime of manslaughter, as required by G.S. 1-180. Without setting forth all that the court charged in respect to manslaughter and to a killing by misadventure or accident, the court charged "a homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act unaccompanied by any criminal, culpable or reckless conduct . . . It would be unlawful in the meaning of this rule, an action which justice says must have been intentionally wrong in itself, that is, it must be brought within the definition of criminal or culpable negligence." The court further charged that to make out a case of culpable negligence it is necessary for the State to show beyond a reasonable doubt a higher degree of negligence than is required to establish negligence in civil actions, and that proximate cause is an essential element of culpable negligence. The court also charged that if the jury found beyond a reasonable doubt from the evidence that the defendant killed the deceased "while in the commission of some unlawful act on part of himself, or that his death resulted from culpable, or criminal negligence on the part of the defendant, and that he was acting in a heedless, reckless manner regardless of the consequences of his act, and the death of the deceased ensued, it would be your duty to find him guilty of involuntary manslaughter. However, if you are satisfied from the testimony in the case, not beyond a reasonable doubt, not by the greater weight of the testimony, but satisfied from the evidence in the case which has been introduced by the defendant and by the State, that the death of the deceased was due to an accident as that has been explained to you to mean, then it would be your duty to find the defendant not guilty." Unlike the charge in *S. v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768, the jury was not left "free to consider ordinary rather than culpable negligence as sufficient to make unavailing to the defendant the plea of accidental killing." This assignment of error is overruled.

The other two assignments of error as to the charge refer to the alleged failure of the court to declare, explain and properly define the law relating to homicide by misadventure or accident, and to the law relating to the right of the defendant to use a pistol in the lawful defense of his property on his own premises. A careful reading of the

22½ pages of the charge shows that these assignments of error cannot be sustained.

The case was fairly presented to the jury by the learned judge in his charge. No prejudicial error is made to appear.

No error.

JOHNSON, J., not sitting.

DEVIN and RODMAN, JJ., took no part in the consideration or decision of this case.

JOHN W. MONTEITH AND WIFE, NETTIE A. MONTEITH, v. WILLIAM C. WELCH AND WIFE, VELMA WELCH; LESLIE R. ROGERS AND WIFE, MARY D. ROGERS; AND THOMAS H. FRANKS, TRUSTEE.

(Filed 19 September, 1956.)

1. Mortgages § 27: Payment § 3—

The trustee in a deed of trust is not, by reason of his position, the implied agent of the holder of the notes to receive payment, and where he has no actual or apparent authority to collect the debt, payment to him of the unmatured notes secured by the instrument does not discharge the debt.

2. Deeds § 5—

The date recited in a deed is at least *prima facie* evidence that it was executed and delivered on that date.

3. Mortgages § 28—

Where deed to purchasers is dated prior to an unauthorized cancellation of a deed of trust by the trustee, or even if the deed to the purchasers and the unauthorized cancellation be made the same day, the purchasers are not protected by the cancellation unless the cancellation is made prior to the execution of the deed, and in fact relied on, with the burden upon the purchasers to show that in fact they relied upon the cancellation. G.S. 45-37.

4. Same—

A registered deed of trust is notice as to its contents, and therefore, where the trustee, without possession of the notes, makes an unauthorized cancellation prior to the maturity of the notes, purchasers, even though they purchase at the same time the unauthorized cancellation is made, upon the mistaken belief that the trustee was authorized to receive payment and cancel the deed of trust, are not protected by the cancellation, since they have notice that the notes had not matured and of want of authority of the trustee, and where loss must fall on one of two innocent persons, it should be borne by the person who occasions it.

5. Principal and Agent § 7d—

Where one of two innocent parties must suffer loss occasioned by the wrongful act of a third person, the party whose act occasions the loss should suffer it, even in the absence of any moral wrong or positive fault on his part.

6. Same—

The principal will not be held to have ratified the acts of his agent unless the act of the principal relied on as a ratification is accompanied by an intent to ratify the unauthorized transaction, and therefore ratification cannot be inferred from acceptance by the principal of benefits to which he is entitled irrespective of the unauthorized act of the agent.

7. Same: Mortgages § 28—

The acceptance by the holder of notes secured by deed of trust of payments from the trustee subsequent to the unauthorized cancellation of the instrument by the trustee is no sufficient evidence of an intent on the part of the holder of the notes to ratify the unauthorized cancellation, since the holder of the notes is entitled to payment, notwithstanding the unauthorized act of the trustee.

JOHNSON, J., not sitting.

APPEAL by defendants Welch from *Nettles, J.*, May-June Term 1956 of HENDERSON County.

Plaintiffs seek to have expunged from the record an asserted unauthorized cancellation of a deed of trust.

On 16 June, 1949, Leslie R. Rogers and wife executed a deed of trust to Thomas H. Franks, trustee. The trust instrument secured the payment of thirteen notes, payable to plaintiffs, given for the purchase of land therein described. The first twelve notes were for the sum of $1,000 each. The last note was for the sum of $600. One note was payable on the 16th of June of each year, beginning 16 June, 1950. Interest was payable semiannually. The deed of trust was duly recorded 17 June, 1949.

Rogers and wife conveyed the lands described in the deed of trust to the defendants Welch by deed dated 7 October, 1952, recorded 15 October, 1952.

Notes 1, 2, and 3 were paid by the defendants Rogers when they became due. On 15 October, 1952, Thomas H. Franks sent plaintiffs his check for the payment of the interest to be due on 16 December, 1952. Upon receipt of the Franks check, plaintiff telephoned to inquire why Franks was sending his personal check. He replied that the defendants Rogers were arranging for a sale of the property to the defendants Welch, but that Welch did not have the money then available, but when Welch got his money plaintiffs would be notified so that they could

bring their notes and deed of trust to Hendersonville for payment. Plaintiffs heard nothing further from defendant Franks.

Entry was made on the margin where the deed of trust was recorded reading as follows: "The notes secured by this deed of trust having been paid in full, the deed of trust is hereby canceled of record, this the 15th day of October, 1952. Thomas H. Franks, Trustee. Witness: Dorothy Kilpatrick, Assistant Register of Deeds."

The evidence discloses that plaintiffs learned in May 1953 that defendants Welch had purchased the property described in the deed of trust. Plaintiff testified: "I met Mrs. Welch when I went to her home on the 17th day of May, 1953. I went to her home to find out something about the Rogerses and when they would be able to pay it. When I got there, she said, 'We have already bought the place.' That 'the deeds were drawed last October,' and I asked her if she knew we were carrying a deed of trust and these notes, and she said that she did, but that they had paid their lawyer to look after that for them." Plaintiff further testified: "The next time I had contact with Mr. Franks was in May. We had come by Mr. Welch's, the man that owned the farm at that time. He is a defendant in this action. We found out that they had already bought the place, so we came over to Mr. Franks' office and he wouldn't talk to us, so we went to Brevard and employed our lawyer Mr. Ralph Fisher. After that time we received this amount in a half dozen payments, I guess. The last payment was made the first day of October, 1953. The first payment was made about a week after the 17th of May, 1953. Between May and sometime in October Mr. Fisher collected the sum of $7,100."

Defendant offered no evidence. The jury, under a peremptory charge, answered the issues as follows:

"1. Was Thomas H. Franks by virtue of his office as Trustee in the deed of trust set forth and described in the pleadings herein filed authorized and empowered to cancel the same of record as appears on the margin thereof in the Office of the Register of Deeds in Deed of Trust Book 160 at page 276 of the Henderson County records?

"Answer: NO.

"2. Was said Thomas H. Franks, at the time of the cancellation, acting as attorney or agent of the plaintiffs, as alleged in the Answer?

"Answer: NO."

Upon the return of the verdict, judgment was entered declaring the cancellation null and void and of no effect. From this judgment defendants Welch appealed.

Potts & Ramsey and Redden & Redden for plaintiff appellees.

B. A. Whitmire and L. B. Prince for defendants Welch.

RODMAN, J. Defendants insist that Franks, the trustee, was authorized to receive payment of the notes and to cancel the deed of trust; and hence they are protected by the cancellation entered of record.

The assertion that Franks, the trustee, was authorized to collect the notes and thereupon to cancel the deed of trust finds no support in the evidence or in law.

Plaintiff testified: "I never authorized Mr. Franks or any other person to collect any money represented by these notes secured by the deed of trust."

The trustee never had possession of the notes or deed of trust. The notes were not due when Welch purchased the land or when the entry was made on the record reciting payment.

The recorded deed of trust was notice of all of its provisions. *Collins v. Davis,* 132 N.C. 106; *Insurance Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436; *Blankenship v. English,* 222 N.C. 91, 21 S.E. 2d 891.

"The general principle supported and recognized by the cases is that the mere naming of one as trustee in a trust mortgage or deed does not constitute him the agent of the bondholders for the purpose of receiving payment. On the contrary, the authority of the trustee to receive payment must affirmatively appear, either expressly or as an implication specially to be gathered from the terms of the trust instrument and bonds." 36 Am. Jur., 896.

Walker, J., speaking in *Wynn v. Grant,* 166 N.C. 39, 81 S.E. 949, said: "1. Payment of money due on written security, to an agent who has not either possession of the security or express authority to receive such money, is not good, and the principal may compel the debtor to pay it again.

"2. The facts that a loan is made through the agent, and that he has collected the interest, and that he has, in special cases, been authorized to collect the principal of particular mortgages, are not evidence of general authority to collect moneys due his principal, and one who pays to him the amount of a mortgage, without his having the mortgage in his possession, does so at his own risk.

"3. Even though an agent has authority to receive payment of an obligation, this does not authorize him to receive payment before it is due."

Since Franks was not, because of his position, the implied agent of plaintiffs and had no authority, actual or apparent, collection by him of the debt evidenced by the unmatured notes was not a payment.

Notwithstanding the lack of authority of Franks, the trustee, to receive payment, were the defendants protected by the cancellation entered on the records?

The statute, G.S. 45-37, provides: "Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

"1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

. . .

"Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded."

Defendants insist that this statute, as interpreted in *Bank v. Sauls,* 183 N.C. 165, 110 S.E. 865, is conclusive and affords them complete protection.

The case on which they rely is not authority for the position taken by them. There the mortgage was canceled by the mortgagee, the payee of the note. There a creditor relied on the cancellation which had been made by one who had the apparent right to receive payment and to cancel. There the notes secured by the mortgage were past due and the mortgagee certified to the bank that they had been paid and satisfied, and there was nothing which pointed to any transfer of the mortgage securing the same.

Here the record shows the notes were not due, the deed from the owners of the equity of redemption to the defendants bears date 7 October, 1952. The cancellation does not purport to have been made until 15 October, 1952. True the deed to defendants was recorded on 15 October, 1952, the same day on which the asserted cancellation was made.

Defendants, in their answer say:

"That all monies paid to the said Thomas H. Franks by these defendants was paid to him in his capacity as a representative of the plaintiffs. That if any funds paid by these answering defendants were not properly and legally applied to the indebtedness, then these defendants are in no way in fault nor are they answerable therefor."

Clark, C. J., in *Bank v. Sauls, supra,* says:

"The statute is plain, and in the absence of fraud participated in by the creditor or purchaser, if the statute is followed the creditor is protected by the entry of cancellation of the mortgage which, if made in the manner provided in the statute, is conclusive."

This language must be interpreted in the light of what was said in *Smith v. Fuller,* 152 N.C. 7, 67 S.E. 48. *Manning, J.,* there said: "It will be observed that the entry of satisfaction of the mortgage on the record of its registry was made by Whitley, the mortgagee; was in proper form, and was made more than four and one-half years before Smith purchased. This is not the case of the attempted cancellation of a mortgage or deed of trust by a person not authorized to make the entry of satisfaction. An existing, uncanceled mortgage, properly admitted to registration, is constructive notice to subsequent purchasers of the mortgage premises of the right of the mortgagee; but a mortgage or deed of trust properly canceled by a person authorized to cancel it, is notice to no one; it continues no lien upon the property."

The cancellation made by Franks could not, in any event, protect defendants unless it was made before they purchased and in fact purchased relying on its validity. The burden of establishing that they purchased without notice of the unauthorized cancellation was on defendants.

The date recited in a deed is at least *prima facie* evidence that it was executed and delivered on that date. *Fortune v. Hunt,* 149 N.C. 358; *Lyerly v. Wheeler,* 34 N.C. 290; *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Turlington v. Neighbors,* 222 N.C. 694, 24 S.E. 2d 648.

If, in fact, the land was acquired by defendants on the date of their deed, as may be inferred from its date, the purchase was made before the deed of trust was canceled. If the defendants or their grantors thereafter made payment to Franks, it would not avail as Franks was not authorized to receive payment.

If, notwithstanding the *prima facie* case made by the date of the deed, defendants, in fact, purchased on the date that the deed was recorded, to wit, 15 October, which was the same date that the instrument was canceled of record, the cancellation could not avail unless it be shown that the cancellation was made prior to their purchase, and they relied on the cancellation.

In their brief defendants say: "Rogers sold this land to Welch for a cash consideration and at the time of closing of the transaction the purchase money deed of trust to plaintiffs was satisfied by a marginal entry made by Thomas H. Franks, Trustee, and witnessed by the Assistant Register of Deeds of Henderson County."

The record does not show that the cancellation was made "at the time the transaction was closed." It merely shows that the cancellation

was made on the day the defendants' deed was recorded. Defendants, in their answer, allege: "these defendants relied upon the cancellation entered by the Trustee, in good faith, and after paying the consideration for said property as hereinbefore alleged." They offer no evidence to support this allegation, and the allegation must be read in connection with the next section of the answer: "That all monies paid to the said Thomas H. Franks by these defendants was paid to him in his capacity as a representative of the plaintiffs."

Assume, as defendants contend, that the cancellation was in fact made at the same instant defendants purchased, and their money was delivered to the trustee under the mistaken belief of law that Franks was, because of his position as trustee, authorized to receive payment and cancel the deed of trust, the cancellation could not destroy plaintiff's lien.

Walker, J., in *Wynn v. Grant, supra,* on facts very similar to the facts in the instant case, says: "It is a general and just rule that when a loss has occurred which must fall on one of two innocent persons, it shall be borne by him who occasioned it, even without any moral wrong or positive fault chargeable to him, and more especially so, if there is bad faith or even a lack of due care on his part, which caused the misfortune."

Finally, defendants assert that plaintiffs ratified cancellation by Franks. The record shows that plaintiffs had no knowledge of the cancellation until May 1953. Learning that defendants Welch had purchased property, they immediately went to Welch. Welch informed plaintiffs that they knew of the mortgage and had paid their lawyer to look after that for them. Plaintiffs immediately went to Franks, the trustee. He refused to talk to them. They then employed counsel. Plaintiffs did not institute their suit until about ten months after learning of the cancellation. As to the defendants' suggestion that indulgence had been granted to Franks, plaintiffs testified: "As to informing Mr. Welch that we did not authorize Mr. Franks to cancel the deed of trust, I did not go with any lawyer to Mr. Welch. I don't know of my own knowledge what our lawyer did. We did not agree to let Mr. Franks work this out over a period of time. We were opposed to permitting him to pay $7,100, but we finally accepted the money over six different payments up until October. We did not notify Mr. Welch in person. We though it was our lawyer's business. We did not grant Mr. Franks this indulgence. We did accept these payments, six payments from May until October."

It is said in 2 Am. Jur. 176: "In order that there may be an effective ratification, the principal's act must be accompanied by an intent to ratify the unauthorized transaction, which intention may be shown by facts amounting to an express or implied ratification. As a consequence,

ratification cannot be inferred from acts which may be readily explained without involving any intention to ratify. To illustrate, it was held that there was not an effective ratification where a principal sold cream belonging to him with which other cream had been purchased and commingled, without authority, by his agent; in such case, the sale was to be explained upon the ground that it was necessary in order that a total loss might be prevented."

There is no sufficient evidence in this record to show an intent on the part of plaintiffs to ratify, which would require the submission of an issue to the jury. *Wynn v. Grant, supra; Ritter v. Plumb,* 213 N.W. 571; *Satek v. Fortuna,* 58 N.E. 2d 464; Mechem, Agency (2d Ed.), sec. 439; 2 C.J.S., Agency, sec. 49b.

The sufficiency of the purported cancellation to comply with the statute, G.S. 161-6, does not appear to have been considered on the trial nor was it discussed in the briefs.

The judgment is

Affirmed.

JOHNSON, J., not sitting.

ROY JENKINS AND WIFE, MARTHA L. JENKINS, AND C. M. SALES v. TOM O. TRANTHAM AND WIFE, ZELDA TRANTHAM, ROSCOE HARWOOD AND WIFE, CORA HARWOOD.

(Filed 19 September, 1956.)

1. Boundaries § 9—

In a proceeding to establish a disputed boundary under G.S. Chapter 38, the burden is upon petitioners to show the true location of their boundary lines.

2. Boundaries § 6—

What constitutes the boundary lines is a matter of law for the court; where those lines are actually located on the premises is an issue of fact for the jury.

3. Trial § 37—

Issues of fact to be submitted to the jury must arise upon the pleadings. G.S. 1-196, G.S. 1-198.

4. Boundaries § 11: Election of Remedies § 1—

In a proceeding to establish a disputed boundary, petitioners may assert the true boundary as pointed out in their petition and at the same time assert by amendment another line marked by a fence, and claim title to the land on one side of the fence by adverse possession, leaving it to the court

and jury to say upon the issues arising on the pleadings, which line, if either, they have carried the burden of establishing, the remedies not being inconsistent or repugnant to each other, and the principle of election does not apply.

5. Appeal and Error § 3—

An appeal will not lie from an interlocutory order unless such order affects some substantial right and the ruling will work injury to appellant if not corrected before an appeal from final judgment.

6. Same—

An order requiring petitioners in a proceeding to establish a disputed boundary to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition, affects a substantial right and is appealable. G.S. 1-277.

JOHNSON, J., not sitting.

APPEAL by petitioners from *Froneberger, J.*, June Civil Term 1956 of BUNCOMBE.

Special proceeding instituted before the Clerk of the Superior Court by virtue of Ch. 38 G.S. to establish the boundary lines, which lines are in dispute, between the adjacent lands of the petitioners and the respondents.

The petitioners filed a joint petition in which they allege these facts: Roy Jenkins and wife, Martha, are the owners and in possession of a tract of land in Buncombe County, which is described by metes and bounds, that a dispute has arisen between them and the respondents Tom O. Trantham and wife, who are adjacent landowners, as to the boundary line between their lands, and the true boundary line is alleged with particularity. The petitioner C. M. Sales is the owner and in possession of a tract of land in Buncombe County, which is described by metes and bounds, that a dispute has arisen between him and all the respondents, who own two adjoining tracts of land, as to the boundary lines between their lands, and the true boundary lines are explicitly alleged.

Trantham and wife and Harwood and wife filed separate answers in which they deny the location of the boundary lines as alleged in the petition, and allege with particularity the true boundary lines as contended by them.

Whereupon, pursuant to G.S. 38-3, the Clerk issued an order to J. R. Reagan, a competent surveyor of Buncombe County, to survey said lines according to the contentions of all the parties, and make a report of the same with a map within 30 days from the date of the order.

The surveyor made a report with a map stating that the lines as contended for by the petitioners were shown on the map by the line marked

A, H and B, and the lines as contended for by the respondents were shown on the map by the line marked D, E, F and G. The surveyor's report contains this statement: "In making this survey I also located and show the same on the map by a broken line with the word 'fence' appearing thereon at intervals, a wire fence beginning at the Black Oak at the letter D and extending southward by a Sassafras Tree and Gum Tree and White Oak to a point on the North side of the Old Fort Road. A wire fence also extends from the stone at the letter G northward and on the West side of the boundary line as contended by the respondents for some distance, and then crossing the boundary line and extending some distance on the East side, all of which is shown by a broken line marked 'fence' on said plat."

After the filing of the report petitioners made a motion to file an amendment to their complaint which the Clerk allowed. This amendment alleges the following facts: That more than 20 years before the institution of this proceeding Sales and his predecessors in title and the other petitioners' predecessors in title and the respondents' predecessors in title erected a fence upon the lands in dispute, said fence running in a North and South direction from the Northern boundary lines of said lands to the Southern boundary lines of said lands, which fence is shown upon the map filed by Reagan. That for more than 20 years prior to the commencement of this action petitioners, and their predecessors in title, have been in the actual, continuous, open and notorious possession of that part of the lands in dispute lying West of said fence, and that such possession has been and is under known and visible lines and boundaries adverse to respondents and all other persons, that at one time petitioners leased this land to the respondents Trantham, and petitioners plead the 20-year statute of limitations and adverse possession as a bar to any claims of title of the respondents in reference to this land held adversely by petitioners and their predecessors in title, and petitioners allege that such adverse possession for 20 years gives them title to that part of the land in dispute lying West of the fence by virtue of G.S. 1-40.

The respondents Trantham answered the amended petition denying its allegations, and asserting that there is not, and never has been, a fence between their lands and the Jenkins land, that the fence South of the Jenkins property was erected at random, part of which is West of the boundary lines as contended for by these respondents, and part East of their boundary lines, and that these respondents for more than 20 years have been in adverse possession of the land located East of the boundary line as contended for by them, and they plead the 20-year statute of limitations and adverse possession as a bar to any claim of petitioners.

The respondents Harwood answered the amended petition denying its allegations, with the exception of such permissive use to which petitioners may have put any part of their lands from time to time during the last 20 years.

Upon the filing of the amended pleadings the Clerk entered an order transferring the proceeding to the Superior Court at term on the ground that issues of title had been raised by the amended pleadings.

The proceeding came on for trial before a judge and jury. After the reading of the complaint and the amendment thereto and the answers, the respondents made a motion that the petitioners be required to elect as to whether they contended their true boundary lines were located by the line shown on Reagan's map marked by the letters A, H and B, as alleged in their petition, or whether they contended their true boundary lines were located at the fence shown on Reagan's map, as alleged in the amendment to their petition. The judge allowed the motion, and entered an order requiring the petitioners to make such an election before the introduction of evidence.

From the order entered petitioners appealed.

W. M. Styles and Oscar Stanton for Petitioners, Appellants.

Don C. Young for Respondents Tom O. Trantham and wife, Zelda Trantham, Appellees.

No Counsel for Roscoe Harwood and wife, Cora Harwood, Respondents.

PARKER, J. A study of the petition and the amendment thereto shows plainly the legal effect of petitioners' pleadings. In their petition they allege with particularity what are the true boundary lines between their lands and the lands of the respondents, and contend that the location of these true boundary lines is shown by the line marked A, H and B on Reagan's map. In the amendment to their petition they assert in effect that, if this is not true, then the fence shown on Reagan's map has become the true line by operation of law by virtue of their 20 years adverse possession under G.S. 1-40 of that part of the lands in dispute lying West of the fence, which adverse possession has vested them with title and fixed the fence as the present true boundary line. *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918.

The fence shown on Reagan's map is West of the boundary lines as contended for by petitioners, and part of it is on the East side of the boundary lines and part of it on the West side of the boundary lines as contended by respondents.

The petitioners have the burden of proof of showing the true location of their boundary lines. *McCanless v. Ballard,* 222 N.C. 701, 24 S.E. 2d 525.

What constitutes the lines is a matter of law for the court: where those lines are actually located on the premises in controversy is an issue of fact peculiarly for the jury. *McCanless v. Ballard, supra; Geddie v. Williams,* 189 N.C. 333, 127 S.E. 423; *Tatem v. Paine,* 11 N.C. 64.

Issues of fact to be submitted to the jury must arise upon the pleadings. G.S. 1-196; G.S. 1-198; *McCullen v. Durham,* 229 N.C. 418, 426, 50 S.E. 2d 511.

By permission of the Clerk petitioners filed an amendment to their petition setting up title to that part of the lands in dispute lying West of the fence, as shown on Reagan's map, by reason of 20 years adverse possession under G.S. 1-40. The respondents deny the allegations of the amendment to the petition. Thus an issue of fact arises on the pleadings, and petitioners can use adverse possession to prove title to that part of the lands in dispute lying West of the fence. *Geddie v. Williams, supra,* pp. 338 and 339 in our Reports, and p. 425 in S.E. Reports.

It may be that petitioners cannot sustain the burden of proof of establishing their boundary lines as alleged in their petition, but that they may successfully show title in them to that part of the lands in dispute lying West of the fence by adverse possession for 20 years under G.S. 1-40, and thus fix their boundary lines at the fence. When all the evidence has been introduced at the trial, the court can submit to the jury the appropriate issues arising upon the pleadings and the evidence. *Greer v. Hayes,* 221 N.C. 141, 19 S.E. 2d 232.

Petitioners are not seeking two remedies which are inconsistent or repugnant to each other. *Irvin v. Harris,* 182 N.C. 647, 109 S.E. 867. Petitioners are seeking co-existing and consistent remedies, and the principle of election does not apply. *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345.

"The plaintiff can unite two causes of action relating to the same transaction and have alternative relief." *Herring v. Lumber Co.,* 159 N.C. 382, 74 S.E. 1011.

The law in this jurisdiction will not compel petitioners to elect at their peril as to whether they contend their true boundary lines are shown by the line on Reagan's map marked by the letters A, H and B, as alleged in their petition, or whether they contend their true boundary lines are shown by the fence on Reagan's map by reason of title having vested in them to the land in dispute up to the fence by virtue of 20 years adverse possession under G.S. 1-40. They may assert both contentions leaving it to the court and jury to say which line, if either, they have carried the burden of establishing. *Jenkins v. Duckworth & Shelton, Inc.,* 242 N.C. 758, 89 S.E. 2d 471. The court committed

prejudicial error in compelling petitioners to make an election as to which line they contended was the true boundary line.

Is the appeal fragmentary and premature, and should it be dismissed, as contended by respondents? An appeal may be taken to this Court "from every judicial order or determination of a judge of a superior court . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277. Except where the statute otherwise expressly provides, as a general rule an appeal to the Supreme Court only lies from a final judgment of the Superior Court. *Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 375; *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925. An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court unless such order affects some substantial right claimed in the action by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Veazey v. Durham, supra; Privette v. Privette, supra; Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299; *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54. The order requiring the petitioners to make an election affects substantial rights claimed by them, and will work injury to them in presenting their case to the jury if not corrected before an appeal from the final judgment.

The order below is

Reversed.

JOHNSON, J., not sitting.

STAUNTON MILITARY ACADEMY, INC., v. J. S. DOCKERY, TRUSTEE, DAVID LINDSAY, JULIUS E. BROWN AND WIFE, VERA E. BROWN.

(Filed 19 September, 1956.)

1. Mortgages § 42—

Where the trustee in a junior deed of trust forecloses the instrument he can convey no better title than he acquired, and, nothing else appearing, title vests in the purchaser subject to any prior liens.

2. Mortgages § 37—

Where the trustee in a junior deed of trust forecloses the instrument, it is his duty, nothing else appearing, to pay the surplus after the discharge of the debt secured by the instrument foreclosed to satisfy junior liens, if any, and then to owners of the equity of redemption, or he may pay the surplus to the clerk of the Superior Court. G.S. 45-21.31b(4). If he elects

to make payment in discharge of the debts secured by prior deeds of trust on the property he does so at his own risk.

3. Mortgages § 38—Complaint held to state cause of action for wrongful application of surplus after foreclosure.

The complaint alleged that the trustee in a junior deed of trust foreclosed the instrument, and notwithstanding notice of plaintiff's claim of lien as a subsequent judgment creditor of the trustor, failed to discharge the judgment lien, and, by inference at least, paid the surplus to the *cestui que trust* in prior encumbrances. *Held:* The complaint states a cause of action in favor of the judgment creditor against the trustee, the *cestui* in the prior encumbrances and the trustor, the liability of the *cestui* being predicated on the ground that he received and had money belonging to the judgment creditor. Nor is the complaint demurrable for misjoinder of parties and causes of action.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Pless, Resident Judge,* in Chambers, Marion, N. C., 25 May, 1956, McDOWELL.

Plaintiff's appeal is from adverse rulings on separate demurrers to complaint filed by defendants J. S. Dockery, Trustee, and David Lindsay.

Plaintiff's allegations may be summarized as follows:

1. Defendants Brown, owners in fee simple of a described tract of land in McDowell County, executed five deeds of trust, all duly recorded in the McDowell County Registry, which, in order of priority, were as follows: (a) deed of trust to A. P. Brinkley and Mary C. O'Donnel, Trustees, securing an indebtedness of $12,000.00 to Home Federal Savings & Loan Association of Johnson City, Tennessee, on a portion of said tract; (b) deed of trust to J. S. Dockery, Trustee, securing an indebtedness of $15,000.00 to defendant David Lindsay, on all of said tract; (c) deed of trust to J. S. Dockery, Trustee, securing an indebtedness of $5,000.00 to defendant David Lindsay, on all of said tract; (d) deed of trust to J. S. Dockery, Trustee, securing an indebtedness of $8,000.00 to defendant David Lindsay, on all of said tract; and (e) deed of trust to J. S. Dockery, Trustee, securing an indebtedness of $3,000.00 to David Lindsay, on all of said tract and in addition thereto on "all and singular the furniture, fixtures and equipment located in the Tourist Court and other buildings on the said land, and all additions and replacements of said personal property" so long as any sum was due under said deed of trust.

2. On 13 July, 1954, subsequent to the registration of said deeds of trust, plaintiff, in a duly constituted civil action, obtained a judgment in the Superior Court of McDowell County against defendants Brown for $1,670.00 plus interest and costs; and the Sheriff of McDowell

County, under execution issued 8 December, 1955, to enforce collection of said judgment, levied 10 December, 1955, on all real and personal property described in and conveyed by the deed of trust described in 1(e) above, the said judgment and levy constituting a lien on all of said tract of land and said personal property, subject only to the prior liens of said five deeds of trust.

3. On account of default in the payment of the indebtedness secured by the deed of trust described in 1(e) above, which was subject and subordinate to the said four prior deeds of trust, defendant J. S. Dockery, Trustee, exercising the power of sale vested in him by its terms, advertised that a foreclosure sale "of said property" would be held 2 December, 1955, "subject to the four deeds of trust," being the prior deeds of trust described in 1(a), 1(b), 1(c) and 1(d) above; and in offering "said land" for sale at public auction pursuant to such foreclosure advertisement defendant J. S. Dockery, Trustee, announced at the public auction sale that "said land was being sold subject to the liens of said four prior deeds of trust," whereupon R. N. Freeman became the last and highest bidder at $45,500.00.

4. Plaintiff notified defendant J. S. Dockery, Trustee, on 8 December, 1955, and again on 10 December, 1955, of its claim and lien; but defendant J. S. Dockery, Trustee, while acknowledging the receipt of such notice, refused to recognize that plaintiff had a valid claim and lien in respect of the surplus arising from the said foreclosure.

5. Freeman's bid became final. The foreclosure sale was completed in January, 1956, when defendant J. S. Dockery, Trustee, executed and delivered deed to the purchaser and filed his final report of receipts and disbursements.

6. Notwithstanding full and actual notice of plaintiff's said claim and lien, defendant J. S. Dockery, Trustee, disbursed the $45,500.00, received by him as purchase price, as follows: After payment of the costs and expenses of foreclosure and taxes, he applied the entire balance of $44,252.93 to the discharge of the five outstanding deeds of trust, to wit, the deed of trust foreclosed and the four prior (unforeclosed) deeds of trust.

Plaintiff prayed (1) that its judgment be adjudged a lien, subject only to said five deeds of trust, on the real and personal property described in the deed of trust foreclosed, and (2) that it recover the amount due on said judgment from J. S. Dockery, individually and as trustee, and David Lindsay, and against them both, jointly and severally, together with costs.

Each defendant demurred for that (1) the complaint failed to state facts sufficient to constitute a cause of action against the demurrant, and (2) there was a misjoinder of parties and of causes of action.

After the hearing on demurrer, judgment was entered as follows:

"(1) That the separate demurrers of the defendant, J. S. Dockery, Trustee, and the defendant, David Lindsay be, and they are hereby sustained insofar as the complaint in this action undertakes to state a cause of action for the recovery of money against said defendants, J. S. Dockery, Trustee, and David Lindsay; PROVIDED, HOWEVER, that if it shall subsequently be made to appear in this action that the defendant, J. S. Dockery, Trustee, had remaining in his hands any surplus funds, after payment of the costs and expenses of the foreclosure, of taxes due upon the property, and after payment of the principal and interest due upon the deed of trust which was foreclosed, and upon all of the prior deeds of trust mentioned and referred to in the plaintiff's complaint, the plaintiff, upon such a showing, would be entitled to participate in such surplus.

"(2) As to the cause of action alleged in the plaintiff's complaint, and specifically as to the prayer for relief contained in paragraph 1 of said prayer, at the conclusion of plaintiff's complaint, in which the plaintiff prays for a judgment adjudicating that the plaintiff had a lien, subject only to the five (5) deeds of trust, including the deed of trust which was foreclosed, and that such lien attached to the real and personal property of the defendants, Julius E. and Vera E. Brown, the demurrer of said defendants, and each of them, is hereby overruled."

Plaintiff excepted and appealed, assigning as error the entry of said judgment.

Roy W. Davis for plaintiff, appellant.

Proctor & Dameron for defendants J. S. Dockery, Trustee, and David Lindsay, appellees.

BOBBITT, J. The rules applicable in testing the sufficiency of the complaint are well settled and need not be repeated. G.S. 1-151; *Pressly v. Walker,* 238 N.C. 732, 78 S.E. 2d 920, and cases cited.

Absent special circumstances, a foreclosure sale by a trustee in a junior deed of trust is made subject to prior liens on the property. The property was so conveyed to the trustee. He can sell and convey no better title than he acquired. Title vests in the purchaser subject to such prior liens. *Bobbitt v. Stanton,* 120 N.C. 253, 26 S.E. 817; *Brett v. Davenport,* 151 N.C. 56, 65 S.E. 611; *Bank v. Watson,* 187 N.C. 107, 121 S.E. 181; 59 C.J.S., Mortgages secs. 514, 556; 37 Am. Jur., Mortgages sec. 760.

Nothing appears in the complaint to take the foreclosure sale made by defendant J. S. Dockery, Trustee, out of the general rule. On the contrary, it is expressly alleged that the property was advertised and

announcement was made that the property was offered for sale subject to the four prior deeds of trust.

On the facts alleged, the duty of defendant J. S. Dockery, Trustee, was to pay the surplus of $44,252.93 to the owners of the equity of redemption or to discharge junior liens, as the facts required. *Bobbitt v. Stanton, supra.* Defendant J. S. Dockery, Trustee, had actual notice of plaintiff's claim and lien before he disbursed said surplus. This distinguishes this case from cases where the trustee disbursed the surplus to the owner of the equity of redemption prior to actual notice of the junior lien. *Skinner v. Coward,* 197 N.C. 466, 149 S.E. 682; *Barrett v. Barnes,* 186 N.C. 154, 158, 119 S.E. 194; *Norman v. Hallsey,* 132 N.C. 6, 43 S.E. 473.

When adverse claims were asserted, defendant J. S. Dockery, Trustee, might have discharged his liability by paying said surplus to the clerk of the Superior Court of McDowell County under authority of G.S. 45-21.31(b)(4). On the facts alleged, he elected to make payment thereof at his own risk in discharge of the debts secured by the four prior deeds of trust. *Lenoir County v. Outlaw,* 241 N.C. 97, 84 S.E. 2d 330.

True, the complaint contains no explicit allegation that defendant J. S. Dockery, Trustee, paid any portion of said surplus to defendant Lindsay. However, plaintiff's allegations, when liberally construed, are deemed sufficient to permit the inference that some portion of the $44,252.93 "devoted . . . to the discharge of the five deeds of trust outstanding against said property, . . ." was paid to defendant Lindsay as *cestui que trust* in three of the four deeds of trust prior in lien to that foreclosed.

If, as contended by appellees, Freeman paid full value for the property with the understanding that the purchase price of $45,500.00 would be disbursed in payment of the debts secured by the four prior deeds of trust, the obvious answer is that nothing of this sort appears in the complaint. Nor are we now concerned with Freeman's rights, if any, to rescind or set aside the sale. Compare *Bobbitt v. Stanton, supra; Mayer v. Adrian,* 77 N.C. 83.

On the facts alleged, nothing else appearing, defendant J. S. Dockery, Trustee, is liable for failure to pay plaintiff's claim and lien out of said surplus, and defendant Lindsay is also liable to the extent of the amount of said surplus paid to him by defendant J. S. Dockery, Trustee, up to the full amount of plaintiff's claim and lien. The liability of defendant Lindsay is predicated on the ground that he received and has money belonging to plaintiff. *Allgood v. Trust Co.,* 242 N.C. 506, 88 S.E. 2d 825, and cases cited.

While no specific ruling was made, failure to dismiss the action implies that the court below rejected the demurrers as related to misjoinder of parties and causes of action. We concur in this view.

Apparently, J. S. Dockery, individually, was not made a party defendant herein.

Based upon the foregoing, the judgment of the court below sustaining the demurrers for failure to allege facts sufficient to constitute a cause of action for the recovery of money against defendants herein is reversed. Such reversal supersedes all further provisions of said judgment inconsistent with the law as stated herein.

Reversed.

JOHNSON, J., not sitting.

BETTIE WEAVER McLAMB AND HUSBAND, OSCAR ROBERT McLAMB, JR., v. NORA HUDSON SCOTT WEAVER; BERTHA WEAVER CATES AND HUSBAND, BILLY WRAY CATES, AND HICKS WALKER.

(Filed 19 September, 1956.)

1. Partition § 4f—

The allotment of the respective shares to tenants in common by commissioners in partition proceedings creates no new estate and conveys no title, the sole effect thereof being to sever the unity of possession and to fix the physical boundaries of the tracts. Therefore, no title vests in the commissioners, and after confirmation of their report they have no further authority and purported deeds executed by them to the several tenants convey nothing. G.S. 46-10; 46-17.

2. Deeds § 1c—

While the grantor in a deed need not use technical operative words of conveyance, he must use words that, upon liberal construction, are sufficient to operate presently as a transfer of the grantor's interest to the grantee, and the mere expression of an intention is insufficient to constitute a conveyance.

3. Same: Husband and Wife § 14: Partition § 4f—

Where commissioners in partition proceedings, after report and confirmation, execute purported deed to a tenant in common and her husband, for her respective share, and the tenant in common also signs the deed, upon recitals immediately before and after the *habendum* to the effect that she wished her interest in the property conveyed to herself and her husband as tenants by entirety, the deed does not create an estate by entirety, since the commissioners' conveyance is a nullity, and the deed contains no operative words of conveyance in behalf of the wife, the wife not being named a grantor therein.

JOHNSON, J., not sitting.

DEVIN and RODMAN, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Mallard, Judge,* January Term, 1956, of DURHAM.

Civil action to recover possession of tract No. 3 and tract No. 10, containing 8.6 acres and 17.2 acres, respectively, as shown on recorded map of the William A. Hardcastle estate, and damages on account of defendants' alleged unlawful possession thereof.

Upon waiver of jury trial, the hearing below was on stipulated facts and on evidence offered by the respective parties. The essential facts are not in dispute.

William A. Hardcastle, sometimes known as William A. Castle, the owner of a tract of land in Durham Township containing 160 acres, died intestate; and thereafter, to wit, on 19 September, 1925, there was instituted in the Superior Court of Durham County a special proceeding for the actual partition of said 160 acre tract among the heirs at law of said intestate. Bertha Weaver, a daughter, inherited an undivided one-sixth interest. She and Charlie Weaver, her husband, and others, were parties defendant in said special proceeding. No issues or questions of fact were raised by the answers to the petition. Pursuant to order of appointment, notice, oath, etc., the commissioners filed their report 19 December, 1925, in which they allotted in severalty *to Bertha Weaver* said tracts Nos. 3 and 10. In addition, to compensate for the inferior value of tract No. 3, the commissioners charged tracts Nos. 1 and 2, allotted to others, with the payment of $72.00 and $63.00, respectively, to Bertha Weaver. No exceptions having been filed, the report of commissioners was confirmed by the clerk on 30 January, 1926. Thereafter, on 18 February, 1926, the clerk's decree was approved by the presiding judge.

The matter in controversy is the legal effect to be given a purported deed, recorded in the Durham County Registry, which, in pertinent part, is as follows:

"That, whereas, . . . (recitals by undersigned commissioners as to their appointment, the specific allotments made to each tenant in common, including the allotment *to Bertha Weaver* of tracts Nos. 3 and 10, the filing of their report, the confirmation thereof on 19 February, 1926, by the clerk, and the payment to Bertha Weaver of the owelty charges assessed in her favor.)

"NOW, THEREFORE, this indenture, witnesseth:

"That, We, H. C. Royster, J. T. Mayton and D. T. Gooch, commissioners as aforesaid, for and in consideration of the premises and the further sum of One ($1.00) Dollar to us in hand paid, the receipt of

which is hereby acknowledged, have given, granted, bargained and sold, and by these presents do give, grant, bargain, sell and convey unto the said Charlie Weaver and wife, Bertha Weaver, that lot or parcel of land situated in Durham Township, Durham County, state aforesaid, bounded and described as follows:

"Lot No. 3, containing 8.6 acres and lot No. 10 containing 17.2 acres, as shown by plat of the William A. Hardcastle estate attached to the report of the commissioners, exact duplicate of said plat being filed in the office of the Register of Deeds for Durham County, Book 1, page 85, reference to which is hereby made for a full and more complete description of said tracts of land.

"And whereas, the said Bertha Weaver has requested, and joins in this deed for the purpose of requesting that this deed be not made to her but to her and her husband, Charlie Weaver, as tenants of the entirety.

"TO HAVE AND TO HOLD said land with all appurtenances and privileges thereunto belonging unto them, the said Charlie Weaver and wife, Bertha Weaver, and their heirs and assigns forever.

"And the said Bertha Weaver joins in this conveyance for the purpose of requesting the commissioners to allot her interest in the above described property to herself and her husband, Charlie Weaver, as tenants by the entirety.

"IN TESTIMONY WHEREOF, we, the said commissioners as aforesaid, have hereunto set our hands and affixed our seals this the 20 day of February, 1926.

"/s/ J. T. His × Mayton Mark Commissioner (SEAL)

"/s/ D. T. Gooch Commissioner (SEAL)

"/s/ H. C. Royster Commissioner (SEAL)

"/s/ Bertha Weaver

"North Carolina,
Durham County.

"The execution of the foregoing deed was this day acknowledged before me by H. C. Royster, J. T. Mayton and D. T. Gooch, the grantors, for the purposes therein expressed and the certificate of G. C. Glymph, Notary Public, Durham County, is adjudged to be correct. Let the same with this certificate, be registered.

"Witness my hand and notarial seal, this 20 day of Feby., 1926.

"/s/ Jas. R. Stone, Deputy CSC

"My com. exps.

"North Carolina, Durham County.

"I, G. C. Glymph, a Notary Public, do hereby certify that Bertha Weaver, the wife of Charlie Weaver, personally appeared before me this day and acknowledged the due execution of the foregoing deed; and being by me privately examined, it appearing to my satisfaction that the wife freely executed this contract and freely consented thereto at the time of her separate examination, and I find as a fact that the same is not unreasonable or injurious to her.

"Witness my hand and notarial seal, this the 3rd day of Feby., 1926.

"/s/ G. C. Glymph

"My com. exps. Nov. 30th, 1926." Notary Public.

Bertha Weaver died intestate in June, 1932. The *feme* plaintiff, the child of Bertha Weaver and her husband, Charlie Weaver, is the only child and sole heir of Bertha Weaver.

In December, 1932, Charlie Weaver married defendant Nora Hudson Scott Weaver; and of this marriage one child was born, to wit, defendant Bertha Weaver Cates. Charlie Weaver died 16 January, 1952, intestate, survived by his widow and his said two children.

Defendants, relying upon said purported deed, assert that Charlie Weaver, upon the death of Bertha Weaver, his first wife, became the sole owner of the lands in dispute; and that the *feme* plaintiff and defendant Bertha Weaver Cates, as children and heirs of Charlie Weaver, now own said lands as tenants in common, subject to the dower interest of defendant Nora Hudson Scott Weaver.

Plaintiff asserts that she is the sole owner of said lands as the only child and sole heir of her mother, Bertha Weaver; and that the possession by her father, Charlie Weaver, subsequent to her mother's death, was as tenant by the curtesy. (G.S. 52-16.)

Defendant Walker, in possession as tenant when the action was commenced, has no present interest in the controversy.

The court below entered judgment that the *feme* plaintiff is the sole owner of the lands in dispute; that she recover the rents therefrom collected by defendants and deposited with the clerk *pendente lite* in accordance with stipulation; and that defendants pay the costs.

Defendants excepted and appealed, assigning as error the conclusions of law upon which the judgment is based.

Spears & Spears, Wallace Ashley, Jr., and C. S. Hammond for plaintiffs, appellees.

Bryant, Lipton, Strayhorn & Bryant for defendants, appellants.

BOBBITT, J. Decision turns on the answer to this question: Did the purported deed divest Bertha Weaver of sole ownership of tracts Nos.

3 and 10 and vest title thereto in Charlie Weaver and wife, Bertha Weaver, as tenants by the entirety? The court below answered "no" and we are in accord.

The Clerk's decree of 30 January, 1926, confirmed the allotment by the commissioners to Bertha Weaver of tracts Nos. 3 and 10. The partition proceeding created no new estate and conveyed no title. The sole effect thereof was to sever the unity of possession and to fix the physical boundaries of the several parts of the common property to be held in severalty by the respective tenants. *Southerland v. Potts,* 234 N.C. 268, 67 S.E. 2d 51; 68 C.J.S., Partition sec. 151(f); 40 Am. Jur., Partition sec. 126. See also, *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340, and *Sutton v. Sutton,* 236 N.C. 495, 73 S.E. 2d 157. Title vested in Bertha Weaver as a child and heir at law of her father, not by virtue of the partition proceeding.

No title vested in the commissioners. Their duty was to make actual partition among the tenants in common and to make a full report thereof. G.S. 46-10, G.S. 46-17. After performing this duty, they had no other function or authority. *Clinard v. Brummell,* 130 N.C. 547, 41 S.E. 675. They had no authority "to sell and convey" any portion of the William A. Hardcastle land, nor was there any court order purporting to authorize them to do so. Hence, their purported deed conveyed nothing to "Charlie Weaver and wife, Bertha Weaver."

It is noted that Bertha Weaver is not named as grantor in the purported deed. The commissioners, as grantors, undertake to make the conveyance. They acknowledge receipt of the recited consideration. Bertha Weaver signed the deed for the purpose(s) expressed in two separate paragraphs thereof. In the paragraph immediately following the *habendum* clause, she requested that the commissioners "allot her interest in the above described property to herself and her husband, Charlie Weaver, as tenants by the entirety." But the commissioners had already allotted tracts Nos. 3 and 10 to her, individually, and such allotment had been confirmed. Moreover, the authority of the commissioners was to partition the land among *the tenants in common.* G.S. 46-10. In the paragraph immediately preceding the *habendum* clause, she requested that "this deed be not made to her but to her and her husband, Charlie Weaver, as tenants of the entirety." Although the commissioners attempted to comply with such request, their attempted conveyance was a nullity.

True, technical operative words of conveyance are not required. *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687. Even so, the words used in the purported conveyance must be such that, upon liberal construction thereof, they suffice to operate presently as a transfer of the grantor's interest to the grantee. Apart from *any* operative words of con-

veyance, the mere expression of an intention is insufficient to constitute a conveyance. *Pope v. Burgess*, 230 N.C. 323, 53 S.E. 2d 159.

Upon the record, we are constrained to hold that Bertha Weaver did nothing more than express an intention that her share in her father's estate be held by herself and her husband as tenants by entirety; and that this expression of her intent was not sufficient to operate as a conveyance by her to her husband of any interest in her land.

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

Affirmed.

JOHNSON, J., not sitting.

DEVIN and RODMAN, JJ., took no part in the consideration or decision of this case.

RUSSELL L. PEED AND J. M. BOOTH v. BURLESON'S, INC., E. C. BURLESON, CHARLES R. PINKSTON AND RICHARD A. BROWN.

(Filed 19 September, 1956.)

1. Trover and Conversion §§ 1, 2—

Where the employee-driver of a truck wrongfully sells the cargo to a stranger who uses the property in his own business, such third person acquires no title and is liable to the true owner on the basis of conversion, with the measure of damages ordinarily being the value of the property at the time and place of conversion, with interest.

2. Sales § 11—Where seller is required to deliver goods to purchaser's plant, delivery to the carrier is not delivery to purchaser.

As a general rule, under a contract of sale which provides for a sale f.o.b. the point of shipment, the carrier is the agent of the purchaser, and title passes upon delivery to the carrier, but where the evidence is sufficient to show that the contract by the seller was to deliver the goods at the purchaser's plant at a designated price per unit, plus a designated sum per unit for freight, the evidence brings the case within the exception to the general rule, and, the seller being required to make delivery, the carrier is the seller's agent to perform this duty, so that delivery to the carrier is not delivery to the buyer, and the seller assumes the risk in carriage.

3. Trover and Conversion § 2—

Where, in an action for conversion of goods bought from the carrier's driver, the evidence, considered in the light most favorable to plaintiffs, does not show that plaintiff owner had been fully reimbursed for the loss by plaintiff carrier, nonsuit as to plaintiff owner on the ground that he had no interest in the subject matter should be denied.

4. Corporations § 25b—

In the absence of conspiracy, an officer of a corporation cannot be held individually liable for the tortious conversion of property by the corporation when such officer had nothing to do with the transaction and does not learn of it until some time after it had been consummated.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *Morris, J.*, June Civil Term, 1956, of BEAUFORT.

Tort action to recover the value of 320 bags of potatoes, allegedly converted by defendants to their own use.

On the former appeal, *Peed v. Burleson's, Inc.*, 242 N.C. 628, 89 S.E. 2d 256, this Court affirmed judgment overruling demurrer interposed by defendants on the ground of misjoinder of parties and causes of action. A statement of the essential allegations of the complaint will be found there. Answering, defendants admitted that defendant Burleson's, Inc., is a North Carolina corporation, with principal office or place of business in Asheville; that defendant E. C. Burleson is said corporation's president and treasurer; and that Charles R. Pinkston is said corporation's vice-president and secretary. Apart from these admissions, defendants denied the allegations of the complaint.

At the close of plaintiffs' evidence and upon motion of defendants Burleson's, Inc., E. C. Burleson and Charles R. Pinkston, the court entered judgment of involuntary nonsuit and dismissed the action as to said defendants. Plaintiffs excepted and appealed, assigning as error the entry of said judgment.

John A. Wilkinson for plaintiffs, appellants.

Rodman & Rodman, J. W. Haynes, and Zebulon Weaver, Jr., for defendants, appellees.

BOBBITT, J. Evidence was offered tending to show these facts:

1. On Friday, 2 July, 1954, at Aurora, North Carolina, plaintiff Peed, the owner of 320 bags of Irish potatoes, U. S. No. 1, size A, Sebago variety, arranged with plaintiff Booth, a truck broker, for the transportation thereof to Licek Potato Chip Company of Decatur, Illinois. Peed agreed to pay Booth for such transportation $1.25 per bag, plus 3% transportation tax. Booth agreed to deliver the potatoes in good condition and on time.

2. Booth, a commission agent for truckers, arranged with one Paul Bullock, who then had four trucks engaged in hauling potatoes out of Aurora, for the actual transportation of the potatoes to Decatur, Illinois. On Friday, 2 July, 1954, the potatoes were loaded on one of

Bullock's trucks; and thereupon, with defendant Brown, Bullock's driver, in charge, the loaded truck left Aurora for Decatur.

3. On Saturday, July 3rd, Brown was temporarily detained in Mt. Airy, North Carolina, on account of improper registration papers. Bullock, by telephone, arranged for his release. On Wednesday, July 7th, Brown was in Asheville, North Carolina, in custody of the police.

4. On Thursday, July 8th, upon arrival in Asheville, Bullock discovered that Brown had delivered the potatoes to defendant Pinkston, from whom Brown had received $1.00 per bag, a total of $320.00; and that the potatoes were received by defendant corporation and handled in the course of its business.

5. When Bullock located Brown in Asheville, he got from him two bus tickets, Asheville to New York, which Brown had purchased. Bullock redeemed these tickets, receiving $30.00 for them, which he kept. Bullock had given Brown $150.00 to defray his expenses on the trip between Aurora and Decatur. Brown was prosecuted and sent to prison.

6. On Monday, July 5th, the market price of potatoes at Aurora was $4.50 per bag. The cost of transportation from Aurora to Asheville was somewhere around $1.00. During the week immediately after Sunday, July 4th, the price of potatoes "jumped."

7. Neither plaintiffs nor Bullock recovered any of the potatoes from defendants or compensation therefor.

8. Plaintiffs have recovered nothing from Bullock or Brown.

9. Peed has paid nothing on account of transportation charges.

10. By reason of his guarantee for safe and prompt delivery of the potatoes to Peed's customer in Decatur, Illinois, Booth, prior to the commencement of this action, paid to Peed the sum of $1,040.00.

Other facts, bearing on the determinative question presented, will be stated below.

The tort of conversion is well defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." 89 C.J.S., Trover & Conversion, sec. 1.

Brown had no title to or interest in the potatoes. Hence, defendants acquired none by their purported purchase. *Wilson v. Finance Co.*, 239 N.C. 349, 356, 79 S.E. 2d 908, and cases cited. By conversion of the potatoes to their own use, defendants became liable to the owner thereof. Ordinarily, in such case, the measure of damages recoverable by the owner would be the value of the potatoes at the time and place of conversion, with interest. 89 C.J.S., Trover & Conversion sec. 163; 53 Am. Jur., Trover & Conversion secs. 94 and 95; *Sledge v. Reid,* 73 N.C. 440; *Hall v. Younts,* 87 N.C. 285.

Appellees insist that neither Peed nor Booth has a cause of action for conversion. They cite and rely on this general rule: "Where the con-

tract of sale provides for a sale f.o.b. the point of shipment, the title is generally held to pass, in the absence of a contrary intention between the parties, at the time of the delivery of the goods for shipment at the point designated." 46 Am. Jur., Sales sec. 442; *Hunter v. Randolph,* 128 N.C. 91, 38 S.E. 288; Annotation: 101 A.L.R. 292. This rule applies when, under the contract of sale, the carrier is the agent of the vendee; for in such case title passes upon delivery to the vendee's agent. *Wooley v. Bruton,* 184 N.C. 440, 114 S.E. 628.

The evidence discloses only these details of the contract between Peed and his customer. Peed testified, on cross-examination, that he sold the potatoes "f.o.b. plus freight at $3.25." His testimony, on direct examination, was explicit: "I . . . sold them (the potatoes) . . . to the Licek Potato Chip Company of Decatur, Illinois, *for delivery at their plant,* for a price of $3.35 per bag, plus $1.25 a bag freight, and a 3% transportation tax." (Italics added.) Peed was to pay the transportation charges and bill his customer for the amount thereof in addition to the amount of the agreed sale price. This evidence was sufficient to support a finding that Peed's contract of sale required that he make delivery of the potatoes to his customer *at its plant* in Decatur, Illinois, and that the truck carrier was *his* agent for that purpose.

The evidence, when considered in the light most favorable to plaintiff, brings the case within this recognized exception to the general rule, viz.: "If the seller by his contract undertakes to make the delivery himself at the point of destination, thus assuming the risk in the carriage, the delivery to a carrier is not a delivery to the buyer. In such a case, the delivery to the carrier is a delivery to it as the agent of the seller to perform the duty of the seller as to transportation to the place of delivery." 46 Am. Jur., Sales sec. 173. While our General Assembly has not adopted the Uniform Sales Act, it is noted that the statement just quoted is in accord with the explicit provisions of sec. 19, Rule 5, thereof.

Appellees insist that the nonsuit as to Peed must be affirmed because he has suffered no loss. Booth paid Peed $1,040.00, that is, $3.25 per bag for 320 bags. As indicated above, the record discloses a conflict in Peed's testimony. If the contract of sale provided for the payment of $3.35 per bag, Peed has not been fully reimbursed. Hence, in considering nonsuit, we do not reach the question as to whether Peed, if fully reimbursed in respect of the sale price, can recover more than his customer was obligated to pay had delivery been made as contemplated. In this connection, it is noted that the evidence fails to disclose that Peed has made any payment to Licek Potato Chip Company on account of his failure to make delivery of the potatoes or that this company makes any claim on Peed for damages on account thereof.

While diverse inferences may be drawn therefrom, the evidence, when considered in the light most favorable to plaintiffs, tends to show that the fair market value of potatoes in Asheville at the time and place of the alleged conversion was in excess of $3.35 per bag.

While the judgment of involuntary nonsuit is reversed in all other respects, it must be affirmed as to defendant E. C. Burleson, individually. There was no evidence that he participated in a conspiracy to acquire the potatoes. Pinkston alone dealt with Brown. Defendant corporation received and handled the potatoes. See *Lavecchia v. Land Bank,* 215 N.C. 73, 1 S.E. 2d 119. As far as the evidence discloses, Burleson, individually, had nothing to do with the transaction and did not learn of it until some time after it had been consummated. The mere fact that defendant corporation, of which Burleson was an officer and in which presumably he had some financial interest, became liable by virtue of its acceptance of the benefits of Pinkston's acts, would not seem a sufficient basis to impose individual liability upon Burleson.

While plaintiffs alleged a conspiracy on the part of defendants, the gravamen of their case is tortious conversion. *Manley v. News Co.,* 241 N.C. 455, 85 S.E. 2d 672, cited by appellees, is distinguishable.

It is noted that the record before us does not disclose the status of this action in relation to defendant Brown.

Affirmed as to defendant Burleson.

Reversed as to defendant Pinkston and as to defendant Burleson's Inc.

JOHNSON, J., not sitting.

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

PERCY BROTHERS, A MINOR, BY HIS NEXT FRIEND, JAMES BROTHERS, v. CHARLES H. JERNIGAN AND EDDIE P. AUSTIN

and

PERCELL SKINNER v. CHARLIE H. JERNIGAN AND EDDIE P. AUSTIN.

(Filed 19 September, 1956.)

1. Automobiles § 54f—

Admission by the employer of the ownership of the truck involved in the collision is sufficient to take the case to the jury on the issue of *respondeat superior* by virtue of G.S. 20-71.1, but the statute does not compel an affirmative finding, and the burden remains on plaintiffs to show that the driver was negligent and that he was the agent or employee of the owner and at the time acting within the scope of his employment.

2. Automobiles § 54c: Evidence § 42f—

Admission in the answer of the employee that at the time of the collision he was driving the employer's truck with the general knowledge and consent of the employer is improperly admitted over the employer's objection, since the admission is not against the interest of the employee but is an affirmative declaration tending only to contradict the defense of the employer.

3. Automobiles § 54e: Principal and Agent § 13c—

Testimony of a statement by the driver that he made the trip in question for the employer-owner is incompetent as to the employer as a hearsay declaration of the agent to prove the fact of agency.

4. Trial § 17—

While ordinarily the admission of evidence competent against one defendant and not another will not be held for error in the absence of a request at the time that its admission be restricted, such request is not necessary when prior to the admission of the evidence the court has stated that he was admitting the evidence as against both parties.

JOHNSON, J., not sitting.

APPEAL by defendants from *Frizzelle, J.*, June Term, 1956, of PERQUIMANS.

These two actions were instituted to recover damages in each case for personal injuries sustained by the overturning of a motor truck, alleged to have been caused by the negligence of the defendants.

As the alleged causes of action grew out of the same occurrence, the separate suits of the two plaintiffs were tried together below and so heard on appeal in this Court.

It was admitted that the truck in which the plaintiffs were riding at the time of its overturn was the property of defendant Jernigan, was registered in his name, and that it was being driven at the time by the defendant Austin who was a part-time employee of Jernigan. But defendant Jernigan denied that the truck was being driven with his knowledge and consent or that Austin was at the time acting as his agent or employee; that on the contrary Austin was using the truck for his own pleasure and not on any business of the defendant Jernigan. The guardian *ad litem* of defendant Austin in his answer denied he was guilty of any negligence. It was testified that the defendant Jernigan operated a cab stand and a wood yard in the city of Edenton, and that the defendant Austin, 19 years of age, was a part-time employee.

The plaintiffs' evidence tended to show that on 22 May, 1954, about midnight, the plaintiffs Brothers and Skinner were at the recreation center known as Southern Shores Beach; that they saw defendant Austin there driving Jernigan's truck, and he agreed to give them a ride to their home in Hertford; that there were two other young men with

plaintiffs who rode in the bed of the truck, and two besides Austin in the cab. On the way, Austin drove at a high speed and, coming to an intersection and sharp curve, negligently caused the truck to overturn, injuring both plaintiffs, the plaintiff Brothers apparently permanently.

The defendant Austin testified that on the afternoon of 22 May, 1954, he finished delivering wood for Jernigan and parked the truck at the wood yard and went home. Later, about 8 p.m., without asking Jernigan he took the truck and drove to Hertford to see some friends and then to the recreation center to a dance. As he was leaving he permitted the plaintiffs and others to ride in the truck, and that the truck overturned. He denied that he operated the truck negligently.

In the case of the plaintiff Brothers issues were submitted to the jury and answered as follows:

"1. Did the motor vehicle of the defendant Jernigan, and driven by the defendant Austin, upset at the intersection of highways, resulting in injury to the plaintiff Percy Brothers, as alleged in the Complaint? Answer: Yes.

"2. If so, were said upset and resulting injuries proximately caused by the negligence of the defendant Austin, as alleged in the Complaint? Answer: Yes.

"3. At the time of said upset, was the defendant Jernigan's vehicle being driven and operated by the defendant Austin as the agent of the defendant Jernigan, for the defendant Jernigan's benefit, and within the course and scope of the defendant Austin's employment, as alleged in the Complaint? Answer: Yes.

"4. Did the plaintiff by his own negligence contribute to his injuries, as alleged in the Answer? Answer: No.

"5. Was the defendant Austin an incompetent or reckless driver, and, if so, did the defendant Jernigan know, or in the exercise of due care should he have known, such fact? Answer: Yes.

"6. What damages, if any, is the plaintiff entitled to recover of the defendant Jernigan? Answer: $35,000.

"7. What damages, if any, is the plaintiff entitled to recover of the defendant Austin? Answer: $35,000."

Identical issues were submitted in the case of plaintiff Skinner and answered in same way except that the amount of damages awarded was $500.

From judgments on the verdicts, the defendants appealed.

Robert B. Lowry and John H. Hall for plaintiffs, appellees.

LeRoy & Goodwin for defendants, appellants.

DEVIN, J. The defendants excepted to the denial of their motions for judgment of nonsuit, but we think these motions were properly denied.

There was competent evidence that the injuries sustained by the plaintiffs were proximately caused by the negligence of the defendant Austin in the operation of the motor truck of his co-defendant, and it was admitted that the motor truck in which the plaintiffs were riding at the time was the property of the defendant Jernigan and registered in his name. Plaintiffs therefore were entitled to invoke the rule of evidence created by the statute codified as G.S. 20-71.1. This statute established, in the language of the decision in *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767, "a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another." Admission of ownership by the defendant Jernigan afforded *prima facie* evidence that the truck was being operated by defendant Austin as employee of defendant Jernigan within the scope of his employment. *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644; *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. It was said in *Caughron v. Walker,* 243 N.C. 153, 90 S.E. 2d 305: "Ownership of the truck is admitted by the defendant 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.*"

But while the vigor of the statute under these circumstances makes admitted ownership of the truck *prima facie* evidence that the operator was acting as his agent or employee within the scope of his employment, and sufficient to carry the case to the jury, it does not compel the finding by the jury that the driver was negligent or that he was the agent or employee of the owner and at the time acting within the scope of his employment. *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765. The burden was still on the plaintiffs to establish these essential facts. The statute aids the plaintiffs in making out a case, but does not determine the issue. Hence the question whether or not defendant Austin was on this occasion acting as agent and employee of defendant Jernigan and within the scope of such employment was material for the proper determination of the actions. The question of agency was sharply presented for the jury's decision.

The defendants have brought forward in their assignments of error two exceptions to the rulings of the court below relating to this question.

The plaintiffs offered in evidence the following portion of the answer of the guardian *ad litem* of defendant Austin: "That on the night referred to in paragraph three of the complaint it is admitted that this defendant was driving said motor vehicle with the general knowledge and general consent of his codefendant." To this defendant Jernigan objected. The objection was "sustained as to the senior defendant" and

"admitted as to the junior defendant." Ordinarily evidence competent as to one defendant and incompetent as to another may be admitted usually with caution to the jury to consider the evidence only as to one and not as to the other, *Humphries v. Coach Co.*, 228 N.C. 399, 45 S.E. 2d 546, but under the circumstances of this case we think the ruling of the court in admitting the introduction of this portion of defendant Austin's answer and permitting the jury to consider it as evidence was prejudicial to the defendant Jernigan. This portion of the answer was not an admission against interest on the part of defendant Austin but an affirmative declaration which did not affect Austin's interest and only tended to contradict the defense of his codefendant. The jury was left to consider this statement on the essential issue of agency.

There was another ruling of the trial court to which defendant Jernigan noted exception and which we think prejudicial. Over objection plaintiffs' witness Joe Spruill was permitted to testify that on the night in question, before the accident, he heard defendant Austin say in response to a question, "I came over here for my boss man." As appears from the record, before ruling on the competency of this evidence, in the absence of the jury, the court stated, "I am going to admit it for two reasons: first, it goes to the credibility of Austin's testimony, and secondly, it goes to the question of agency." The defendant Jernigan objected and his exception was duly noted. As to defendant Jernigan this was a hearsay declaration of the agent to prove his agency and was incompetent. Stansbury, Sec. 169; *Parrish v. Manufacturing Co.*, 211 N.C. 7, 188 S.E. 817; *Howell v. Harris*, 220 N.C. 198, 16 S.E. 2d 829; *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716. While this evidence may have been competent to contradict Austin, and there appears no request of counsel that the court instruct the jury as to the particular aspect in which it might be considered, doubtless in view of the court's statement that he was admitting it to prove agency, we think the jury was permitted unrestricted consideration of this testimony which related to an essential feature of the case and was incompetent and prejudicial to the defendant Jernigan. Again in his charge to the jury the court stated as one of the contentions of the plaintiffs for the consideration of the jury, on the issue of defendant Jernigan's liability for the conduct of Austin, the testimony of this witness. *Howell v. Harris, supra.*

For the reasons herein set out, we think there should be a new trial, and it is so ordered.

The defendants in their assignments of error brought forward other exceptions based on exceptions noted, which they argued orally and by brief, but as there must be a new trial, we deem it unnecessary to discuss or decide them as they may not arise on another hearing.

New trial.

JOHNSON, J., not sitting.

DOROTHY DAVIS ALLEN v. ROBERT C. ALLEN.

(Filed 19 September, 1956.)

1. Divorce and Alimony §§ 5d, 8d—Allegations and evidence held sufficient as to ground for alimony without divorce.

Plaintiff's allegations and evidence were to the effect that defendant became involved in love affairs with other women and the parties separated, that upon defendant's entreaties and promises to remain faithful, there was a reconciliation, but that for several months prior to the institution of the action defendant had absented himself from home and remained away for long periods of time in the company of women, returning at late hours with his shirt smeared with lipstick, that he had announced to plaintiff that he was dissatisfied with their marriage, that he was cold and indifferent to his wife and children and planned to leave them, etc., *are held* sufficient to make out a cause of action for alimony without divorce on the ground that defendant had offered such indignities to the person of plaintiff as to render her condition intolerable and her life burdensome, the failure on the part of the defendant to live up to his promises made as an inducement to the reconciliation having the effect of reviving his former offenses.

2. Same—

Allegations to the effect that defendant's acts were without provocation, with plaintiff's testimony that she had tried to be a wife to her husband and a mother to her children, and that her husband never found fault with her or blamed or criticized her conduct, together with evidence of her good character, *are held* sufficient on the issue of whether defendant's acts of misconduct were without provocation on the part of plaintiff.

3. Appeal and Error § 23—

An assignment of error that the court erred in admitting testimony as shown by the numbered exception, with reference to the page of the record on which the exception is noted, is insufficient, since the assignment of error should clearly point out the error relied on and not compel the Court to go beyond the assignment itself to learn what the question is.

4. Appeal and Error § 21a—

An assignment of error to the court's ruling on motion to nonsuit is sufficient if it refers to the motion, the ruling thereon, the number of the exception and the page of the record where found, and an attempt to summarize the evidence in the assignment of error is not advised.

5. Appeal and Error § 42—

Assignments of error to designated portions of the charge will not be sustained when the charge read contextually is free of prejudicial error.

6. Divorce and Alimony §§ 5d, 8d—

The State and society and the children of the marriage have an interest in the marriage *status*, and the requirement that the complaining party allege and prove lack of provocation is salutary and will be enforced in order that the Court have opportunity to see that the assistance of the law in breaking up the family is used for the benefit of the injured party only.

JOHNSON, J., not sitting.

APPEAL by defendant from *Froneberger, J.*, April, 1956 Term, BUNCOMBE Superior Court.

This is a civil action for alimony without divorce instituted in the General County Court of Buncombe County upon allegations that the defendant had offered such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome. Specifically, she alleged about four years prior to the institution of the action the defendant became involved in love affairs with other women and that his cold and indifferent attitude to the plaintiff caused a separation. "Plaintiff finally agreed to resume the marital relationship and did so after defendant's repeated entreaties and promises to the plaintiff that he would be faithful to her and would not again be guilty of misconduct."

Paragraph 4 of the complaint alleged: "That for several months prior to the institution of this action, the defendant has absented himself from home, has remained away for long periods of time in the company of other women, even though he knew that plaintiff could not be at home with the children because of her employment, and even though he knew that the children had to be cared for by plaintiff's mother in her absence; that defendant has openly flaunted his conduct before this plaintiff over the past several months by remaining away from home in the company of other women and returning at late hours with his shirt smeared with lipstick, and has refused to offer an explanation or account for his conduct, even though he has, for the past several weeks, taken no meals at his home but has spent his entire time away from his wife and children."

Paragraph 5 in part alleged: "That shortly prior to the institution of this action, the defendant announced to plaintiff that he was dissatisfied with his marriage and that he intended to abandon this plaintiff and the minor children of said marriage and has stated to plaintiff that he intends to leave the State of North Carolina, giving up his present occupation and employment; that he has failed and refused to give any explanation of his dissatisfaction. . . ."

The defendant by answer admitted the allegations of residence, marriage, and employment. He denied all other allegations.

At the trial the plaintiff testified that on one occasion she and a neighbor went to an apartment in Asheville about 8:30 at night, rang the doorbell and in about five minutes a Miss H., who occupied the apartment, came to the door dressed in a housecoat and without shoes, and about five minutes later the defendant came out of another room in the apartment.

"I am not living with Mr. Allen now. We separated on February 26th. Immediately before we separated, Mr. Allen told me that he wasn't satisfied at home and that he was leaving me. He just told me that he wasn't satisfied and that he didn't love me and that he was leaving me. He said he was leaving North Carolina and going to Knoxville. . . . He didn't give any other reason." . . . "For some months prior to this separation, he was not at home very much. He would come in around 11 o'clock at night and would leave sometimes even before breakfast the next morning and I wouldn't see him all day. For the month prior to our separation he didn't come home for any lunch or dinner meals. He wouldn't hardly talk with the children. The children would speak and holler at him 'good-bye' as he went out the door and he usually left without even saying 'good-bye' to them. He didn't spend much time there." . . . "When he came in he did not say anything to me during that time. I saw lipstick on his person several times during the month before he left home. I did not have anything to do with putting it on him, and when I asked him where he got it, he said he didn't know." . . . "I tried to be a wife to my husband and a mother to my children."

There was other evidence of the same import; also testimony of the plaintiff's good character. At the close of the plaintiff's evidence the defendant moved for nonsuit and excepted when the court overruled the motion. The following issues were submitted to the jury and answered as indicated:

> "1. Has the defendant offered such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome, as alleged in the complaint?
>
> "Answer: Yes.
>
> "2. Was such conduct on the part of the defendant brought about by any act or deed or provocation on the part of the plaintiff?
>
> Answer: No."

From a judgment awarding the plaintiff alimony and counsel fees, the defendant appealed to the Superior Court of Buncombe County. Judge Froneberger of the Superior Court heard and overruled all assignments

of error and affirmed the judgment of the General County Court. The defendant duly excepted and appealed, assigning errors.

Ward & Bennett for plaintiff, appellee.
McLean, Gudger, Elmore & Martin
By: Harry C. Martin, for defendant, appellant.

HIGGINS, J. The defendant demurred *ore tenus* in this Court for that the complaint failed properly to allege (1) sufficient acts and conduct on the part of the defendant to entitle the plaintiff to the relief demanded; and (2) that such acts were without adequate provocation on her part. He cites as authority *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214; *Lawrence v. Lawrence,* 226 N.C. 624, 39 S.E. 2d 807; *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1.

In the *Ollis case* the plaintiff alleged her husband's abusive and violent treatment put her in fear for her safety and made it necessary for her to leave him. This Court held the complaint defective in that it alleged only the plaintiff's conclusions. It failed to set out the particular acts of abuse and violence, of which she complained, so that the Court could determine whether they were sufficient to support her conclusions.

The complaint in the *Best case* contained, among others, the allegation the defendant had become an habitual drunkard. That allegation, in itself, constituted a ground for divorce from bed and board, G.S. 50-7(5), and hence was sufficient to support an action for alimony, G.S. 50-16, even though other insufficient allegations also appeared in the complaint.

In the *Lawrence case* the defendant in his answer had charged the plaintiff with acts of adultery which she did not deny in her testimony. Failure to allege and to offer evidence that the acts charged against the defendant were without provocation on her part, was fatal to her cause.

In the *Pollard case* the complaint appears less explicit than the complaint in the instant case. However, the decision in *Pollard v. Pollard* was based not on the insufficiency of the allegations but upon the failure of proof to support them.

This case is distinguishable from those relied upon by the defendant. When liberally construed, as it must be in passing on the demurrer, we think the complaint states a cause of action. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696. In passing on both the sufficiency of the allegations and the proof, we must take into account the fact that failure on the part of the defendant to live up to his promises which were made as an inducement to the reconciliation, revived his former offenses. *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909; *Jones v.*

Jones, 173 N.C. 279, 91 S.E. 960; *Page v. Page,* 167 N.C. 346, 83 S.E. 625; *Lassiter v. Lassiter,* 92 N.C. 130. Evidence of the plaintiff's neglect, dissatisfaction with his marriage, cold indifference to his wife and children, plans to leave them, the amount of time spent away from home, and especially the lipstick smears upon his clothes, when combined with his visit to the apartment of Miss H. at night were sufficient to go to the jury on the first issue. The evidence that defendant's acts were without provocation on the part of the plaintiff is somewhat less direct. The plaintiff testified that she had tried to be a wife to her husband and a mother to the children. She also testified that the defendant never at any time found fault with her or blamed or criticized her conduct in any particular. Added to the foregoing is the evidence of her good character. We conclude this evidence was sufficient to go to the jury on the second issue.

The demurrer *ore tenus* in this Court is overruled. The Assignment of Error No. 4, based on the court's refusal to nonsuit, is not sustained. The defendant's Assignment of Error No. 3 is not in form sufficient to enable us to consider it. Here it is: "The court erred in admitting the testimony as shown by the defendant's exceptions (each consecutively numbered 3 to 24, inclusive) R. pp. 12-15." Assuming the exceptions enumerated may be treated under one assignment (*Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785), the assignment is otherwise not in compliance with Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554, 555. *S. v. Mills, post,* 487; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. "Always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." The foregoing relates to assignments of error with respect to the admissibility of evidence.

When the assignment of error is to the court's ruling on nonsuit, it is enough to refer to the motion, the ruling thereon, the number of the exception, and the page of the record where found. This Court can pass on the efficacy of the motion only after reviewing *all* of the evidence. Attempt to summarize it in the assignment would be of no assistance. The place for such summary is in the brief.

The assignments of error to designated portions of the court's charge cannot be sustained. When read contextually the charge is in substantial compliance with the decisions of this Court. We realize this is a borderline case. To reach this decision to sustain the verdict has not been easy. However, to reach a contrary decision would be even more difficult.

To require the complaining party to allege and prove lack of provocation at first blush may seem illogical and out of place. Such would be the case if only the parties to the suit were involved. But the State and society and the children have an interest in the marriage status, and

in preserving the family when that can be done without undue hardship. To require the complaining party to show lack of provocation gives the Court a chance to see that the assistance of the law in breaking up the family is used for the benefit of the injured party only. For these reasons and others, nothing said here is intended to change or weaken what this Court has previously said in a long line of decisions, among them the following: *Ollis v. Ollis, supra; Best v. Best, supra; Brooks v. Brooks, supra; Pearce v. Pearce,* 225 N.C. 571, 35 S.E. 2d 636; *Howell v. Howell,* 223 N.C. 62, 25 S.E. 2d 169; *Carnes v. Carnes,* 204 N.C. 636, 169 S.E. 222; *Dowdy v. Dowdy,* 154 N.C. 556, 70 S.E. 917; *Martin v. Martin,* 130 N.C. 27, 40 S.E. 822; *O'Connor v. O'Connor,* 109 N.C. 139, 13 S.E. 887; *Jackson v. Jackson,* 105 N.C. 433, 11 S.E. 173; *White v. White,* 84 N.C. 340.

The judgment of the Superior Court of Buncombe County is Affirmed.

JOHNSON, J., not sitting.

C. F. FLEISHEL v. J. C. JESSUP, P. W. JESSUP AND ARNOLD T. JESSUP.

(Filed 19 September, 1956.)

Mortgages § 36—

In an action to recover deficiency judgment after foreclosure of a deed of trust on certain realty and stipulated "items of machinery and equipment and other personal property," defendant mortgagors are entitled to introduce evidence bearing upon and have the jury determine the question whether the enumerated structures, or any of them, were actually affixed to and became a part of the freehold, and the value thereof, since plaintiffs are precluded by G.S. 45-21.38 from recovering deficiency judgment as to any portion which was realty.

JOHNSON, J., not sitting.

APPEAL by defendants from *Fountain, S. J.,* at 16 February, 1956, Term of PAMLICO.

Civil action to recover deficiency judgment on certain promissory notes, and to foreclose deed of trust securing the notes.

The record on this appeal shows that plaintiff alleges in indicated paragraphs of his complaint substantially the following:

"3." That prior to 17 November, 1952, plaintiff was the owner of the following described property, real and personal, situate in Pamlico County, N. C.: Two specifically described tracts of land, and "also the

following items of machinery and equipment and other personal property.

"Planing Mill and all equipment incident thereto.

"Two (2) 150 Horsepower Boilers and all equipment incident thereto,

"TWO (2) Brick Moore Steam Dry Kilns, and all equipment incident thereto, including bunks, trucks, etc.

"One (1) Ross Lumber Carrier."

"4." That under date of 17 November, 1952, plaintiff agreed to sell and defendants agreed to buy said property and pay therefor the sum of $20,000, $5,000 of which was paid in cash, and the balance of $15,000 was evidenced by six notes in the sum of $2,500 each payable on or before 6, 12, 18, 24, 30 and 36 months from date, bearing interest as stated, and in order to secure same defendants, with the joinder of their wives, executed a deed of trust to Bernard B. Hollowell, Trustee, upon the property above described, which deed of trust is recorded as alleged.

"5." That the first two of said notes were paid when they became due, and the remaining four notes are unpaid; that the first of said notes is past due by its terms, and the remaining notes are past due by reason of the acceleration clause contained in the said deed of trust; that the taxes on said property for the year 1953 are due and unpaid, and there are other taxes due by defendants to Pamlico County, which are or might become a lien upon said property, or so much as has not been destroyed by fire as thereinafter set out.

"8." That on or about 24 April, 1953, a fire destroyed a large part of the personal property and buildings, and the value of said property greatly decreased, and the property as conveyed is only partially available for foreclosure.

And plaintiff prays judgment against defendants jointly and severally in the sum of $10,000 with interest, and unless "paid in a short day to be fixed by the court" a commissioner be appointed to foreclose the deed of trust, or the Trustee therein be directed by the court to foreclose same, and to apply the proceeds, if any, upon said judgment, for costs and general relief.

Defendants, answering, admit each of the foregoing allegations, "subject to the explanations and averments contained in the defendants' second and further defense hereto." And for a second and further defense, defendants aver and say, in pertinent part:

"2." That at the time of the alleged contract and before any of the papers were executed and delivered, plaintiff as the owner of a certain tract of land in Pamlico County, upon which was situated a planing mill, dry kiln, etc., all affixed to and a part of the realty, placed a value

of $10,000 on the dry kiln, $5,000 on the planing mill, $2,500 on the boilers, and $2,500 on the land.

"3." That defendant P. W. Jessup, acting for himself and his co-partners, agreed with plaintiff to purchase said property, based upon values set forth in next preceding paragraph, and it was agreed between the parties that a 10-acre lot was to be conveyed by plaintiff to defendants; and the purchase price agreed upon for the land and fixtures was $20,000, payable as set forth hereinabove, $5,000 in cash and balance to be evidenced by notes secured by a purchase money deed of trust to Bernard B. Hollowell, Trustee, who was then and still is regular attorney for plaintiff.

"6." That the deed of trust made by defendants to Bernard B. Hollowell, Trustee, was for the security of purchase money notes.

"7." That by virtue of the statute G.S. 45-21.38 the plaintiff is not entitled to a deficiency judgment in this case, but is only entitled to have the land described in the deed of trust sold and the proceeds of sale applied on the purchase money debt.

"8." That after defendants had paid off and discharged the first and second notes, as hereinbefore set forth, the building housing the planing mill or sawmill on said land was destroyed by fire, and defendants contend and allege that such misfortune cannot change the law, and plaintiff cannot recover anything more than the land will bring,—that "it is so nominated in the Bond."

And defendants pray that judgment be entered in accordance with their averments.

Plaintiff also alleges in his complaint, and defendants admit in their answer that the notes, except as to due dates, are in the form attached to the complaint.

Upon the trial in Superior Court defendants offered evidence tending to show the nature and kind of property involved so as to determine whether or not it was real or personal property. The trial court sustained objections thereto, and defendants excepted.

The parties stipulated that the land described in the deed of trust, exclusive of all other property described therein, was worth $3,111.00 on the date of the sale by the commissioners appointed by the court. And plaintiff offered final report of commissioners showing that after paying items of cost, the sum of $1,616.16 was disbursed to the Clerk of Superior Court.

The case was submitted to the jury upon two issues:

> "1. Was the planing mill and all equipment incident thereto, the two 150 h.p. boilers and all equipment incident thereto, the two brick Moore steam dry kilns and all equipment incident thereto,

including the bunks and trucks and one Ross Lumber Carrier, a part of the land as alleged in the Answer?

"2. What amount, if any, are the defendants indebted to the plaintiff?"

Upon peremptory instruction the jury answered the first issue "No," and the second "$8,383.84." Judgment was signed in accordance therewith and defendants excepted thereto, and appeal to Supreme Court, and assign error.

B. B. Hollowell and R. E. Whitehurst for Plaintiff, Appellee.

Henry A. Grady, Jr., and Raymond E. Dunn for Defendants, Appellants.

WINBORNE, C. J. See former appeal, 242 N.C. 605, 89 S.E. 2d 462.

Appellants now present, among others, as involved on this appeal, these questions: Where defendants in their answer allege that certain property designated in the deed of trust as "machinery and equipment and other personal property" was actually affixed to and a part of the real property described therein, (1) was an issue of fact raised, and (2) did the court err in refusing to admit oral evidence as to the nature and kind of the property, so as to determine whether it was real or personal property? These questions are predicated upon assignments of error two and three on exceptions duly taken in the course of the trial.

Manifestly, the trial court considered that an issue was raised, as indicated by the first issue submitted to the jury. Indeed, upon the former appeal this Court stated that "the determination of the issue as to whether the enumerated structures were real property or personal property and the value of the land at present must await the sale . . . The court may then determine the amount of the deficiency judgment, if any, to which plaintiff is entitled and the other questions and issues raised by the pleadings." A sale seems to have been had, and the parties agreed as to the value of the naked land. But the court excluded all the evidence sought to be elicited by defendants upon cross-examination of plaintiff, and to be produced on direct examination of witnesses for defendants, bearing upon the question as to whether the enumerated structures, or any of them, were actually affixed to, and a part of the freehold,—and the value thereof.

In so doing, this Court holds there was error. Hence the second question above stated merits an affirmative answer. *Horne v. Smith,* 105 N.C. 322, 11 S.E. 373; *Moore v. Vallentine,* 77 N.C. 188; *Bryan v. Lawrence,* 50 N.C. (5 Jones) 337. Compare *Springs v. Refining Co.,* 205 N.C. 444, 171 S.E. 635, where the Court treats of cases between landlord and tenant not involved here.

In *Horne v. Smith, supra,* quoting from *Elwes v. Mawes,* 2 Smith Leading Cases, note p. 267, this Court said: "It is a well settled principle of common law that everything which is annexed to the freehold becomes part of the realty. Although ownership of the land and of the chattel is vested in the same person, or when the owners of both concur in a common purpose, the presumption that a chattel is made a part of the land by being affixed to it may be rebutted, yet the evidence must, as it would seem, be in writing, under the statute of frauds, or else consist of facts and circumstances of a nature to render writing unnecessary, by giving birth to an equity or an equitable estoppel."

Thus defendants contend, and we hold rightly so, that they are entitled to present to the jury, and have the jury decide the question of what proportion of the value of all the property was actually real estate, and that, then, as to such proportion, plaintiff may not secure a deficiency judgment under the provisions of G.S. 45-21.38.

While the rule may be different between a landlord and tenant, as recognized by this Court, it is declared in *Horne v. Smith, supra:* "But as between vendor and vendee, the common law that articles of personalty affixed to the freehold are a part of the realty, and pass by a conveyance of the latter, is enforced in full vigor."

Nevertheless, if at the time of the purchase and sale the parties agree that the property or parts thereof affixed to the soil should be considered personal property, then under such circumstance the intent of the parties would prevail. However this intent could only be shown by writing.

For error pointed out, let there be a
New trial.

JOHNSON, J., not sitting.

STATE v. ALBERT LANCE.

(Filed 19 September, 1956.)

1. Statutes § 13—

Whether a later statute repeals a former one by implication or substitution is a question of legislative intent to be ascertained by application of the rules for ascertaining legislative intent.

2. Same—

Repeals by implication are not favored, and where a later act by any reasonable construction can be declared to be operative without obvious or necessary repugnancy to a former act, it is the duty of the court to give effect to both.

3. Same—

A later penal statute will not be held to repeal a former act by substitution unless the later statute covers the whole ground and the intention of the legislature that the later act should be in substitution of the former is clear and manifest.

4. Statutes § 5c—

The court has the right to look to the title of an ambiguous statute for the purpose of determining the meaning thereof and the legislative intent.

5. Crime Against Nature § 1—

G.S. 14-202.1 does not repeal G.S. 14-177, either partially or entirely, since the two acts are complementary rather than repugnant or inconsistent.

JOHNSON, J., not sitting.

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

APPEAL by defendant from *Nettles, J.*, May Term 1956 of HENDERSON.

Criminal prosecution upon a bill of indictment charging the defendant under G.S. 14-177 with committing the crime against nature with one Cecil Henderson.

The defendant entered a plea of Not Guilty. The jury returned a verdict of guilty as charged in the bill of indictment.

From a judgment of imprisonment in the State's prison, the defendant appeals, assigning error.

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

Redden & Redden for Defendant, Appellant.

PARKER, J. The bill of indictment charges a violation of G.S. 14-177. It does not allege the age of the defendant or the age of Cecil Henderson. The evidence shows that the defendant was 23 years of age, and the pathic a 13 year old schoolboy.

The defendant presents for decision one question: should the State have been nonsuited? He admits in his brief there can be no doubt the State's evidence, when considered in its most favorable light, made a case for the jury under G.S. 14-177. The defendant bases his appeal on the single contention that, when a person over 16 years of age commits a crime against nature with a child of either sex under 16 years of age, it is a violation of Ch. 764, Session Laws 1955, codified as G.S. 14-202.1, and not a violation of G.S. 14-177, for the reason that G.S. 14-202.1 has repealed G.S. 14-177 so far as concerns the commission of a crime against nature when the defendant is over 16 years of age and the

pathic is under 16 years of age. The defendant says he can be indicted and tried under G.S. 14-202.1.

There is no express repeal of G.S. 14-177, or any part thereof, by G.S. 14-202.1, and it is a familiar doctrine that repeals by implication are not favored. An act, of course, may be repealed by implication as well as by express terms. *S. v. Epps,* 213 N.C. 709, 197 S.E. 580. A portion of an act may also be repealed by implication. *Bramham v. Durham,* 171 N.C. 196, 88 S.E. 347; *U. S. v. Tynen,* 11 Wall. 88, 20 L. Ed. 153. The presumption is always against the intention to repeal where express terms are not used, and where both statutes by any reasonable construction can be declared to be operative without obvious or necessary repugnancy. But, if the two statutes by any reasonable construction are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. However, when a new penal statute practically covers the whole subject of a prior penal act, and embraces new provisions, plainly and manifestly showing that it was the legislative intent for the later act to supersede the prior act, and to be a substitute therefor, comprising the sole and complete system of legislation on the subject, the later act will operate as a repeal of the prior act. *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9; *S. v. Foster,* 185 N.C. 674, 116 S.E. 561; *Story v. Comrs.,* 184 N.C. 336, 114 S.E. 493; *S. v. Perkins,* 141 N.C. 797, 53 S.E. 735; *U. S. v. Yuginovich,* 256 U.S. 450, 65 L. Ed. 1043; *U. S. v. Tynen, supra; Con. Ins. Co. v. Simpson,* 8 F. 2d 439; Black on Interpretation of Laws, 2nd Ed., p. 351 *et seq.*

It may be presumed that statutes are enacted by legislative bodies with care and deliberation, and with knowledge of former related statutes. *Con. Ins. Co. v. Simpson, supra.*

This Court said in *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473: "The rule is that if two statutes cover the same matter in whole or in part, and are not absolutely irreconcilable, it is the duty of the court to give effect to both (citing authority), and the later act does not repeal the earlier."

"The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest." *Red Rock v. Henry,* 106 U.S. 596, 27 L. Ed. 251, 253.

The question whether a statute is repealed in whole or in part by a later one containing no express repealing clause, on the ground of repugnancy, or whether a statute is repealed by a later one containing no express repealing clause, on the ground of substitution, is a question of

legislative intent to be ascertained by the application of accepted rules for ascertaining that intention. The intent of the lawmaking body gives the statute its vital force, and it is the province of the courts to ascertain and effectuate the valid legislative intent. *S. v. Humphries, supra; Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 173 S.E. 601; *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960.

In *U. S. v. Claflin,* 97 U.S. 546, 24 L. Ed. 1082, it is said: "It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they may refer to the same subject."

The court has the right to look to the title of an ambiguous statute for the purpose of determining the meaning thereof and the legislative intent. *S. v. Keller,* 214 N.C. 447, 199 S.E. 620; *S. v. Woolard,* 119 N.C. 779, 25 S.E. 719; 50 Am. Jur., Statutes, sec. 311.

G.S. 14-177 provides "if any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the State's prison not less than five nor more than sixty years."

Ch. 764, Session Laws 1955, now codified as G.S. 14-202.1, is captioned "An Act to provide for the protection of children from sexual psychopaths and perverts," and reads: "Section 1. Any person over 16 years of age who, with intent to commit an unnatural sexual act, shall take, or attempt to take, any immoral, improper, or indecent liberties with any child of either sex, under the age of 16 years, or who shall, with such intent, commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, shall, for the first offense, be guilty of a misdemeanor and for a second or subsequent offense shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court. Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed."

It is manifest that G.S. 14-202.1 does not repeal, and was not intended to repeal, in its entirety G.S. 14-177. It is equally plain that G.S. 14-202.1 was not intended as a substitute for G.S. 14-177. The defendant makes no such contentions. To hold otherwise would lead to the absurdity of imputing to the legislative body a purpose to abolish the statute condemning crimes against nature.

The precise question presented by this appeal is: does G.S. 14-202.1 partially repeal G.S. 14-177 as contended by the defendant? If we accept the defendant's contention, it would mean that, if a person committed a crime against nature with a person over 16 years of age, he would be guilty of a violation of G.S. 14-177 and a felony, and should be imprisoned in the State's prison for a term of not less than five nor more than sixty years, and that, if a person over 16 years of age com-

mitted a crime against nature with a child under 16 years of age, he would for the first offense only be guilty of a violation of G.S. 14-202.1 and a misdemeanor, and subject to fine or imprisonment. Ch. 764, Session Laws 1955, is captioned "An act to provide for the protection of children from sexual psychopaths and perverts." It would lead to a bizarre result, if an act so captioned, should be construed to be intended by the Legislature to repeal in part G.S. 14-177 so as to give children under 16 years of age less protection than adults from having crimes against nature committed upon them. It would be irrational to impute to the lawmaking body a purpose to produce or permit such a result. It would seem that to adopt the defendant's reasoning would lead to the result that the crime of rape and of incest would be reduced to misdemeanors, if the defendant was over 16 years of age and the victim was under the age of 16 years and it was a first offense, on the ground that the statutes creating those offenses were partially repealed by the provisions of G.S. 14-202.1.

G.S. 14-202.1 is not repugnant to G.S. 14-177 so as to work a repeal in part of G.S. 14-177, intentionally or otherwise. The two acts are complementary rather than repugnant or inconsistent. G.S. 14-177 condemns crimes against nature whether committed against adults or children. G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. G.S. 14-202.1, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance.

In the trial below there is

No error.

JOHNSON, J., not sitting.

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

STATE v. ROBERT A. WILLIAMS.

(Filed 19 September, 1956.)

1. Criminal Law § 81d—

Upon appeal from refusal of motion to grant a new trial for newly discovered evidence, the Supreme Court will not review questions assigned as error in a former appeal dismissed for failure to comply with the Rules of Court.

2. Criminal Law § 57b—New trial for newly discovered evidence will not lie for evidence that could have been procured by due diligence at original hearing.

Upon the original trial, defendant's motion for *nol pros* under Chapter 140, Public-Local Laws of 1935, on the ground that he had attended three successive terms of court excluding the term to which the bail was returnable, was denied upon the court's finding that defendant had not attended three successive terms of court. Defendant moved for a new trial for newly discovered evidence on the ground that he had not testified that he had attended a certain term of the court because he had not been asked in regard thereto and offered in evidence the calendar for such term. *Held:* The motion for new trial for newly discovered evidence was properly denied, since it is apparent that the evidence relied on was available to defendant at the original trial, and further that the records in the clerk's office tending to show defendant's attendance at the term in question were at all times available to defendant.

3. Criminal Law § 81a—

A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the denial of the motion is not appealable and is not reviewable in the absence of abuse of discretion.

APPEAL by defendant from *Paul, J.*, June Term, 1956, of CRAVEN.

This is a criminal prosecution originally tried in the Recorder's Court of the City of New Bern upon a warrant issued on 20 January 1955, charging the defendant with the operation of a motor vehicle upon the public roads or streets of the City of New Bern on 12 November 1954, while under the influence of intoxicating liquor, opiates or narcotic drugs, and with careless and reckless driving. The case was tried before the judge of the Recorder's Court and a six-man jury. A verdict of guilty was returned on both counts. Upon motion of the defendant, the judge set aside the verdict on the count of reckless driving but imposed a fine of $100.00 and costs on the other count. The defendant appealed to the Superior Court of Craven County.

The grand jury returned a true bill of indictment against the defendant at the November Term 1955 of the Superior Court, charging him with the same offenses charged in the warrant upon which he was tried in the Recorder's Court. The case was called for trial at the January Term 1956 of the Superior Court on the count in the bill of indictment charging him with the operation of a motor vehicle upon the public highways of Craven County, while under the influence of intoxicants or narcotics. The jury was duly impaneled and upon the evidence submitted, returned a verdict of guilty.

The court imposed a fine of $100.00 and costs and the defendant appealed to the Supreme Court at the Spring Term 1956 and the appeal

was dismissed on 12 April 1956 for failure to comply with Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562.

At the June Term 1956 of the Superior Court of Craven County, Judge Paul presiding, his Honor heard a motion for a new trial upon the ground of newly discovered evidence. The court heard the evidence and argument of counsel, found certain facts, and upon such facts denied the motion. From the denial of this motion the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

J. Wayland Sledge for defendant, appellant.

DENNY, J. The original counsel in this case, Mr. Charles L. Abernethy, Jr., having testified in the hearing below, filed a motion in this Court requesting permission to withdraw as counsel for the defendant. We allowed the motion.

The defendant contends that he is entitled to have this criminal charge *nol prossed* and abated under the provisions of Chapter 140, Public-Local Laws of 1935, which are applicable to the criminal terms of the Superior Court of Craven County. The pertinent part of the Act upon which the defendant relies, is as follows: "Sec. 4. That when any defendant is held to bail in said court and has attended three successive terms of said court, excluding the term to which the bail was returnable, and has not, at any of such terms, moved for a continuance of said cause against said defendant, such charges against said defendant shall be *nol prossed* and he shall be forever discharged from further prosecution on such charges: Provided, this section shall not apply to defendants charged with felonies." Section 2 of the Act only requires defendants to attend court when their cases are calendared for trial.

The defendant moved for a *nol pros* of this action pursuant to the provisions of the above Act before pleading to the bill of indictment when the case was called for trial at the January Term 1956. The court at that time found as a fact that the case was calendared and that the defendant attended the June Criminal Term 1955, the August Special Criminal Term 1955, and the November Criminal Term 1955; that the case was not calendared and that the defendant did not attend the September Criminal Term 1955 of the Superior Court of Craven County. The motion was denied on the ground that the defendant did not attend three successive terms of the court. The defendant excepted to this ruling, and his second assignment of error in his case on appeal to this Court at the Spring Term 1956 was based thereon.

On appeal from a refusal of the court below to grant a new trial upon the ground of newly discovered evidence, we will not review questions

assigned as error in a former appeal to this Court which was dismissed for failure to comply with our rules.

We take the view that the present appeal presents only the question whether the trial court committed error in denying the defendant's motion for a new trial on the ground of newly discovered evidence.

The sum and substance of the evidence upon which the defendant moved for a new trial on the ground of newly discovered evidence, is simply this: The defendant testified in the hearing below that he also attended the April Criminal Term 1955 of the Superior Court of Craven County; that no motion for a continuance of the case was made on his behalf, and that the only reason he did not testify as to his attendance at the above term of court when the original motion was made to *nol pros* the case at the January Term 1956, was because he was not asked about his attendance at such term. Counsel for the defendant who testified in the hearing below, admitted that in the former hearing no evidence was offered tending to show that the defendant had attended the April Criminal Term 1955 of the Superior Court. The defendant offered in evidence the printed calendar for the April Criminal Term 1955 which showed this case calendared for trial on Wednesday, 13 April 1955. The Clerk of the Superior Court of Craven County testified that a subpoena issued in the case and returned on 13 April 1955, was at all times available to the defendant and his counsel had they inquired about it.

In the case of *S. v. Casey,* 201 N.C. 620, 161 S.E. 81, *Stacy, C. J.,* stated the prerequisites to the granting of new trials on the ground of newly discovered evidence, one of which being that "due diligence was used and proper means were employed to procure the testimony at the trial." It is clear from the evidence offered in the hearing below that all the evidence now proffered as newly discovered evidence was known to the defendant and his counsel at the time of the original hearing in January 1956, or could have been procured by due diligence.

It is also stated in the last cited case, "To do justly is the goal of the courts in every case, but this does not mean to favor the negligent at the expense of the diligent party. He who sleeps upon his rights may lose them."

Moreover, a motion for a new trial upon the ground of newly discovered evidence, is addressed to the sound discretion of the trial court and its refusal to grant the motion is not reviewable in the absence of abuse of discretion. *S. v. Parker,* 235 N.C. 302, 69 S.E. 2d 542. No abuse of discretion is suggested on this record. A motion for a new trial in a criminal case, on the ground of newly discovered evidence, will not be granted in the Supreme Court. The rule is otherwise, however, in civil actions. See *S. v. Casey, supra.*

Furthermore, no appeal lies to this Court from a discretionary determination of an application for a new trial for newly discovered evidence. *S. v. Murphy,* 236 N.C. 380, 72 S.E. 2d 751; *S. v. Bryant,* 236 N.C. 379, 72 S.E. 2d 750; *S. v. Suddreth,* 230 N.C. 754, 55 S.E. 2d 690; *S. v. Thomas,* 227 N.C. 71, 40 S.E. 2d 412; *S. v. Rodgers,* 217 N.C. 622, 8 S.E. 2d 927; *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399; *S. v. Lea,* 203 N.C. 316, 166 S.E. 292. Hence, under the authority of the above cases, this appeal is dismissed.

Appeal dismissed.

FLORENCE E. GRANT, ALIAS TOATLEY, v. THEODORE TOATLEY.

(Filed 19 September, 1956.)

1. Deeds § 2b—

Where a deed is made to a man "and wife," designating a person not the male grantee's wife, without evidence or contention that the conveyance was not intended to be to the *femme* designated and no sufficient evidence of mistake, nothing else appearing, the grantees take as tenants in common, and further upon the jury's finding that the *femme* had furnished at least one-half of the purchase price, a resulting trust in her favor would arise even though she were not designated as a grantee.

2. Husband and Wife § 14—

Where a conveyance is made to two persons who are not married, nothing else appearing, they take as tenants in common, it being necessary to the creation of an estate by entirety that there be "unity of person" created by marriage.

JOHNSON, J., not sitting.

APPEAL by defendant from *Froneberger, J.,* May Term 1956, BUNCOMBE.

Civil action for partition.

Plaintiff alleged that she and defendant jointly purchased a lot in Asheville and were cotenants, each owning an undivided half interest. She prayed for a sale for partition.

Defendant denied the cotenancy. He alleged that he furnished all the purchase money and that title was vested solely in him or in him and his wife, Lovey Toatley; that Florence Grant, *alias* Toatley, was not his wife. Defendant further pleaded that the grantors, by mistake, inserted the name Florence Toatley in the deed when defendant had directed the conveyance to be made to him and his wife.

The land in controversy was conveyed on 20 May, 1944, by M. F. MEREDITH and wife, DOROTHY N. MEREDITH, to THEODORE R. TOATLEY and wife, FLORENCE TOATLEY.

Plaintiff and defendant executed a purchase money mortgage on the property, reciting that they were husband and wife. Grantor testified that he was instructed to make the deed to Theodore Toatley and wife, Florence Toatley. He identified plaintiff as the party to whom he made the deed. He said the first time he heard of Lovey Toatley was after the institution of this action.

Defendant offered no evidence of a mistake on his part or on the part of the grantors. The nearest suggestion of a mistake is the following testimony of defendant. He said: "At the time I was negotiating with Mr. Meredith about the property I did not tell him how to make the deed. . . . When I purchased the property, I intended the deed to be executed to me or to me and my lawful wife. I have the deed. The deed says Theodore Toatley and wife and on there Florence Toatley, but there has never been a Florence Toatley to my knowledge. . . . My wife was in the Sanatorium at Goldsboro and couldn't attend to her business and that is why Florence Grant's name appears on the front of the documents and deeds."

Defendant married Lovey Patton in April 1926. Shortly after the marriage Lovey was confined in the asylum at Goldsboro where she remained until March 1955.

About 1933 plaintiff and defendant began living together as man and wife and continued to so live until Lovey was released from the asylum and returned to Asheville in March 1955. Defendant procured policies of insurance on his life, naming plaintiff as his wife. They attended church, proclaiming they were husband and wife. That defendant held plaintiff out as his wife is not controverted.

The parties were in sharp disagreement as to who paid for the property. Plaintiff contended that she provided more than half the purchase money. Defendant asserted he paid all the purchase money. This was the only fact in controversy.

This issue was submitted to the jury: "Is the petitioner Florence Grant, *alias* Toatley, the owner of a one-half undivided interest as tenant in common with Theodore Toatley in the property described in paragraph 1 of the Petition?"

The court charged the jury that if they should find from the evidence and by its greater weight that petitioner contributed at least one-half of the purchase price of the property, they should answer the issue in the affirmative; otherwise to answer it in the negative. The jury answered the issue in the affirmative. Thereupon judgment was entered adjudging petitioner to be the owner of an undivided one-half interest in the land described in the petition. Defendant appealed.

Harold T. Epps for petitioner appellee.
I. C. Crawford and L. C. Stoker for respondent appellant.

RODMAN, J. Defendant assigns as error the charge of the court, insisting that the court should have charged the jury if they found defendant intended that the beneficial owners of the property were to be Theodore R. Toatley or Theodore R. Toatley and Lovey Toatley, the jury should answer the issue submitted in the negative.

Defendant does not contend that the name of Florence Toatley was not intentionally and deliberately put in the deed. He does not say that plaintiff is not the person named in the deed as Florence Toatley. He merely contends "that petitioner's name was used merely for the transaction of business because respondent's wife was insane."

The designation of plaintiff as "and wife," cannot, on the facts here disclosed, affect plaintiff's title. *Freeman v. Rose,* 192 N.C. 732, 135 S.E. 870; *Hodgson v. Dorsey,* 137 A.L.R. 456; 26 C.J.S., Deeds, sec. 99f. (p. 355).

There is no suggestion that plaintiff intended to make a gift of the land to defendant or to defendant and "his lawful wife." If, as the jury has found, the plaintiff contributed at least half the purchase money, a resulting trust would have arisen in her favor if defendant had, without her knowledge and consent, procured the deed to be executed naming him only as the grantee.

It is said in *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642:

"The overwhelming weight of authority recognizes the general rule that in the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase. *Harris v. Harris,* 178 N.C. 8, 100 S.E. 125; *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775; *Summers v. Moore,* 113 N.C. 394, 18 S.E. 712; 26 R.C.L. 1219, s. 64, note 1; 65 C.J., p. 382, s. 154(5), note 14. The presumption is regarded as so powerful that the payment of the purchase price under such circumstances draws the equitable title to the payor 'as if by irresistible magnetic attraction.' *Ricks v. Wilson,* 154 N.C. 282, 286, 70 S.E. 476. And a resulting trust in favor of the party paying the consideration will arise, although the conveyance is made to another with the knowledge and consent of the payor. *Summers v. Moore, supra.* Such a trust may be established by parol evidence." *Murchison v. Fogleman,* 165 N.C. 397, 81 S.E. 627; *Tyndall v. Tyndall,* 186 N.C. 272, 119 S.E. 354; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418.

The court charged the jury:

"If two persons who are not married to each other purchase property jointly, they become tenants in common, nothing else appearing, and they would be joint owners one-half to each in their interest in the property.

"The Court further says that if two people are under the misapprehension of being married and purchase property as an estate by the entirety, and that later it develops that they are not legally or lawfully married, the estate becomes a tenancy in common rather than an estate by the entirety." The defendant excepted to the foregoing portion of the charge and assigned it as error.

The charge is correct. To create an estate by the entirety there must be "unity of person," that is, the unity created by the marriage—husband and wife. *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486; *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490; *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 526; *Carter v. Insurance Co.,* 242 N.C. 578, 89 S.E. 2d 122. When the unity of person, created by the marriage, is lacking, the estate by the entirety cannot exist. A conveyance to two persons who are not married creates, nothing else appearing, a tenancy in common.

No error.

JOHNSON, J., not sitting.

JOHN SHIMER, CHARLES R. SHIMER AND F. E. WALLACE, JR., v. EMANUEL TRAUB.

(Filed 19 September, 1956.)

Deeds § 17—

An action will not lie for breach of warranty of title to real estate, nor on a general warranty or covenant of quiet enjoyment until there has been an ouster under a superior title. Nor will an action lie for fraudulent misrepresentations on the ground of the grantor's knowledge of claim of title by a third person and failure to disclose such claim, since an action for fraud for misrepresentations in the sale of real estate must be collateral to the title.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *Bone, J.,* March Term, 1956, of LENOIR.

This is a civil action in which the plaintiffs seek to recover of the defendant the amount of the purchase price of the land referred to hereinafter, in the sum of $375.00, and $1,000.00 punitive damages.

According to the allegations of the complaint, on the 10th day of June 1955 the defendant and his wife conveyed to the plaintiffs a small parcel or lot of land in the City of Kinston. The deed, which has been duly registered, contains full covenants of (a) seizin and right to convey, (b) against encumbrance, and (c) general warranty.

It is alleged in the complaint that on or about the 13th day of June 1955 the plaintiffs employed a surveyor to go on the premises described in the deed and lay off a site for the erection of a building to be constructed thereon; that the surveyor was stopped by Charlie Kinsey and Viola Kinsey who were asserting superior title to said land and who were cultivating the same.

It is further alleged in the complaint that the defendant represented to the plaintiffs, by and through his agent, T. D. Smith, that the defendant had a good and marketable fee simple title to the premises involved herein; that the same were free and clear of all adverse claims when, as the plaintiffs are informed and believe, and upon such information and belief allege, the defendant had actual knowledge that the Kinseys claimed title to the lands described in the aforesaid deed.

It is also alleged in the complaint that no defect appears of record in the chain of title to said property into the defendant.

The defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it is not alleged that there has been an ouster of plaintiffs under a superior title. Demurrer sustained and the plaintiffs appeal, assigning error.

William F. Simpson for appellants.
Sutton & Greene and James H. Brooks for appellee.

DENNY, J. It is the law in this State that a cause of action for breach of warranty of title to real estate does not arise until there has been an ouster or eviction of the grantee or grantees under a superior title. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Cedar Works v. Lumber Co.,* 161 N.C. 603, 77 S.E. 770; *Fishel v. Browning,* 145 N.C. 71, 58 S.E. 759; *Wiggins v. Pender,* 132 N.C. 628, 44 S.E. 362, 61 L.R.A. 772; *Ravenal v. Ingram,* 131 N.C. 549, 42 S.E. 967; *Griffin v. Thomas,* 128 N.C. 310, 38 S.E. 903. Therefore, since the complaint filed in this action does not allege an ouster or eviction of the grantees under a superior title, no cause of action for breach of warranty is stated therein.

The plaintiffs contend, however, that they have stated facts sufficient to constitute a cause of action for fraudulent misrepresentation. These allegations are to the effect that the defendant, acting through his agent, represented to the plaintiffs that he had a good and marketable fee simple title to the property described in the deed executed and delivered to the plaintiffs when, as a matter of fact, he knew of the claim of the Kinseys and knowingly withheld his knowledge thereof from the plaintiffs.

It is well settled by our decisions that a covenant of general warranty is confined to "all lawful claims and demands" and does not extend to

wrongful acts of strangers or tortious wrongdoers. The warranty is not broken until there is an eviction or ouster under a superior title. *Fishel v. Browning, supra.*

Connor, J., in the last cited case, quoted with approval from Platt on Covenants, 3 Law Lib., 312, as follows: "A general covenant for quiet enjoyment was, in earlier times, holden to extend to tortious evictions or interruptions, but this doctrine was never fully acquiesced in; and a different rule is now established, so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood of all men claiming by title, for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseizes a purchaser, he shall not have an action against the vendor; the reason being that the law has already furnished the means of redress by giving the injured party an action of trespass against the wrongdoer."

Moreover, the Supreme Court of the United States, in considering the identical question now before us, in the case of *Andrus v. St. Louis Smelting & Ref. Co.,* 130 U.S. 643, 32 L. Ed. 1054, said: "False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property, and the right of possession which follows its acquisition, such as the location, quantity, quality, and condition of the land, the privileges connected with it, or the rents and profits derived therefrom. . . . Such representations by the vendor as to his having title to the premises sold may also be the ground of action where he is not in possession, and has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them. . . . But where the vendor, holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, executes a conveyance to the purchaser, with a warranty of title and a covenant for peaceable possession, his previous representations as to the validity of his title, or the right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant, which determined the extent of his liability."

There is no allegation in the plaintiffs' complaint that the defendant made any representations to them, through his agent or otherwise, that relate to any matter collateral to the title to the property. Therefore, in our opinion, the facts alleged in the complaint are not sufficient to constitute a cause of action for fraudulent misrepresentation, and we so hold.

The ruling of the court below is
Affirmed.

JOHNSON, J., not sitting.

THURMAN VINCENT AND WIFE, MARION DUNN VINCENT, v. EVA M. CORBETT AND HUSBAND, F. S. CORBETT.

(Filed 19 September, 1956.)

1. Trusts § 4b—

A grantor may not engraft a parol trust on his deed conveying the fee simple title except in cases of fraud, mistake or undue influence.

2. Fraud § 3—

While a promissory misrepresentation may be the basis of fraud, it is required that such misrepresentation be made with intent not to comply and that it be relied upon by the promisee and induce him to act to his disadvantage.

3. Trusts § 4c—Misrepresentation which does not induce grantor to act to his disadvantage will not support parol trust for fraud.

Plaintiffs' allegations to the effect that pending sale of lands under a decree to enforce a charge thereon in favor of defendants, the *femme* defendant induced plaintiffs to convey the land to defendants by representations that they would reconvey to plaintiffs upon payment of the amount of the charge with interest, and that at the time defendants had no intention of treating the conveyance as a trust, *held* insufficient to raise an issue of fraud as the basis of a parol trust, and proof offered in support thereof is insufficient to overcome a demurrer to the evidence.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *Paul, J.*, January Term, 1956, of PITT.

This was an action to engraft a parol trust in favor of the plaintiffs upon a deed executed by them to the defendants. Plaintiffs allege fraud.

In 1927 J. N. Vincent died leaving a last will and testament wherein he devised to the plaintiff Thurman Vincent, his grandson, a tract of land containing 57 acres, known as his home place, subject to a life estate in his widow, with stipulation that "when he comes in possession of said land he shall pay to my daughter Eva Corbett (defendant) $3000 in money." The life tenant died in 1932 and plaintiffs entered into possession of the land 1 January, 1933. The plaintiffs having failed to pay the $3,000, in 1934 the defendants instituted suit to have the land sold to pay this charge, resulting in judgment decreeing sale.

But before sale, on 18 June, 1934, plaintiffs conveyed the land to the defendants by deed in fee simple, reciting the foregoing facts, in full satisfaction of the legacy and the judgment. It was further recited in the deed that plaintiffs should deliver possession 31 December, 1935, plaintiffs to pay rent for said year. Plaintiffs remained in possession of the land, paying defendants portions of the crops each year until 1948.

In January, 1954, plaintiffs demanded that defendants reconvey the land to them, alleging a promise so to do at the time of the conveyance to the defendants. Plaintiffs later tendered the $3,000 and interest. Defendants refused the tender and denied having made such a promise.

Plaintiff alleged that they were induced to execute the deed in 1934 by the promise of defendants to hold title to the land in trust for them and to reconvey upon payment of $3,000 and interest; that the defendants "cunningly and with deceit and stratagem" proposed this plan on the plea of preventing sale of the homestead, and that they had no intention of treating the conveyance as a trust; that the promise of the defendants was a fraudulent and unlawful scheme or trick cunningly planned and designed by defendants with intent to obtain title to the land.

These allegations were denied by the defendants.

Plaintiff Thurman Vincent, in the absence of the jury, testified in part as follows: "It (the land) was already advertised and she (defendant Eva Corbett) told me 'I haven't got any money and neither have you. If the land is put up and sold at auction it will go out of the family. If you will sign it over to me and then whenever you get in a position and things pick up and you got the money and want the land back I'll convey it back to you.' That was the ground upon which I signed the deed." Defendants objected and the objection was sustained. Plaintiffs excepted. Plaintiff Thurman Vincent also testified, in the absence of the jury, that in June 1954 he went to see defendant Eva Corbett and told her he had the money to reimburse her and demanded deed. She said, "I never made you that kind of promise." He maintained she did. She declined the tender and refused to make the deed. Objection to this testimony was sustained. Objection to testimony of Mrs. Marion Vincent of similar import was likewise sustained.

At the close of plaintiffs' evidence, defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiffs appealed.

Roberts & Stocks and L. W. Gaylord for plaintiffs, appellants.

Albion Dunn and Louis W. Gaylord, Jr., for defendants, appellees.

DEVIN, J. In *Gaylord v. Gaylord,* 150 N.C. 222 (227), 63 S.E. 1028, this Court stated the pertinent principle of law in these words: "Upon the creation of these estates (parol trusts), however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass." This statement of law has been approved in numerous decisions of this Court. *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Jones v. Brinson,* 231 N.C. 63, 55 S.E. 2d 808; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138.

The plaintiffs here seek to bring this case within the exception to the rule permitted in cases of fraud upon allegation that a promise to reconvey was made with intent at the time not to comply. True, a promissory representation containing all the elements of fraud, made merely to induce the promisee to act to his disadvantage, with intent not to comply, wherein the intent is regarded as a subsisting fact, will support an action in fraud. *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118; *Roberson v. Swain,* 235 N.C. 50, 69 S.E. 2d 15; *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131. But here we think the evidence is insufficient to support an action based on this ground.

We concur in the ruling of the court below that plaintiffs' evidence as offered, if admitted, would not have been sufficient to make out a case for the jury. If it be conceded that the allegations in the complaint are sufficient to raise an issue, the proof offered in support is insufficient to overcome a demurrer to the evidence.

The judgment of nonsuit is

Affirmed.

JOHNSON, J., not sitting.

JOE BROWNING v. E. L. WEISSINGER, TRADING AND DOING BUSINESS AS WEISSINGER LUMBER COMPANY.

(Filed 19 September, 1956.)

Appeal and Error § 40—

Where appellant fails to show prejudicial error on his exceptions to the admission of evidence and the court's charge to the jury, the judgment will be affirmed.

JOHNSON, J., not sitting.

APPEAL by defendant from *Pless, J.*, January Term, 1956, of HAYWOOD.

This was an action to recover the market value of 50,000 feet of chestnut logs, alleged to have been wrongfully taken by defendant.

Plaintiff's evidence tended to show the following facts: The defendant Weissinger had purchased a large quantity of timber in what is known as the Fires Creek Boundary in Clay County, including dead chestnut trees and fallen logs. As to this chestnut timber, defendant had made a contract with Ervin Reece by the terms of which Reece was to cut the timber into logs of proper lengths, pull or snake the logs down to the landing or place of loading, where they were to be loaded on trucks and hauled to the mill of Hogsed in Haysville. Reece was to pay the defendant for the logs at the rate of $10 per thousand feet for stumpage, plus $1 per thousand for loading, using defendant's loader. The contract contemplated that Reece would get out logs in quantity to scale 100,000 feet. After signing the contract and cutting some of the logs, Reece for a consideration sold his contract and all his rights and interest in the logs to the plaintiff, Joe Browning.

On 26 March, 1954, Reece and plaintiff Browning gave written notice to the defendant of their agreement in the form of a letter signed by both. In this letter, which was in evidence, Reece stated that "it would be to the best interest of both of us that I let Joe Browning have my interest in my timber I have been cutting and he will carry out my contract and has the equipment to carry out our agreement." Plaintiff showed this letter to the defendant and the defendant said it was all right. Thereupon, with his equipment and three employees, Browning took over and cut and brought out to the place of loading 200 logs, sizes 18 to 48 inches in diameter, which would have cut 50,000 feet of merchantable chestnut lumber. Plaintiff did not haul the logs away immediately and contemplated putting down a mill to saw them, but shortly thereafter the defendant Weissinger hauled the logs to his own mill at Ellijay, Georgia, where they were converted into lumber and sold in due course.

Plaintiff's evidence tended to show the market value of chestnut logs at the time and place and in the condition and of the grade of these logs was $45 per thousand feet, and that allowing $10 per thousand stumpage and $1 for loading, the value of these logs taken by defendant was $1,700.

The defendant in his testimony denied that he had agreed that plaintiff Browning should take over Reece's contract, but did not controvert the fact that plaintiff and several of his employees were at work in the Fires Creek Boundary. He admitted hauling off some of the logs to his mill in Georgia, but offered evidence that these logs only scaled

some 14,000 feet, and that the market value of the logs was not more than $40 per thousand.

It appeared that plaintiff went to see the defendant in Ellijay and demanded payment for his logs. The defendant testified: "I didn't pay Browning for these logs that were taken to my mill in Ellijay because he never asked for the pay. He came there and run me in the house and didn't even give me a chance to offer him pay. I didn't send him a check because I didn't know how much. He did not ask for pay; he asked to settle in court. I would have paid him gladly a reasonable amount but he asked me if I wanted to pay him $4,000 or settle it in Court, and I said 'Just settle it in court.' "

Without objection the court submitted this issue to the jury:

"1. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury for their verdict answered the issue "$1,500." From judgment on the verdict, defendant appealed.

W. R. Francis and F. E. Alley, Jr., for plaintiff, appellee.

O. L. Anderson and Frank D. Ferguson for defendant, appellant.

DEVIN, J. The defendant in his appeal to this Court assigned numerous errors in the court below in the admission of testimony over defendant's objection and in the court's charge to the jury, but an examination of the entire record leaves us with the impression that the court correctly interpreted the controversy and fairly presented the case to the jury. No prejudicial error has been made to appear.

We note that according to the record before us the defendant testified on the trial in substance that he did not pay the plaintiff because he didn't know how much, and that he would have paid him a reasonable amount if he had asked him.

The jury, after hearing all the testimony, found the amount the plaintiff was entitled to recover was $1,500. On this record we see no valid reason to disturb the result.

No error.

JOHNSON, J., not sitting.

OTIS R. CLEMENTS v. J. M. BOOTH AND WIFE, MRS. J. M. BOOTH.

(Filed 19 September, 1956.)

Courts § 4b—Appeal from recorder's court held correctly dismissed for laches of appellant in failing to see that record was properly docketed.

Defendants appealed from judgment against them in the recorder's court and paid the Clerk of the Superior Court the necessary fees for perfecting the appeal, but only the judgment with the appeal entries noted thereon was sent up, and the appeal was not put on the trial docket, G.S. 1-299, G.S. 1-300. It was admitted that rules governing appeals from a justice of the peace were applicable. Execution was issued on the judgment, and defendants took no action until seven terms of Superior Court had intervened. The trial court's action in docketing and dismissing the appeal on motion of plaintiff on the ground of defendants' laches, is affirmed.

JOHNSON, J., not sitting.

APPEAL by defendants from *McKeithen, S. J.*, May Term, 1956, BEAUFORT Superior Court.

Civil action instituted in the Aurora Recorder's Court, Beaufort County, for the recovery of $332.94, alleged to be due by contract for hauling produce from Florida to Illinois. All additional facts necessary to determination of this case are set forth in the following part of the judgment rendered in the Superior Court:

"This action was instituted in the Recorder's Court of Aurora, N. C. and was tried in said court on June 20, 1955, at which time judgment was rendered in favor of the plaintiff; defendants gave notice of appeal in open court and further notice was waived and an entry to this effect was made upon the face of the judgment and signed by the Recorder; the fee required for transferring the record to the Superior Court was paid to the Recorder; on June 23, 1955 there was received in the office of the Clerk of the Superior Court of Beaufort County the judgment with the notation of appeal as aforesaid; no other papers accompanied the judgment at that time and no return of notice to appeal was affixed to the judgment; the Clerk of the Superior Court docketed the judgment as in cases of judgments rendered by Justices of the Peace and the case was not placed by the Clerk at that time on the Civil Issue Docket of the Superior Court. On June 30, 1955 the sum of $4.85 was received by the Clerk of the Superior Court and there appears in the receipt book of the Clerk the following language: 'Clerk of the Superior Court, Beaufort County, Washington, N. C., June 30, 1955, Received of LeRoy Scott, Atty. $4.85 Transcript Jdg. & Notice of Appeal Otis R. Clements *v.* J. M. Booth and wife, Mrs. J. M.

Booth. (Signed) Frances Cecil, Deputy C. S. C.'; in January 1956 execution on the judgment was issued and pursuant to the execution the judgment was paid; there were terms of the Superior Court in Beaufort County in September, October, November and December 1955, and January, February and March 1956; no inquiry was made of the Clerk of the Superior Court by appellants or their counsel as to whether the case had been docketed until March 1956; petition which was denominated a Writ of Recordari was directed to the Clerk of the Superior Court, which was in reality a petition under General Statutes 7-182 to require the Recorder to send to the Superior Court the remainder of the record in the case; no order was issued pursuant to the petition, for the reason that the balance of the record was at that time transmitted by the Recorder to the Clerk of the Superior Court; the remainder of the record consisted of summons, complaint, warrant of attachment and order of attachment and returns thereon; appellants moved before the Clerk of the Superior Court in April 1956 to have the appeal placed on the Civil Issue Docket, which motion was allowed and the appeal was duly docketed; from this order plaintiff appellee appealed to the Judge presiding at the May 1956 Term of the Superior Court;

"The Court is of the opinion that the defendants, J. M. Booth and wife, Mrs. J. M. Booth, were not diligent but were guilty of laches in having the appeal docketed in the Superior Court of Beaufort County, and that the appeal was not docketed at the next ensuing term of the Superior Court or until such time as at least six terms of the Superior Court of Beaufort County had passed.

"The motion of the plaintiff to docket in the Superior Court and to dismiss the appeal of the defendants from the Recorder's Court of Aurora is allowed and said appeal of defendants from the Recorder's Court of Aurora is hereby dismissed. W. A. Leland McKeithen, Judge Presiding."

From the judgment docketing and dismissing the appeal on the plaintiff's motion, the defendants appeal.

John A. Wilkinson for defendants, appellants.
LeRoy Scott for plaintiff, appellee.

HIGGINS, J. The only exceptive assignment relates to the order allowing plaintiff's motion to docket and dismiss the appeal. The question presented, therefore, is whether the facts found are sufficient to support the judgment. The appeal presents no other question. It is admitted that the rules governing appeals from the recorder's court are the same as those applicable to appeals from a justice of the peace.

The recorder's court rendered judgment for the plaintiff. The defendants gave notice of appeal to the Superior Court and paid the recorder's fee. The recorder sent up only the judgment with the appeal entries noted thereon. The summons, complaint, affidavit, bond, and writ of attachment were not sent to the Superior Court. The defendants, however, paid the Superior Court the necessary fees for perfecting the appeal. Instead of entering the appeal on the trial docket as contemplated by G.S. 1-299 and G.S. 1-300, the Clerk seems to have docketed the judgment in the manner provided for docketing transcripts in the Superior Court as contemplated by G.S. 7-166. For seven terms of court the defendants made no effort to ascertain whether their appeal had been placed upon the trial docket. They did not execute a stay bond. They permitted the plaintiff to issue execution and to satisfy his judgment from a sale of the attached property. They made no inquiry to ascertain what had happened to their case. They permitted it to look after itself. They insisted, however, that having given notice of their appeal and having paid the requisite fees to have it perfected, they were entitled to rely on the officers to discharge their official duties. They cite as authority, *Johnson v. Andrews,* 132 N.C. 376, 43 S.E. 926. In that case there was no writ of attachment, no sale of attached property. There was inquiry and assurance from the Clerk that the appeal had been docketed for trial. The *Johnson case* and this case fall in different categories.

Judge McKeithen found facts as set forth in the judgment and held the defendants were guilty of laches and, in his discretion, permitted the appeal to be docketed and dismissed on plaintiff's motion. The facts found warranted the trial court in holding the defendants guilty of laches. The judgment finds support in many decisions of this Court, among them the following: *Electric Co. v. Motor Lines,* 229 N.C. 86, 47 S.E. 2d 848; *Trust Co. v. Cooke,* 204 N.C. 566, 169 S.E. 148; *S. v. Fleming,* 204 N.C. 40, 167 S.E. 483; *Barnes v. Saleeby,* 177 N.C. 256, 98 S.E. 708; *Helsabeck v. Grubbs,* 171 N.C. 337, 88 S.E. 473; *Tedder v. Deaton,* 167 N.C. 479, 83 S.E. 616; *Abell v. Power Co.,* 159 N.C. 348, 74 S.E. 881; *Peltz v. Bailey,* 157 N.C. 166, 72 S.E. 978; *Southern Pants Co. v. Smith,* 125 N.C. 588, 34 S.E. 552.

The facts found are sufficient to support the judgment, and the same is

Affirmed.

JOHNSON, J., not sitting.

T. D. HARRIS v. CHARLES M. UPHAM.

(Filed 19 September, 1956.)

1. Process § 6: Judgments § 18: Attachment § 3—Nonresident may be served by publication in action to enforce contract to convey land situate here.

Action for specific performance of a contract to convey a described tract of land was instituted against a nonresident in the county in which the land is situate. Process was served by publication under G.S. 1-98(3) and personally by a United States Marshal under G.S. 1-104. *Held:* Levy on the land under a writ of attachment was not required, since the bringing of the action in the jurisdiction where the land lies is sufficient to enable the court to exercise dominion over it, and the court acquired jurisdiction over the *res* sufficient to support a judgment *in rem* decreeing specific performance of the contract.

2. Appeal and Error § 3—

A defendant may appeal from a denial of his motion to dismiss on the ground that the court had no jurisdiction over the person or property of the defendant. G.S. 1-134.1.

JOHNSON, J., not sitting.

APPEAL by defendant from *Frizzelle, J.*, April, 1956 Term, CAMDEN Superior Court.

Civil action instituted on 5 December, 1955, in which the plaintiff seeks the following: (1) Specific performance of a contract to convey a described tract of land; and (2) an accounting for a division of profits from the sale of other lands.

At the time of suit the plaintiff resided in South Carolina, the defendant in the District of Columbia. The lands involved in both causes of action are located in Camden County, North Carolina. The plaintiff filed notice of *lis pendens,* G.S. 1-116, and obtained an extension of time, later approved by the Superior Court Judge, to file complaint. He served, or attempted to serve process on the defendant outside the State as prescribed by G.S. 1-104, by having a United States Marshal for the District of Columbia deliver the necessary papers to the defendant in Washington, D. C. Likewise, he served, or attempted to serve process by publication of notice thereof as provided by G.S. 1-98(3).

On 29 February, 1956, the defendant filed a motion to dismiss under G.S. 1-134.1 for that "the court has no jurisdiction over the person or property of the defendant." He prayed that the purported service be quashed and stricken. The plaintiff entered a voluntary nonsuit as to his cause of action for division of profits. Whereupon, the court denied the motion to dismiss and from the order accordingly, the defendant appealed.

M. B. Simpson for plaintiff, appellee.
John H. Hall for defendant, appellant.

HIGGINS, J. The question presented is whether the Superior Court acquired jurisdiction over the 50-acre tract of land and over the defendant—a nonresident—to the extent necessary to bind his interest therein by the method of service here employed. It must be conceded that no judgment *in personam* can be rendered on such service. The defendant contends the court could acquire jurisdiction over the land only by a levy thereon under a writ of attachment. Attachment would be necessary if the suit involved matters aside from the land itself. But where the controversy involves the title to or interest in land, the bringing of the action in the jurisdiction where the land lies is sufficient to enable the court to exercise dominion over it. "In such cases the court has the power to determine who is entitled to the property and to vest title by decree." *Voehringer v. Pollock*, 224 N.C. 409, 30 S.E. 2d 374; *Foster v. Allison*, 191 N.C. 166, 131 S.E. 648; *White v. White*, 179 N.C. 592, 103 S.E. 216; *Lawrence v. Hardy*, 151 N.C. 123, 65 S.E. 766; *Vick v. Flournoy*, 147 N.C. 209, 60 S.E. 978; *Herbeitter v. Oil Co.*, 112 U.S. 294.

A decree of specific performance of a contract to convey land goes no further than to operate on the land and on the parties to the extent necessary to carry out that contract. The decree is effective to vest and to divest title. When the land is in the jurisdiction of the court, constructive service on adverse claimants is sufficient. "Such service may also be sufficient in cases where the object of the action is to reach and to dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting same." *Pennoyer v. Neff*, 95 U.S. 714; *Bernhardt v. Brown*, 118 N.C. 700, 24 S.E. 527, 715; *Long v. Ins. Co.*, 114 N.C. 465, 19 S.E. 347. The plaintiff served process both by publication and by an officer outside the State. That both methods of service were followed cannot detract from the efficacy of either.

The Superior Court entered an order denying the defendant's motion to quash the service and to dismiss the action, and allowed 30 days in which to answer. The defendant excepted and appealed as he had a right to do under G.S. 1-134.1. For the reasons assigned, the order of the Superior Court of Camden County is

Affirmed.

JOHNSON, J., not sitting.

JOHN MIMIDIS v. ANDREW H. PAPOULIAS AND SOCRATES A. LEVAS.

(Filed 19 September, 1956.)

Appeal and Error § 49—

The findings of fact of the referee in a consent reference, approved by the trial court, are conclusive when supported by evidence.

JOHNSON, J., not sitting.

APPEAL by defendant Papoulias from *Froneberger, J.*, January Term, 1956, of BUNCOMBE.

This was a suit to settle the partnership between plaintiff and defendants, who had been doing business as Pack Square Hat Cleaners. Plaintiff alleged there was a balance due him by defendant Papoulias for the purchase of one-half interest in the business in the sum of $2,500, and that Papoulias was indebted to him on other items. Defendant Papoulias admitted he owed plaintiff $2,500 as alleged, but contended plaintiff was indebted to him on several matters growing out of their dealing.

There was a consent reference. The referee reported that defendant Papoulias owed plaintiff $2,500 balance on purchase of one-half interest in the partnership, but that the records were incomplete, inaccurate, and conflicting, and that it was impossible to determine the amount, if any, plaintiff owed Papoulias or defendant Papoulias owed plaintiff; that defendant Levas had been settled with in full and was not entitled to recover anything. Defendant Papoulias filed exceptions to the referee's report.

Judge Fountain overruled the exceptions and adopted the findings of the referee, but remanded the cause to the referee to further consider the evidence and determine if either plaintiff or defendant Papoulias was indebted to the other. The referee reported that he found defendant Papoulias was not indebted to the plaintiff and that plaintiff was not indebted to the defendant Papoulias. Defendant Papoulias filed exceptions to the referee's further report.

Judge Froneberger concluded that the findings by the referee in this supplemental report were correct, overruled the exceptions and approved and confirmed the report.

Defendant Papoulias appealed.

I. C. Crawford and L. C. Stoker for plaintiff, appellee.
Irvin Monk and Ward & Bennett for defendant Papoulias, appellant.

PER CURIAM. This was a consent reference. The findings and conclusions of the referee appear to be supported by evidence and these

were adopted and approved by the court. Hence the judgment will be affirmed. *Anderson v. McRae,* 211 N.C. 197, 189 S.E. 639; *Griffin v. Jones,* 230 N.C. 612, 54 S.E. 2d 920.

Affirmed.

JOHNSON, J., not sitting.

STATE v. WILLIAM O. REGISTER, JR.

(Filed 19 September, 1956.)

Criminal Law § 12g—

Chapter 115, Public Laws of 1929, 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.

JOHNSON, J., not sitting.

APPEAL by defendant from *Fountain, Special Judge,* April Term, 1956, of CRAVEN.

This is a criminal action, originally instituted upon a warrant issued by a justice of the peace on the 6th day of October 1955, charging the defendant with careless and reckless driving and operating a motor vehicle upon the public highways of the State, while under the influence of intoxicants or narcotics. The warrant was made returnable to the Craven County Recorder's Court. When the case was called for trial in the Recorder's Court, the defendant demanded a jury trial; whereupon, the case was transferred to the Superior Court of Craven County, pursuant to the provisions of Chapter 115 of the Public Laws of 1929.

The grand jury returned a true bill of indictment against the defendant at the November Term 1955 of the Superior Court of Craven County, charging him with the identical offenses charged in the warrant. The case was called for trial at the April Term 1956 of the Superior Court of Craven County and the defendant entered a plea of not guilty. The jury was chosen and impaneled and upon the evidence adduced in the trial, found the defendant guilty on the first count in the bill of indictment, charging him with operating a motor vehicle upon the public highways of Craven County while under the influence of intoxicants or narcotics.

From the judgment imposed on the verdict, the defendant appeals, assigning error.

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

Charles L. Abernethy, Jr., for appellant.

PER CURIAM. The defendant assigns as error the refusal of the court below to remand the case to the Recorder's Court of Craven County, contending that the provisions of Chapter 115 of the Public Laws of 1929, which provide that when a jury trial is demanded in the Recorder's Court of Craven County the case shall be transferred for trial in the Superior Court of Craven County and the defendant required to give bond for his appearance at the next term of the Superior Court, are unconstitutional.

We upheld similar legislation relating to the Recorder's Court of Washington County, in the case of *S. v. Norman*, 237 N.C. 205, 74 S.E. 2d 602, and to the Recorder's Court of Edgecombe County, in the case of *S. v. Owens*, 243 N.C. 673, 91 S.E. 2d 900. The defendant's assignment of error to the ruling of the court below is without merit.

The additional exceptions and assignments of error, in our opinion, present no prejudicial error that would justify a disturbance of the verdict and judgment of the court below.

No error.

JOHNSON, J., not sitting.

RALPH STEPHENS, MINOR, BY MR. TILDON STEPHENS, NEXT FRIEND, v. JACKSON COUNTY BOARD OF EDUCATION, AND/OR STATE BOARD OF EDUCATION.

(Filed 19 September, 1956.)

State § 3d—

Where, in a proceeding under the State Tort Claims Act, the findings of fact of the Industrial Commission, supported by competent evidence, support the conclusions as modified on appeal to the Superior Court, the decision of the Commission, as sustained by the Superior Court, must be upheld.

JOHNSON, J., not sitting.

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

APPEAL by defendant State Board of Education from *Pless, J.*, May Term 1956 of JACKSON.

A claim for damages for injuries to Ralph Stevens, who was a 13 year old student at Johns Creek School, Jackson County, and was severely injured by the flames of burning gasoline, instituted before the State

Industrial Commission under the State Tort Claims Act, G.S. 143-291 *et seq.*

The Industrial Commission found that Ralph Stephens' injuries were caused by the actionable negligence of Wayne Lovedahl, a regular school bus driver in the school system of Jackson County, and of Bill Smith, principal of Johns Creek School, both employees of the State Board of Education of the State, the same being an agency of the State, which actionable negligence occurred at a time when both were acting within the scope of their employment, and without contributory negligence on the part of Ralph Stephens. On these findings the Commission determined the amount of damages to which Ralph Stephens is entitled in the amount of $7,500.00, and by appropriate order directed the payment of such damages, by the State Board of Education.

On appeal to the Superior Court the findings and conclusions and the order of the Commission directing the payment of such damages were affirmed, with this exception to wit: that Pless, J., held that the Commission was in error in holding the defendant State Board of Education negligent because no school teacher was upon the grounds at the time Ralph Stephens was injured, and reversed that part of the order.

The defendant State Board of Education appeals, assigning error.

William B. Rodman, Jr., Attorney General, Claude L. Love, Assistant Attorney General, and Harvey W. Marcus, Staff Attorney, for the State.

John M. Queen and Frank D. Ferguson, Jr., for Plaintiff, Appellee.

PER CURIAM. The decisive findings of fact of the Industrial Commission are supported by competent evidence. These findings of fact support the conclusions, as modified by Judge Pless, and order below directing the payment of damages, and the decision of the Commission, as sustained by the Superior Court, must be upheld.

Affirmed.

JOHNSON, J., not sitting.

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

JOSEPH F. FURLOUGH, JR., v. A. G. OWENS AND WIFE, LOUISE OWENS.

(Filed 19 September, 1956.)

Vendor and Purchaser § 18—

The vendors' refusal to comply with their contract after tender of cashier's check for the initial payment and demand of deed, relieves the purchaser of the necessity of making further tender or tendering cash.

JOHNSON, J., not sitting.

APPEAL by defendants from *Burgwyn, Emergency Judge,* April Term, 1956, of TYRRELL. No error.

This was an action for specific performance of a contract to convey land. Determinative issues were submitted to the jury and answered in favor of plaintiff. From judgment on the verdict, the defendants appealed.

Pritchett & Cooke and Sam S. Woodley for plaintiff, appellee.

Norman & Rodman for defendants, appellants.

PER CURIAM. It was admitted that defendants for a valuable consideration executed and delivered to the plaintiff an option to purchase described land upon stated terms, including payment of $1,800 in cash. Plaintiff testified that within the time limited he notified defendants that he elected to exercise the option, was ready, able and willing to comply with its terms, and demanded deed. Defendants failing to have deed prepared for delivery, plaintiff offered to have this done, but defendants refused. Plaintiff tendered cashier's check for the initial payment and demanded deed. Defendants made no objection to the cashier's check and gave no reason for their refusal to execute deed. Defendants offered no evidence in rebuttal.

The defendants' refusal to comply with their contract relieved plaintiff of the necessity of making further tender or tendering cash, as such tender would have availed nothing. *Penny v. Nowell,* 231 N.C. 154, 56 S.E. 2d 428; *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59.

In the trial we find

No error.

JOHNSON, J., not sitting.

THE REV. C. L. GRIFFIN v. INTER-OCEAN INSURANCE COMPANY.

(Filed 19 September, 1956.)

Insurance § 43½—

Insured was riding on the rear of a truck. The cab of the truck struck an overhanging limb, breaking the windshield. The limb was bent far enough back for the cab to pass, and when the pressure on the limb was released by the passing of the cab, it flew back, striking plaintiff in the eye, causing the loss of the sight of that eye. *Held:* The striking of the limb by the cab was a collision within the meaning of that term as used in the policy in suit, and that the limb should strike plaintiff on the rebound was an accident within the coverage of the policy.

JOHNSON, J., not sitting.

APPEAL by defendant from *Frizzelle, J.*, May Term 1956 of PASQUOTANK.

Defendant insured plaintiff "against loss resulting from bodily injuries caused directly and independently of all other causes through accidental means. . . . While driving or riding in an automobile and such injury so sustained shall be the direct and immediate consequence of the collision, upset or disabling of such automobile (the term automobile to include and be limited to private passenger automobile, taxicab, truck, bus and trackless trolley)"

The policy provides for the payment of $900 for "the loss of sight of either eye."

Plaintiff was riding in the rear of a truck on a farm lane or road. On the side of the road was a row of trees. A limb two and one-half to three inches in diameter overhung the road. The cab of the truck struck this limb, breaking the windshield. When the truck struck the limb, it bent the limb back far enough for the cab of the truck to pass. When the pressure on the limb was released by the passing of the cab, it flew back, striking plaintiff in the right eye, causing the loss of the sight of that eye.

Defendant, by motion for nonsuit and exceptions to the charge, insists that the injury sustained was not the direct and immediate consequence of the collision.

John H. Hall for plaintiff appellee.

LeRoy & Goodwin for defendant appellant.

PER CURIAM. The striking of the limb by the cab of the truck was a collision. That the limb should spring back to its normal position when the pressure created by the collision was released was the natural and

direct result of the collision. It was an accident that the limb should strike plaintiff on the rebound caused by the collision.

The injury resulting from this accident was the immediate and direct consequence of the collision. Hence, liability existed under the policy.

The amount is not in controversy.

No error.

JOHNSON, J., not sitting.

CLAY HYDER, ET AL., AS RESIDENTS, FREEHOLDERS AND TAXPAYERS OF HENDERSON COUNTY, NORTH CAROLINA, ON BEHALF OF THEMSELVES AND ALL OTHER RESIDENTS, FREEHOLDERS AND TAXPAYERS WHO DESIRE TO MAKE THEMSELVES PARTIES TO THIS ACTION, v. E. E. McBRIDE, J. J. THOMPSON, AND WM. E. DALTON, INDIVIDUALLY AND AS MEMBERS OF AND COMPRISING THE BOARD OF COMMISSIONERS OF HENDERSON COUNTY.

(Filed 19 September, 1956.)

Injunctions § 8—

An order enjoining county commissioners from making further payments under the contract attacked until the final hearing, upon conflicting allegations in the verified pleadings, is upheld.

JOHNSON, J., not sitting.

APPEAL by defendants from *Nettles, J.*, May-June Term, 1956, of HENDERSON.

Action by plaintiffs-taxpayers against defendants, individually and as county commissioners.

The controversy grows out of a contract authorized by the county commissioners, whereby Henderson County agreed to pay a total of $45,000.00 to E. T. Wilkins & Associates of Lincoln, Nebraska, for services to be performed in appraising all taxable real estate and commercial and industrial personal property within the county, incident to a quadrennial (1956) revaluation and equalization program.

Plaintiffs, on the basis of particular facts set forth, alleged that said contract was and is unlawful and void; that the activities of representatives of E. T. Wilkins & Associates purporting to constitute a performance thereof were of no value; that valuations and assessments attempted to be made by them were without authority in law and were "arbitrary, fictitious and fantastic"; and that the county commissioners, unless restrained, would levy 1956 taxes on the valuations and assessments as made by E. T. Wilkins & Associates. Answering, de-

fendants denied plaintiffs' said allegations, averring facts upon which they asserted that their acts and conduct, past and contemplated, were in all respects in accordance with law.

In their First Cause of Action, plaintiffs, for the benefit of Henderson County, sought to recover from defendants, individually, the amount of Henderson County funds theretofore paid under said contract, and in addition sought to restrain defendants from making any further payment to E. T. Wilkins & Associates thereunder.

In their Second Cause of Action, plaintiffs sought to restrain defendants, as county commissioners, from levying 1956 *ad valorem* taxes based on valuations and assessments made by E. T. Wilkins & Associates.

An *ex parte* restraining order was issued 8 May, 1956, when the action was commenced. On 29 May, 1956, after hearing on return of order to show cause, Judge Nettles, then presiding, entered judgment wherein, pending final determination of the action, it was ordered, adjudged and decreed:

"FIRST CAUSE OF ACTION

"That the defendants as members of the Board of Commissioners of Henderson County, be and they are hereby enjoined and restrained from paying to E. T. Wilkins & Associates or any other person any funds of Henderson County by reason of the contract between said parties, copy of which is attached to the defendants' answer.

"SECOND CAUSE OF ACTION

"That the defendants be, and they are hereby enjoined and restrained from levying a tax against the taxable property in Henderson County based upon the assessment made by E. T. Wilkins & Associates."

This appeal is from said judgment of 29 May, 1956.

Redden & Redden and Arthur J. Redden for plaintiffs, appellees.

R. Lee Whitmire, L. B. Prince, G. H. Valentine, and W. B. Howe for defendants, appellants.

PER CURIAM. On oral argument in this Court, it was stated by counsel for all parties that subsequent to said judgment of 29 May, 1956, defendants, as county commissioners, levied 1956 *ad valorem* taxes and that such levy was *not* based on assessments made by E. T. Wilkins & Associates. Admittedly, the appeal, in respect of the Second Cause of Action, is now moot.

Thus, the only question before us relates to the portion of the judgment wherein defendants, pending final determination of the action, are restrained from making further payments "to E. T. Wilkins & Asso-

ciates or any other person" by reason of said contract. Consideration of the conflicting allegations in the verified pleadings, the only evidence in the record, fails to disclose sufficient grounds for this Court to disturb the said *pendente lite* restraining order.

On oral argument in this Court, appellants stated that they then demurred *ore tenus* to the complaint. No writing was filed in this Court as required by Rule 36 (221 N.C. 566). Moreover, appellants did not undertake to specify the particulars wherein, under their contention, the complaint, in its entirety, was fatally defective.

Nothing stated herein is to be deemed a ruling or expression of opinion as to whether the facts alleged are sufficient to state a cause of action against defendants, individually, for the recovery, for the benefit of Henderson County, of amounts paid to E. T. Wilkins & Associates prior to the commencement of this action.

The judgment of 29 May, 1956, in respect of the *pendente lite* restraining order relating to the First Cause of Action, is

Affirmed.

JOHNSON, J., not sitting.

STATE v. FRED THOMAS MILLS.

(Filed 19 September, 1956.)

Criminal Law §§ 78d(1), 78e(1): Appeal and Error §§ 23, 24—

Assignments of error to the court's rulings on the admissibility of evidence and to parts of the charge which do nothing more than refer to the page of the record where the alleged errors may be discovered, are insufficient, since the Court should not be compelled to go beyond the assignment itself to learn what the question is. Rule of Practice in the Supreme Court, No. 19(3).

JOHNSON, J., not sitting.

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

APPEAL by defendant from *Nettles, J.*, Regular June 1956 Mixed Term, MCDOWELL Superior Court.

This criminal prosecution originated in the McDowell County Criminal Court on a warrant charging the defendant with the unlawful operation of a motor vehicle on the public highway at a rate of speed greater than that allowed by law, to wit: 80 miles per hour. From a conviction and judgment, he appealed to the Superior Court of Mc-

Dowell County. From an adverse verdict and judgment in the Superior Court, he appealed.

William B. Rodman, Jr., Attorney General, Robert E. Giles, Assistant Attorney General, for the State.

I. C. Crawford, L. C. Stoker for defendant, appellant.

PER CURIAM. While the defendant duly noted exceptions (1) to the trial court's rulings on the admissibility of evidence and (2) to parts of the charge, his assignments of error do nothing more than refer to the pages of the record where the alleged errors may be discovered. The assignments, therefore, fail to comply with Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 543. "Just what will constitute a sufficiently specific assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829.

However, assignments of error Nos. 10 and 16 do present the question of the sufficiency of the evidence to go to the jury. The evidence in the case as disclosed in the record, when taken in the light most favorable to the State, is sufficient to warrant the verdict and to sustain the judgment thereon.

No error.

JOHNSON, J., not sitting.

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

STATE v. JOHN MANLEY SHERRER.

(Filed 19 September, 1956.)

APPEAL by defendant from *Nettles, J.*, at May 1956 Term, of RUTHERFORD.

Criminal prosecution upon a bill of indictment charging defendant in three counts with (1) felonious breaking and entering a building occupied by Matheny Motor Company with intent to steal merchandise of said company, (2) larceny of goods, etc., of said company, and (3) receiving stolen property, knowing it to have been stolen,—submitted to the jury upon the first and second counts.

Verdict: Guilty of larceny, as charged, guilty in both counts as charged in the bill of indictment.

Judgment: Imprisonment on each count, sentences to run consecutively—from which defendant appeals to Supreme Court and assigns error.

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

Hamrick & Hamrick for Defendant Appellant.

PER CURIAM. A careful consideration of each and all of the assignments of error brought up by defendant on this appeal fails to present any new question of law which requires express treatment, and prejudicial error is not shown. Hence in the judgment from which appeal is taken, there is

No error.

JOHNSON, J., not sitting.

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

HATTIE S. WOOLARD, FLORENCE SILVERTHORNE, JAMES ENOCH SMITH, JR., PEARLIE BELL McCULLAR AND W. E. SMITH v. EMMA F. SMITH.

(Filed 26 September, 1956.)

1. Deeds § 1a—

The right to contract and to convey property ought not to be limited or circumscribed unless prohibited by sound public policy or valid statute.

2. Husband and Wife § 15—

An estate by entirety is based on the fiction of the unity of persons resulting from marriage, so that the husband and wife constitute a legal entity separate and distinct from them as individuals, with the result that together they own the whole, with right of survivorship by virtue of the original conveyance.

3. Husband and Wife § 14—

A husband owning land may create an estate by the entireties by deeding the land to himself and wife, and the contention that the deed fails as to one-half because a person may not be grantor and grantee at the same time, is untenable, since the legal entity constituted by husband and wife is separate and distinct.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *McKeithen, Special J.*, May Term 1956, BEAUFORT.

Proceeding for partition of real estate situated in Beaufort County.

The parties stipulated the facts. From the stipulation it appears: Plaintiffs are the heirs at law of J. E. Smith by his first marriage. After the death of his first wife, J. E. Smith married defendant. Prior to 5 June, 1948, J. E. Smith was the owner in fee of the lands in controversy. On 5 June, 1948, J. E. Smith executed the deed made a part of the stipulation as Exhibit A. Said deed was duly recorded on the day of its execution. When the deed was executed, J. E. Smith and defendant, Emma F. Smith, were man and wife and living together as such, and thereafter they continued to live together until his death. J. E. Smith died intestate.

The parts of the deed referred to in the stipulation which are material to a decision of this controversy follow:

"THIS DEED, Made this 5th day of June 1948, by J. E. Smith, party of the first part, to J. E. Smith and wife, Emma F. Smith, parties of the second part; all parties being of the County of Beaufort and State of North Carolina; WITNESSETH:

"WHEREAS, on the 2nd day of April 1948, party of the first part was conveyed two certain lots, hereinafter described by G. Smith Bennett and wife, Annie M. Bennett, and deed N. Henry Moore and wife dated 12th day of Aug. 1944; and whereas party of the first part is desirous of having the title vested in parties of the second part and known as an estate by the entirety; and whereas party of the first part is willing to have said real estate, hereinafter described, to be vested in parties of the second part as an estate by the entirety;

"NOW, THEREFORE, for and in consideration of the sum of TEN DOLLARS, said party of the first part has this day been paid by parties of the second part, receipt of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, and convey unto the said parties of the second part, an estate by the entirety, the following described tracts of land, to-wit:

". . .

"TO HAVE AND TO HOLD, the aforesaid lots of land, unto the said parties of the first part, their heirs and assigns, in fee simple; and the said party of the first part does hereby covenant to and with the said parties of the second part, that he is seized of said premises in fee and has a right to convey the same; that the same are free and clear of all liens and encumbrances and that he will forever warrant and defend the title to the same against the lawful claims of all persons whomsoever."

The court, on the facts stipulated, adjudged the deed conveyed an estate by the entireties, and upon the death of J. E. Smith the land described in the deed became the absolute property of the defendant. It further adjudged that plaintiffs, as heirs at law of J. E. Smith, the grantor, were, by the warranties contained in the deed, estopped to deny defendant's sole ownership.

LeRoy Scott and L. E. Mercer for plaintiff appellants.
John A. Mayo and Junius D. Grimes for defendant appellee.

RODMAN, J. The judgment presents for decision these questions:

1. May a husband, the owner of land, by deed to himself and wife create an estate by the entireties?

2. If not, may the same result be accomplished by way of estoppel?

It will be noted that the *habendum* of the deed reads: "Unto the said parties of the first part, their heirs and assigns, in fee simple . . ." Appellants, in their brief, concede this was a clerical error.

The deed, by express language, recites both a desire and a willingness on the part of the party of the first part to create an estate by the entirety. Following this recital are formal words of conveyance followed by general covenants of seizin and warranty.

The right to contract and to convey property ought not to be limited or circumscribed unless prohibited by sound public policy or valid statute.

What sound reason, if any, exists why a deed from a husband to husband and wife cannot, in accord with the express language of the deed, create an estate by the entirety?

Appellants contend that J. E. Smith, the husband, could not, at the same moment, be grantor and grantee. So, they say, the deed conveyed nothing to J. E. Smith. They say that Emma Smith, the other named grantee, could take only an undivided half interest. Hence, they say, the deed constituted J. E. Smith and Emma Smith tenants in common and upon the death of J. E. Smith, his half descended to plaintiffs, his heirs at law.

The assertion that one cannot be grantor and grantee at the same instant is logical and a correct statement of law. *Pearson, J.*, expressed it thus: "Property must at all times have an owner. One person cannot part with the ownership unless there be another person to take it from him. There must be a 'grantor and a grantee and a thing granted.'" *Dupree v. Dupree,* 45 N.C. 164.

Appellants assume the very question at issue. They assume that a conveyance to "J. E. Smith and wife, Emma Smith," is a conveyance to two separate and distinct individuals. Their assumption does not

accord with the theory on which the estate by entireties originated and which is recognized by us.

That husband and wife constitute a legal entity separate and distinct from the component parts of the marital status was recognized as early as the Fourteenth Century. It was so declared by this Court as early as 1837. *Motley v. Whitemore,* 19 N.C. 537.

The necessity of the unity of person, that is, a separate entity, to create an estate by the entirety has been declared on many occasions by this Court.

The following quotations illustrate the uniform holdings of this Court:

"The idea that husband and wife are one, or, as generally expressed, of the unity of person, does not have its origin in the common law. It dates from the Garden of Eden when it was declared 'they shall be one flesh' (Gen., 2:14), and it has been reaffirmed and preserved in the Gospels and the Epistles. 'Wherefore they are no more twain, but one flesh.' (Mat., 19:5); 'They twain shall be one flesh' (Mark, 10:18); 'They too shall be one flesh.' (Eph., 5:31).

"It is on the doctrine of Unity of Person that estates by entireties, with the right of survivorship, rest." *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486.

"The estate was predicated upon the fact that in law the husband and wife, though twain, are regarded as one—there being, in other words, a unity of person, which has been called the fifth unity of this estate, the others being of time, title, interest, and possession, which also belonged to an estate by joint tenancy." *Moore v. Trust Co.,* 178 N.C. 118, 100 S.E. 269.

"This tenancy by the entirety is *sui generis,* and arises from the singularity of relationship between husband and wife. In order to comprehend its peculiar properties and incidents, the one fact which must be constantly borne in mind is that the estate may be taken and held only by husband and wife in their capacity as such, and not otherwise, though it is not necessary that they be so described. 13 R.C.L. 1180. As between them, there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole and every part and parcel thereof. *Ketchum v. Walsworth,* 5 Wis., p. 102. It may be taken under execution against one of the parties only when the legal personage of 'husband and wife' has been reduced to an individuality identical with the natural person of the survivor." *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490.

"Tenancy by entireties, or by the entirety, is the tenancy by which husband and wife at common law hold land conveyed or devised to

them by a single instrument, which does not require them to hold it by another character of tenancy. Littleton, sec. 291; Tiffany, Real Property, sec. 194. The husband and wife take the whole estate as one person. Each has the whole; neither has a separate estate or interest. . . ." *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484.

"Estates by the entireties are creatures of the common law created by legal fiction and based wholly on the common-law doctrine that husband and wife are one, and, therefore there is but one estate, and in contemplation of law, but one person owning the whole. . . . By reason of their legal unity by marriage, the husband and wife together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. Upon the death of one the entire estate and interest belongs to the other, not by virtue of survivorship, but by virtue of the title that vested under the original limitation." Thompson on Real Property, sec. 1803.

The New York Court said:

"It (estate by entireties) originated in the marital relation, and, although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. . . . At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole, and not of any undivided portion. They were thus seised of the whole because they were legally but one person." *Steltz v. Shreck,* 28 N.E. 510.

Death creates no new estate in the survivor. The survivor takes by virtue of the original conveyance. *Spruill v. Mfg. Co.,* 130 N.C. 42; *Underwood v. Ward,* 239 N.C. 513, 80 S.E. 2d 267.

Presumably appellants would concede that J. E. Smith, the grantor, could convey to a corporation whose only stockholders were the grantor, J. E. Smith, and his wife, Emma Smith. That would be true because a corporation is a different entity, a different person from J. E. Smith, the grantor.

The husband may have property conveyed to a trustee for the husband and his wife. Such conveyance forthwith creates a tenancy by entirety. *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518.

A conveyance by one spouse to the other followed by a conveyance by both to a trustee for the husband and wife has been held by us to create an estate by the entireties, the trust being passive, is immediately executed by the statute. *Harris v. Distributing Co.,* 172 N.C. 14, 89 S.E. 789.

If husband and wife are in law one person, that is, an entity separate from the individuals as the cases declare, the foundation on which appellants build their case falls, and their assertion of ownership must fall with it.

Appellants claim Blackstone supports their position. Blackstone says: "The *properties* of a joint-estate are derived from its unity, which is fourfold; the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession;* or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."

Appellants insist that these unities cannot exist here because J. E. Smith and Emma Smith take at different times, J. E. Smith, by virtue of the original conveyance; Emma Smith, by virtue of the conveyance to her. That is simply another way of saying that the grantee, "J. E. Smith and wife, Emma Smith," take, if at all, as separate individuals and not as a single unity. Blackstone clearly differentiates between a joint tenancy and an estate by the entireties. He says: "Joint-tenants are said to be seised *per my et per tout,* by the *half* or *moiety,* and by *all;* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole.* They have not, one of them, a seisin of one half or moiety, and the other of the other moiety; neither can he be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety." He there points to the distinction between joint tenants and tenants in common. He immediately follows it by saying: "And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: *for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, per tout, et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." (Emphasis supplied.)

A joint tenancy may be terminated by sale by one of the joint tenants or by sale under execution against one of the joint tenants. An estate by the entirety cannot be so terminated.

Survivorship in joint tenancy was abolished by statute in this State in 1784. G.S. 41-2. But this statute did not affect estates by the entirety. *Motley v. Whitemore, supra.*

The late *Chief Justice Clark,* on two occasions, said: "though it has often been recommended to the Legislature the abolition of this anomaly, it has not been done." *Moore v. Trust Co., supra; Freeman v. Belfer, supra.*

The Legislature, notwithstanding the suggestion made by the late *Chief Justice,* has not abolished estates by the entirety but has enacted legislation by which a sale of the estate may be made if one of the tenants is insane. G.S. 35-14.

No sound reason has been suggested why the right to create these estates should be limited or discouraged.

Courts in our sister states are not in accord on the question of whether an estate by entirety may be created by direct conveyance from a husband to a husband and wife. The varying decisions are assembled and analyzed in 44 A.L.R. 2d 587. To properly evaluate the cases in the different states one must consider the statutes of those states and the fact that in some states the estate by the entireties is not recognized. Some of the decisions holding that such an estate may not be created by direct conveyance proceed upon the theory joint tenancy is attempted. In joint tenancy, as previously noted, the tenants are not a unity. Hence where one undertakes to convey to himself and another as joint tenants, he is conveying to two distinct individuals and the conveyance to himself fails. This is the reasoning of the Michigan Court, *Pegg v. Pegg,* 130 N.W. 617; *Wright v. Knapp,* 150 N.W. 315. Notwithstanding this holding, the Michigan Court recognized that a spouse may create an estate by the entirety with respect to property owned by him by conveying to a straw man. It is said in *Howell v. Wieas,* 205 N.W. 55: "We have said that where a husband holds the record title to real estate and desires to create an estate by the entirety, the proper course to be pursued is to deed to a third party, who in turn deeds to the husband and wife. The reason for requiring a deed to a third party is that the husband must divest himself of the legal title so there may be created in him and his wife that unity of title and interest necessary in an estate by the entireties."

Appellants urge in support of their position *Deslauriers v. Senesac* (Ill.) 62 A.L.R. 511. There Ida Deslauriers, the owner of a lot, with the joinder of her husband undertook to convey the lot to her husband and herself. The deed stated: "Said grantors intend and declare that their title shall and does hereby pass to grantee not in tenancy in common but in joint tenancy."

The Court concluded that the deed was ineffectual to create a joint tenancy. The Court said: "Ida Deslauriers was the sole owner of the half lot prior to the execution of the deed from herself and husband to themselves. She could not by that deed convey an interest in the property to herself. It is manifest from the deed that she did not intend to convey the whole and entire interest to her husband, for she retained an equal share or interest. Hence the interest of Ida Deslauriers and her husband were neither acquired by one and the same conveyance, nor did they vest at one and the same time."

Illinois does not recognize estates by the entireties. Hence that court, in reaching its conclusion, gave no consideration to the legal fiction of unity of person on which estates by the entirety are founded and to which we adhere.

Apparently a majority of the courts recognizing estates by the entirety and called upon to consider the question have declared a conveyance by husband to husband and wife valid. The reasons assigned accord with the conclusions reached by us, *viz.*, the unity of husband and wife suffices to effectuate the express and declared intention of the grantor.

To hold that the deed under consideration created a tenancy in common between J. E. Smith and his wife would do violence to the declared intent of the grantor: (1) it would permit immediate partition at the instance of either cotenant; (2) it would permit either cotenant to sell his or her moiety; (3) it would deprive the husband of the usufruct during his lifetime; (4) it would permit the wife to devise her moiety, thus depriving the husband and grantor of his right of survivorship; (5) upon the death of the wife intestate her moiety would descend to her heirs, defeating the right of survivorship; (6) a half could be sold under execution issuing on a judgment rendered against either cotenant and for which the other was not liable. None of these results would be permitted if the deed created an estate by the entireties.

To hold that the deed created a tenancy in common would not be a construction of the deed. It would be a creation by the courts of a new and entirely different deed from the one the grantor signed. It would create an estate we have no right to think the grantor ever contemplated.

It is unnecessary to consider the question of estoppel.

The judgment is

Affirmed.

JOHNSON, J., not sitting.

HERBERT J. FOX AND WIFE, FRANCES HILL FOX, HOWARD W. GAMBLE AND WIFE, PAUL D. GAMBLE, ISAAC H. TERRY, JR., J. M. HAGY, JOHN B. NICHOLS AND JULE S. COLEY, FOR AND ON BEHALF OF THEMSELVES AND OTHER RESIDENTS AND TAXPAYERS OF DURHAM COUNTY, v. THE BOARD OF COMMISSIONERS FOR THE COUNTY OF DURHAM, S. LEROY PROCTOR, GEORGE F. KIRKLAND, EDWIN B. CLEMENTS, FRANK H. KENAN AND DEWEY S. SCARBORO.

(Filed 26 September, 1956.)

1. Appeal and Error §§ 1, 6: Constitutional Law § 6½—Constitutionality of statute will not be determined unless question is presently presented to protect constitutional rights.

Plaintiffs attacked the constitutionality of a statute conferring authority upon a county to adopt a comprehensive zoning ordinance, and the zoning ordinance enacted pursuant thereto, in their entirety, but did not allege that any plaintiff owned any property affected by the ordinance or that demand had been made upon any of them for the payment of fees of any kind in connection with the enforcement of the ordinance. *Held:* The courts will decide the constitutionality of a statute only when presently presented and the determination thereof is necessary in order to protect rights guaranteed by the Constitution, and therefore the action should have been dismissed as presenting an abstract question to obtain an adjudication in the nature of an advisory opinion.

2. Injunctions § 4g—

When public officials act in accordance with and under color of an act of the General Assembly, the constitutionality of such statute may not be tested in an action to enjoin enforcement thereof unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury.

3. Same—

Residents and taxpayers of a county may not, solely on the basis of such *status*, restrain a county and its officials from appropriating and expending funds in implementing a zoning ordinance authorized by act of the General Assembly, since the constitutionality of the statute and ordinance may not be tested by injunction, and plaintiffs would have an adequate remedy at law if an unauthorized or illegal tax should be levied against any of them. G.S. 105-406.

4. Statutes § 6—

A statute or an ordinance may be valid in part and invalid in part, and therefore a party should not be allowed to challenge the constitutionality of an entire statute and ordinance in bulk, but should be required to present only those particular provisions which they contend impinge in some way their constitutional rights.

JOHNSON, J., not sitting.

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

FOX *v.* COMMISSIONERS OF DURHAM.

APPEAL by plaintiffs from *Mallard, J.*, March Term, 1956, of DURHAM.

The named plaintiffs, residents of six different townships of Durham County, bring this action as such residents and as taxpayers of Durham County, against the Board of County Commissioners and the members of said board, defendants herein.

Plaintiffs seek to restrain defendants from exercising any authority purportedly conferred upon them by Chapter 1043, Session Laws of 1949: specifically, (1) to restrain defendants from appropriating and paying tax funds to employees or members of the Durham County Zoning Commission, the Durham County Board of Adjustment, or other employees of Durham County acting under said statute or the zoning ordinance adopted by defendants; (2) to restrain defendants from appropriating and paying tax funds for compiling information, printing or other matters affecting or relating to "any zoning ordinance" adopted by defendants; and (3) to restrain defendants from collecting fees "as alleged in Section 25, paragraph 4, entitled 'General Requirements, the Committee of Durham Zoning Ordinance.' "

The said statute applies only to Durham County. Plaintiffs attack said Durham County Act as unconstitutional on two grounds, viz.: 1. It is alleged to be a local act in violation of Article II, Sec. 29, Constitution of North Carolina. 2. It is alleged to be a delegation of legislative power in violation of Article VII, Sec. 2, Constitution of North Carolina.

Exercising the authority purportedly conferred by said Act, defendants adopted a comprehensive zoning ordinance, applicable to all of Durham County not within the corporate limits of a city or town. The ordinance defined in detail the permissible uses of property within each of eighteen types or classes of districts. A map identified the boundaries of various districts and indicated the classification of each. Certain districts were designated on the map as RD—"Rural District." As to land within a Rural District, the ordinance provided that "All realty, and all buildings and structures whatsoever, being or to be used for agricultural, farming, livestock or poultry operations, and all forestry land shall be exempt from each and every provision of this ordinance." The ordinance definition of "agricultural or farming purposes" is quoted in the judgment of the court below.

Defendants appointed a Zoning Commission in accordance with the Act. Upon enactment of the ordinance, defendants appointed a Board of Adjustment as provided in the Act and as provided in the ordinance.

In addition to attacking the Act as unconstitutional, plaintiffs alleged that the ordinance is invalid for that, in violation of the terms of the Act, it attempts to regulate land in use "for farming or agricultural operations or the keeping of livestock."

Answering, defendants alleged the validity of the Act and of the ordinance, the appointment of the Zoning Commission, the Board of Adjustment, etc., and admitted they were spending county tax funds to implement and enforce the ordinance and would continue to do so unless restrained. The court below, on return of a notice to show cause, had before it the pleadings, the Act, the ordinance and the zoning map. The judgment entered was as follows:

"It is CONSIDERED, ORDERED, ADJUDGED AND DECREED that Chapter 1043 of the 1949 Session Laws is constitutional and does not amount to an unlawful and unconstitutional delegation of legislative powers and that the Board of Commissioners of the County of Durham, the defendant herein, has not delegated to the Durham County Board of Adjustment and Durham County Zoning Commission any authority or power in contradiction of Chapter 1043 of the 1949 Session Laws.

"It is further held that the Zoning Ordinances introduced herein are valid and proper ordinances except that portion of Section III of the Zoning Ordinance which is the subject of the controversy in this matter, is void in that part thereof reading:

> 'Agricultural or farming purposes shall be realty, buildings or other structures which fall into any one of the following classifications:
>
> '(a) Any area of realty which is comprised of forty (40) acres or more.
>
> '(b) Any area smaller than forty (40) acres which yields an annual gross income of $500.00 or more from any agricultural, farming, livestock or poultry operation, exclusive of home gardens.'

"It is further found as a fact and adjudged that the Zoning Ordinance and the Boards and Commissioners created thereunder are for a public purpose, and the Board of County Commissioners are authorized to appropriate funds derived from sources other than *ad valorem* taxes for the enforcement of said ordinance but they are restrained from expending *ad valorem* taxes for the enforcement thereof.

"IT IS ORDERED that the costs of this action be taxed against the plaintiff."

Plaintiffs excepted and appealed, assigning errors.

E. C. Brooks, Jr., and Gantt, Gantt & Markham for plaintiffs, appellants.

Reade, Fuller, Newsom & Graham for defendants, appellees.

BOBBITT, J. The court below adjudged: (1) that the Act is constitutional and valid in its entirety; and (2) that the zoning ordinance is in

all respects valid except as to the quoted definition of "agricultural and farming purposes." The questions stated and argued in appellants' brief relate solely to the constitutionality of the Act.

True, the quoted portion of the zoning ordinance adjudged void by the court below was challenged as violative of the Act itself. But it was not alleged or shown that any plaintiff owns realty constituting farm land either subject to or exempt from the provisions of the ordinance. Indeed, it is not alleged or shown that any plaintiff owns any property of any kind presently restricted by the ordinance. Plaintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion. *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918; *Hood, Comr. of Banks, v. Realty, Inc.,* 211 N.C. 582, 591, 191 S.E. 410.

Plaintiffs alleged that they will suffer irreparable injury unless defendants are restrained from using county tax funds to implement the Act and the ordinance. This is based solely on their status as residents and taxpayers of Durham County. Should an unauthorized or illegal tax be levied against any of the plaintiffs, an adequate remedy at law is available. G.S. 105-406; *Development Co. v. Braxton, supra; Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453.

In 28 Am. Jur., Injunctions sec. 182, the general rule is stated as follows: "The usual ground for asking injunctive relief against the enforcement of statutes is their invalidity, but that, of itself, is not sufficient to warrant the exercise by equity of its extraordinary injunctive power. In other words, the mere fact that a statute is alleged to be unconstitutional or invalid will not entitle a party to have its enforcement enjoined. Further circumstances must appear bringing the case under some recognized head of equity jurisdiction and presenting some actual or threatened and irreparable injury to complainant's rights for which there is no adequate legal remedy. If it is apparent that the law can furnish all the relief to which the complainant is entitled, the injunction will be refused."

When public officials act in accordance with and under color of an act of the General Assembly, the constitutionality of such statute may not be tested in an action to enjoin enforcement thereof unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury. *Newman v. Comrs. of Vance, supra,* and cases cited; *Hood, Comr. of Banks, v. Realty, Inc., supra;* also, see *Amick v. Lancaster,* 228 N.C. 157, 44 S.E. 2d 733. The rule as stated was fully recognized, not impaired, in *Summrell v. Racing Asso.,* 239 N.C. 591, 80 S.E. 2d 638, and in *Taylor v. Racing Asso.,* 241 N.C. 80, 84 S.E. 2d 390. It has been frequently pointed out that "the courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to

do so in order to protect rights guaranteed by the Constitution." *Turner v. Reidsville,* 224 N.C. 42, 46, 29 S.E. 2d 211; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22. The rule is epitomized in this succinct statement of *Adams, J.:* "A party who is not personally injured by a statute is not permitted to assail its validity; . . ." *Yarborough v. Park Commission,* 196 N.C. 284, 288, 145 S.E. 563.

"A statute may be valid in part and invalid in part." 82 C.J.S., Statutes sec. 92; *Constantian v. Anson County,* 244 N.C. 221, 228, 93 S.E. 2d 163, and cases cited. This applies equally to an ordinance. *Connor, J.,* reminds us that confusion is caused "by speaking of an act as unconstitutional in a general sense." *St. George v. Hardie,* 147 N.C. 88, 97, 60 S.E. 920. Yet plaintiffs, notwithstanding their failure to allege or show that any provision of the Act or of the ordinance impinges on them in any way, undertake to have the court consider both the Act and the ordinance in bulk and pass on the constitutionality of the numerous provisions contained therein.

The validity of the ordinance, apart from separable details, depends on the constitutionality of the Act. In due course, this Court will decide whether the Act, or a similar act, is constitutional, in whole or in part; but not now on this record. The constitutionality of specific provisions of the Act and of the ordinance must be considered in relation to whether the impact made by enforcement thereof on persons challenging the Act and ordinance will result in an invasion or denial of their specific personal or property rights under the Constitution. Plaintiffs do not allege or show that the enforcement of any specific provisions of the Act or ordinance has made or will make such impact on them.

It is noted that plaintiffs do not allege or show that demand has been made on them for the payment of fees of any kind in connection with the enforcement of the ordinance. Indeed, in the mimeographed copy of the ordinance filed in this Court, it appears that the provisions as to fees, originally appearing in Section XXV, paragraph 4, have been stricken therefrom. Too, it appears that the provision as to penalties for violation of the ordinance, originally appearing in Section XXXVI, has been stricken therefrom.

Consideration of the cases cited in appellants' brief wherein the constitutionality of a statute was successfully challenged reveals that the constitutional question was properly presented by a person directly and personally affected thereby.

Our conclusion is that the court below was in error in undertaking to rule on the constitutionality of the Act and on the validity of the provisions of the ordinance. Hence, the judgment is vacated and the cause remanded with direction that the action be dismissed, plaintiffs' allegations being insufficient to entitle them to injunctive relief.

Judgment vacated and cause remanded.

JOHNSON, J., not sitting.

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

EDNA M. SCARBOROUGH v. WORLD INSURANCE COMPANY.

(Filed 26 September, 1956.)

1. Insurance § 38—

Death of insured resulting directly from insured's voluntary act and aggressive misconduct, or from an act culpably provoked by insured, ordinarily is not death by "accidental means" within the coverage of a policy of insurance, even though the result may be such as to constitute accidental death. The distinction between "accidental" death and death by "accidental means" pointed out.

2. Same—

Evidence tending to show that insured was the aggressor and demonstrated an attempt to do violence to the person of the witness, causing the witness to push him away to protect himself and home, that insured fell back and struck his head against a water meter, causing death, does not disclose death from bodily injury sustained through purely accidental means within the coverage of the insurance policy sued on, and nonsuit should have been entered.

JOHNSON, J., not sitting.

APPEAL by defendant from *Phillips, J.*, January Term, 1956, of DARE.

This was an action to recover on an accident insurance policy issued to Adrian C. Midgett. It was alleged that the death of the insured resulted from an accident within the terms of the policy.

It was admitted that the defendant issued its policy whereby it insured Adrian C. Midgett against loss of life "resulting directly and independently of all other causes from bodily injuries sustained during any term of this policy through purely accidental means."

The defendant also admitted the death of Adrian C. Midgett while the policy was in force and that plaintiff was the beneficiary named therein, but it alleged that the death of the insured resulted from an altercation with one Herman Lee Baldwin and was the result of his own aggression and hence did not result directly and independently of all other causes through purely accidental means. It was admitted that in the course of the altercation brought on by the wrongful conduct of the insured he was pushed back by Herman Lee Baldwin in the manner

and under the circumstances set forth in the deposition of Baldwin and that Midgett's head came in contact with a water meter, resulting in injuries from which he died ten days thereafter.

The only evidence offered by plaintiff, or in the trial, tending to show the circumstances under which the insured sustained the injury resulting in his death was the deposition of Herman Lee Baldwin. This witness testified as follows:

"I was sitting on the steps of the porch of my house, No. 721 Southampton Avenue in Norfolk, Va. It is on the south side of the street. There are four steps from the porch of my house to the sidewalk, five including the last one. The sidewalk in front of my house is not paved; it is dirt; on that sidewalk there is a metal water meter or cap; it is pretty good size, about the size of that wastepaper basket or a little larger; about six inches across; it was protruding above the ground and it was near the curb; the street itself was paved.

"On this Sunday morning I saw Mr. Adrian C. Midgett while I was sitting on the porch. I didn't know him at that time and had never seen him as I recall. I was sitting on the porch when he came up. He stopped in front of my house. Mr. Midgett came up and walked up to me and said, 'Can I speak to you?' I said, 'Yes, what is it?' I was sitting there with my hand on my jaw like this (indicating), and he said, 'Where can I get a woman and some whiskey?' He came from the direction of Colley Avenue. I pointed and said, 'Go back to the corner and turn to your right and you will probably find what you want up there.' I said, 'There is nobody living through here but colored people and I don't know anything about anything like that.' . . . He insisted I knew. I told him, 'I am sorry, fellow, but you have got the wrong fellow. I don't know anything about anything like that.' I said, 'You wouldn't like it if a colored man come in a white section and asked you for a woman and whiskey.' . . . I said, 'White people live up there and colored people live in this section. You are in the wrong place.' From there he started cursing me, got vicious, and called me s.o.b.'s and started towards me. . . . He got up at least three steps. By my sitting down and him rushing to me I didn't know what he would do. When I got up he was in reach of me. The porch is narrow. It is a two-story apartment. The steps is wide because one section of steps goes downstairs and the other section goes upstairs. I was sitting up against the bannister on my side of the porch where I live. He came within reach of me. I really was in fear of bodily harm. He was still advancing on me. The door of my house was immediately back of me and was locked because when I come out and pulled the door to it automatically locks. When I stood up he was still advancing on me. That is the reason I stood up. When he got almost to me I just pushed him away from me. He was still advancing when I pushed him. I shoved him

back. He was on the steps and he fell backwards. . . . After I shoved him I got up and . . . went into the house. I just pushed him away from me and he had to go back because he was facing me. If a man is vicious enough to come on you like that you don't know what he is going to do so I knocked on the door and went upstairs. I didn't look back but I know he fell. He had to go backwards because he was coming towards me. He weighed over 200 pounds, was a settled man, I would call him, may have been in his early 40's or late 40's. He looked strong all right. That is why I was in a hurry to get away from him. He was larger than I am . . . When I shoved him back I was not doing anything other than to protect myself and my home. I had not said anything to him to provoke a fuss, nothing at all. I didn't curse him. That is one thing I don't do."

The witness Baldwin further testified: "Evidently he (the insured) was infuriated because he cursed me the way he did. . . . He didn't have his hands down to his side as he came towards me. He came as if he was going to grab me. He had his hands in front of him. . . . I don't know whether he was drinking or not. As he approached me I became scared he might strike me or inflict some bodily harm upon me. Because of that fear I pushed him back. . . . When he started up the steps he started cursing and continued cursing and he came up with his hands raised. . . . I went to Police Headquarters. I told them what had happened and I was acquitted."

The court overruled defendant's motion for judgment of nonsuit.

Upon issues submitted the jury returned verdict in favor of the plaintiff, and from judgment in accord therewith, the defendant appealed.

Wallace R. Gray and McCown & McCown for plaintiff, appellee.

Jack W. Marer, R. C. Andrews, and Worth & Horner for defendant, appellant.

DEVIN, J. The policy issued to Adrian C. Midgett by the defendant insured against loss of life resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means. It was not controverted that the death of the insured resulted from an altercation with the witness Baldwin. From the testimony of this witness, who was the sole witness to the occurrence offered by the plaintiff, the conclusion seems inescapable that the insured was the aggressor; that he used the language of vituperation and fury and demonstrated an attempt to do violence to the person of the witness; that he advanced with arms raised up the steps of Baldwin's home in such a manner as to put Baldwin in fear, so much so that Baldwin was caused to push him away to protect himself and his home, and then to retreat within doors.

The policy sued on insured against loss of life resulting from bodily injuries sustained through accidental means. In *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687, *Barnhill, J.*, drew the distinction between "accidental" and "accidental means" as these terms are used in accident insurance policies, and pointed out that the phrase "accidental means" refers to the occurrence or happening which produces the result rather than the result. *Scott v. Ins. Co.*, 208 N.C. 160, 179 S.E. 434; *Kirkley v. Ins. Co.*, 232 N.C. 292, 59 S.E. 2d 629; *Ocean Accident & Guarantee Corp. v. Glenn*, 165 Va. 283, 182 S.E. 221. See also Michie's Jurisprudence, Law of Virginia, Insurance Sec. 128; Vance on Insurance, 569.

Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury. 45 C.J.S. 779.

Where the insured is the aggressor in a personal encounter and commits an assault upon another with demonstration of violence and knows, or under the circumstances should reasonably anticipate, that he will be in danger of great bodily harm as the natural and probable consequence of his act or course of conduct, his injury or death may not be regarded as caused by accidental means. 45 C.J.S. 827.

Where the death of the insured results from an aggressive assault upon another, whether the loss is covered by the terms of the policy insuring against death through accidental means depends on whether the death was the natural and probable consequence of the insured's aggression, and what is the natural and probable consequence thereof depends on the character of the aggression and the circumstances attending. *Podesta v. Metropolitan Life Ins. Co.*, 150 S.W. 2d 596.

It was said by *Hoke, J.*, in *Clay v. Ins. Co.*, 174 N.C. 642, 94 S.E. 289, that "the true test of liability in cases of that character is whether the insured, being in the wrong, was the aggressor under circumstances that would render a homicide likely as result of his own misconduct." In that case the insured was killed by a pistol shot while engaged in an affray with another.

In *Ins. Co. v. Ryder*, 166 Va. 446, 185 S.E. 894, it was said: "One who assaults another or voluntarily enters into an affray and is hurt has not suffered an accident."

Applying these principles of law to the uncontradicted evidence in this case, we conclude that the death of the insured Adrian C. Midgett did not result from bodily injuries sustained through purely accidental means, and hence was not covered by the policy of insurance sued on.

We have considered the authorities cited by counsel for the appellee in their brief and the arguments they advance that the death of the insured in the manner described by the witness was not the natural and probable consequence of the conduct of the insured, but we think the character and the extent of the insured's aggression under the circumstances herein fully set out are such as to exclude the concept of death by accidental means within the meaning of the policy.

The defendant's motion for judgment of nonsuit, aptly interposed, should have been allowed.

The judgment of the Superior Court is

Reversed.

JOHNSON, J., not sitting.

STATE v. JAMES GORDON HAIRR.

(Filed 26 September, 1956.)

1. Automobiles § 72—

Evidence *held* sufficient to carry the case to the jury on the charge of driving an automobile upon the highways within the State while under the influence of intoxicating liquor. G.S. 20-138.

2. Criminal Law § 79—

An exception not assigned as error and set out in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Automobiles § 72—

Before the State is entitled to a conviction under G.S. 20-138, it must show beyond a reasonable doubt both that defendant was driving a vehicle upon the highways of the State and also that at the time of driving he was under the influence of intoxicating liquor or narcotic drugs.

4. Criminal Law § 53a—

The judge must charge the essential elements of the offense.

5. Criminal Law § 81c(2)—

It is prejudicial error for the court, in undertaking to define the law, to state it incorrectly.

6. Automobiles § 74—Charge held for error in failing to submit an essential element of the offense to the jury.

Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about mid-afternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted

that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact.

7. Automobiles § 66: Criminal Law § 27—

It is a matter of common knowledge that a person does not become drunk or materially under the influence of intoxicating liquor immediately after drinking an immoderate quantity of it.

8. Automobiles § 66—

A person is intoxicated within the purview of G.S. 20-138 when he has drunk a sufficient quantity of intoxicating liquor to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties, and not such as to affect them however slightly.

9. Criminal Law § 81c(2)—

Where the charge contains an incorrect instruction on a material aspect of the case, such error cannot be held harmless because in another part of the charge the court gives a correct instruction thereon, since the jury may have acted upon the incorrect portion.

JOHNSON, J., not sitting.

BOBBITT, J., concurring in result.

APPEAL by defendant from *Bundy, J.*, April-May Criminal Term 1956 of SAMPSON.

Criminal prosecution upon a bill of indictment charging the defendant in the first count with driving an automobile upon the highways within the State, while under the influence of intoxicating liquor in violation of G.S. 20-138; in the second count with the reckless driving of an automobile in violation of G.S. 20-140; and in the third count with failing to stop in the event of an accident resulting in damage to property in violation of G.S. 20-166(b) and (c).

Plea: Not Guilty. At the close of the State's evidence the court, upon motion of the defendant, nonsuited the State as to the second and third counts in the bill of indictment, and overruled the motion as to the first count in the bill of indictment. The jury convicted the defendant on the charge in the first count in the bill of indictment.

From judgment of imprisonment the defendant appeals.

George B. Patton, Attorney General, and Claude L. Love, Assistant Attorney General, for the State.

Roland C. Braswell and Calvin B. Bryant for Defendant, Appellant.

PARKER, J. The State's evidence tended to show these facts: About 6:30 p.m. on 19 November 1955 Edward William Gray was driving his automobile on the highway from the town of Faison to the town of Clinton. He met an automobile going back and forth across the road. He reduced his speed, and was proceeding with his right wheels on the shoulder of the road. The approaching automobile sideswiped his automobile, and kept travelling in the direction of Faison. Gray's car stopped in the ditch. Five or ten minutes later an automobile with the left front damaged driven by the defendant came from the direction of Faison and stopped at the scene. The defendant and a passenger in the car got out. The defendant was intoxicated. The defendant asked if he could help him get out of the ditch. Gray asked defendant if he was the man who ran into him. Defendant did not answer, but got in his car and drove it off on the highway in the direction of Clinton. Gray saw the defendant later that night in jail at Clinton. The defendant was highly intoxicated. Shortly after 6:30 p.m. this night D. W. Williams, a State patrolman, went to the scene of the collision. About 30 minutes later the patrolman went to the defendant's home. He was lying in the living room very drunk. He said he had been in a wreck, but someone else was driving.

Defendant's evidence presented these facts: His wife testified that he was brought home "passed out" by William Byrd and June Pope in the back seat of an automobile. This is defendant's testimony: On 19 November 1955 he stopped work as a mechanic about 1:00 p.m.; a man asked him to fix his truck out on the Wilmington Road; they went out there and the man had wine and whiskey mixed and he drank too much of it. This man brought him back after his truck was fixed. He was drunk on this evening, and got that way about 4:30 p.m. Later William Byrd took his car with him in it and drove out into the country. That he went to sleep, and does not remember anything until he waked up in jail. That he does not remember a wreck. On cross-examination defendant said: "I couldn't have been driving because I was passed out."

There is plenary evidence to carry the case to the jury on the first count in the bill of indictment. Defendant's exception to the refusal of the court to allow his motion for nonsuit as to the first count in the bill of indictment is not assigned as error, and such exception is not set out in his brief. It is taken as abandoned. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544.

Defendant assigns as error this part of the charge in parenthesis: "(However, the thing here is, whether or not the defendant was driving this car. He admits that he was drunk; He admits that he was under the influence of intoxicants, what you are to be concerned with is whether or not the State has proved by evidence beyond a reasonable

doubt that he was driving his car, not necessarily at the time of the collision; it can be at that time) or it can be at the time that he came back there or any other time on the afternoon, any other time on the night in question."

Defendant also assigns as error the conclusion of the judge's charge which reads as follows: "One may not—well, that isn't necessary here because the defendant admits he was under the influence of intoxicants. The question before you is to say whether or not the defendant is guilty or not guilty, to find whether or not the defendant drove the automobile at any time on this late afternoon and night in question, for it is established and admitted by him that he was under the influence of intoxicants and if you find that he drove a car at any time after he drank that combination of whiskey and wine on the highway on that late afternoon and night, it would be your duty to return a verdict of guilty."

There are two essential elements of the offense condemned by G.S. 20-138: one, the driving of a vehicle upon the highways of the State, and two, when under the influence of intoxicating liquor or narcotic drugs. Before the State is entitled to a conviction under this statute, it must show beyond a reasonable doubt from the evidence that the defendant is guilty of both the essential elements of the offense. *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

The judge must charge the essential elements of the offense. *S. v. Gilbert,* 230 N.C. 64, 51 S.E. 2d 887; *S. v. Rawls,* 202 N.C. 397, 162 S.E. 899; *S. v. Eunice,* 194 N.C. 409, 139 S.E. 774; *S. v. McDonald,* 133 N.C. 680, 45 S.E. 582.

When a judge undertakes to define the law, he must state it correctly, and if he does not, it is prejudicial error sufficient to warrant a new trial. *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313; *Jones v. Bland,* 182 N.C. 70, 108 S.E. 344; *Roberson v. Stokes,* 181 N.C. 59, 106 S.E. 151; *S. v. Wolf,* 122 N.C. 1079, 29 S.E. 841.

The statements of the court to which exceptions are entered to the effect that the jury was only concerned with whether or not the State had proved beyond a reasonable doubt from the evidence that the defendant drove his car at any time on the afternoon and night in question, because he admitted he was drunk, constitute inadvertent but unequivocal expressions of opinion by the court that an essential element of the crime charged had been fully or sufficiently proven, which is a clear violation of G.S. 1-180. These statements cannot be considered as instructions upon uncontradicted evidence that, if the jury finds the facts to be as all the testimony tends to show, it should find the defendant was under the influence of intoxicating liquor at any time on the afternoon or night in question, for the reason that the evidence does not show such fact. The defendant testifying in his own behalf stated

that he was drunk on the day in question from about 4:30 p.m. until after he was jailed. He testified that he drank too much wine and whiskey mixed, when he went to fix the truck on the Wilmington highway, but he did not state the time when he went to the truck, or when the mixed wine and whiskey made him drunk, except that he got drunk about 4:30 p.m. So far as his testimony is concerned he had drunk no intoxicating liquor that day until he drank this wine and whiskey. The State's evidence contains no reference to the defendant's condition until about 6:30 p.m. on this day.

The defendant testified: "A man asked me to fix his truck out on the Wilmington road. We went out, and he had wine and whiskey mixed and I drank too much of it. He brought me back after his truck was fixed, and put me off." The jury may have found that defendant drove a car to the truck, and if they did, under the charge of the judge it was not necessary for them to consider if at the time of such driving the defendant was under the influence of intoxicating liquor, because he admitted he was drunk. There is no evidence that the defendant admitted he was drunk at that time. A contextual reading of the charge clearly shows the prejudicial error of the judge's statement that an essential element of the offense had been fully or sufficiently proven by the admission of the defendant, when there is no evidence of so broad and comprehensive an admission by the defendant.

The Attorney General with his usual frankness admits that the above portions of the charge are not strictly accurate, but contends that, when the charge is read contextually, it is thought no prejudicial error appears.

The harmful effect of the judge failing to charge the jury on both essential elements of the offense charged appears in this part of the charge assigned as error: "Now, the State, on the other hand, contends that you should find the defendant guilty for that he was guilty, for that if upon nothing else, he drove the car back to Clinton after he had consumed this mixture of wine and whiskey out on the highway and if he found himself under the influence of intoxicants upon returning to Clinton, that he theretofore had driven the car; and that he doesn't say whether or not thereafter he drove the car."

It is a matter of common knowledge that a person does not become drunk or materially under the influence of intoxicating liquor immediately after drinking an immoderate quantity of it. Slightly under the influence of intoxicating liquor precedes the grosser forms of intoxication. It is not sufficient for a conviction under G.S. 20-138 for the State to show that a defendant drove an automobile upon a highway within the State when he has drunk a sufficient quantity of intoxicating liquor to affect however slightly his mental and physical faculties. The State must show that he has drunk a sufficient quantity of intoxicating

liquor "to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *S. v. Carroll, supra.*

Whatever the court may have said before or after in its charge does not cure the parts of the charge we have stated are errors. We have uniformly held that where the court charges correctly in one part of the charge, and incorrectly in another part, it necessitates a new trial, since the jury may have acted upon the incorrect part of the charge. *S. v. Stroupe, supra,* and cases cited.

For errors in the charge, it is ordered that there be a

New trial.

JOHNSON, J., not sitting.

BOBBITT, J., concurring in result: There are two grounds on which I think a new trial should be awarded, viz.:

1. Defendant made no judicial admission or stipulation. Only his testimony was before the court and jury. This was evidence, nothing more. The trial judge treated this testimony as a judicial admission, thereby removing from the jury's consideration and determination one of the essential elements of the offense. It seems unnecessary to determine the purport of defendant's testimony.

2. Defendant offered no character evidence. He testified, on cross-examination, that some four years back he had pleaded guilty to the charge of "drunken driving" and had been "to Mayor's Court for public drunkenness." The evidence was competent, by way of impeachment, as bearing on the credibility of defendant's testimony. This is an excerpt from the charge: "The State contends further, one contention the State makes that I call your attention to, that is, that the defendant by his own testimony is the kind of a man who would do this kind of a thing, for that about three or four years ago he was convicted of the same thing, and that therefore he is the kind of man who would commit the offense with which he is charged, and that according to his own testimony he has been convicted three or four times of being under the influence of intoxicants and is the kind of man who gets under the influence of intoxicants and is the kind of man who would drive a car under such condition because he has heretofore been convicted of the same thing." Although phrased as a contention, I think this instruction plainly indicated to the jury that evidence as to the defendant's prior offenses was substantive evidence bearing on his guilt or innocence in the case being tried.

M. L. PEEL v. MAURICE S. MOORE.

(Filed 26 September, 1956.)

1. Controversy Without Action § 1—

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250.

2. Judgments § 29—

A judgment cannot be binding upon persons who are strangers to the action and who are given no opportunity to be heard.

3. Appeal and Error § 55—Cause remanded for necessary parties.

It was stipulated that intestate left as his only next of kin first cousins of the blood of his mother and first cousins of the blood of his father. The controversy devolved upon whether all the first cousins of deceased inherited from him or whether only first cousins of the blood of his mother did so. Only one cousin on the side of his father and one cousin on the side of his mother were parties. *Held:* All the first cousins of the deceased are necessary parties to a complete determination of the action, and therefore the cause is remanded in order that all necessary parties join in the submission of the controversy, or if all of them cannot agree upon the facts, that a civil action be instituted to which all are made parties.

JOHNSON, J., not sitting.

APPEAL by defendant from *Paul, J.*, July Term 1956 of MARTIN.

Controversy without action to determine the sufficiency of a deed to convey title, submitted to the Court under G.S. 1-250, for its decision and judgment.

On 1 February 1914 Emma V. Stallings, a widow, died intestate seized and possessed of six tracts of land, and of a three-fifths undivided interest in a seventh tract of land known as the Ball Gray Farm containing about 1200 or 1500 acres—the acreage is stated both ways in the Record. W. Herbert Stallings and Alton Stallings were her only children and sole heirs at law.

In the Fall of 1914 W. Herbert Stallings executed and delivered a deed of trust, which was properly recorded, upon all the interests in the lands he had inherited from his mother to secure his note for $12,000.00 held by the Bank of Martin County. On 19 April 1916 this deed of trust was foreclosed, and a trustee's deed made to the Bank of Martin County conveying to it all W. Herbert Stallings' interests in the lands inherited by him from his mother: this included his three-tenths undivided interest in the Ball Gray Farm. The trustee's deed was properly recorded.

On 1 September 1915 Alton Stallings was duly adjudicated incompetent from want of understanding to manage his own affairs, and the Clerk of the Superior Court of Martin County appointed J. G. Godard

as guardian for him. On 18 May 1916 J. G. Godard, as guardian for him, instituted a special proceeding before the Clerk of the Superior Court by virtue of G.S. 33-31 requesting authority by petition properly verified to sell and convey by deed to the Bank of Martin County all the interests in the lands inherited by his ward from his mother except his three-tenths undivided interest in the Ball Gray Farm for and in exchange and in consideration of the Bank of Martin County executing and delivering to his ward, Alton Stallings, a deed for its three-tenths undivided interest in the Ball Gray Farm. On 20 May 1916 the Clerk of the Superior Court entered a decree that a sale and conveyance and exchange be made by the guardian as requested in his petition, which order was duly confirmed by the Resident Judge of the district. Pursuant to the order in the special proceeding the Bank of Martin County on 30 May 1916, for and in consideration of the sum of ten dollars, and in accordance with the terms and conditions set forth in the order, sold and conveyed by deed properly recorded to Alton Stallings its three-tenths undivided interest in the Ball Gray Farm, and on the same date J. G. Godard, as guardian, for the same consideration, and in accordance with the terms and conditions set forth in the order, sold and conveyed to the Bank of Martin County all of his ward's interests in the lands inherited by him from his mother, except his three-tenths undivided interest in the Ball Gray Farm.

In 1926 Alton Stallings had been for 10 years an inmate of the State Hospital for the Insane in Raleigh. In that year J. G. Godard, as guardian, under authority of an order of court, duly confirmed by the Resident Judge of the district in a special proceeding instituted by virtue of G.S. 33-31 sold and conveyed by deed properly recorded his ward's three-fifths undivided interest in the Ball Gray Farm to C. C. Fleming and Ransom Fleming for $12,000.00, receiving in payment $3,000.00 in cash and notes aggregating $9,000.00 secured by a purchase money deed of trust upon the property conveyed.

After this sale J. G. Godard resigned as guardian, and M. S. Moore was duly appointed as his successor.

Default in the payment of the notes secured by the deed of trust having occurred, the deed of trust in 1933 was properly foreclosed, and M. S. Moore, as guardian for Alton Stallings, being the last and highest bidder at the trustee's sale, the trustee executed and delivered to him a deed properly recorded, conveying to M. S. Moore, guardian for Alton Stallings, a three-fifths undivided interest in the Ball Gray Farm.

On 18 January 1956 Alton Stallings, who was never married, died intestate leaving as his only next of kin first cousins of the blood of his mother and first cousins of the blood of his father. Plaintiff M. L. Peel is a first cousin of the blood of his father, and defendant Maurice S. Moore is a first cousin of the blood of his mother.

Plaintiff and defendant agree that, if plaintiff owns any interest in the Ball Gray Farm, it consists of a 1/32 undivided interest inherited by him from Alton Stallings. Plaintiff by written contract has agreed to sell and convey a 1/32 undivided interest in this farm to M. S. Moore for the price of $2,000.00, and by said written contract M. S. Moore has agreed to purchase such interest, provided M. L. Peel can convey to him a fee simple marketable title. Pursuant to such contract M. L. Peel has executed and tendered to M. S. Moore a deed sufficient in form to convey such interest. Moore has refused to accept the deed and pay the purchase price on the ground that Alton Stallings inherited his three-fifths interest in the Ball Gray Farm from his mother, and M. L. Peel not being of the blood of his mother inherited no interest in the land under G.S. 29-1, Rule 4. M. L. Peel contends that Alton Stallings at his death owned a three-fifths interest in the Ball Gray Farm by purchase, and that Rule 5, G.S. 29-1 applies to the part acquired by purchase.

Judgment was entered that "plaintiff is the owner of an undivided interest in said lands and that his deed as tendered to defendant will convey a good title for such interest," and defendant was ordered to accept said deed and to pay to plaintiff the agreed purchase price.

From the judgment, defendant appeals.

Clarence W. Griffin for Plaintiff, Appellee.
Peel & Peel for Defendant, Appellant.

PARKER, J. The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250. *Griffin v. Springer, ante,* 95, 92 S.E. 2d 682.

This Court said in *Realty Corp. v. Koon,* 216 N.C. 295, 4 S.E. 2d 850: "All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in the case of an action instituted in the usual way. *McKethan v. Ray,* 71 N.C. 165."

Alton Stallings never married, and at his death his nearest collateral relatives capable of inheriting were first cousins of his mother's blood and first cousins of his father's blood. Of all these first cousins only two are parties to this proceeding: plaintiff, a first cousin of the father's blood, and defendant, a first cousin of the mother's blood. Plaintiff and defendant have agreed that plaintiff is a first cousin of the father's blood and that, if plaintiff inherited from Alton Stallings any interest in the Ball Gray Farm, it is a 1/32 undivided interest. All the other first cousins of Alton Stallings at his death, who are certainly interested in the controversy, have made no such agreement; they have not agreed that plaintiff is a first cousin of Alton Stallings; and they have not

agreed that, if he is a first cousin and if he has inherited anything, it amounts to a $\frac{1}{32}$ undivided interest. A judgment in this proceeding to which these other first cousins are strangers with no opportunity to be heard is not binding upon them. *Thomas v. Reavis,* 196 N.C. 254, 156 S.E. 226.

In the following cases of controversies without action involving title to land, when it appeared to us there could not be a complete and final determination of the rights of the parties interested in the absence of some of the interested parties, we have set aside the judgments rendered and remanded the cases, or remanded the cases, so that the cases can come before the court properly constituted in respect to parties and to the judgment demanded. *McKethan v. Ray,* 71 N.C. 165; *Campbell v. Cronly,* 148 N.C. 136, 61 S.E. 1134; *Same case,* 150 N.C. 457, 64 S.E. 213; *Brinson v. McCotter,* 181 N.C. 482, 106 S.E. 215; *Wagoner v. Saintsing,* 184 N.C. 362, 114 S.E. 313; *Thomas v. Reavis, supra; Realty Corp. v. Koon, supra.* See also *Waters v. Boyd,* 179 N.C. 180, 102 S.E. 196.

It is to be noted that the legal title to the three-fifths undivided interest in the Ball Gray Farm was taken in the name of M. S. Moore, guardian of Alton Stallings, when the Fleming deed of trust was foreclosed.

All the first cousins of Alton Stallings at his death are necessary parties to a complete determination of this controversy. M. S. Moore in his capacity as guardian is a proper, if not a necessary, party. Being a consent proceeding they cannot be brought in against their will. If they so desire, all can come in and join in the submission of the controversy without action upon the facts now stated, or all of them can agree upon additional facts or a new and different statement of facts, and submit a controversy without action. *Wagoner v. Saintsing, supra; Realty Corp. v. Koon, supra.* If all cannot agree upon the facts so as to submit a controversy without action, the facts can be established in a civil action to which all are parties. *Thomas v. Reavis, supra.*

Until that is done, we refrain from discussion of the facts appearing of record.

The judgment below is set aside, and the case remanded to the end that further proceedings be had as the law directs and the rights of the parties require.

Error and remanded.

JOHNSON, J., not sitting.

JOE M. CONNER, EMPLOYEE, v. UNITED STATES RUBBER COMPANY, EMPLOYER, SELF-INSURER.

(Filed 26 September, 1956.)

1. Master and Servant § 55d—

Where exceptions to the findings of the hearing commissioner are not preserved and no exception is entered either to the findings of fact or conclusions of law made by the Industrial Commission, the sufficiency of the evidence to support the findings is not presented for review in the Superior Court, and the review therein is limited to the single question whether the findings are sufficient to support the award.

2. Appeal and Error § 27—

Where no exceptions to the findings of fact are preserved on the appeal from the Industrial Commission to the Superior Court, the sufficiency of the evidence to support the findings is not presented on further appeal to the Supreme Court, and it will be presumed that the findings are supported by the evidence, and the sole question is whether the findings are sufficient to support the judgment.

3. Master and Servant § 55d—

Findings of fact by the Industrial Commission are conclusive if supported by competent evidence, even though the evidence upon the entire record might also support a contrary finding.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Clarkson, J.*, February Term, 1956, of GASTON.

Proceeding under Workmen's Compensation Act to determine the liability of defendant, self-insurer, to the plaintiff, employee, for additional compensation.

On 20 May 1953 the plaintiff sustained an injury by accident arising out of and in the course of his employment. The parties thereafter entered into an agreement for the payment of compensation. Compensation was paid at the lawful rate for temporary total disability from 20 May 1953 to 13 August 1953, when payments of compensation were stopped by authority of the Industrial Commission (hereinafter called Commission).

According to the findings of fact by the hearing Commissioner on 30 November 1954, the plaintiff returned to work as a spare hand in August 1953 and continued to work for the defendant until some time in September 1954. He stopped working for the defendant by his own choice. In the meantime, according to the record, the employee requested a hearing on 8 December 1953, contending that he suffered an injury to his back in addition to the admitted injury to his head. The defendant denied that the plaintiff had suffered a back injury. It was

agreed that the defendant would attempt to provide suitable work for the plaintiff and the plaintiff agreed to accept such work. It was further agreed that the case might be removed from the hearing calendar without prejudice to either party and that it would not be heard with respect to the contention as to the back injury, until some interested party should so request.

According to finding of fact No. 4, the plaintiff was examined by Dr. Roland T. Bellows on 15 October 1954, and "at that time the plaintiff had no residual disability as a result of the injury by accident giving rise hereto which would affect his wage earning capacity."

The findings of fact further show that on 25 October 1954, the plaintiff was examined by Dr. George Carswell Blanchard, and "at that time the plaintiff was alert mentally and he was, neurologically, entirely negative with no disability which would affect his ability to earn wages."

Upon these and other findings of fact, the hearing Commissioner concluded as a matter of law that the plaintiff had suffered no loss of wage earning capacity on account of the injury by accident on 20 May, 1953, since 13 August 1953, and is, therefore, not entitled to any additional compensation.

The plaintiff appealed to the Commission. The Commission adopted as its own the findings of fact and conclusions of law of the hearing Commissioner and affirmed the award entered by him. Whereupon, the plaintiff appealed to the Superior Court of Gaston County, "for errors of law in the review of the award made by the . . . Commission." His Honor heard the matter and overruled the plaintiff's exceptions and affirmed the order of the Commission. The plaintiff appeals to the Supreme Court, assigning error.

Hamrick & Hamrick for plaintiff, appellant.
Mullen, Holland & Cooke for defendant, appellee.

DENNY, J. The plaintiff took no exception to any of the findings of fact set out in the statement of facts herein. Exceptions to other findings were entered, which the court below held were supported by competent evidence.

In the instant case, however, as in *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467, and in *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E. 2d 762, no exception was entered either to the findings of fact or conclusions of law made by the Commission. Neither did the plaintiff except to the award entered by the hearing Commissioner or the Commission. Consequently, the court below, on the record as presented, was not required to determine whether or not the findings were supported by competent evidence. The appeal to the Superior Court was not for

a review of exceptions taken to the findings of fact and conclusions of law made by the Commission, but was expressly limited to errors of law made by the Commission. Therefore, the single question presented to the Superior Court was whether the facts found by the Commission were sufficient to support the award. *Wyatt v. Sharp, supra.* The exceptions to the findings of the hearing Commissioner, upon appeal to the Commission, were not preserved in the appeal from the Commission to the Superior Court. Hence, such findings will be presumed to be supported by the evidence and are binding upon appeal. *Wyatt v. Sharp, supra; Greene v. Bd. of Education,* 237 N.C. 336, 75 S.E. 2d 129; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601. The facts found by the Commission are sufficient to support the judgment entered below.

Notwithstanding the medical testimony adduced in the hearing before the hearing Commissioner, we think there was evidence upon which the Commission might have found that the plaintiff had suffered a loss of wage earning capacity since 13 August 1953. Even so, a careful review of the whole record leads us to the conclusion that the findings of fact are supported by sufficient evidence to compel an affirmance of the award had exceptions been entered to the findings of fact and conclusions of law of the Commission and duly preserved in the subsequent hearings.

Findings of fact by the Commission are conclusive if supported by competent evidence, even though the evidence upon the entire record might also support a contrary finding. *Watson v. Clay Co.,* 242 N.C. 763, 89 S.E. 2d 465; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Insurance Co.,* 226 N.C. 325, 38 S.E. 2d 97; *Kearns v. Furniture Co.,* 222 N.C. 438, 23 S.E. 2d 310.

The judgment of the court below is

Affirmed.

JOHNSON, J., not sitting.

RALPH G. BRITTAIN v. SULCER SPRATT BLANKENSHIP.

(Filed 26 September, 1956.)

1. Appearance § 2—

A voluntary general appearance is equivalent to personal service and waives all defects and irregularities in, or even want of, service.

2. Appeal and Error § 44—

A remark of the court made in reply to, or provoked by, argument of counsel is invited error of which appellant may not complain.

APPEAL by defendant from *Clarkson, J.*, at February 1956 Civil Term, of GASTON.

Civil action to recover property damage allegedly resulting from negligent operation of a motor vehicle.

The record shows that summons issued to Gaston County 16 April, 1955, was returned by the sheriff endorsed "The defendant is not to be found in Gaston County, after due and diligent search." In complaint filed 16 April, 1955, plaintiff alleges a cause of action based upon actionable negligence of defendant in operating his automobile in that he failed (1) to keep proper lookout for other automobiles, (2) to keep his automobile under proper control, (3) to properly apply his brakes, after ascertaining the danger, and (4) "operated his vehicle under the influence of alcohol," and that as proximate result of such negligence of defendant, plaintiff's vehicle was struck in the rear and damaged in substantial amount.

The record shows that thereafter on 15 September, 1955, defendant filed an answer prefaced in this language: "Now comes S. S. Blankenship into court and makes this a voluntary general appearance without service of process and requests his counsel of record J. L. Hamme to file this answer and general appearance in the action entitled as above, and answers and says: . . ."

In the answer so filed the allegation of the complaint "that on or about the 13th day of November, 1954, at about 9 P. M., the wife of plaintiff was operating the plaintiff's 1952 Ford sedan automobile on the hard-surfaced State road which runs through Mount Holly, North Carolina, in a westerly direction to McAdinville, North Carolina," is not denied. And it is admitted that plaintiff's wife stopped the car, and that defendant approached the intersection and collided with the car of plaintiff in its rear and that some damage was done thereto. In other material aspects, the allegations of the complaint are denied.

Defendant set out in the answer averments in further answer and defense.

Plaintiff in reply denies in material part the averments so made by defendant.

The case on appeal shows that during the progress of the trial in Superior Court, and after the plaintiff had testified, and on the convening of court the next day, "defendant through counsel enters a plea to the jurisdiction of the court as action was instituted April 16, 1956; no service of process was had; general voluntary appearance made September 15, 1955; thus this action died 90 days after issuance of

summons and no *alias* was issued." Counsel for defendant contended that "the action is a dead action." And to the ruling of the Presiding Judge in denial of the plea and refusal of motion defendant excepted.

Defendant reserving exception to the overruling of his motion for judgment as of nonsuit, testified as a witness in his own behalf, and renewed motion for judgment as of nonsuit at close of all the evidence.

The case was submitted to the jury upon three issues (1) as to negligence of defendant (2) as to contributory negligence of plaintiff, and (3) as to amount, if any, plaintiff is entitled to recover of defendant. The jury answered the first issue "Yes," the second "No," and the third "$566.00."

To judgment in accordance therewith defendant excepted and appeals to Supreme Court, and assigns error.

J. L. Hamme for Defendant Appellant.
No counsel contra.

WINBORNE, C. J. A careful reading of the record and case on appeal as challenged by exceptions brought up for consideration on this appeal leads to the conclusion that, in the trial below, substantial justice has been done. And while there may be technical error in some respects, it is not of sufficient import to require a new trial.

In connection with the exception to denial of defendant's so-called "plea to jurisdiction," entered as hereinabove related, the statute G.S. 1-103 provides specifically that a voluntary appearance of a defendant is equivalent to personal service of the summons upon him. And decisions of this Court hold that a general appearance waives all defects and irregularities, and is sufficient even if there has been shown no service of the summons at all. See *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *Hospital v. Joint Comm.,* 234 N.C. 673, 68 S.E. 2d 862; *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *Wilson v. Thaggard,* 225 N.C. 348, 34 S.E. 2d 140; *Moseley v. Deans,* 222 N.C. 731, 24 S.E. 2d 630; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484; *Asheboro v. Miller,* 220 N.C. 298, 17 S.E. 2d 105; *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427; *Credit Corp. v. Satterfield,* 218 N.C. 298, 10 S.E. 2d 914; *Clement v. Clement,* 216 N.C. 240, 4 S.E. 2d 434; *Shaffer v. Bank,* 201 N.C. 415, 160 S.E. 481, and many more, cited under G.S. 1-103.

The trial judge ruled in accordance with these decisions. And in so doing it appears in the case on appeal that the Judge stated to counsel for defendant, "You cannot come into court with one hand and with the other say you are not in court." Defendant excepted thereto and contends that he is prejudiced thereby before the jury. In this connection reference to the pleading shows that defendant in his further answer

and defense undertook to set up a cause of action on the theory that while he was operating his automobile in a lawful and reasonably prudent manner plaintiff's automobile was being negligently operated in manner stated as proximate result of which defendant's automobile was damaged in stated amount. Thus it is apparent that this fact prompted the statement of the Judge.

Be that as it may, if the Judge erred in making the statement, it is clear from the record, details of which need not be recited, that it is invited error of which defendant cannot complain. *In re McGowan,* 235 N.C. 404, 70 S.E. 2d 189, and cases cited.

Other assignments of error brought forward in brief of appellant require no specific treatment. They are without substantial merit.

For reasons stated, there is in the judgment from which appeal is taken

No error.

WILLIAM A. WARREN v. A. P. WINFREY, JR., AND CLEMENT C. BELL, TRADING AS CLINTON MOTOR COMPANY.

(Filed 26 September, 1956.)

Trial § 21—

The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accordance with the statute. Therefore, the court has no power to enter judgment as of nonsuit before the plaintiff has rested his case. G.S. 1-183.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Bundy, J.,* May Term 1956 of SAMPSON.

Civil action to rescind a contract of purchase of an automobile for failure of consideration, to recover back the value of an automobile credited as part payment on the purchase price, to cancel a note given for the remainder of the purchase price and the conditional sale contract securing said note, and to recover damages for the wrongful withholding of the purchased automobile.

When the plaintiff left the stand as a witness, and before plaintiff had rested his case, the defendant made a motion for judgment of nonsuit, which the court allowed.

Plaintiff appeals, assigning error.

David J. Turlington, Jr., for Plaintiff, Appellant.

Butler & Butler for Defendants, Appellees.

PER CURIAM. "The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accord with the statute, G.S. 1-183." *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257.

G.S. 1-183 provides that "when on trial of an issue of fact in a civil action . . ., the plaintiff has introduced his evidence and rested his case, the defendant may move . . . for judgment as in case of nonsuit."

The court had no power to nonsuit the case before plaintiff rested his case. For this error plaintiff is entitled to a new trial. In the state of the record the questions discussed in the briefs are not presented for decision.

Reversed.

JOHNSON, J., not sitting.

C. R. WILKS, INC., A FLORIDA CORPORATION, AND C. C. BELLAMY, TRUSTEE, v. SCOTT DILLINGHAM, SCOTT DILLINGHAM, TRUSTEE FOR APARTMENT MOTELS CORP., BUILDERS SAVINGS LOAN CO., A N. C. CORPORATION, W. E. ALLEN AND WIFE, HARRIETT E. ALLEN, AND BLANCHE CIROLINE AND NORMAN H. BLITCH AND WIFE, CLAUDIA BLITCH, AND WM. B. KINSEY.

(Filed 26 September, 1956.)

Appeal and Error § 3—

An appeal will not lie from the overruling of a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action; and an attempted appeal therefrom will be dismissed *ex mero motu.* Rule of Practice in the Supreme Court No. 4(a).

JOHNSON, J., not sitting.

APPEAL by defendants from *Pless, J.,* at March 1956 "A" Term, of BUNCOMBE.

Civil action to recover on promissory note and to foreclose deed of trust on real estate as security for the note.

Defendants demurred to amended complaint on the grounds of alleged misjoinder of causes, and of failure to state facts sufficient to constitute causes of action. The court overruled the demurrers, and defendants appealed.

Carl W. Greene and Guy Weaver for Plaintiffs Appellees.

Styles & Styles for Defendants Appellants.

PER CURIAM. Rule 4(a) of the Rules of Supreme Court, 242 N.C. 766, provides that "From and after the first day of the Spring Term 1956, this Court will not entertain an appeal: (1) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action . . ."

The attempted appeal in the instant case fails to come within the exception. Hence on authority of this Rule 4(a) the appeal will be and it is hereby dismissed *ex mero motu*, without prejudice to rights reserved to demurrant under the rule.

Appeal dismissed.

JOHNSON, J., not sitting.

W. L. CLEMENTS AND WIFE, KATE CLEMENTS, v. O. B. SIMMONS AND WIFE, FRANCES DAVIS SIMMONS.

(Filed 26 September, 1956.)

Appeal and Error § 3—

An appeal will not lie from the overruling of a demurrer for misjoinder of causes or failure of the complaint to state facts sufficient to constitute causes of action, and an attempted appeal therefrom will be dismissed. Rule of Practice in the Supreme Court No. 4(a).

JOHNSON, J., not sitting.

APPEAL by defendants from *Froneberger, J.*, Regular May Civil Term 1956 of BUNCOMBE.

Civil action to have Brookside Avenue, as shown on the plat of the development and subdivision called Mountain View Development, which plat is recorded in Plat Book No. 2, p. 41, in the Register of Deeds' Office of Buncombe County, declared a public street, and that the defendants be required to remove the fence, or fences, they have erected across it obstructing plaintiffs' right to use said avenue. In their brief the plaintiffs assert that the allegations in their complaint as to the discontinuance of a permissive roadway across their property were never intended to allege a cause of action, but were a surplus embellishment of their pleading.

The defendants demurred to the complaint thereto on three grounds: one, a defect of parties defendant; two, a misjoinder of causes; and three, the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was overruled, and the defendants appealed.

Roy A. Taylor and Don C. Young for Plaintiffs, Appellees.
Harkins, Van Winkle, Walton & Buck for Defendants, Appellants.

PER CURIAM. This Court, after the first day of the Spring Term 1956, will not entertain an appeal "from an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action." Rule 4(a) of the Rules of the Supreme Court, 242 N.C. 766. The demurrer here is not for a misjoinder of parties and causes. The defendants' attempted appeal is dismissed by virtue of Rule 4(a).

Appeal dismissed.

JOHNSON, J., not sitting.

STATE v. NORRIS DILLAHUNT.

(Filed 26 September, 1956.)

Criminal Law §§ 41d, 78d(1)—

The admission of testimony of an incriminating statement made by defendant's wife not in his presence must be held for prejudicial error even in the absence of objection, since such testimony is made incompetent by statute. G.S. 8-57.

JOHNSON, J., not sitting.

APPEAL by defendant from *Fountain, S. J.*, May, 1956 Special Term, CRAVEN Superior Court.

Criminal prosecution upon an indictment charging the defendant, Norris Dillahunt, with felonious assault with a deadly weapon on Fred Hall, inflicting serious injury not resulting in death. At the trial, Sheriff Berry, a witness for the State, testified without objection that defendant's wife made the statement that shortly before the difficulty the prosecuting witness passed her mother's house in a car and that her husband followed him. The parties were in dispute as to which started the shooting.

The jury convicted the defendant of assault with a deadly weapon. From the judgment imposed, he appealed, assigning as error the failure of the trial judge *ex mero motu* to exclude the wife's statements made to the sheriff.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Cecil D. May and John D. Larkins for defendant, appellant.

PER CURIAM. In a criminal action neither the husband nor the wife is competent to testify against the other. G.S. 8-57. The rule is subject to certain exceptions not material here. The prohibition extends to declarations made by one spouse not in the presence of the other. It is the duty of the presiding judge to exclude such evidence. Objection is not necessary. *S. v. Warren*, 236 N.C. 358, 72 S.E. 2d 763. The Attorney General concedes the State's inability to distinguish between this and the *Warren case* and on its authority the assignment of error is sustained and a new trial ordered.

New trial.

JOHNSON, J., not sitting.

MRS. GRACE ELAINE McC. BUTLER, WIDOW; MRS. GRACE ELAINE McC. BUTLER, NEXT FRIEND FOR PATSY BUTLER, MINOR DAUGHTER; BONNY BUTLER, MINOR DAUGHTER; BILLY BUTLER, MINOR SON, AND JOHNNY BUTLER, MINOR SON; JOHN CARLTON BUTLER, DECEASED, EMPLOYEE, v. JONES PLUMBING & HEATING COMPANY, EMPLOYER; GENERAL ACCIDENT FIRE & LIFE INSURANCE COMPANY, CARRIER; AND CONN STRUCTORS, EMPLOYER; UNITED STATES CASUALTY CO., CARRIER.

(Filed 26 September, 1956.)

Master and Servant § 40c—

Evidence to the effect that the employee was injured while working under the supervision of his superior in attempting to make repairs on a drum belonging to another contractor working in the same building and on the same job, with evidence that the two contractors had on prior occasions assisted each other without charge, supports the conclusion that the injury arose out of and in the course of the employment.

JOHNSON, J., not sitting.

APPEAL by defendants Jones Plumbing & Heating Company and General Accident Fire & Life Insurance Company from *Bundy, J.*, November, 1955 Term, CRAVEN Superior Court.

This action originated before the North Carolina Industrial Commission upon a claim for compensation filed by the dependent widow on behalf of herself and the four minor dependent children of John Carlton Butler, deceased employee, for injury and death as the result of an

accident arising out of and in the course of his employment as a welder for Jones Plumbing & Heating Company. The deputy commissioner conducted a hearing, made findings of fact, stated his conclusions of law, and awarded compensation. The defendant employer and its insurance carrier filed exceptions and assignments of error and appealed first to the full commission and from its adverse ruling, then to the Superior Court of Craven County. Judge Bundy overruled all exceptions and entered judgment affirming the award of the full commission in all particulars. From the judgment the defendants appealed, assigning errors.

W. K. Rhodes, Jr., for plaintiffs, appellees.

Barden, Smith & McCotter for defendants, appellants.

Thomas A. Banks for defendants Conn Structors and United States Casualty Company, appellees.

PER CURIAM. The evidence before the hearing commissioner fully sustained his findings of fact and conclusions of law. They in turn supported the award. On the evidence presented, it is difficult to see how any other result could be reached. The record shows that the deceased employee was working under the direct supervision and instruction of his superior in attempting to make repairs on a drum that actually belonged to another contractor working in the same building and on the same job. The evidence showed also that the two contractors had on prior occasions assisted each other without charge. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. The record here is free from error and the judgment is

Affirmed.

JOHNSON, J., not sitting.

LELA MAE HARRIS, KENNETH LEE BRILEY, ARMISSA JACKSON, AND THELMA LEE BRILEY, WIDOW OF HERMAN BRILEY, AND NEXT FRIEND OF WILLIS GRAY BRILEY, BARBARA JEAN DICKENS, CHURCHILL BRILEY, AND HERMAN LAWRENCE BRILEY, THE LAST FOUR NAMED BEING MINORS, V. JOHN J. BRILEY.

(Filed 26 September, 1956.)

Deeds § 6—

Judgment that deed of gift delivered by grantors in escrow, and therefore not registered by the grantees within two years after its execution, is void, G.S. 47-26, affirmed on authority of *Allen v. Allen*, 209 N.C. 744.

JOHNSON, J., not sitting.

APPEAL by defendant from *Paul, J.*, March Term 1956 of PITT.

Plaintiffs, heirs at law of W. B. Briley, assert the invalidity of a deed from W. B. Briley and wife to defendant. When the case was called for trial, the parties stipulated the following facts:

"(1) That W. B. Briley and his wife, Amanda Briley, were the parents of John J. Briley.

"(2) That the plaintiff Lela Mae Harris, wife of J. L. Harris, is the daughter of W. B. Briley and Amanda Briley, and that Kenneth Lee Briley, Armissa Jackson, Willie Gray Briley, Barbara Jean Dickens, Churchill Briley and Lawrence Briley are the children of Herman Briley, a son of W. B. Briley and Amanda Briley, who died on September 30, 1951, and that Thelma Lee Briley is the widow of the late Herman Briley.

"(3) That prior to October 12, 1951, W. B. Briley was the owner in fee of the lands described in the complaint.

"(4) That the late W. B. Briley and wife, Amanda Briley, on the 15th day of October, 1951, executed the deed referred to in the complaint conveying the land therein described and reserving a life estate therein.

"(5) That the deed recited the following consideration: 'That for and in consideration of love and affection and the further consideration of $10.00 . . .'

"(6) That after executing and acknowledging the deed referred to in the complaint, the grantors W. B. Briley and Amanda Briley, delivered the deed to F. C. Harding, Esq., (who had no interest therein) on the date of said acknowledgment, the 15th day of October, 1951, and instructed him to hold said deed until their death, and then to deliver the same to the defendant John J. Briley, the grantee in said deed, the said W. B. Briley and Amanda Briley imposing no condition upon the said F. C. Harding that he was to hold it for them, the grantors, and without reserving any right to repossess it at any time, or to have any control over it; and that F. C. Harding, Esq., then placed the deed in an envelope, along with a deed executed by said grantors to Lonnie Briley and Clara Mae Briley, and after sealing said envelope the following notation, or words of like effect, were written on said envelope, to wit: 'To F. C. Harding: You are directed to hold these deeds until our death, and upon the death of both of us you are directed to deliver the same to the grantees,' and after said notation was written on the back of the envelope, W. B. Briley and Amanda Briley duly signed the same, and their signatures, made by mark on said envelope, were witnessed by R. B. Lee, and, upon the signing of said notation, the said F. C. Harding placed said envelope containing said deeds in his safe until the death of the said W. B. Briley, when the deed to the defendant was delivered to him by R. B. Lee, and was by the defendant on the

same day, August 12, 1954, placed of record, as appears in Deed Book Y-27 at page 95 in the office of the Register of Deeds of Pitt County.

"(7) That said deed was kept in the safe of F. C. Harding, Esq., on August 12, 1954, after the death of W. B. Briley.

"(8) That W. B. Briley died on July 24, 1954, and that Amanda Briley died on March 2, 1955."

Being of the opinion that the instrument, a deed of gift, was void for failure to record within two years from its making as required by G.S. 47-26, the court rendered judgment in favor of plaintiffs. Defendant appealed.

James & Speight for plaintiff appellees.

Albion Dunn and Louis W. Gaylord, Jr., for defendant appellant.

PER CURIAM. The application of the statute to the factual situation here stipulated has heretofore been carefully considered and determined adversely to the claims of defendant. *Allen v. Allen,* 209 N.C. 744, 184 S.E. 485. The judgment is

Affirmed.

JOHNSON, J., not sitting.

ALLIE H. TYNES v. CHARLES DAVIS.

(Filed 26 September, 1956.)

Appeal and Error § 19—

An assignment of error not supported by an exception is ineffectual and presents no question of law for the determination of the Supreme Court. Rules of Practice in the Supreme Court Nos. 19(3) and 21.

JOHNSON, J., not sitting.

APPEAL by defendant from *Sharp, Special Judge,* May Civil Term, 1956, of MARTIN.

Civil action to rescind a lease between plaintiff-lessor and defendant-lessee, plaintiff alleging that she was induced to execute the lease by reason of defendant's false and fraudulent representations. The jury answered the determinative issue as to alleged fraud in plaintiff's favor. Thereupon, the court adjudged the lease null and void, ordered the cancellation of the record thereof, and taxed defendant with the costs. Defendant appealed.

Lucas, Rand & Rose for plaintiff, appellee.

Critcher & Gurganus and Hugh G. Horton for defendant, appellant.

PER CURIAM. An assignment of error not supported by an exception is ineffectual. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Here no exception appears in the entire case on appeal. Hence, there is no basis for the assignments of error appellant attempts to set forth; and no question of law is presented to this Court for decision. *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926. See Rules 19(3) and 21, Rules of Practice in the Supreme Court, 221 N.C. 554, 558.

The judgment, supported by pleadings, evidence and verdict, will not be disturbed.

Apart from the foregoing, inspection of the record discloses that the case was well and fairly tried in accordance with settled legal principles.

No error.

JOHNSON, J., not sitting.

H. S. ELLER AND WIFE, MAUDE J. ELLER, v. THE BOARD OF EDUCATION OF BUNCOMBE COUNTY.

(Filed 26 September, 1956.)

APPEAL by defendant from *Dan K. Moore, Judge,* January Term, 1956, of BUNCOMBE.

The allegations of the complaint are summarized in *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144. On that appeal, this Court affirmed judgment overruling demurrer. Thereafter, by answer, defendant interposed a general denial of plaintiffs' allegations.

The court submitted and the jury answered these determinative issues, viz.: "1. Are the plaintiffs the owners of the lands described in the complaint? Answer: Yes. 2. Has the value of plaintiffs' lands been appreciably impaired and diminished by the defendant constructing and maintaining a septic tank, or sewerage disposal device, near the plaintiffs' home and spring, as alleged in the complaint? Answer: Yes. 3. What compensation are the plaintiffs entitled to recover of the defendant? Answer: $1,000.00."

Upon the verdict, judgment was entered that plaintiffs recover from defendant the sum of $1,000.00 "as permanent damages to the following described lands of the plaintiffs, and as compensation for the taking,

or partial taking thereof, as alleged in plaintiffs' complaint"; and further that, upon payment into court, for the benefit of the plaintiffs, of said sum of $1,000.00, together with the costs of the action, "the plaintiffs, their heirs, executors, administrators and assigns, are hereby forever barred from asserting any claim or demand for damages of any nature, kind or description whatsoever, for and on account of all damages to the lands of the plaintiffs described in their complaint, due to, because of and on account of the construction, location, maintenance and operation of the sewerage disposal plant of The Board of Education of Buncombe County located on the Revis tract of land at the North Buncombe Consolidated High School, in Buncombe County, and on account of the maintenance of the affluent outfall pipe line and other drainage pipes, together with filter pipes through, over and across the defendant's lands near and west of the branch, the dividing line between the plaintiffs and defendant's property, the said sum of $1,000.00 being in full settlement and satisfaction of all damages and compensation for said taking, or partial taking, of plaintiffs' land, past, present and prospective."

Defendant excepted and appealed, assigning errors.

E. L. Loftin for plaintiffs, appellees.

McLean, Gudger, Elmore & Martin for defendant, appellant.

PER CURIAM. Plaintiffs' evidence tended to show a partial taking and that they were entitled to compensation in the amount of $4,000.00. Defendant's evidence tended to show that there had been no taking or impairment in value of plaintiffs' lands. By consent, the jury viewed the premises. To the extent reflected by the verdict, the jury resolved the controverted issues in favor of plaintiffs.

It appears that the case was well and fairly tried in accordance with the law as declared in opinion on former appeal; and consideration of defendant's assignments of error brought forward in its brief, relating to rulings on evidence and portions of the charge, fails to disclose error deemed sufficiently prejudicial to warrant a new trial.

No error.

JOHNSON, J., not sitting.

STATE v. CHARLES OUTLAW.

(Filed 26 September, 1956.)

APPEAL by defendant from *Clarkson, J.*, at April 1956 Criminal Term, of GASTON.

Criminal prosecution upon a warrant issued out of Domestic Relations Court, of Gastonia, N. C., charging defendant with assault upon his wife, he being a male person over the age of 18 years, heard in Superior Court before judge and jury,—upon appeal thereto from judgment of said Domestic Relations Court.

Upon trial in Superior Court the State offered testimony of defendant's wife and their fourteen-year-old daughter, tending to show that on 26 August, 1955, defendant, while drunk, tried to make his wife and two children leave home and, when they got in her car to leave, he threw a rock about the size of a coconut into the window of the car shattering glass, filling his wife's eyes with glass. There was testimony that defendant said he would fix the car so his wife could not drive it.

In instructing the jury the court stated the charge against defendant in the language of the warrant, and declared to the jury that defendant could not be convicted unless the State satisfies the jury beyond a reasonable doubt from the evidence that he is guilty as charged.

The jury returned a verdict of guilty. And the court pronounced judgment that defendant be confined in the County jail for a period of not less than six nor more than twelve months, and assigned to work the roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals therefrom to the Supreme Court, and assigns error.

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

Max L. Childers for Defendant Appellant.

PER CURIAM. The record of case on this appeal reveals that the case was presented to the jury clearly and distinctly in keeping with appropriate principles of law. Error for which a new trial should be ordered is not made to appear. Reiteration of such principles would serve no useful purpose.

Hence, in the judgment below there is

No error.

RICHARD E. RANKIN v. RAY T. HELMS, TRADING AS HELMS CONSTRUCTION COMPANY.

(Filed 10 October, 1956.)

1. Frauds, Statute of, § 9—

A contract for the construction of a house is not required to be in writing. G.S. 22-1, *et seq.*

2. Contracts § 1: Evidence § 39—

Where a contract is not required to be in writing it may be partly written and partly verbal, in which event the verbal part may be shown by parol, provided the parol evidence does not vary or contradict the written terms, but supplements the written part so as to establish one entire contract.

3. Same—

A written agreement to pay a contractor a stipulated fee to supervise the erection of a residence does not preclude parol evidence of a contemporaneous verbal agreement that the entire cost of the construction of the dwelling, including the builder's fee, should not exceed a stipulated sum, since the parol agreement supplements the written so that the written and parol agreements together constitute one entire contract.

4. Contracts § 23—

Plaintiff's evidence to the effect that defendant agreed to supervise the construction of a dwelling for a fee and stipulated that the entire cost of construction should not exceed a stated sum, that the house was not completed according to the plans and specifications, and that the cost of construction largely exceeded the contract price, *is held* sufficient to overrule defendant's motion for nonsuit in an action for damages for breach of contract.

5. Damages § 11: Evidence § 46d—Witness may not give mere estimate or opinion as to amount of damages without proper predicate therefor.

Plaintiff owner sought to recover of the defendant contractor damages for breach of contract for construction of a residence, upon the ground that the cost exceeded the contract price and on the ground that the house and garage had not been completed according to the contract and plans. Plaintiff offered no evidence as to the cost of completing the unfinished items, but was permitted to testify that defendant was indebted to him in a specified amount, which amount was in excess of the difference between the amount plaintiff had paid out, according to the evidence, and the contract price. *Held:* Plaintiff's statement as to the amount of damage was a mere guess or opinion, and the admission of such testimony on the precise point for the jury's determination, without any proper basis therefor, was prejudicial error.

6. Trial § 23a—

A jury verdict cannot be based upon a mere guess.

RODMAN and DEVIN, JJ., took no part in the consideration or decision of this case.

JOHNSON, J., not sitting.

HIGGINS, J., dissenting.

APPEAL by defendant from *Froneberger, J.*, Regular December Civil Term 1955 of GASTON.

Civil action for damages for alleged breach of contract.

The plaintiff desired to build a ten-room house and garage. The defendant was in the construction business. Plaintiff alleges in substance in his complaint as follows: Plaintiff submitted plans and specifications for a house and garage to defendant, and told him, before he entered into a contract, that it was imperative that he should know the maximum cost of construction, in order to make necessary financial arrangements. Defendant said he hoped to be able to hold the cost to $40,000.00, but in no event would the cost, including his $4,500.00 fee for construction, exceed $46,500.00. On 11 January 1954 plaintiff engaged defendant to construct the buildings according to his plans, and agreed to pay him a fee of $4,500.00 for supervising the work. Up to 16 August 1954 plaintiff has paid defendant $37,859.25, at his request has paid $6,114.94 for materials and labor, and has furnished materials of the value of $862.80. Since 18 August 1954 defendant sent two subcontractors to plaintiff to demand payment of their accounts in the sum of $4,320.40, which, with the amounts stated above, total $49,157.39. On the afternoon of 16 August 1954 defendant caused to be delivered to plaintiff another bill for $8,336.25. The work on the house is incomplete, and defendant has refused to finish the work until he is paid a further sum of $4,516.25. It will cost plaintiff $500.00 to complete his house. The defendant has breached his contract by failing to keep the total cost of construction below the sum of $46,500.00 in accordance with his undertaking, by failing to give adequate supervision to the construction, so that the time of laborers and sub-contractors has been wasted and considerable expense added to the cost of the house, and by failing to complete the house. The plaintiff alleges he has suffered loss and damage in the amount of $5,657.39.

This is a summation of defendant's amended answer—the original answer is not in the record—: Defendant admits that he reviewed plaintiff's plans, visited the site of the proposed buildings, and gave plaintiff an estimate that the cost of construction would be $46,125.00. The only contract between plaintiff and himself in respect to the construction of the buildings was in writing, and is as follows:

"Dr. R. E. Rankin January 11, 1954
Mount Holly
North Carolina

I, T. R. Helms, trading as Helms Construction Company, do hereby agree to furnish such supervision as is necessary to build a residence for Dr. R. E. Rankin, Mount Holly, North Carolina, for the sum of four thousand five hundred dollars ($4,500.00). I further agree to keep a fair and account (*sic*) of all labor and materials and such other expenses as are directly chargeable to this job and shall render an invoice of the same for payment. All invoices shall be paid promptly in order to realize the saving and discounts extended by most suppliers of materials.

By: (s) T. R. HELMS
Date: Jan. 11—1953. (*Sic*)

Accepted:
RICHARD E. RANKIN, M. D."

Defendant faithfully performed the terms and conditions of his written contract with the plaintiff, until plaintiff breached the contract on 18 August 1954, by failing to pay him for payrolls and materials which the defendant had paid for and on behalf of plaintiff in the amount of $3,016.25, and by failing to pay him the unpaid balance of $1,500.00 on his supervisory fee. For these unpaid amounts totaling $4,516.25 defendant filed a counter-claim against plaintiff.

Plaintiff filed a reply alleging as follows:

"That the contract as set out in paragraph 3 of the defendant's Further Answer and Defense and Counterclaim relates to the engagement of the defendant to supervise the building of the house; that the contract for the actual construction of the house was not reduced to writing but, as alleged in the plaintiff's complaint, related to revised plans to be drawn by the defendant's architects; which plans were prepared by January 28, 1954. This agreement provided for the house as shown in the revised plans to be built at a total price not exceeding $46,500, including the defendant's supervisory fee. The plaintiff has already paid out to the defendant, or to others at the defendant's request, a sum in excess of $46,500; that there has been no alteration in the plans or specifications which would justify this excess over the original construction price, or any excess over the original price, and the plaintiff therefore owes the defendant nothing."

The following issues were submitted to the jury without objection by the parties, and answered as appears:

"1. Did the plaintiff and defendant enter into an oral contract, as alleged in the plaintiff's complaint?

Answer—Yes.

"2. Did the defendant breach said contract, as alleged in the plaintiff's complaint?

Answer—Yes.

"3. In what amount, if any, is the plaintiff entitled to recover by way of damages against the defendant?

Answer—$5,657.39.

"4. Did the plaintiff and the defendant enter into a written contract, as alleged in the defendant's answer and counterclaim?

Answer—No.

"5. Did the plaintiff breach said written contract, as alleged in the defendant's answer and counterclaim?

Answer.....

"6. What amount, if any, is the defendant entitled to recover of the plaintiff for the breach of said contract?

Answer....."

Judgment was entered in accord with the verdict, and defendant appeals.

R. G. Cherry and Frank Battley Rankin for Plaintiff, Appellee.

Basil L. Whitener and Warren C. Stack for Defendant, Appellant.

PARKER, J. Plaintiff offered evidence, which was admitted by the court over 31 objections and exceptions by the defendant based upon the ground that the evidence violated the parol evidence rule, to this effect: Plaintiff made a verbal contract with defendant that the maximum cost of the construction of the house would not exceed $46,500.00. They had an oral agreement, when the written contract was signed, that the maximum cost, including the supervisory fee of $4,500.00, was $46,500.00. Defendant told plaintiff the written contract "was just a supervisory contract and asked me to sign it, and that this $4,500.00 was included in the total contract for which we agreed to."

On cross-examination plaintiff testified defendant "guaranteed me" my house would not go above $46,125.00.

J. Bart Hall, President of the Belmont Building & Loan Association, testified without objection, that plaintiff made an application for a loan when the house was more than half completed. That after this conversation with plaintiff he discussed the loan with the defendant, who said "that the house was on a cost plus basis, and that he had given Dr. Rankin an upset bid of $46,500.00."

Was oral testimony that plaintiff and defendant made a verbal contract that the cost of construction of the house would not exceed $46,500.00 admitted in evidence in violation of the parol evidence rule?

When the parties have reduced their contract to writing, parol evidence is not admissible to vary, alter or contradict it. *McLawhon v. Briley*, 234 N.C. 394, 67 S.E. 2d 285. This rule is only applicable when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, provided the contract is not required by law to be written, it is competent to establish the latter part by oral evidence, if it does not conflict with what has been written. *McLawhon v. Briley, supra; Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606; *Evans v. Freeman*, 142 N.C. 61, 54 S.E. 847.

Stacy, C. J., said for the Court in *Insurance Co. v. Morehead, supra:* "It is well nigh axiomatic that no verbal contract between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. . . . On the other hand, there are a number of seeming exceptions, more apparent than real perhaps, as well established as the rule itself. These decisions are to the effect that the rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument, is not violated: . . . Sixth, by showing the whole of a contract, only a part of which is in writing, provided the contract is not one required by law to be in writing and the unwritten part does not conflict with the written."

A contract for the construction of a house for a man to live in is not required to be in writing. See G.S., Sections 22-1 through 22-4, Contracts Requiring Writing.

If a contract is not required by law to be in writing, the parties may contract in writing, or orally, or reduce some of the terms to writing, and leave the others in parol. *Neal v. Marrone*, 239 N.C. 73, 79 S.E. 2d 239. In such case "if a part be written and a part verbal, that which is written cannot ordinarily be aided or contradicted by parol evidence, but the oral terms, if not at variance with the writing, may be shown in evidence; and in such case they supplement the writing, the whole constituting one entire contract." *Fertilizer Co. v. Eason*, 194 N.C. 244, 139 S.E. 376.

The contract between plaintiff and defendant for the construction of a house and garage was not required to be in writing. Plaintiff's evidence tends to show that the written contract was only a part of the agreement: that defendant told him the written contract "was just a supervisory contract, and asked me to sign it, and that this $4,500.00 was included in the total contract," and that the total contract was that the maximum cost of construction should not exceed $46,500.00. Plain-

tiff's witness, J. Bart Hall, testified the defendant told him "that the house was on a cost plus basis, and that he had given Dr. Rankin an upset bid of $46,500.00." The oral agreement that the maximum cost of construction should not exceed $46,500.00, or as plaintiff testified on cross-examination defendant "guaranteed me" my house would not go above $46,125.00, is not in conflict with the written agreement that defendant should be paid a supervisory fee of $4,500.00, but supplements it, the whole constituting one entire contract. Plaintiff's evidence does not show a parol agreement and a written agreement, dealing with identical subject matter, which are totally inconsistent, so that the written agreement must stand. *Smithfield Mills, Inc., v. Stevens*, 204 N.C. 382, 168 S.E. 201. The evidence was competent, as his Honor ruled, for the parol evidence rule was not violated.

The defendant assigns as error the failure of the court to allow his motion for judgment of nonsuit made at the close of plaintiff's evidence, and renewed at the close of all the evidence. The plaintiff offered evidence tending to show that the defendant did not adequately supervise the building of his house, and as a result the house was not completed according to the plans and specifications and the cost of construction to plaintiff largely exceeded the contract price of $46,500.00. The court was correct in not nonsuiting the case.

Plaintiff testified that the house and garage were not completed according to the contract and plans, in that, among other things, the basement steps and back porch had not been completed, two closets have not been completed, a clothes chute to the basement and two cabinets to the library have not been completed, weather-stripping of the doors has not been started, the air-conditioning unit has never worked or cooled the house, the maid's room over the garage is incomplete. He did not testify as to what it would cost to complete these things, nor is there any evidence in the Record as to the cost. Plaintiff also testified that up to the time of the filing of his complaint he had paid out on the construction of the house, either direct or on the instructions of the defendant, $49,157.39. Plaintiff testified: "My only complaint is that it cost over $46,125.00 and my house has not been completed." Plaintiff was then asked by his counsel this question: "What amount, Doctor, do you claim that Mr. Helms is indebted to you?" Objection by the defendant, overruled by the court, and exception by the defendant. Plaintiff answered: "At the time this complaint was filed, $5,657.39." Defendant assigns the admission of this evidence as error. This in substance is all of plaintiff's evidence as to damages, except that he said there were some small overcharges or mistakes in defendant's account. The plaintiff alleged in his complaint "that by reason of the said unlawful and wilful acts and conduct of the defendant the plaintiff has suf-

fered loss and damage in the sum of $5,657.39," and he prayed judgment against the defendant in that amount.

The third issue submitted to the jury read: "In what amount, if any, is the plaintiff entitled to recover by way of damages against the defendant?" Defendant assigns as error this part of the charge of the court on the third issue in parenthesis: "Now, the plaintiff says, gentlemen of the jury, that you should answer that issue yes, (and that you should answer it at least in the sum of $5,657.39. The plaintiff says and contends, and has offered evidence tending to show, that the original price for the building was $46,500.00 and that it has extended actually in the neighborhood of $50,000.00, and that other costs have developed that he did not know of at the time; and that certain parts of the building were not complete; and that certain mistakes were made in the accounts; and that you should at least answer that issue in his favor in the sum of at least $5,657.39)." The jury answered the third issue $5,657.39.

It is manifest that plaintiff's answer to the question that he had been damaged in the amount of $5,657.39 up to the time of the filing of the complaint is, if not a mere guess, a statement of his mere opinion or conclusion as to the amount of damages he has suffered, where no proper basis for the receipt of such evidence had been shown. That such is the case is clearly shown by the court's charge quoted above.

This is said in *Food Co. v. Elliott*, 151 N.C. 393, 66 S.E. 451, 31 L.R.A. (N.S.) 910: "The record is extremely meager as to evidence of damage, the whole of it being as follows: 'Q. How much were you damaged, if any, by this transaction? A. I have been damaged right smart; I could not tell exactly. Q. Give an estimate. A. I have been damaged at least fifty dollars, I know.' It is manifest that this extract from the record contains no facts from which the jury can estimate the damage done to the defendant's business. The defendant so testifying cannot be permitted to assess his own damage. That is the exclusive province of the jury. He must state the particulars of his injury, so the court can see if they come within the recognized principles of the law and are allowable. Damages must be reasonably certain, both in their nature and in respect to the cause from which they proceed. 1 Sutherland, sec. 53. If the evidence of injury to defendant's business is so vague, indefinite and uncertain that it does not furnish a basis for the estimating of damages by the jury, then they cannot be recovered. *Hart v. R. R.*, 101 Ga., 188; *Fletcher v. Packing Co.*, 58 N. Y. Sup., 612; 1 Sutherland, sec. 53. The party injured cannot be permitted to simply 'guess at it.' The defendant does not state that any portion of his estimate of fifty dollars was injury to his business, nor does he testify that his business was injured at all."

In *Stevenson v. Ebervale Coal Co.,* 201 Pa. 112, 50 A. 818, 88 Am. St. Rep. 805, the Court said: "The question of depreciation of the value of the property was not properly before the jury; but even if it had been, the opinions of these witnesses were reckless guesses, based upon no facts, and ought not to have been allowed to go to the jury, who may have been improperly and unduly influenced by them."

Goforth v. Smith, (Supreme Court of Oklahoma) 244 P. 2d 304, was an action to recover damages for alleged breach of an oral contract for the rent of farm lands, for destruction of terraces placed on the land, and for breach of a grazing contract. As to the damages the plaintiff testified that, if defendant had harvested the wheat, it would have made 12 or 12½ bushels to the acre, and by reason of defendant's failure to harvest the wheat plaintiffs were damaged in the sum of $1,000; that, if the cotton had been planted, it would have made ¾ of a bale to a bale per acre, and that because of defendant's failure to plant the cotton, plaintiffs were damaged in the sum of $1,200; and because of the destruction of the terraces some permanent damage was done to the land, and they were damaged in that respect in the sum of $500.00. All of this evidence was admitted over defendant's objection. The Court said: "This objection should have been sustained. This witness testified to no facts from which damages could have been computed. He merely gave his estimate without any facts upon which to base such estimate as to the amount in which plaintiffs were damaged in these respects. This is the only evidence offered by plaintiffs to prove damages. The trial court committed prejudicial and reversible error in admitting this testimony."

In 32 C.J.S., Evidence, sec. 447, it is written: "Under the rule excluding opinion evidence, see *supra*, sec. 438, a witness may not state his mere opinion or conclusion as to the amount or extent of damages sustained where no proper basis for the receipt of such evidence has been shown . . ." See also: 20 Am. Jur., Evidence, p. 759, where it is said: "But the plaintiff's own mere guess as to the amount of his damages, supported by no facts, is not admissible."

In McCormick's Handbook of the Law of Evidence, Hornbook Series, (1954), this is stated: "Undoubtedly, there is a kind of statement by the witness which amounts to little more than an expression of his belief as to how the case should be decided or as to the amount of damages which should be given or as to the credibility of certain testimony. Such extreme expressions as these all courts, it is believed, would exclude. There is no necessity for such evidence, and to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses."

Defendant's assignment of error to the admission of plaintiff's testimony to the effect that he had been damaged in the amount of $5,657.39

is well taken. On the third issue the precise point the jury had to pass on from the evidence was the amount of damages, if any, plaintiff was entitled to recover from the defendant. The court, over the defendant's objection, permitted the plaintiff to guess at the amount of damages, or to give an estimate of damages without any proper basis for such estimate, and the jury answered the issue in the exact amount of his guess or estimate. A jury verdict cannot be based upon a mere guess. *Transport Co. v. Ins. Co.*, 236 N.C. 534, 73 S.E. 2d 481; *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661. The admission of this incompetent evidence necessitates a

New trial.

RODMAN and DEVIN, JJ., took no part in the consideration or decision of this case.

JOHNSON, J., not sitting.

HIGGINS, J., dissenting: I agree that error was committed in the course of the trial. However, I am of the opinion that the evidence fails to show a contract of guaranty on the part of the defendant that the cost of building plaintiff's home would not exceed $46,500. To my mind the evidence in the light most favorable to the plaintiff shows nothing more than that the defendant, as architect, merely estimated the cost of the structure. The evidence shows too many changes in plans during the progress of the work, without any corresponding change in the cost estimate, to permit the inference the defendant had agreed to underwrite the cost estimate originally made.

The case goes back for a new trial. The Court's opinion will be the law of the case. For that reason I record my belief that defendant's assignment of error No. 14 should be sustained and judgment of nonsuit entered.

MRS. PEARL H. WATERS v. DR. PAUL McBEE.

(Filed 10 October, 1956.)

1. Courts § 2—

A court has no power or authority to hear and determine matters in controversy beyond its territorial limits, but a limitation on its territorial jurisdiction has no reference to the kind or character of action of which the court may take jurisdiction or of the parties who may be subject to its jurisdiction.

2. Courts § 11—

The provisions of section 1, chapter 216, Public Laws of 1923 (G.S. 7-265), that courts created under the act should have jurisdiction "over the entire county in which the said court may be established" give such courts jurisdiction within the boundaries of its county notwithstanding that other courts may have been created with jurisdiction covering the same matters in other parts of the county, and do not limit such courts to causes of action arising within the county.

3. Courts § 2—

The jurisdiction of a court is the measure of its power to hear the matter in controversy and, by its judgment, bind those affected by the controversy.

4. Courts § 11—

A general county court has jurisdiction to hear a case of asserted malpractice when the court has jurisdiction of the parties. G.S. 7-279(3).

5. Same—

Where an action within the jurisdiction of a county court is instituted by a resident of the county against a nonresident, the general appearance of the defendant subjects him to the jurisdiction of the court, and the court has jurisdiction to hear the controversy.

6. Courts § 2—

While a defendant cannot by consent confer jurisdiction on a court, he may waive the issuance of process necessary to compel his attendance at the hearing of an action within the court's jurisdiction.

7. Appearance § 1—

The filing of motions for change of venue, as a matter of right and for the convenience of witnesses, constitutes a general appearance.

8. Appearance § 2—

A general appearance is equivalent to personal service and gives the court the same power over a defendant that it would have by due service of summons. G.S. 1-103.

JOHNSON, J., not sitting.

APPEAL by defendant from *Froneberger, J.*, January 1956 Term of BUNCOMBE.

Plaintiff instituted this action in the General County Court of Buncombe County. Summons issued on 13 September, 1954, to the sheriff of McDowell County. It was served 15 September. The complaint alleges that plaintiff is a resident of Buncombe County, defendant a resident of McDowell County, that in 1952 plaintiff employed defendant to treat plaintiff's broken hip, that defendant was careless and negligent in his treatment of plaintiff, resulting in permanent injuries to her damage. It appears from the complaint that the contract

of employment was made and the treatment rendered in McDowell County.

Defendant's answer does not deny the residence of plaintiff. It admits the residence of defendant and his treatment of plaintiff in Marion General Hospital in McDowell County. Defendant denies all allegations of negligence. He asserts that plaintiff's condition is congenital.

Having pleaded to the merits, defendant, by further answer and motion, asserts that the General County Court of Buncombe County did not have jurisdiction of the action for that: (1) defendant was a resident of McDowell County and had never resided in Buncombe County; (2) the matters and wrongs complained of did not occur in Buncombe County but in McDowell County; (3) plaintiff was a resident of McDowell County at the time of the asserted wrongs.

The General County Court heard the plea to its jurisdiction. It found that defendant was not and had never been a resident of Buncombe County but was a resident of McDowell. It found that plaintiff, at the time of the asserted wrongs, was a resident of McDowell County, but was, at the institution of the action, a resident of Buncombe County. It found that all matters complained of by the plaintiff and set forth as a basis for her alleged cause of action occurred in McDowell County, North Carolina. The answer and motion to dismiss for want of jurisdiction were filed 22 August, 1955. Defendant, on 2 October, 1954, filed a motion to remove the cause to McDowell County as a matter of right, and this motion was denied by the General County Court. This ruling was, on appeal to the Superior Court, affirmed. On 9 November, 1954, defendant filed in the General County Court a written motion for removal to McDowell County for the convenience of witnesses. The motion was denied, and the Superior Court, on appeal, affirmed. From the facts found, the General County Court of Buncombe County concluded it had jurisdiction. Hence it denied defendant's motion.

Defendant appealed from the County Court to the Superior Court. The Superior Court adopted as its own the findings of fact and conclusions of law made by the County Court and affirmed the judgment of the County Court. From the judgment of the Superior Court denying defendant's motion to dismiss for want of jurisdiction in the County Court, defendant appealed.

I. C. Crawford and L. C. Stoker for plaintiff appellee.

Proctor & Dameron, W. E. Anglin, and McBee & McBee for defendant appellant.

RODMAN, J. Before the limitation was imposed on the Legislature by sec. 29, Art. II of the Constitution, it could, by local act, establish in

any community courts inferior to the Superior Court. *Rhyne v. Lipscombe,* 122 N.C. 650; *S. v. Baskerville,* 141 N.C. 811; *Oil Co. v. Grocery Co.,* 169 N.C. 521, 86 S.E. 338; *McCall v. Webb,* 125 N.C. 243; *Jones v. Oil Co.,* 202 N.C. 328, 162 S.E. 741.

The limitation imposed on the Legislature by the amendment (sec. 29, Art. II) to establish local courts, tailored to fit the assumed needs of each locality, created a responsibility to provide a uniform system of sufficient breadth to meet all the varying conditions in the State.

The Legislature attempted to solve the problem in 1919. To accomplish the desired purpose, it enacted c. 277 of the laws of that year. That statute authorized local communities to establish local courts with differing territorial power but substantially the same jurisdiction. The courts authorized were Municipal Recorder's Courts, County Recorder's Courts, and Municipal-County Courts. The jurisdiction conferred was principally criminal. With slight modifications, the authority given by c. 277, P.L. 1919, to create these courts now appears as Articles 24, 25, and 26 of Chapter 7 of the General Statutes.

In only one instance did the statute confer extensive civil jurisdiction. Secs. 47 and 48 of c. 277 provide:

"Sec. 47. The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand nor more than twenty-five thousand inhabitants, in which city or town there has been established a recorder's court, under the provisions of this act, or in which there is a recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, wherein the party plaintiff or defendant is a resident of such county, as hereinafter provided; or where the plaintiff or defendant is doing business in said county, such jurisdiction may be conferred upon such court by resolution by the board of county commissioners of the county, which resolution shall be entered upon the minutes of the board."

"Sec. 48. The jurisdiction in civil actions of such court shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the jurisdiction of the Superior Court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the Superior Court in all actions other than actions founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars."

The population limitation for the creation of the court authorized by s. 47 of the Act manifestly limited the number of courts which could be created under the statute. So far as civil jurisdiction was concerned,

the statute of 1919 accomplished very little for the establishment of new courts.

Secs. 12 and 18 of this Act authorizing the creation of Municipal Recorder's Courts and County Recorder's Courts permitted them to issue process to any county in the State. Jury trials in these courts conformed to jury trials before a justice of the peace, but jury trials in courts authorized by s. 47 of the Act were with a jury of twelve. s. 52, c. 277, P.L. 1919.

Sec. 56 of c. 277, P.L. 1919, provides:

"Sec. 56. The rules of practice in the said court (that is, a court established pursuant to s. 47 of the Act) shall be the same as the rules of practice in the Superior Court, as near as may be, and processes and pleadings shall be issued and filed in the same manner as processes and pleadings in the Superior Court, as near as may be: *Provided,* that processes shall be returnable directly to this court in all cases: Provided, no civil process issued by any recorder's court in this State shall be issued to any county other than in which such court is located."

The Legislature of 1921 amended s. 47 of the Act of 1919, which had been codified as C.S. 1589, by adding at the end of the section: "and the board of county commissioners of any county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein." s. 7, c. 110, P.L. 1921.

Sec. 48 of c. 277, P.L. 1919, which had been codified as C.S. 1590, was also amended to name "municipal and county recorder's courts" as courts which could exercise the jurisdiction conferred by s. 48 of the Act of 1919.

The 1921 statute thus conferred extensive civil jurisdiction on each of the courts established pursuant to the authority given by c. 277, P. L. 1919.

But the jurisdiction thus conferred was limited as follows: (a) concurrent with that of a justice of the peace, (b) concurrent with the Superior Court in all actions founded on contract where the amount involved exclusive of interest and costs did not exceed one thousand dollars, (c) concurrent with the Superior Courts in all actions not founded upon contract when the amount did not exceed five hundred dollars, and (d) where one of the parties to the action was a resident of the county wherein the action was instituted.

Deeming the court system created by the 1919 Act (c. 277) as amended in 1921 (c. 110) not sufficiently elastic to meet the needs of the State, the Legislature of 1923 authorized the creation of a new system of courts. The authority to establish such courts is contained in s. 1, c. 216, P.L. 1923, which is as follows: "In each county of this State

there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this act, and which court shall be called the General County Court and shall have jurisdiction over the entire county in which said court may be established." This is now the first sentence of G.S. 7-265.

Criminal jurisdiction was conferred on the General County Courts so authorized by s. 13 in the following language: "The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county." Then follow the first four subsections of G.S. 7-278.

Civil jurisdiction is conferred by s. 14, c. 216, P.L. 1923, in the following language: "The jurisdiction of the General County Court in civil actions shall be as follows." Then follows the same language found in the first five subsections of G.S. 7-279.

The authority of General County Courts to issue civil process and the rules of procedure in civil actions is defined by s. 7 of c. 216, P.L. 1923, as follows:

"The rules of procedure, issuing process and filing pleadings shall conform as near as may be to the practice in the Superior Courts. The process shall be returnable directly to the court, and no civil process, except subpoenas, shall issue out of the court to any county other than that in which the court is located."

This provision gave the General County Courts authority to require only those who could be found within the territorial confines of the court to answer in civil actions. Residence was not made a jurisdictional test as in 1921. Nonresidents of the county could voluntarily submit to its jurisdiction.

The Legislature of 1925 passed two acts dealing with the issuance of process by General County Courts established pursuant to c. 216, P.L. 1923.

Both acts were ratified 10 March, 1925, the day of adjournment. They are c. 242 and c. 250 of the Laws of 1925. The portions of each of these acts as pertinent to this controversy are as follows:

"That chapter two hundred and sixteen, section seven of Public Laws of one thousand nine hundred and twenty-three, be and is hereby amended by striking out all of said section and substituting in lieu thereof the following:

" 'The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the Superior Courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the State: *Provided*, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.' " s. 2, c. 242, P.L. 1925.

"Section seven of chapter two hundred and sixteen of the Public Laws of one thousand nine hundred and twenty-three be amended by adding thereto the following: *'Provided,* that in any civil action instituted in said general county court, where one or more bona fide defendants reside in said county and one or more bona fide defendants reside out of said county, then in such case, summons may be issued out of said general county court against the defendants residing outside of said county as well as those residing in said county, and the said general county court shall have jurisdiction to try the action as against all of said defendants.' " s. 2, c. 250, P.L. 1925.

It is apparent that the legislation of 1925 was intended to enlarge the power of the General County Courts to require parties to submit to its process.

By the 1923 Act (c. 216, s. 7) the only civil process which could issue outside of the county was a subpoena. Both of the 1925 Acts, c. 242 and 250, extended the power of the court to issue civil process outside of the county.

C. 250 extended the power to issue process outside of the county when one or more of the defendants reside in the county and one or more of the defendants reside outside of the county.

C. 242, enacted the same day as c. 250, expressly provided that process could issue to any county in the State, with a proviso that "civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits." Thus c. 242 gave to General County Courts power equal to the power of the Superior Court as to those matters of which the Superior and General County Courts had concurrent jurisdiction but less power to issue process than a justice of the peace as to those matters of which the justice of the peace and the General County Court had jurisdiction, G.S. 7-138. An anomalous situation.

Construing c. 250 as relating to the issuance of process in actions involving matters within the jurisdiction of a justice of the peace, there is a uniform and harmonious pattern governing the issuance of process to acquire jurisdiction of parties.

Defendant asserts that lack of jurisdiction of the General County Court is apparent. He contends: (1) that the phrase "shall have jurisdiction over the entire county in which said court may be established," appearing in the statute, G.S. 7-265, authorizing the creation of the court, confines its right to hear and adjudicate only those questions which arose in the county where it sits; (2) that s. 2 of c. 250, P.L. 1925, limits the jurisdiction of the court when a defendant is not a resident of the county to those cases where there are both resident defendants and nonresident defendants, and, since there is only one defendant in this

action, and he is a resident of McDowell County, the Buncombe County General Court can have no jurisdiction.

The phrase "shall have jurisdiction over the entire county in which said court may be established" (G.S. 7-265) does not have reference to the kind or character of action of which the court may take jurisdiction nor of the parties who may be subject to its jurisdiction. It merely fixes the territorial limits within which the court may act. A court has no power or authority to hear and determine matters in controversy beyond its territorial limits. *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732; *Brown v. Mitchell*, 207 N.C. 132, 176 S.E. 258; *Investment Co. v. Pickelsimer*, 210 N.C. 541, 187 S.E. 813; 21 C.J.S., Courts, s. 20.

Because of the numerous courts which had been created by local act and under the authority conferred by the Act of 1919, it was desirable to make it clear that the General County Court had the right to exercise jurisdiction anywhere within the boundaries of the county notwithstanding the fact that other courts might have been created with jurisdiction covering the same matters in parts of the county. Had it been the intention of the Legislature to limit the jurisdiction of the General County Court to causes of action arising in the county, it would have been simple and appropriate for it to have inserted such a provision in s. 14 of the Act, prescribing the jurisdiction of the court. (G.S. 7-279.) No such limitation appears.

The jurisdiction of a court is the measure of its power to hear the matter in controversy and, by its judgment, bind those affected by the controversy. *Thompson v. Humphrey*, 179 N.C. 44, 101 S.E. 738; *White v. Lumber Co.*, 199 N.C. 410, 154 S.E. 620; *S. v. Hall*, 142 N.C. 710; *Jones v. Brinson*, 238 N.C. 506, 78 S.E. 2d 334; *Bullington v. Angel*, 220 N.C. 18, 16 S.E. 2d 411.

The power of the General County Court of Buncombe County to hear a case of asserted malpractice when it has jurisdiction of the parties cannot be doubted. The statute, G.S. 7-279(3), gives it concurrent jurisdiction with the Superior Court "in all actions not founded upon contract."

Since the court has jurisdiction of the subject matter with the right to hear within its territorial limits, the only other element essential to its jurisdiction is its authority to bind the parties. Plaintiff is seeking the aid of the court and hence is bound.

It will be noted that the section of the statute (s. 2, c. 250, P.L. 1925) on which defendant relies does not deal with the question of jurisdiction as such but only with one element necessary to invest the court with complete authority to hear and render judgment, namely, the power of the court to enforce the attendance of the defendant.

Defendant could not, by consent, confer on the court the power to hear a controversy not within the authority given it by the Legislature, but he could waive the issuance of process necessary to compel his attendance at the hearing. *Jones v. Brinson, supra; Brittain v. Blankenship, ante*, p. 518. A voluntary appearance of a defendant is equivalent to personal service of summons upon him. G.S. 1-103. The filing of the motions for change of venue, as a matter of right and for the convenience of the witnesses, constituted general appearances which gave the General County Court the same power over the defendant that it would have acquired over a resident of Buncombe County duly served with summons. *Grant v. Grant*, 159 N.C. 528, 75 S.E. 734.

The General County Court of Buncombe County there sitting has the authority to hear the matter in controversy. The parties have voluntarily submitted themselves to the court for the adjudication of the matters in controversy. All the tests of jurisdiction have been met. The judgment appealed from is

Affirmed.

JOHNSON, J., not sitting.

MILDRED B. LONG v. LUCY E. GILLIAM AND MARGARET GILLIAM STROCK, T/A MILDRED'S SHOP.

(Filed 10 October, 1956.)

1. Master and Servant § 2—

The written contract in this case, purporting to reduce to writing the prior verbal contract of employment between the parties, without payment to the employee of the compensation due her up to the time of the execution of the writing and without providing in express terms either for cancellation or continuance of the employment, together with provision for the continuance of the use of the employee's given name as the trade name for the business, *is held* not a cancellation or termination of the pre-existing contract of employment or a contract fixing a new rate of pay for subsequent employment.

2. Master and Servant § 6b—

Where a contract of employment does not fix a definite term, it is terminable at the will of either party, but as long as it is not terminated by either party, the employee is entitled to compensation at the contract rate for the period worked.

3. Master and Servant § 2b—

A verbal contract of employment under which the employee's compensation was fixed at a stipulated sum per week, plus a yearly share of the net

profits, was reduced to writing which did not stipulate a fixed term of employment, and the employee continued to work in the same manner after the execution of the writing. *Held:* Under the allegations and evidence, whether the employee was to continue to receive a share of the profits in addition to the compensation to be paid weekly was a question of fact for the jury.

4. Trial § 22b—

Defendant's evidence in conflict with that offered by plaintiff is not to be considered in passing upon motion to nonsuit.

JOHNSON, J., not sitting.

APPEAL by defendants from *McKeithen, J.*, March Term 1956, MECKLENBURG.

In January 1954, plaintiff, seeking to recover compensation asserted to be owing to her under a contract of employment, filed a complaint in which she alleged:

"3. That in January 1951 the defendants employed the plaintiff to work in said business known as Mildred's Shop as an operator thereof and saleswoman therein for which the defendants agreed to pay to the plaintiff as wages the sum of $25.00 per week, plus 40% of the net profits from the operation of said business; that on or about the 3rd day of May 1952 said contract of employment was reduced to writing by the parties hereto; and that a verbatim copy of said written contract is attached hereto and made a part of this paragraph of this complaint as if fully set forth herein, and is for the purpose of identification marked as EXHIBIT A.

"4. That pursuant to said agreement, the plaintiff entered into the employment of the defendants in said capacity and fully performed the duties assigned to her in an able, efficient, adequate, and proper manner until on or about the 29th day of December 1953, when the plaintiff was wrongfully and unlawfully discharged without cause, by the defendants."

She then alleged that she had received, on 3 May, 1952, the sum of $818.28 as her share of the profits for the year 1951; that no portion of the profits had been paid to her for the years 1952 and 1953. She alleged that she was, by the contract, entitled to continuous employment and that the discharge in December 1953 was unlawful and in breach of her contract rights. She asked for an accounting, that she recover her portion of the profits for the years 1952 and 1953 and such further relief as she might be entitled to.

Defendants for answer to sections 3 and 4 of the complaint say:

"3. Answering the allegations of paragraph 3 of the complaint, the defendants admit that in the month of January 1951 they employed the

plaintiff to work in their said business as saleswoman and agreed to pay her as wages the sum of $25.00 per week plus 40% of the net profits from the operation of said business, provided said percentage of the profits should be applied by the plaintiff toward her purchase of a one-third interest and share in said business; that said agreement was verbal and was not reduced to writing; that on or about the 3rd day of May 1952, said parties considered it advisable to have a written agreement setting forth the terms of the original verbal employment. Any other allegations embraced in said paragraph 3 are untrue and are denied.

"4. Answering the allegations of paragraph 4 of the complaint the defendants say that said plaintiff continued in their employ at the salary of thirty dollars per week; that they had no agreed time for said employment to continue; that in the month of December 1953, the defendants found that the services of the plaintiff were no longer satisfactory and they suspended her from her said employment; and that on January 12, 1954 for good and satisfactory reasons and cause they discharged her from their said employment. Any other allegations contained in said paragraph of the complaint are untrue and are denied."

Defendants deny that they are indebted to plaintiff in any sum.

In August 1955 plaintiff made a motion to amend her complaint so as to allege that plaintiff was, under the contract, entitled to continue as an employee of defendants for the years 1954 and 1955 and to receive 40% of the net profit for those years; that she had sought other employment to minimize her damage without success and was in this action entitled to recover 40% of the profits of defendants' business for the years 1954 and 1955. This motion was allowed, and an amended complaint was filed reiterating plaintiff's assertion that she was entitled to 40% of the profits for the time she worked for defendants and was also entitled to 40% of the profits for the years 1954 and 1955.

Defendants thereupon filed a motion to strike the amended complaint. The motion was allowed as to that portion of the complaint asserting a right to recover any portion of the profits after the discharge. The defendants thereupon answered the amended complaint and denied that they were indebted to plaintiff in any sum.

Exhibit A attached to the complaint follows:

"STATE OF NORTH CAROLINA
"COUNTY OF MECKLENBURG

"THIS AGREEMENT made and entered into this 3rd day of May 1952, by and between MRS. MILDRED B. LONG, party of the first part, and MRS. LUCY E. GILLIAM and MRS. MARGARET GILLIAM STROCK, parties of the second part all of the County and STATE aforesaid;

"WITNESSETH, WHEREAS, in January 1951, the parties of the second part purchased from Mrs. Betty Steiner of Tryon, North Carolina, a woman's wear shop located at 202 East Morehead Street, Charlotte, North Carolina, whereat, as of the time of such purchase, the party of the first part had been employed as operator and/or manager; and

"WHEREAS, at the time of the purchase of the aforementioned shop by the parties of the second part, certain understandings were had between the parties of the second part and the party of the first part concerning the continued employment and/or affiliation of the party of the first part with said woman's wear shop; and

"WHEREAS, it now seems desirable and appropriate to reduce to writing, for the purpose of the better understanding of the parties, the agreements heretofore reached between them;

"NOW, THEREFORE, in consideration of the mutual acknowledgments and covenants and conditions hereinafter contained, it is hereby mutually AGREED between the parties hereto as follows:

"1. That from and after the date of the acquisition by the parties of the second part from Mrs. Betty Steiner of that certain woman's wear shop heretofore and presently located at 202 East Morehead Street, Charlotte, North Carolina, the party of the first part was employed by the parties of the second part as an operator or employee of the parties of the second part for the purpose of operating said shop, and that the party of the first part accepted such employment at a compensation payable by the parties of the second part at the rate of $25.00 per week, plus 40% of the net profits from the operation of said woman's wear shop.

"2. That the party of the first part acknowledges receipt in full to the date hereof the periodic salary payments to which she has become entitled by reason of the agreement specified above, and does further acknowledge receipt of the sum of $818.28 to her in hand paid, which said sum is accepted by her as payment in full of her share of the net profits from the operation of the shop for the year 1951.

"3. The party of the first part acknowledges that the agreement by the parties of the second part to pay to her, in addition to the above specified periodic salary amounts, 40% of the net profits of the operation of the business was at least in part in consideration of the good will accruing to the business on account of the personal service rendered by the party of the first part in connection with the operation of said business, and in consideration of the agreement of the party of the first part that said business should be operated and conducted under the name of 'Mildred's Shop,' 'Mildred' being the given name of the party of the first part. The party of the first part further grants unto the parties of the second part and their assigns, the full right and authority to continue to use the trade name 'Mildred's Shop' as long as they may

desire to do so, and also in the event that they may incorporate said business.

"4. The party of the first part acknowledges that at the time the parties of the second part acquired said business they offered to her the opportunity to acquire a proprietary interest in the same, and that she declined to accept said offer, and said party of the first part hereby acknowledges that by reason of her rejection of said offer made by the parties of the second part, she now has no right, demand or claim to becoming a partner or shareholder in the said business.

"IN TESTIMONY WHEREOF the parties hereto have hereunto set their hands and seals this the day and year first above written.

"MILDRED B. LONG (SEAL)
"LUCY E. GILLIAM (SEAL)
"MARGARET GILLIAM STROCK (SEAL)"

The court, without objection, submitted these issues to the jury:

"1. Did plaintiff and defendants agree that plaintiff should be paid an amount of money equal to 40% of the net profits of Mildred's Shop for the period of time after 1951?

"Answer: Yes.

"2. If so, in what amount of money, if any, are defendants indebted to the plaintiff based on profits earned in 1952 and 1953?

"Answer: $3,749.15."

Judgment was rendered on the verdict and defendants appealed.

Blakeney & Alexander and Ernest W. Machen, Jr., for plaintiff appellee.

G. T. Carswell, James F. Justice, and Samuel M. Millette for defendant appellants.

RODMAN, J. The court's charge is not in the record. The only error assigned and relied on by the defendants is the refusal of the court to allow their motion of nonsuit. They now insist that the paper writing of 3 May, 1952, is not in fact a contract of employment but a release and cancellation of a pre-existing contract, and that the court should, as a matter of law, have so construed it and hence allowed their motion of nonsuit.

That the paper cannot on its face be declared a cancellation and termination of a pre-existing contract of employment or a contract fixing a new rate of pay for subsequent employment seems clear. It recites (1) that the parties had, sixteen months prior thereto, made an oral agreement; (2) that it was desirable to reduce the terms of the agreement to writing; (3) that defendants had purchased a mercantile

establishment of which plaintiff had been manager and which was operated under the given name of plaintiff; (4) that the rate of compensation to be paid plaintiff for services to be rendered had been fixed by agreement; (5) that the weekly salary in the amount of $25 had been paid to that date and payment had also been made of the agreed percentage of the profits for 1951; (6) that the agreement to pay a percentage of the profits was based in part on the right to use plaintiff's name "Mildred," and that defendants might continue to so use the name; (7) that plaintiff was originally given the right to become a partner in the business but had surrendered that right.

It is to be noted that the instrument does not in express terms provide for cancellation or continuance of plaintiff's employment. Being for an indefinite term, it could be terminated at the will of either party. *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146; *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436; *May v. Power Co.*, 216 N.C. 439, 5 S.E. 2d 308; *Currier v. Lumber Co.*, 150 N.C. 694, 64 S.E. 763. But if the contract is not terminated by one of the parties, the employee is entitled to his compensation at the contract rate for the period worked.

There is at least indirect recognition in the instrument of 3 May, 1952, that the employment had not terminated. The instrument makes no pretense of paying plaintiff for her portion of profits earned to 3 May, 1952. It may suggest by permitting defendant to continue to use the name "Mildred's" that the relationship is to continue.

Since the contract does not terminate the relationship of employer and employee and since it is conceded that plaintiff continued to work for defendants from 3 May, 1952, to 29 December, 1953, what was the basis of her compensation? If the pleadings be given the liberal interpretation to which they are entitled, they suffice to allege that the employment continued with compensation to be paid during 1952 and 1953 as agreed upon in 1951 and as set out in the instrument of 3 May, 1952, namely, a fixed compensation of $25 per week plus 40% of the net profits.

Plaintiff testified without objection: "I worked in Mildred's Shop in 1951, '52, and '53. The Shop was owned by Mrs. Gilliam and her daughter, Mrs. Strock. They operate a partnership. The exhibit just introduced is the contract under which I was employed at Mildred's Shop."

Defendant, by cross-examination of plaintiff's witness, elicited this testimony: "I knew that a provision was in it (contract); that she gave her name for 40% of the net profits and her clientele. I don't know whether it was to go on for life but it was understood that it was to go on as long as help was in that shop. That was Mrs. Long's understanding, and she told me that this is what she understood."

The evidence for defendants tended to show that a settlement was had of all matters on 3 May, 1952, that the payment of $818.28 was a complete discharge of obligations of defendants to that date, and that thereupon a new contract of employment was entered into by which plaintiff was to receive $30.00 per week as compensation for the services to be rendered to defendants, and that she was not to receive any part of the net profits.

Defendants, in the brief filed here, point to the evidence of defendants in support of their motion to nonsuit. The motion to nonsuit must be tested by evidence favorable to plaintiff and without regard to conflicting evidence offered by defendants. *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727.

The instrument dated 3 May, 1952, does not of itself determine the controversy. The question at issue was: Did plaintiff continue to work for defendants at the rate fixed in January 1951, or did she, after 3 May, 1952, work at a different rate agreed to by the parties? This was a question of fact for the jury. The motion for nonsuit was properly denied. There is

No error.

JOHNSON, J., not sitting.

N. B. HILL (ORIGINAL PARTY PLAINTIFF), AND LYDIA WORTHINGTON HILL AND BRANT WATERS, CO-EXECUTORS OF THE ESTATE OF N. B. HILL, DECEASED (ADDITIONAL PARTIES PLAINTIFF), v. HILL SPINNING COMPANY, INCORPORATED.

(Filed 10 October, 1956.)

1. Pleadings § 3a—

A party may not by reference incorporate in a pleading allegations made by him in a separate and independent action.

2. Pleadings §§ 19c, 31—

Where a further answer and defense rests wholly on allegations made by the pleader in a prior action, ineffectually sought to be incorporated in the pleading by reference, plaintiff's demurrer and motion to strike such further answer and defense are proper.

3. Pleadings § 27—

Where plaintiff files a bill of particulars the case is confined to the items specified therein.

4. Abatement and Revival § 8—

In order to support a plea in abatement it is not sufficient that the subject matter of the second action may be litigated in the first, but it is also required that judgment in the prior action would operate as a bar to the second. G.S. 1-127(3).

5. Same—

The pendency of a prior action by a corporation to recover monies allegedly wrongfully misappropriated by its president, without allegation that any of the alleged withdrawals were or purported to be salary payments or funds to which the president was entitled to receive as salary, will not support a plea in bar to a subsequent action instituted by the executors of the deceased president to recover salary allegedly due but not paid, since the issues and judgment in the prior action would not determine whether the corporation was indebted on account of unpaid salary.

JOHNSON, J., not sitting.

APPEAL by defendant from *Bundy, J.*, June Term, 1956, of SAMPSON.

Action commenced 2 December, 1955, to recover $10,350.00, alleged to be due N. B. Hill, original plaintiff, as unpaid salary for his services as president and treasurer of defendant from 1 November, 1951, through 31 October, 1954. Hill died 23 January, 1956, and his executors, substituted as parties plaintiff, adopted the original complaint.

A prior action entitled "Hill Spinning Company, Incorporated, *v.* N. B. Hill and wife, Lydia Hill, and N. B. Waters," instituted 7 April, 1954, was pending in the Superior Court of Sampson County.

Defendant herein, answering, denied that it was indebted to Hill on account of unpaid salary, and in addition interposed a further answer and defense containing three numbered paragraphs, viz.:

1. Herein defendant pleaded said prior pending action, alleged to involve the same parties and subject matter, and moved that this action be abated on account thereof.

2. Herein defendant pleaded the three year statute of limitations in bar of plaintiffs' right to recover.

3. Herein defendant alleged: "That N. B. Hill, the original plaintiff in the above-entitled action, fraudulently withdrew funds from the defendant and applied the same to his own use and the use of his co-defendants and for the uses and purposes other than corporate use and purpose of the defendant in the manner and under the circumstances set forth in the complaint filed in the action entitled 'Hill Spinning Company, Inc. *v.* N. B. Hill and wife, Lydia Hill, and N. B. Waters,' and a Bill of Particulars filed in said action, and, for which he was and his Estate is liable to this defendant over and above any and all amounts to which he was entitled to credit and to which his estate is entitled to credit, of $57,992.50, copies of which said complaint, bill of particulars

and reply are hereto attached and asked to be taken as a part of this paragraph of the answer."

And paragraph 3 of defendant's prayer for relief is as follows: "3. That the defendant have and recover of the estate of N. B. Hill, deceased, the sum of $57,992.50."

Plaintiffs challenged in writing said paragraph 3 of defendant's further answer and defense and said paragraph 3 of its prayer for relief both by demurrer and by motion to strike.

Upon hearing the court, in separate orders, (1) denied defendant's plea in abatement, (2) sustained plaintiffs' demurrer, and (3) allowed plaintiffs' motion to strike.

Defendant excepted and appealed, assigning as error the signing and entry of each of said orders.

R. M. Holland and Butler & Butler for plaintiffs, appellees.
Jones, Reed & Griffin for defendant, appellant.

BOBBITT, J. We need not consider whether it was permissible for defendant to allege as a counterclaim or defense the same facts it had alleged in its said prior action. Suffice it to say, defendant has not alleged such facts.

In a complaint, if plaintiff undertakes to allege two or more separately stated causes of action, each must be complete within itself. It is not permissible to incorporate by reference allegations made in another separately stated cause of action. *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104, and cases cited. *A fortiori,* it is not permissible for a plaintiff to incorporate by reference allegations made by him in a pleading filed in a separate and independent action. This rule applies equally when a defendant attempts to allege a cause of action as a counterclaim.

Paragraph 3 of defendant's further answer and defense rests wholly on the allegations in its pleadings in said prior action, which defendant attempted to incorporate by reference. When we exclude these from consideration, said paragraph 3 does not state facts sufficient to constitute a cause of action. Hence, the orders sustaining plaintiffs' demurrer and motion to strike were proper.

Even so, analysis of the pleadings in said prior action must be made to determine the validity of defendant's plea in abatement. In this connection, it is noted that the record on this appeal contains only the pleadings filed by the plaintiff (corporation) in said prior action. The reply affords no assistance since the answer to which it relates does not appear.

In its complaint in said prior action, the plaintiff alleged generally that Hill, as president and treasurer of the corporation from 1940 until

the action was commenced, had full charge of the corporation's finances and operations; that he withdrew and fraudulently misapplied to his own use and to the use of his codefendants funds of the corporation in an amount in excess of $100,000.00, all with the knowledge, acquiescence and approval of his codefendants; and that the funds so misappropriated were used in acquiring various properties, title to which was taken in the name of the defendants or one or more of them.

When the plaintiff filed its bill of particulars it thereby confined its case to the items specified therein. *Beck v. Bottling Co.*, 214 N.C. 566, 199 S.E. 924. The bill of particulars, omitting details, specified these alleged withdrawals and misappropriations of the corporation's funds, to wit:

1. During 1946-1954, inclusive, Hill traded in cotton futures in the name of the corporation, using the corporation's credit and funds, realizing a net gain from such trading of $6,584.63. However, Hill caused entries to be made on the corporation's books reflecting a net loss of $31,523.86. The total of these two items, to wit, $38,108.49, was "fraudulently withdrawn, misapplied and misappropriated by the said defendant (Hill), and through him by his codefendants . . ."

2. During 1947-1954, inclusive, Hill traded in cotton futures "for his own personal use and benefit, and for the use and benefit of his codefendants and others than the plaintiffs," using the funds and credit of the corporation, and in so doing lost $19,883.91. However, Hill caused book entries to be made showing this to be the corporation's loss.

And the plaintiff in said prior action, in its bill of particulars, modified its prayer for relief, alleging that the defendants were jointly and severally liable to it in the amount of $57,992.50.

The rules applicable when considering a plea in abatement on the ground that "there is another action pending between the same parties for the same cause" (G.S. 1-127(3)) are stated, with full citation of authority, by *Ervin, J.*, in *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E. 2d 860, and by *Winborne, J.* (now *C. J.*), in *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892.

Defendant's plea in abatement is good only if (1) the plaintiffs herein could obtain the same relief by counterclaim in said prior action, *and* (2) a judgment in favor of the plaintiff in said prior action (defendant herein) would operate as a bar to plaintiffs' prosecution of this action. *Cameron v. Cameron*, 235 N.C. 82, 86, 68 S.E. 2d 796, and cases cited.

The said prior action was in tort for alleged conversion of the corporation's funds. Whether Hill's claim for salary was permissible as a counterclaim therein is governed by the provisions of G.S. 1-137(1). *Garrett v. Rose*, 236 N.C. 299, 305, 72 S.E. 2d 843. The words and phrases used in G.S. 1-137(1) are defined by *Barnhill, J.* (later *C. J.*),

in *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614. In *Bitting v. Thaxton*, 72 N.C. 541, under a somewhat similar factual situation, such a counterclaim was held to be permissible. We need not decide whether the cited case would control decision under the facts here. Compare: *Finance Co. v. Holder*, 235 N.C. 96, 68 S.E. 2d 794. We may concede, for present purposes, that Hill's claim for back salary was permissible as a counterclaim in said prior action.

Be that as it may, we have reached the conclusion that, under applicable decisions of this Court, the said prior action and this action are not for the same cause of action within the meaning of G.S. 1-127(3). See, also, G.S. 1-133, and *McDowell v. Blythe Brothers Co., supra.* The basic reason is that a defendant, having a cause of action against the plaintiff, even if permissible as a counterclaim, may elect to plead it as such or institute a separate action thereon *unless the issues raised in the prior action, if answered in favor of the plaintiff therein, would preclude and bar the prosecution of the second action. Cameron v. Cameron, supra,* and cases cited; *Trust Co. v. McKinne,* 179 N.C. 328, 102 S.E. 385; *Francis v. Edwards,* 77 N.C. 271. McIntosh, N.C.P.&P., sec. 468.

In *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545, and similar automobile collision cases, pleas in abatement were allowed. *Dwiggins v. Bus Co., supra; Johnson v. Smith,* 215 N.C. 322, 1 S.E. 2d 834. *Brown, J.,* in *Trust Co. v. McKinne, supra,* took occasion to emphasize that in *Allen v. Salley, supra,* the sole purpose of the litigation was to determine whose negligence caused the collision. Necessarily the issues in the first action would determine the whole controversy between the parties.

In *Construction Co. v. Ice Co.,* 190 N.C. 580, 130 S.E. 165, the construction company's action to recover the balance alleged to be due under a building contract was abated on account of the pendency of a prior action wherein the ice company sued to recover damages for an alleged breach of the identical building contract. The basis of decision is indicated by this excerpt from the opinion of *Stacy, C. J.*: "It will be observed that the parties bottom their respective causes of action on the same contract, each alleging a breach by the other. The two causes of action, therefore, arise out of the same subject-matter; and a recovery by one would necessarily be a bar or offset, *pro tanto* at least, to a recovery by the other."

In accord with *Construction Co. v. Ice Co., supra: Lumber Co. v. Wilson,* 222 N.C. 87, 21 S.E. 2d 893; *Garrett v. Kendrick,* 201 N.C. 388, 160 S.E. 349; *Savage v. McGlawhorn,* 199 N.C. 427, 154 S.E. 673; *Bell v. Machine Co.,* 150 N.C. 111, 63 S.E. 680. These cases present factual situations relating to a single contract, each party alleging a breach thereof by the other.

In short, consideration of decided cases in which a plea in abatement has been allowed discloses the fact that answers to the issues in the

prior action perforce would determine the whole controversy between the parties. *Cameron v. Cameron, supra.*

Applying these legal principles to the present case, it is noted that the complaint and bill of particulars in said prior action do not relate to Hill's salary. The allegations thereof negative any idea that any of the alleged withdrawals were or purported to be salary payments. The issues raised concern only the alleged fraudulent withdrawal and misapplication of the corporation's funds. Nor do plaintiffs herein contend that any part of the funds alleged to have been fraudulently withdrawn and misapplied are funds to which Hill was entitled as salary. The present action is to recover salary allegedly due but *not* paid.

The issues in said prior action relate directly and solely to the specific matters alleged in the bill of particulars. If answered in favor of the plaintiff (corporation), the issues and the judgment predicated thereon would not determine whether the corporation is indebted to Hill on account of unpaid salary. Therefore, it would not preclude and bar the prosecution of this action. Whether the corporation is indebted to Hill on account of unpaid salary is a separate and distinct matter, the sole issue arising on the pleadings in the present action. The *cause of action* in the one case is different from the *cause of action* in the other.

Taking this view, it is unnecessary to consider what effect, if any, should be given the fact that Mrs. Lydia Hill and N. B. Waters, defendants in said prior action, are not parties to this action.

It is noteworthy that both actions are pending in the Superior Court of Sampson County. The prior action, instituted by the corporation, appears first on the docket; and presumably such action will be tried first. As a practical matter, the situation is quite different from that ordinarily presented in connection with a plea in abatement. Where the second action is instituted in a county different from that in which the first action is pending, each party is disposed to compete with the other to determine which case will be first reached for trial. The defendant herein is well ahead. No reason is apparent why it should not proceed with the trial of said prior action.

For reasons stated, the three orders signed and entered by the court below are

Affirmed.

JOHNSON, J., not sitting.

MARY RUTH JENKINS, ADMINISTRATRIX OF THE ESTATE OF D. C. JENKINS, v. NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES.

(Filed 10 October, 1956.)

1. Negligence § 1—

An intentional act of violence is not a negligent act.

2. State § 3a—

The State Tort Claims Act does not permit recovery for a wrongful and intentional injury, but by the terms of the Act waives the State's immunity only for injuries negligently inflicted. G.S. 143-291.

3. Same—Findings of fact held to show that patrolman intentionally shot prisoner.

Findings of fact to the effect that an armed patrolman, weighing 185 pounds, was taking an unarmed, intoxicated prisoner, weighing 130 pounds, into custody, that the patrolman after being assaulted by the prisoner, dragged the prisoner from the car, that during the fight between them the patrolman fired a bullet grazing the prisoner's chest, that the prisoner lost his footing and fell, and that as the prisoner was falling and while his back was toward the patrolman, the patrolman fired the fatal bullet into the prisoner's back, *held* to justify a finding and conclusion that the shooting was intentional, and therefore was not a negligent act within the purview of the State Tort Claims Act.

4. Constitutional Law §§ 8a, 10c—

The Supreme Court must construe an Act as written, the power to change the law being the exclusive province of the General Assembly.

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

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

APPEAL by defendant from *Pless, J.*, May Term, 1956, HAYWOOD Superior Court.

The plaintiff instituted this proceeding before the North Carolina Industrial Commission under the provisions of the Tort Claims Act to recover compensation for the alleged wrongful death of her intestate, D. C. Jenkins. The deputy commissioner, after hearing, made findings of fact, stated his conclusions of law, and awarded compensation in the sum of $8,000.

The hearing commissioner's findings of fact Nos. 1 to 7, inclusive, in substance are: At about 8:45 p.m. on Sunday, 13 June, 1953, Highway Patrolman Murrill went to Rock Hill Schoolhouse in Haywood County as a result of information that a difficulty was taking place there. He was accompanied by the local game protector. Both the patrolman and game protector were large men, each weighing approximately 185 pounds. The patrolman arrested D. C. Jenkins, age 23 years, and

weighing 130 pounds, upon a charge of operating a motor vehicle upon the public highway while under the influence of liquor and also upon the charge of public drunkenness. At the same time, one Franklin, companion of Jenkins, was also placed under arrest for public drunkenness. After searching both Jenkins and Franklin and ascertaining they were unarmed, the patrolman placed them in the back seat of the patrol car, Jenkins behind Murrill, who was driving, and Franklin behind Aiken, the game protector.

Finding of Fact No. 8 is here quoted in full:

> "That after the patrol car had traveled just a few feet on the highway, Jenkins suddenly reached over the seat and grabbed Murrill around the neck; that the patrolman thereupon stopped the car, opened the door with his left elbow, and pulled the deceased out of the car; that the two men then fought from the car across the highway and a drainage ditch, into a field on the opposite side of the road; that part of the time the two were on the ground; that, as the two were fighting in the field, Jenkins made an effort to get the patrolman's gun which was in his holster at the patrolman's side."

For reasons that will hereafter appear, the hearing commissioner's finding of fact No. 9 is not repeated here. From the findings, conclusions and award of compensation made by the deputy commissioner, the defendant appealed to and asked a review by the full commission upon assigned errors. The full commission affirmed and adopted as its own all findings of fact of the hearing commissioner, except No. 9, which was stricken out and the following finding made by the full commission:

> "9. That as the two were fighting and as they were approximately fifty feet from the patrol car, Murrill drew his gun, stepped back approximately ten feet from Jenkins, and told him not to come toward him any more; that Jenkins again started toward Murrill, whereupon the patrolman shot twice in the ground in front of the deceased; that Jenkins continued to come toward Murrill, whereupon the patrolman struck Jenkins, knocking him sideways; that Murrill then fired again and the bullet grazed the deceased's chest; that the deceased then turned back toward the patrolman, but lost his footing and fell; that as the deceased was falling, and as the deceased's back was toward the patrolman, Murrill fired again and the fatal bullet struck the deceased in the back, approximately four inches to the right of his spine; that Jenkins had nothing in his hands nor did he appear to have anything in them while he was advancing toward the patrolman; that the damages

sustained in this case were not occasioned by the negligence of a State employee."

The full commission by a two to one vote concluded that the act of Patrolman Murrill in shooting D. C. Jenkins was an intentional and, therefore, not a negligent act as contemplated by the Tort Claims Statute. Also by a two to one vote the full commission denied recovery.

From the findings, conclusions and award of the full commission, the claimant appealed to the Superior Court of Haywood County. Judge Pless, after hearing, concluded the findings of fact made by the full commission show that D. C. Jenkins met his death as the result of a negligent act on the part of Patrolman Murrill, reversed the decision of the Commission and remanded the case to the Commission for the entry of an award allowing compensation. The defendant excepted and appealed.

William B. Rodman, Jr., Attorney General, Claude L. Love, Assistant Attorney General, and Harvey W. Marcus, Staff Attorney, for the State.

George H. Ward and Felix E. Alley, Jr., for plaintiff, appellee.

HIGGINS, J. Presented here for decision is the question whether recovery under the Tort Claims Statute for the negligent act of a State agent is authorized where the negligent act complained of is the intentional shooting of a prisoner by a member of the State Highway Patrol who had him in custody. That the unjustified shooting under such circumstances is a tort is not open to serious question. If the Act, G.S. 143-291, authorized recovery for torts committed by employees of the State there would be little difficulty in sustaining the judgment of the Superior Court. While the North Carolina Industrial Commission is constituted a court to hear and pass on tort claims, the Act specifically sets out the essentials necessary to be shown by evidence and found by the Commission in order to permit recovery: "The Industrial Commission shall determine whether or not each individual claim arose *as a result of a negligent act* (emphasis added) of a State employee while acting in the scope of his employment and without contributory negligence on the part of the claimant." As of the date this claim was filed, the absence of contributory negligence had to be shown by the claimant as a part of his case. *Floyd v. Highway Commission*, 241 N.C. 461, 85 S. E. 2d 703. (Chapter 400, Session Laws of 1955, amended the original Act and made contributory negligence a matter of defense.) The amendment, however, did not become effective until 31 March, 1955, and provided that it should relate only to claims arising after that date.

The Commission found "that Jenkins continued to come toward Murrill, whereupon the patrolman struck Jenkins, knocking him sideways;

that Murrill then fired again and the bullet grazed the deceased's chest; that the deceased then turned back towards the patrolman but lost his footing and fell; and as the deceased's back was turned toward the patrolman, Murrill fired again and the fatal bullet struck the deceased in the back." The deceased was unarmed. Thus we have an unarmed, intoxicated boy, 23 years of age, five feet seven inches tall, and weighing 130 pounds, a prisoner in the custody of an armed officer weighing 185 pounds. It was the duty of the officer to take the boy to jail alive to answer for a misdemeanor. Instead, the boy was taken to the morgue, shot in the back. There was sufficient competent evidence before the Commission to permit and justify the finding and conclusion that the shooting in this case was intentional.

While the courts of the several states are not in agreement as to the various acts and omissions which may be included in the term "negligence," there is, however, general agreement that an intentional act of violence is not a negligent act.

At common law, actions for trespass and trespass on the case provided remedies for different types of injuries: The former "for forcible, direct injuries, whether to persons or property," and the latter "for wrongful conduct resulting in injuries which were not forcible and not direct." Law of Torts, Prosser, Ch. 2, pp. 26, 27. In the former, the injury was intended. In the latter, injury was not intended but resulted from the careless or unlawful act. Negligence, in all its various shades of meaning, is an outgrowth of the action of trespass on the case and does not include intentional acts of violence. For example, an automobile driver operates his car in violation of the speed law and in so doing inflicts injury as a proximate result, his liability is based on his negligent conduct. On the other hand, if the driver intentionally runs over a person it makes no difference whether the speed is excessive or not, the driver is guilty of an assault and if death results, of manslaughter or murder. If injury was intended it makes no difference whether the weapon used was an automobile or a pistol. Such willful conduct is beyond and outside the realm of negligence.

As was said by *Justice Adams* in *Ballew v. R. R.*, 186 N.C. 704, 120 S.E. 334, "The authorities generally hold that the doctrine of contributory negligence as a bar to recovery has no application in an action which is founded on intentional violence, as in the case of an assault and battery; but intentionable violence *is not negligence* (emphasis added) and without negligence on the part of the defendant there can be no contributory negligence on the part of the plaintiff." To like effect is the opinion of *Justice Bobbitt* in *Hinson v. Dawson, ante*, 23, 92 S.E. 2d 393: "An analysis of our decisions impels the conclusion that this Court, in reference to gross negligence, has used the term in the sense of wanton conduct. *Negligence, a failure to use due care, be*

it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing." (Emphasis added.)

In addition to the above, the position here taken finds support in the following cases: *Gallagher v. Davis,* 37 Del. 380, 183 A. 620; *Kasnovitch v. George,* 348 Pa. 199, 34 A. 2d 523; *Seamon Store Co. v. Bonner,* 195 Ark. 563, 113 S.W. 2d 1106; *Millington v. Hiedloff,* 96 Colo. 581, 45 P. 2d 937; *Kile v. Kile,* 178 Okla. 576, 63 P. 2d 753; *Haacke v. Lease,* Ohio App., 41 N.E. 23 590; *Pittsburgh C. C. & S. L. R. R. Co. v. Farrell,* 39 Ind. App. 515; *Walker v. Chicago & A. R. Co.,* 149 Ill. App. 406; *Lockwood v. Belle City Ry. Co.,* 92 Wis. 97, 65 N.W. 866; *Louisville & N. R. Co. v. Perkins,* 152 Ala. 133, 44 So. 602; *Gardner v. Heartt,* N. Y., 3 Denio 232; *Pitkin v. N. Y. & N. E. R. Co.,* 64 Conn. 482, 30 A. 772; *Murphy v. Barlow Realty Co.,* 206 Minn. 527, 289 N.W. 563; *Michels v. Crouch,* Tex. Civ. App., 122 S.W. 2d 211; *Gimenez v. Rissen,* 12 Cal. App. 2d 152, 55 P. 2d 292; *Gibeline v. Smith,* 106 Mo. App. 545, 80 S.W. 961; *St. Louis & S. F. R. R. Co. v. Boush,* 68 Okla. 301, 174 P. 1036; *Schulte v. Louisville & N. R. Co.,* 128 Ky. 627, 108 S.W. 943; *Kuelling v. Roderick Lean Mfg. Co.,* 183 N.Y. 78, 75 N.E. 1098; *Robinson v. Township,* 123 N.J.L. 525, 9 A. 2d 300.

Under our Tort Claims Act, contributory negligence on the part of the plaintiff is a complete defense to the claim. Contributory negligence is no defense to an intentional tort. *Stewart v. Cab Co.,* 227 N.C. 368, 42 S.E. 2d 405; *Ballew v. R. R., supra; Fry v. Utilities Co.,* 183 N.C. 281, 111 S.E. 354. That contributory negligence under the wording of the Act will defeat a claim supports the view that it was not the intention of the Legislature to allow recovery for torts involving violence.

In the case of *Lowe v. Department of Motor Vehicles, ante,* 353, 93 S.E. 2d 448, the Commission found that the patrolman was negligent in using his pistol but that its discharge was an accident. This finding of negligence was sufficient to support the recovery.

The claimant here, in support of recovery, cites cases arising under the Federal Tort Claims Act. But that Act, unlike ours, provides for recovery not only for negligent acts, but also for *wrongful acts* on the part of an employee. After authorizing recovery for wrongful acts, however, the Congress provided that the Act shall not apply "to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights." Our Act needs no such exceptions for it does not permit recovery for wrongful acts. That contributory negligence is made a defense lends powerful support to the view that the *negligent acts* contemplated are those to which *contributory negligence would be a defense.*

Strong and appealing argument can be advanced why compensation should be allowed in this case, upon the ground that the more grievous the fault on the part of the agent of the State, the more readily the State should compensate for the injury. But the Court must construe the Act as written. The Legislature has power to change the law. The Court does not have that power.

The judgment of the Superior Court of Haywood County is

Reversed.

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

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

N. F. PAUL v. C. H. NEECE.

(Filed 10 October, 1956.)

1. Appeal and Error § 38—

Assignments of error not set out in appellant's brief and not supported by reason or argument are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Trusts § 2a—

The pleadings and evidence in this action to establish a parol trust *held* sufficient to be submitted to the jury under the principle that where one person buys land under a parol agreement to do so and to hold it for another until he pays the purchase price, the purchaser becomes a trustee for the party for whom he purchases the land, and equity will enforce such an agreement.

3. Same—

If an agreement to purchase and hold land for another is made at or before the time the legal estate passes, the agreement creates a parol trust, and it is not required that there be consideration to support it.

4. Trial § 31d—

Where the *quantum* of proof necessary to establish the cause of action is not stated in one paragraph of the charge relating to the elements necessary to constitute such cause of action, but the following paragraphs repeatedly and correctly state the *quantum* of proof, the charge read contextually is not prejudicial.

5. Trusts § 2b—

While in an action to establish a parol trust the burden is on plaintiff to show by clear, strong and convincing proof an agreement with defendant constituting the basis of the action, on the subsequent issue as to the amount defendant paid for the lots, the burden of proof on plaintiff is only to show the amount by the preponderance of evidence.

6. Pleadings § 22b—

The amendment allowed by the trial court in this case *is held* not to supply a fatal deficiency in the complaint, but was addressed to the discretion of the court and not appealable.

7. Trusts § 2b—

The charge of the court in this case on the issue of a parol trust *is held* without error.

8. Appeal and Error § 1—

In this action to establish a parol trust in lands, defendant defended solely on the ground that he made no such contract as plaintiff alleged as the basis of the action. *Held:* On appeal defendant may not defend on the ground of want of payment or tender, or on the ground that plaintiff was attempting to vary the alleged trust by having deeds prepared not only to himself, but also to his son for part of the lands, since the theory upon which the case is tried in the court below must prevail in considering the appeal and in interpreting the record and in determining the validity of exceptions.

JOHNSON, J., not sitting.

APPEAL by defendant from *Sharp, S. J.*, at April Civil Term 1956, of WASHINGTON.

Civil action to establish a parol trust in lands.

The record and case on appeal pertaining to the case in hand disclose the following:

Plaintiff alleges in his complaint and, upon the trial in Superior Court testified, in substance, that on 17 June, 1950, he, having entered into, or negotiated an agreement to purchase from Norfolk Southern Railway Company an area of land in Washington and Hyde Counties, North Carolina, comprising approximately 2,250 acres at given price for different areas of the acreage, consulted the defendant to ascertain whether he would be interested in acquiring a part of the lands; that he, plaintiff, and defendant thereupon agreed that plaintiff would acquire title to seven lots numbers 43 to 49 of given registered Estate Numbers containing 466 acres in Washington County, and the balance to be acquired by defendant; that it was agreed by and between plaintiff and defendant that title to the entire 2,250 acres be conveyed to defendant, and immediately upon the registration of the deeds and the issuance of certificates of title to defendant, he would thereupon reconvey to plain-

tiff the registered estates covering said lot numbers, containing 466 acres; that the amount of the total purchase price to be paid by plaintiff was thereupon agreed to by plaintiff and defendant; that in March 1951 defendant accepted and filed for registration deed covering all of said lands and paid the total purchase price of $2,200; that at the time it was agreed that defendant should take title to all of said land and reconvey the 466 acres to plaintiff, plaintiff expressly informed defendant he was ready, able and willing to pay the purchase price of the lands to be acquired by him any time defendant should call for it; that immediately after the conveyances were accepted by defendant, and on numerous occasions since, plaintiff demanded deed from defendant for his land; that defendant made excuse for inability to do so, and promised that he would, but he has not done so; and that by reason of the foregoing parol agreement defendant is holding in trust for plaintiff lands he should acquire out of the purchase, as specifically described in the complaint, as above set forth.

Defendant, answering, and as a witness upon trial in Superior Court, denied that he made any such agreement with plaintiff as alleged and contended by plaintiff.

The case was submitted to the jury, under charge of the court, upon these issues, which the jury answered as indicated:

"1. Before the Norfolk Southern Railway conveyed the lands described in paragraph 2 of the complaint to the defendant Neece, did he agree with plaintiff Paul that he would take title to said lands in trust for Paul and convey them to him, upon payment of the purchase price which the defendant Neece paid to the railroad for said lots? Answer: Yes.

"2. If so, what was the purchase price paid to the railroad for said lots? Answer: $549.88.

"3. Did the plaintiff Paul pay to the Voliva Lumber Company the sum of $800.00 of his own funds for the defendant Neece? Answer: No."

Judgment was entered in pertinent part adjudging plaintiff to be the owner of the lands in question, and appointing a commissioner of the court to execute a good and sufficient deed therefor to plaintiff, and ordering that upon the execution of the deeds by the commissioner, plaintiff shall pay over to him for the defendant the sum of $549.88, together with interest, costs and other charges contained in the Stipulation filed in the cause.

Defendant excepted thereto and appeals to Supreme Court and assigns error.

Norman & Rodman for Plaintiff Appellee.
Harry B. Brown for Defendant Appellant.

WINBORNE, C. J. While the record shows that defendant, the appellant, assigned as error the denial of his motion, made when plaintiff first rested his case, and renewed at the close of all the evidence, for judgment as of nonsuit, these assignments of error are not set out in appellant's brief nor is reason or argument stated or authority cited in support thereof. Hence under Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at 562, the exceptions are taken to be abandoned. Indeed, the exceptions presented are untenable.

For it is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement. *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869, citing *Cohn v. Chapman,* 62 N.C. 92; *Cobb v. Edwards,* 117 N.C. 244, 23 S.E. 241; *Owens v. Williams,* 130 N.C. 165, 41 S.E. 93; *Avery v. Stewart,* 136 N.C. 426, 49 S.E. 775; *Allen v. Gooding,* 173 N.C. 93, 91 S.E. 694; *Peterson v. Taylor,* 203 N.C. 673, 166 S.E. 800.

In *Owens v. Williams, supra,* it is stated that "Whenever land is conveyed to one party under an agreement that he is to hold it for another, he becomes a trustee, whether this agreement is made at the time of conveyance or is made before, and the land is conveyed in pursuance of said agreement."

And in *Hare v. Weil, supra,* this Court said that "a parol trust does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer," citing cases.

Applying this principle to case in hand the pleadings raise the issue first stated in the record, and the evidence offered upon trial in Superior Court is adequate to justify and require the submission of the issue to the jury.

Appellant assigns as error Numbers 7 and 8 based upon exceptions 6 and 7 respectively,—portions of the charge in respect to the first issue. But in his brief filed here only a portion of that covered by exception 6 is quoted. From this it is contended that there is a conflict of instruction on the *quantum* of proof required. However, the two portions of the charge appear consecutively and when so read the court clearly stated to the jury that the establishment of a parol trust is required to be by evidence which is clear, strong and convincing—that a "mere preponderance" of the evidence is not sufficient to establish a parol trust. Indeed, in the specific portion of the charge covered by that portion so quoted, as above stated, no rule as to *quantum* of proof

is stated. But in the following paragraphs the rule is stated repeatedly and correctly. Hence this Court holds that prejudicial error therein is not made to appear.

Appellant also assigns as error this portion of the charge: "The burden of proof as to the second issue is on the plaintiff to satisfy you by the greater weight of the evidence as to what was the amount of the purchase price paid by the defendant to the railroad for the seven lots in question." Assignment of error Number 11, Exception 10.

It is contended by appellant that the *quantum* of proof on the second issue is by evidence which is clear, strong and convincing,—that the amount of the purchase price to be paid by plaintiff to defendant was an integral part of the parol trust. Appellee contends, and this Court holds properly so, that the first issue determined the question as to whether or not there was a parol trust—an integral part of which was the agreement by plaintiff to repay the purchase price which defendant paid to the railroad for the lots. The burden as to this comes within the *quantum* "clear, cogent and convincing." But the second issue only elicits the amount to be paid, and would seem to come within the general rule—that in civil matters the burden of proof is usually carried by preponderance of the evidence, or by its greater weight.

Appellant further excepts to the action of the trial judge in allowing plaintiff to amend his complaint by adding to Section 3 thereof the following: "And that the defendant would thereafter make deed to plaintiff covering said lands," and by striking out the word "was" in line 17 of Section 3 of the complaint and substituting therefor the words "had been" to which assignments of error 1 and 2 based on exceptions 1 and 2 relate.

It is contended by appellant that a careful reading of the original section of the complaint does not contain any alleged declaration of trust,—that the third section shows that the alleged agreement occurred "when the transfer or conveyance was accepted from Norfolk Southern Railway Company," etc., and that the latter part of that section originally speaks of a then agreement that defendant would take title and reconvey, etc.; whereas the permitted amendment puts the agreement in the past tense.

In this connection it is noted that the amendments were allowed by the court in the exercise of her discretion, from which no appeal may be had. Nevertheless, the complaint alleges, particularly in paragraph 2, the agreement between plaintiff and defendant when plaintiff first consulted defendant as hereinabove set forth.

Appellant further presents a group of assignments of error, Number 9 based on Exception 8, Numbers 13 and 14 on Exceptions 12 and 13, respectively, and assignments 16 and 17 on Exceptions 15 and 16.

In this connection it is noted that Exception Number 8 is to this portion of the charge: "Now with reference to this first issue, members of the jury, if the plaintiff has satisfied you by evidence which is clear, strong and convincing that before the Norfolk Southern Railway conveyed the seven lots described in the complaint to the defendant Neece that the defendant Neece agreed with the plaintiff Paul that he would hold the title to those lots for the use and benefit of Paul and would thereafter convey the lots to Paul, upon his paying to the defendant the purchase price which the defendant Neece had paid the railway for those lots, you would answer the first issue yes. If the plaintiff failed to so satisfy you, you would answer it no."

This is a clear statement of applicable principle of law.

Exceptions 12 and 13 are to the failure of the court to declare, explain and apply the law arising on the evidence, as required by G.S. 1-180, (1) "to the effect that the amount of the purchase price and its payment or tender, and the keeping of the tender good, was a part of the alleged parol trust, to be proved by the plaintiff by evidence clear, cogent and convincing before the jury could answer the first issue Yes," and (2) "particularly as to the evidence of plaintiff in attempting to vary the alleged trust by having had deeds prepared not only to himself, but also to his son for a part of the lands the subject matter of the alleged parol trust."

These exceptions are contrary to the theory upon which the case was tried in Superior Court. Defendant was contending there that he made no such contract as plaintiff alleged, and as to which he testified,—and was not entitled to prevail on the theory of parol trust. Defendant may not now be heard to change the theory of the trial.

It is a well settled principle in this State that the theory upon which the case is tried in the courts below must prevail in considering the appeal and in interpreting a record and in determining the validity of exceptions. *Simons v. Lebrun,* 219 N.C. 42, 12 S.E. 2d 644, and cases cited. Also *Hinson v. Shugart,* 224 N.C. 207, 29 S.E. 2d 694.

All authorities cited by defendant in connection with assignments of error have been examined and found to be distinguishable, and all assignments of error have been given due consideration and are found to be without merit. Hence in the judgment from which appeal is taken, the Court finds

No error.

JOHNSON, J., not sitting.

WILLIE JAMES EASON, APPEARING HEREIN BY HIS NEXT FRIEND, JAMES C. EASON, PLAINTIFF, v. GRACE BISHOP DEW, EXECUTRIX OF THE ESTATE OF R. P. DEW, DECEASED, DEFENDANT.

(Filed 10 October, 1956.)

1. Controversy Without Action § 2—

Where, after filing of pleadings, the parties submit the cause to the court on facts agreed, and such facts negative rather than support plaintiff's allegations as to the existence of a contract between plaintiff and defendant, there is a variance between the allegations and proof.

2. Same—

When litigants submit a cause on agreed facts, the agreed facts constitute the sole basis for decision.

3. Agriculture § 3—

An agricultural worker's lien for labor done is incident to and security for a debt, and there can be no lien in the absence of an underlying debt. G.S. 44-1.

4. Agriculture § 1—

The landlord's lien for rent and advancements and expenses incurred in making and saving the crop is a preferred lien on the entire crop. G.S. 42-15.

5. Same—

A person who deals with a tenant is charged with notice of the landlord's rights under G.S. 42-15.

6. Agriculture § 4—Landlord's lien for rent and advancements held superior to subtenant's lien for labor under separate contract with tenant.

The facts agreed were to the effect that the landlord and tenant entered into an agreement to farm "on halves" with provision that the tenant could subcontract part of his crops, but that the tenant and subtenants were to account to each other. It was further stipulated that plaintiff performed labor under an agreement with the tenant for a monthly wage plus a share of the crops, but that at no time did the landlord enter into any contract directly with plaintiff. The proceeds of the crop were insufficient to discharge in full the landlord's lien for rent and advancements. *Held:* The landlord owed no debt to plaintiff as a basis for a lien, the landlord not being liable for the labor performed by plaintiff under a correct construction of the agreement between the landlord and tenant, and plaintiff is not entitled to recover from the landlord the amount due plaintiff by the tenant. G.S. 44-1, G.S. 44-41. Further, the facts agreed do not show that notice of lien was filed as prescribed by statute. G.S. 44-38, G.S. 44-39.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Parker, J.*, June Term, 1956, of WILSON.

Plaintiff's action is to recover $756.00 and interest, allegedly due him as a farm laborer for one Hugh McKeel, tenant of the late R. P. Dew, in connection with crops raised in 1955 on land owned by said R. P. Dew.

Plaintiff, in substance, alleged: (1) that early in 1955 he entered into a contract with McKeel and Dew whereby plaintiff was to work throughout the 1955 farming season as a farm laborer for McKeel, for which he was to receive from McKeel's share of the crops a sum of money equal to the average yield per acre of the tobacco grown by McKeel as tenant of Dew; (2) that it was expressly understood and agreed between plaintiff and Dew that plaintiff was to receive his acre's yield before Dew as landlord took any part of McKeel's share of said crops in payment of sums advanced by Dew as landlord to McKeel as tenant; (3) that plaintiff performed the farm labor pursuant to said contract; (4) that the tobacco, all of which was sold, brought an average price of $756.00 per acre; (5) that defendant took the proceeds from McKeel's share of the tobacco crop and, notwithstanding formal notice thereof, has refused to pay plaintiff's claim for $756.00; and (6) that, independent of any contractual relation between plaintiff and Dew, plaintiff has a lien under G.S. 44-41 for the $756.00.

Answering, defendant denied the essential allegations of the complaint, specifically averring that Dew had no contract of any kind with plaintiff.

The cause was submitted to the court below for decision, without a jury, upon stipulated facts, to wit:

The agreed facts are as follows:

"(1) That R. P. Dew, deceased, entered into a landlord-tenant contract with one Hugh McKeel to farm 'on halves' a tract of land located approximately 4 miles East of Wilson for the year 1955, by the terms of said contract it was expressly understood that Hugh McKeel was to furnish all 'labor'; the cost of grading tobacco, housing and harvesting, except the cost of picking cotton was to be divided between them. The cost of fertilizer, chemicals for dusting, fuel for curing tobacco and similar expenses were to be divided between the said R. P. Dew, now deceased, and Hugh McKeel. It was further agreed that Hugh McKeel could sub-contract part of his crops expected to be grown on the farm to other tenants since he could not himself furnish all of the 'labor' necessary to cultivate, harvest and house the crops. That R. P. Dew was to make certain advancements to McKeel for living and farm expenses for which the latter was to account at the end of the farm year from his one-half of the income from the sale and his share of the crops raised on the said farm. That it was understood and agreed that Hugh McKeel and the sub-tenants were to account to each other. That at

no time did the said R. P. Dew enter into any contract or agreement with the sub-tenant, Charlie Sumerlin and Willie James Eason.

"(2) That after crediting the said Hugh McKeel with his share of the income from the sale of tobacco, cotton, and any and all other crops raised on said lands, the amount was not sufficient to pay all advancements made to Hugh McKeel by the defendant and his share of the expenses incurred in making and saving said crops. That the Estate of R. P. Dew incurred a loss during the 1955 farm year operation.

"(3) That during the early part of 1955 the plaintiffs, Charlie Sumerlin and Willie James Eason, entered into a contract with Hugh McKeel under which the plaintiffs were to receive from Hugh McKeel— 1. $20.00 per month. 2. A place to lodge. 3. A share of the crops grown on said lands equal to the average yield per acre of the tobacco grown by Hugh McKeel as tenant of R. P. Dew upon the completion of all tobacco sales for the 1955 season.

"(4) Under the plaintiff's contract with Hugh McKeel, they were to work and did work in harvesting and marketing the crops grown on the land which McKeel was cultivating and farming as tenant of R. P. Dew.

"(5) The plaintiffs have received the said $20.00 per month and a place to lodge. The plaintiffs have not received a share of the crops grown on said lands equal to the average yield per acre of the tobacco grown by Hugh McKeel as tenant of R. P. Dew upon the completion of the 1955 season.

"(6) A notice of claim was filed with the defendant in December 1955."

The court below ruled that defendant is not indebted to plaintiff "by reason of the matters and things set out in the agreed statement of facts." Judgment was entered that plaintiff recover nothing from defendant and that plaintiff pay the costs. Plaintiff excepted and appealed. The sole assignment of error brings forward his exception to the signing and entry of the judgment.

Allen W. Harrell for plaintiff, appellant.
Wiley L. Lane, Jr., for defendant, appellee.

BOBBITT, J. The facts agreed negative rather than support plaintiff's allegations as to the existence of a contract between plaintiff and Dew. In this respect, there is a material variance between the allegation and proof. There can be no recovery except on the case made by the complaint. *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786; *Manley v. News Co.*, 241 N.C. 455, 85 S.E. 2d 672.

Are the facts alleged sufficiently established by the facts agreed to warrant plaintiff's recovery of $756.00 or any amount by reason of the

provisions of G.S. 44-1 and G.S. 44-41? When litigants submit a cause on agreed facts, such agreed facts constitute the sole basis for decision. *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273.

The agreed facts do not show that notice of lien was filed in the office of the clerk of the Superior Court as prescribed by G.S. 44-38 and G.S. 44-39. The stipulation was simply that "a notice of claim was filed with the defendant in December 1955." Moreover, the agreed facts do not show that the tobacco sold brought an average price per acre of $756.00 or any other stated amount. Nor is there any admission in defendant's answer bearing on this matter. Hence, if otherwise entitled to recover some amount, there was no factual basis upon which judgment could have been entered for plaintiff. But apart from the defects noted, the agreed facts do not sustain plaintiff's right to recover.

The statutory lien is incident to and security for a debt. There can be no lien in the absence of an underlying debt. G.S. 44-1; *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828; *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324, and cases cited; *Grissom v. Pickett,* 98 N.C. 54. Thus, the ultimate question is whether the estate of Dew, the landlord, is indebted to plaintiff on account of the failure of McKeel, Dew's tenant, to pay to plaintiff the amount to which he was entitled under the Eason-McKeel contract.

Eason had no contract with Dew. Nor does it appear that Dew was advised as to the arrangement or agreement Eason had with McKeel. *McCoy v. Wood,* 70 N.C. 125, and *White v. Riddle,* 198 N.C. 511, 152 S.E. 501, cited by appellant, deal with different factual situations.

In the Dew-McKeel contract, it was "agreed that Hugh McKeel could sub-contract part of his crops expected to be grown on the farm to other tenants since he could not himself furnish all of the 'labor' necessary to cultivate, harvest and house the crops"; but it was also "understood and agreed that Hugh McKeel and the sub-tenants were to account to each other."

Under the Eason-McKeel contract, in addition to lodging and $20.00 per month, Eason was to receive "a share of the crops grown on said lands equal to the average yield per acre of the tobacco grown by Hugh McKeel as tenant of R. P. Dew upon the completion of all tobacco sales for the 1955 season."

Under G.S. 42-15, Dew had a preferred lien on the entire crop until the rent and all advancements made and expenses incurred in making and saving the crop were paid. *Hall v. Odom,* 240 N.C. 66, 81 S.E. 2d 129, and cases cited. The crop did not bring an amount sufficient to satisfy Dew's lien. Defendant owes nothing to McKeel.

The Eason-McKeel contract was subordinate to the Dew-McKeel contract. True, McKeel had the right, by sublease, assignment or

otherwise, to create a lien on *his* share of the crop. *Glover v. Dail*, 199 N.C. 659, 155 S.E. 575. However, any lien created by such subordinate contract made by McKeel was subject to the primary and paramount lien in favor of Dew by virtue of G.S. 42-15. *Moore v. Faison*, 97 N.C. 322; *Belcher v. Grimsley*, 88 N.C. 88. As stated by *Smith, C. J.*, in *Montague v. Mial*, 89 N.C. 137: "The land and the crops to be grown cannot be freed from the conditions imposed by law, nor can the lessor's rights be abridged by any subordinate contracts of the lessee." A person who deals with a tenant is charged with notice of the landlord's rights under G.S. 42-15. *Hall v. Odom, supra.*

Appellant directs attention to this provision of the Dew-McKeel contract: ". . . it was expressly understood that Hugh McKeel was to furnish all 'labor'; the cost of grading tobacco, housing and harvesting, except the cost of picking cotton was to be divided between them." This provision, appellant contends, obligated Dew to pay one-half of the cost of grading, housing and harvesting the tobacco. Such a construction would seem at variance with plaintiff's theory of the case. Moreover, nothing is alleged or in the agreed facts to indicate the value of plaintiff's services in grading, housing and harvesting the tobacco. While the use of a semicolon rather than a comma after the word "labor" was inept, consideration of the pleadings and of the facts agreed impel us to construe the quoted stipulation to mean that McKeel was to furnish all labor except that the cost of picking cotton was to be equally divided between Dew and McKeel. Nothing is alleged or in the agreed facts to indicate that plaintiff picked cotton or, if so, the value of such services.

The parties, in the agreed facts, expressly recognize that the Dew-McKeel contract created the relationship of landlord and tenant.

It is noted that *McCoy v. Wood, supra*, and *Warren v. Woodard*, 70 N.C. 382, cited by appellant, were decided prior to statutory amendments now incorporated in G.S. 42-15.

It is further noted that the agreed facts refer to a separate case entitled: "Charlie Sumerlin *v.* Grace Bishop Dew, Executrix of the Estate of R. P. Dew, deceased." However, the process, pleadings and judgment in the record on this appeal relate solely to the Eason case.

Under the facts agreed, McKeel is indebted to plaintiff. If a judgment against McKeel would be uncollectible, plaintiff's partial loss is unfortunate and regrettable. Even so, under existing statutory law as construed by this Court, plaintiff has no basis on which he can recover from defendant the amount of McKeel's debt to him.

Affirmed.

JOHNSON, J., not sitting.

THE WASHINGTON CITY BOARD OF EDUCATION, A BODY CORPORATE, v. E. C. EDGERTON.

(Filed 10 October, 1956.)

1. Deeds § 14b—

A deed "upon condition that the same shall be held and possessed by the party of the second part only so long as the property shall be used for school purposes," without provision for termination or right of re-entry for condition broken, *is held* not to disclose an intent to impose rigid restrictions upon the title or to create a condition subsequent, but only to indicate the purpose and motive of the transfer of title, it being apparent from the record that the proceeds of sale were to be used to build other and more suitable school buildings on another and more appropriate site.

2. Same—

The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested, and where the language in the deed merely expresses the motive and purpose which prompted the conveyance, without reservation of power of termination or right of re-entry for condition broken, an unqualified fee will pass.

JOHNSON, J., not sitting.

APPEAL by defendant from *Paul, J.*, 31 July, 1956. From BEAUFORT.

This was an action to determine the title to a lot in the city of Washington, N. C., which the defendant had contracted to purchase.

The defendant declined to accept tendered deed on the ground the plaintiff Board could not convey a fee simple title free and discharged from restrictions and conditions in the deed under which it claims.

Upon stipulated facts, jury trial being waived, it was adjudged that the plaintiff had legal right to convey the land described in the pleadings free and discharged from any conditions, restrictions or reversionary interest whatsoever.

The defendant excepted and appealed.

Lee & Hancock for appellant.

Carter & Ross for appellees.

DEVIN, J. In 1808 by an act of the General Assembly of North Carolina, Chapter LXXV, the trustees of the Washington Academy were created a corporate body, and as such acquired fee simple title to the land described in the pleadings, and erected thereon a building which was used thereafter by the trustees for conducting a school. In 1904 successor trustees of the Washington Academy conveyed this property by deed to the Board of School Trustees of the Town of Washing-

ton and their successors for a nominal consideration "upon condition that the same shall be held and possessed by the party of the second part only so long as the said property shall be used for school purposes."

Thereafter a 3-story brick school building was erected on the property and continuously used for school purposes until March, 1956, when the building was sold and removed, a new school building having been erected on another site, and the land was offered for sale at public auction in accord with the statute. The defendant Edgerton became the last and highest bidder in the amount of $77,800. It was stipulated that the plaintiff, The Washington City Board of Education, a body corporate, is one and the same as the Board of Trustees of the Washington City Administrative Unit and the Board of School Trustees of the Town of Washington, by virtue of pertinent statutes.

In 1954, C. B. Cutler, a citizen and taxpayer of Washington, instituted an action against the Trustees of Washington City School Administrative Unit and others to determine the title to the property described in the pleadings in this action. Upon appeal to this Court from judgment upholding the right of the school authorities to convey in fee simple, it appeared that the Trustees of Washington Academy were dead and no successors had been appointed to whom title might revert in the event a clause in the deed of 1904 be held sufficient to create a reversion, and the cause was remanded to afford opportunity for additional parties. See *Cutler v. Winfield*, 241 N.C. 555, 85 S.E. 2d 913. Thereafter the General Assembly of North Carolina in 1955 amended the act of 1808 which had created the Trustees of Washington Academy a corporate body, and named and designated L. H. Swindell, J. W. Oden and Harry S. Gurganus as trustees of Washington Academy. The trustees so appointed were continued as a body corporate and were authorized and empowered to quitclaim and release to the Board of School Trustees of Washington Administrative Unit any interest or right by virtue of the deed of 1904. On 8 August, 1955, the named trustees of Washington Academy executed and delivered deed to said Board, in accord with the power conferred, releasing any right or interest in the described land. The Trustees of Washington Academy, being made parties to this action, filed answer admitting the allegations of the complaint.

The record in this case presents an interesting epitome of the school history of Washington. In 1904 the Trustees of Washington Academy, who for nearly a hundred years had conducted a private school on the property described, executed a deed therefor to the Board of School Trustees of the Town of Washington, who were the administrators of a statutory public school, and thereby conveyed the property to be held and possessed for the purpose of education. The effect of the language

used in that conveyance is the question presented for decision by this appeal.

After a careful study of all the facts and circumstances in this case in the light of previous decisions of this Court, we reach the conclusion that the language used in the *habendum* clause in the deed of 1904 was not intended to impose rigid restrictions upon the title or to create a condition subsequent, but that it was intended by the parties thereby to indicate the motive and purpose of the transfer of title. It expresses no power of termination or right of re-entry for condition broken.

"A clause in a deed will not be construed as a condition subsequent unless it expresses in apt and appropriate language the intention of the parties to that effect (*Braddy v. Elliott*, 146 N.C. 578), and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition." *Hall v. Quinn*, 190 N.C. 326, 130 S.E. 18; *Oxford Orphanage v. Kittrell*, 223 N.C. 427, 27 S.E. 2d 133.

In *Shaw University v. Ins. Co.*, 230 N.C. 526, 53 S.E. 2d 656, the plaintiff proposed to borrow money, and to give as security a mortgage on certain real property which had been acquired by the plaintiff by deed from one Daniel Barringer. The deed contained among other restrictions the provision that grantees "shall hold and apply the property herein conveyed to them for the uses and purposes of an educational institution and the *proceeds of the rental or sale thereof* shall be perpetually devoted to *educational purposes*, . . ." It was said in the opinion written for the Court by *Denny, J.*: "There is nothing in the Barringer deed to indicate the grantor intended to convey a conditional estate, or that the Trustees intended to purchase or create such an estate. There is no clause of re-entry, no limitation over or other provision which was to become effective upon condition broken." *Hall v. Quinn, supra; Braddy v. Elliott, supra,* and several cases from other jurisdictions were cited in support of the principle applied to the facts in that case.

In *Ange v. Ange,* 235 N.C. 506, 71 S.E. 2d 19, a conveyance of land to the trustees of the Christian Church in Jamesville contained the clause "for church purposes only." We held that this language did not create a condition subsequent and that the trustees of the church had right to convey the land in fee simple.

The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested. *Church v. Refining Co.*, 200 N.C. 469, 157 S.E. 438; *Hinton v. Vinson,* 180 N.C. 393, 104 S.E. 897. And where the language in the deed merely expresses the motive and purpose which prompted the conveyance, without reservation of power of termination or right of re-entry for condition broken, an unqualified fee will pass. *Hall v. Quinn, supra; Tucker v. Smith,*

199 N.C. 502, 154 S.E. 826; *Lassiter v. Jones,* 215 N.C. 298, 1 S.E. 2d 845.

It may not be inappropriate to observe that we gather from the record in this case that the Board of School Trustees of Washington City Administrative Unit thought it wise, in the interest of public education in a growing and expanding city, to dispose of this school property which had been in use since 1904, and to build other and more suitable buildings on another and more appropriate site, and to use the funds derived from the sale of the old to aid in financing the new; so that the sale of the property conveyed by the deed of 1904 and the use of the funds thus derived exclusively for school purposes in the same locality would seem to accord with the primary purpose of the conveyance.

Consequent upon the view we have taken in this case as the basis of decision, it is unnecessary to decide other questions presented by the record and discussed in the briefs.

For the reasons hereinbefore set out, the judgment of the Superior Court is

Affirmed.

JOHNSON, J., not sitting.

LESTER HARRIS, ADMINISTRATOR OF THE ESTATE OF SHERIFF J. HARRIS, v. AVERY LEE DAVIS AND D. L. EASTER.

(Filed 10 October, 1956.)

1. Automobiles § 44: Negligence §§ 17, 21—

The burden of proof on the issue of contributory negligence is on defendant, but defendant is entitled to have the evidence bearing on that issue considered in the light most favorable to him in determining whether there is sufficient evidence of contributory negligence to be submitted to the jury.

2. Automobiles §§ 32, 44—Evidence of contributory negligence of cyclist held sufficient for submission of issue to jury.

Defendant's testimony on adverse examination introduced by plaintiff tended to show that as defendant was overtaking and passing a bicyclist, traveling in the same direction on his right-hand side of the highway, defendant blew his horn, pulled to his left so as to straddle the center of the highway, and that just as defendant came abreast of the bicycle, intestate turned his bicycle suddenly to the left, right in front of defendant's truck. The evidence further tended to show that the right headlight on defendant's truck hit the bicycle about the middle of the right-hand lane. *Held:* The evidence is sufficient to warrant the submission of the issue of intestate's contributory negligence to the jury. G.S. 20-149(b).

3. Automobiles § 32—

Bicycles are vehicles and every rider of a bicycle upon a highway is subject to the provisions of the Motor Vehicle Act, except those which by their nature can have no application.

4. Appeal and Error § 35—

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Parker, J.*, June Term, 1956, of WILSON.

This is an action to recover damages for the alleged wrongful death of plaintiff's intestate.

About 6:40 a.m. on 25 October, 1955, the defendant Davis was driving the defendant Easter's dump truck on a rural paved road leading from Stantonsburg, North Carolina, to a sand pit in the county. Plaintiff's intestate, Sheriff J. Harris, was riding his bicycle on the pavement along the extreme right side of the highway, proceeding in the same direction as the defendant Davis' truck. It was daylight. Visibility was good.

Defendant Davis was adversely examined by the plaintiff prior to the trial of the case, and his testimony obtained on the adverse examination was introduced by the plaintiff at the trial. The defendants offered no testimony.

The testimony of Davis in his adverse examination is to the effect that he saw Sheriff J. Harris on his bicycle approximately 200 yards in front of him. Both of them were proceeding easterly and Harris was riding on the right-hand portion of the highway. Davis was driving approximately 35 miles per hour, and when he saw Harris he slowed down to 25 miles per hour; that he had passed Harris on this road many times before, in fact, every morning and evening for some time, except Saturdays and Sundays; that on this occasion when he got close to him, he slowed down a little bit and turned to the left to pass him. As he was getting ready to pass him, Harris fell in front of him. The impact took place in the right half of the highway. That he pulled out slightly to the left to go around him, but he didn't pull his truck completely over into the left lane. He drove down the road with his truck approximately straddling the middle of the road. That Harris turned his bicycle slightly to the left, right in front of the truck. Before that, Harris was well to the right side of the highway. Just about the time he hit him, his bicycle was about in the middle of the right-hand lane. The truck did not run over the bicycle or Harris, and was stopped in less than its length.

This witness further testified during the adverse examination, "I would say I was 20-25 feet from him when I blew my horn. I was about 25 feet behind him and going around him when I blew my horn." However, when the transcript was written up, the witness corrected his testimony as follows: "I desire to correct my testimony about blowing the horn. Before I pulled to the left to get around Harris, I blew my horn two or three times. The last time I blew my horn, I was approximately 25 yards from Harris, not 20 or 25 feet as appears in the record. I desire to make this change for the reason the record is not correct."

The Highway Patrolman who investigated the accident testified that the defendant Davis told him that he blew his horn as he was approaching Harris; that he pulled out to the left to go around Harris, whom he had seen riding his bicycle up in front of him on the right-hand edge of the pavement; that just as he went to pass him, Harris turned his bicycle sharply to the left and into the truck. The Patrolman further testified that he saw some fine glass all over the right-hand portion of the highway.

Other evidence tended to show that the only damage to the truck was to the right front headlight. The glass was broken out of that headlight and glass was found within one or two feet of the right-hand edge of the pavement.

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

Judgment was accordingly entered, and the plaintiff appeals, assigning error.

Lucas, Rand & Rose for plaintiff appellant.
Gardner, Connor & Lee for defendant appellees.

DENNY, J. The determinative question on this appeal is whether or not the evidence on contributory negligence was sufficient to warrant the submission of that issue to the jury.

We concede that the question presented is an extremely close one. However, the defendants having alleged contributory negligence, and the burden being on them on that issue, they are entitled to have the evidence bearing thereon considered in the light most favorable to them in considering whether or not the issue should have been submitted.

In *Battle v. Cleave*, 179 N.C. 112, 101 S.E. 555, *Hoke, J.*, in stating the law with respect to nonsuit upon the ground of contributory negligence as a matter of law, said: "The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible

from plaintiff's proof . . ." *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146; *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197.

While no one contends that the negligence of plaintiff's intestate was of such a nature as to constitute contributory negligence as a matter of law, we think opposing inferences are permissible in this respect from plaintiff's evidence, and that it was for the jury to determine whether or not the plaintiff's intestate was contributorily negligent. Furthermore, the conflict in plaintiff's evidence bearing on this question was for the jury to resolve and not the court. *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Emery v. Insurance Co.,* 228 N.C. 532, 46 S.E. 2d 309; *Bank v. Insurance Co.,* 223 N.C. 390, 26 S.E. 2d 862.

In *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565, *Winborne, J.,* now *Chief Justice,* said: ". . . it is pertinent to note that for the purposes of the Motor Vehicle Act, effective in this State at the time of the accident in question, 'bicycles' shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of the Act applicable to the driver of a vehicle, except those which by their nature can have no application."

It is presumed that in the trial of this case the trial judge properly instructed the jury with respect to the statutory requirements imposed upon motorists in passing a vehicle proceeding in the same direction, as contained in G.S. 20-149(b), as well as on every other phase of the case, both with respect to the law and the evidence, since the charge was not brought forward in the case on appeal. *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104; *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92; *Emery v. Insurance Co., supra.*

In the trial below we find

No error.

JOHNSON, J., not sitting.

STATE v. ROBERT P. ARTHUR.

(Filed 10 October, 1956.)

1. Perjury § 1—

Perjury is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. G.S. 14-209.

2. Perjury § 8—

In a prosecution for perjury, it is prejudicial error for the court to fail to instruct the jury that in order to convict they must find guilt beyond a reasonable doubt from the evidence of at least two witnesses, or from the evidence of one witness together with other evidence of corroborating circumstances.

3. Criminal Law § 85a: Judgments § 20—

After the granting of a new trial, defendant may move in the lower court for correction of the minutes, without prejudice to his right to be heard on the question of former jeopardy if no verdict had been returned.

JOHNSON, J., not sitting.

BOBBITT, J., concurs in result.

APPEAL by defendant from *Sink, E. J.*, at 7 May, 1956 Regular Schedule "B" Criminal Term, of MECKLENBURG.

Criminal prosecution upon a bill of indictment charging that Robert P. Arthur did on 3 August, 1953, feloniously, willfully and unlawfully commit perjury upon the trial of an action in the August Term 1953 of Superior Court of Mecklenburg County, wherein he was plaintiff and Rochelle P. Arthur was defendant, in manner specifically set forth.

Upon the trial in Superior Court the State offered evidence tending to support the charge with which defendant is indicted. And the case on appeal recites that "the entry recorded in the Minute Book No. 17 at page 632, Mecklenburg County, office of the Clerk of Superior Court, is set out below:

" 'The defendant through his counsel C. M. Llewellyn enters a plea of not guilty to the above charge. The jury . . . (naming them) being duly sworn and impaneled to try the issue between the State and defendant, find the defendant guilty as charged with the recommendation of mercy. The judgment of the court is that the defendant be confined in the State's Prison at Raleigh, North Carolina, for a term of not less than two (2) nor more than three (3) years to be assigned to work as provided by law under the supervision of the State Highway and Public Works Commission. Notice of appeal given in open court.' "

And these entries of appeal appear over the signature of the Presiding Judge: "Upon the coming in of the verdict, defendant moves to set aside the verdict as being against the greater weight of the evidence and for a new trial. Motion overruled. The defendant excepts. Exception #55.

"Defendant moves for a new trial as a matter of law, for errors committed in the progress of the trial. Motion overruled. Defendant excepts. Exception #56.

"Judgment pronounced as set out in the record. To the judgment as pronounced, the defendant objects. Objection overruled. Defendant excepts. Exception #57.

"The defendant appeals to the Supreme Court of North Carolina, upon errors assigned and to be assigned. Notice of appeal given in open court; further notice waived. Exceptions 58, 59, 60, 61."

And the record contains the following: "After some deliberation, the jury returned for further instructions: 'Your Honor, we'd like to ask if it's within our province to recommend mercy?'

"Court: (E) 'It is within the province of the jurors in any criminal action tried in the State of North Carolina to make a recommendation of mercy.'" (E) Exception #52. Defendant excepts to the final instruction given by the Court, above set forth between (E) and (E).

Then the case on appeal contains, "as taken from the certified transcript of the Court Stenographer Opal W. Blair," the following in respect to the taking of the verdict, and the form of judgment:

"Verdict:

"Court: 'Lady and Gentlemen of the jury, have you agreed upon a verdict?'

"Jury: 'We have.'

"Court: 'Guilty?'

"Jury: 'We'd like to recommend mercy.'

"Judgment:" (Identical with the language shown in the minutes of the court.)

Note: The above appears to be basis for the motion to correct minutes of the Superior Court, which is the subject of *S. v. Arthur, post,* 586.

In instant case defendant appeals and assigns error.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

C. M. Llewellyn, Ann Llewellyn Greene, and E. T. Bost, Jr., for Defendant Appellant.

WINBORNE, C. J. Perjury, as defined by common law and enlarged by statute in this State, G.S. 14-209, is "a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question." *S. v. Smith,* 230 N.C. 198, 52 S.E. 2d 348, and cases there cited. See also *S. v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191.

And in a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances, "adminicular" circumstances, as the

late *Chief Justice Stacy* was wont to say, if you please, sufficient to turn the scales against the defendant's oath. *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *S. v. Hill,* 223 N.C. 711, 28 S.E. 2d 100; *S. v. Webb,* 228 N.C. 304, 45 S.E. 2d 345; *S. v. Sailor, supra,* and cases there cited.

Indeed, in the *Hill case, supra,* in opinion by *Seawell, J.,* this Court said: "Conceivably, the uncorroborated testimony of one witness might produce in the minds of the jury the satisfaction to a moral certainty of the guilt of the accused; in other words, convince the jury beyond a reasonable doubt of such guilt; but it is not sufficient in law, and the instruction, therefore, that if the jury is so satisfied from the evidence beyond a reasonable doubt they should return a verdict of guilty, while a satisfactory formula, in most cases, disregards conditions which the law declares essential to conviction of perjury, and therefore is not adequate."

In the case in hand appellant invokes this principle, and excepts to the charge, Exception 58, on the ground that the trial Judge failed to instruct the jury in compliance therewith. And the State through the Attorney-General in brief filed in this Court frankly states that "Although the State offered evidence of the crime of perjury through at least two witnesses and a number of corroborating circumstances, it is true the court failed to charge the jury to the effect that, in order to find the defendant guilty, it must find guilt beyond a reasonable doubt from the evidence of at least two witnesses, or from the evidence of one witness together with other evidence of corroborating circumstances."

And it is further conceded that "the State is unable to distinguish the instant case from that" of *S. v. Hill, supra,* and cases there cited.

While the case on appeal discloses sufficient evidence to take the case to the jury, and to withstand the motion for nonsuit,—for error thus confessed by the State there must be a new trial. Hence it is deemed unnecessary to consider other assignments of error.

However, defendant contends that the minutes of the Superior Court as hereinabove set forth do not reflect truly what transpired in the return made by the jury in respect to a verdict; and that the true facts are as reported by the Court Reporter. In accordance therewith defendant made a motion at the June Term 1956 for correction of the minutes to speak the truth. The case was then pending in Supreme Court on this appeal. Therefore the Judge declined to hear the motion. Defendant has undertaken to appeal. See *S. v. Arthur, post,* 586.

In granting a new trial, it is without prejudice to defendant to move, and to be heard, and to have the facts found, on his motion for correction of the minutes. If no verdict was rendered, the new trial here granted shall not prejudice defendant with respect to his right to be heard, if he should so desire, on question of former jeopardy.

New trial.

JOHNSON, J., not sitting.

BOBBITT, J., concurs in result.

STATE v. ROBERT P. ARTHUR.

(Filed 10 October, 1956.)

Appeal and Error § 12: Criminal Law § 72: Judgments § 20—

Pending appeal, the trial court has no jurisdiction to hear a motion for correction of the minutes.

JOHNSON, J., not sitting.

APPEAL by defendant from *Armstrong, J.*, at June 1956 Term, of MECKLENBURG.

Criminal prosecution upon bill of indictment charging defendant with the crime of perjury, tried at the 7 May, 1956 Regular Schedule "B" Criminal Term of Mecklenburg, which is the subject of appeal in *S. v. Arthur, ante,* 582.

The record on this attempted appeal shows that at the June Term 1956 of Mecklenburg, defendant made a motion for correction of minutes of Superior Court in respect to the taking of a verdict at the trial term. Since the case was then on appeal to Supreme Court, the Judge Presiding denied the motion. Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

G. M. Llewellyn and Ann Llewellyn Greene for Defendant Appellant.

PER CURIAM. The case of *S. v. Arthur, ante,* 582, being on appeal to Supreme Court, the Superior Court was then without authority to entertain the motion for correction of the minutes. Hence the judgment from which appeal is taken is affirmed, and the

Appeal dismissed.

JOHNSON, J., not sitting.

WILLIAM A. TILLIS, SR., v. CALVINE COTTON MILLS, INC., A CORPORATION, AND LEON SALKIND.

(Filed 10 October, 1956.)

1. Appeal and Error § 19—

The Rules of Court governing appeals are mandatory and will be enforced, even *ex mero motu*.

2. Same—

Appellant is required to group and bring forward such of his exceptions previously noted in the case on appeal as he desires to preserve, and the assignments of error should definitely and clearly present the asserted errors so that the Supreme Court is not compelled to go beyond the assignments themselves to ascertain the precise questions involved. Rule of Practice in the Supreme Court No. 19(3).

3. Bill of Discovery § 8—

The requirements of G.S. 8-89 are satisfied by a verified motion sufficiently designating the books, papers and documents sought to be inspected.

4. Bill of Discovery § 9—

A motion for inspection of writings, upon proper verified motion, is addressed to the discretion of the trial court.

5. Same—

Where the motion is for inspection of writings in the possession of the corporate defendant, and the order allows inspection of writings in the possession of both the corporate and individual defendant, but both defendants are represented by the same counsel and it appears that the individual defendant was the president of the corporate defendant and that the writings referred to in the order all relate to business of the corporate defendant, abuse of discretion in granting the order is not shown.

JOHNSON, J., not sitting.

APPEAL by defendants from *Campbell, J.*, June Regular B Civil Term 1956 of MECKLENBURG.

Civil action to recover damages for alleged breach of contract heard on motion of plaintiff, made pursuant to G.S. 8-89, for inspection of writings in the possession of the corporate defendant, after complaint and amended complaint and answers to the amended complaint had been duly filed in the action, which is now pending for trial in the Superior Court of Mecklenburg County.

The court below entered an order in its discretion for the inspection of writings in the possession of both defendants. The court found as a fact that the individual defendant at the time of the commencement of this action was, and still is, the president of the corporate defendant.

Defendants appeal, assigning error.

G. T. Carswell, B. Irvin Boyle, and James F. Justice for Plaintiff, Appellee.

Sedberry, Clayton & Sanders for Defendants, Appellants.

PARKER, J. This is the third time that this case has been before this Court. In 236 N.C. 553, 73 S.E. 2d 464, the defendants appealed from an order denying their motion for a bill of particulars. The appeal was dismissed. In 238 N.C. 124, 76 S.E. 2d 376, plaintiff appealed from an order allowing defendants' motion to examine the plaintiff before trial. The appeal was dismissed.

The defendants' assignments of error consist of a *seriatim* listing of their exceptions, except that the defendants assign as error the judge "in setting the record proper on appeal" incorporated certain portions of the record. It is plain that these incorporations are not prejudicial to the defendants. These assignments of error are typical: "1. That the court erred in failing and refusing to find the defendants' requested Fact #5. (Exception #2, R. p. 33)," and "6. That the court erred in failing and refusing to find defendants' requested conclusion #1. (Exception #9, R. p. 34)."

Rule 19(3) Rules of Practice in the Supreme Court, 221 N.C. 544; G.S. Volume 4A, p. 157, reads: "All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed . . ." The Rule further states the Court in its discretion may refer the transcript to the clerk or to some attorney to state the exceptions according to the Rule on certain conditions.

Rule 27½ of our Rules of Practice in this Court provides: "The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal."

The Rules of this Court, governing appeals, are mandatory, and will be enforced, *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126: they will be enforced *ex mero motu* by this Court, *Pruitt v. Wood, supra; Anderson v. Heating Co.,* 238 N.C. 138, 76 S.E. 2d 458; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664; *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602.

An appellant is required to group and bring forward such of his exceptions previously made and noted in the case on appeal that he desires to preserve and present to the Court. *Suits v. Ins. Co., supra.*

This Court said in *Steelman v. Benfield; Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829: "Just what will constitute a sufficiently spe-

cific assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. . . . the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors."

The assignments of error are quite similar to the assignments of error in *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735, in which case *Stacy, C. J.*, said for the Court: "The assignments of error, appearing on the present record, are not sufficiently definite to enable the Court to understand what questions are sought to be presented, without a voyage of discovery through the record, citing authority. Hence, the motion of plaintiffs to dismiss the appeal and to affirm the judgment for failure to comply with Rule 19, sec. 3, would seem to be well founded." To the same effect see: *Merritt v. Dick*, 169 N.C. 244, 85 S.E. 2; *Byrd v. Southerland*, 186 N.C. 384, 119 S.E. 2; *Investment Co. v. Chemicals Laboratory*, 233 N.C. 294, 63 S.E. 637.

The purported assignments of error, with the exception of the assignment of error to the signing of the order for the inspection of writings, do not throw the slightest light upon the questions upon which we are asked to pass on this appeal, and do not comply with Rule 19(3) and Rule 27½ of our Rules of Practice in this Court, and will not be considered. *Ellis v. R R.*, 241 N.C. 747, 86 S.E. 2d 406; *Cecil v. Lumber Co., supra.*

The requirement of G.S. 8-89 that the books, papers and documents sought to be inspected contain "evidence relating to the merits of the action" is satisfied by the verified motion. This verified motion sufficiently designates the books, papers and documents sought to be inspected. *Construction Co. v. Housing Authority, ante*, 261, 93 S.E. 2d 98.

It is plain that plaintiff's verified motion discloses facts adequate to sustain the order entered. Therefore, the granting or refusal of the motion was within the discretion of the judge. *Construction Co. v. Housing Authority, supra; Star Manufacturing Co. v. R. R.*, 222 N.C. 330, 333, 23 S.E. 2d 32; *Dunlap v. Guaranty Co.*, 202 N.C. 651, 163 S.E. 750; *Bank v. Newton*, 165 N.C. 363, 81 S.E. 317. The judge exercised his discretion in allowing the motion to inspect.

It is true that the verified motion was to inspect writings in the possession of the corporate defendant, and the order allows an inspection of writings in the possession of both defendants. According to the order the individual defendant at the time of the institution of this action, and now, is president of the corporate defendant. The order is to inspect writings in respect to the business of the corporate defendant. This action has been pending for several years, and in this appeal both de-

fendants are represented by the same counsel. When the order was entered in the trial below the same counsel appeared in behalf of both defendants. No prejudicial error sufficient to modify the order as to the individual defendant by striking out its provisions as to him appears, for it is patent that the order refers to writings of the corporate defendant and not to any writings of his not connected with the business of the corporate defendant.

We find no abuse of discretion on the part of his Honor so as to raise a legal question for decision.

The order entered below is

Affirmed.

JOHNSON, J., not sitting.

STATE v. EDWARD COPPEDGE.

(Filed 10 October, 1956.)

1. Bastards § 1—

The offense proscribed by G.S. 49-2 is the willful refusal of a parent to support his or her illegitimate child, and neither the begetting of the child nor the failure of the father to pay expenses of the mother incident to the birth of the child, is an offense under the statute.

2. Bastards § 4: Criminal Law § 56—

Where a warrant under G.S. 49-2 fails to allege that defendant's failure to support his illegitimate child was willful, the warrant is fatally defective and motion in arrest of judgment must be allowed.

3. Bastards § 1: Criminal Law § 24½—

Since the willful failure to support an illegitimate child is a continuing offense, arrest of judgment on an invalid warrant will not preclude a subsequent prosecution.

APPEAL by defendant from *Parker (J. W.), J.*, at May 1956 Term, of NASH.

Criminal prosecution upon a warrant issued 22 February, 1956, out of the Recorder's Court of Nash County, upon affidavit of Ivory Alston charging "that . . . on or about ..... day of May, 1955, Edward Coppedge did unlawfully, wilfully beget upon the body of Beatrice Alston an illegitimate child now the age of 3 days and he has failed and refused to provide support and maintenance for said child and to pay doctor's bill, contrary to the form of the statute . . .," heard in Superior Court

on the original warrant, upon appeal thereto by defendant, from judgment of Recorder's Court.

Verdict: Guilty of bastardy, as charged in the warrant.

Judgment: Imprisonment, suspended on conditions stated.

Defendant appeals therefrom to Supreme Court and assigns error.

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

W. O. Rosser for Defendant Appellant.

WINBORNE, C. J. The statute, G.S. 49-2, declares that "any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor . . ."

The only prosecution contemplated under this statute is grounded on the willful neglect or refusal of a parent to support his or her illegitimate child,—the mere begetting of the child not being denominated a crime. *S. v. Clarke,* 220 N.C. 392, 17 S.E. 2d 468; *S. v. Dill,* 224 N.C. 57, 29 S.E. 2d 145; *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157; *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857; *S. v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209.

Likewise the failure of a father to pay the expenses of the mother incident to the birth of the illegitimate child is not a criminal offense. *S. v. Thompson, supra.*

In the *Clarke case, supra,* opinion by *Devin, J.,* later *C. J.,* this Court stated in respect to the offense defined in G.S. 49-2: "Willfulness is one of the essential elements of the offense. This must be charged in the warrant . . . Its omission is not cured by C.S. 4623 (now G.S. 15-153)," citing cases.

In the light of the statute, as so interpreted by this Court, it appears upon the face of the record proper that the warrant fails to allege the essential element of willfulness. This is a fatal defect in the warrant. Hence motion in arrest of judgment should be allowed. *S. v. Clarke, supra.* The Attorney-General so concedes.

Nevertheless, this statute G.S. 49-2, as interpreted by this Court, creates a continuing offense. *S. v. Chambers, supra,* citing *S. v. Johnson,* 212 N.C. 566, 194 S.E. 319; *S. v. Bradshaw,* 214 N.C. 5, 197 S.E. 564; *S. v. Davis,* 223 N.C. 54, 25 S.E. 2d 164; *S. v. Robinson, supra.*

Hence the decision here will not preclude further prosecution in keeping with the existing factual situation. *S. v. Perry,* 241 N.C. 119, 84 S.E. 2d 329.

For reason stated

Judgment arrested.

HOUSING AUTHORITY OF THE CITY OF WILMINGTON, NORTH CAROLINA, v. J. K. BROWN AND ELECTRIC CHEMICAL COMPANY.

(Filed 10 October, 1956.)

Process § 8d—

Findings of fact of the trial court *held* sufficient to support its conclusion that defendant corporation was doing business in this State within the meaning of G.S. 55-38 so as to warrant service of process by service on the Secretary of State.

JOHNSON, J., not sitting.

APPEAL by defendant Electric Chemical Company from *Stevens, J.*, May Civil Term, 1956, of NEW HANOVER.

This appeal is from a denial of the corporate defendant's motion under special appearance to set aside service of process and to dismiss. The judgment of the court below sets out in detail the proceedings and the court's findings of fact, viz.:

"This cause coming on for hearing and being heard by the undersigned Judge holding the May 1956 Civil Term of Superior Court of New Hanover County, upon the Special Appearance and Motion of the defendant, Electric Chemical Company, to set aside service of summons and to dismiss Amendment to Complaint, both plaintiff and defendants being represented by counsel; and

"It appearing to the Court that summons and complaint were filed in the Superior Court of New Hanover County on the 26th day of January 1956, and that copy of summons and complaint were served by the Sheriff of New Hanover County on R. E. Miller, Technical Director for the defendant Electric Chemical Company on January 26, 1956; and

"It further appearing to the Court that copy of summons and complaint were served on J. K. Brown, Service Engineer for the defendant Electric Chemical Company, by the Sheriff of Guilford County, North Carolina, on January 27, 1956; and

"It further appearing to the Court that two copies of the summons and complaint in this action were on March 7, 1956, served by the Sheriff of Wake County, North Carolina, on Honorable Thad Eure, Secretary of State, of the State of North Carolina, Raleigh, North Carolina, said Secretary being the Process Agent for the defendant Electric Chemical Company named in the Order of the summons as provided in Chapter 55 of the General Statutes of North Carolina, and that on March 9, 1956, copy of said summons and complaint were delivered to the defendant Electric Chemical Company by registered mail, as by law provided; and

"It further appearing to the Court that, by leave of this Court first had and obtained, the plaintiff amended its complaint as set out in said Amendment to the Complaint, said Amendment being served by the Sheriff of Wake County, North Carolina, on the Honorable Thad Eure, Secretary of State, of the State of North Carolina, Raleigh, North Carolina, on April 20, 1956, as by law provided; that on or about the 23rd day of April 1956 a copy of said Amendment to said Complaint was delivered to the defendant Electric Chemical Company, by registered mail, as by law provided; and

"It further appearing to the Court that on or about February 23, 1956 the defendant J. K. Brown filed an answer to said complaint; and

"It further appearing to the Court that on or about February 20, 1956 the defendant Electric Chemical Company, through counsel, entered a Special Appearance and Motion to set aside attempted service of summons upon the grounds therein set forth; and

"It further appearing to the Court that thereafter, on or about March 30, 1956, the defendant Electric Chemical Company entered a Special Appearance and Motion to set aside service of summons through the Secretary of State, of the State of North Carolina, as Process Agent for said defendant, as provided by law; and

"It further appearing to the Court that on or about the 30th day of April 1956, the defendant Electric Chemical Company entered a Special Appearance and Motion to dismiss an Amendment to Complaint filed by plaintiff on or about April 17, 1956.

"Upon the reading of all pleadings, and affidavits in support thereof, and after hearing argument of counsel, and after a careful examination of the law applicable to this action, the COURT FINDS THE FOLLOWING FACTS:

"1. That the defendant Electric Chemical Company is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal office in the City of Cleveland, and was not at the times complained of domesticated in the State of North Carolina, nor did it have an officer or agent in the State of North Carolina upon whom process in all actions or proceedings against it could be served.

"2. That the Electric Chemical Company was at the times complained of engaged in the manufacture, production and sale of chemical products and water conditioning materials for the control and prevention of corrosion, and other deleterious matters in hot and cold water distribution systems, domestic and commercial, and had transacted and repeatedly solicited business in the State of North Carolina over a period of approximately ten years prior to the commencement of this action on January 26, 1956.

"3. That the defendant J. K. Brown at all times represented himself to be Service Engineer for the defendant, Electric Chemical Company,

in the State of North Carolina, and was engaged by the defendant Electric Chemical Company as such, and as the accredited representative of the defendant Electric Chemical Company, made periodical visits to the City of Wilmington for the specific purpose of making checks, readings, tests, and chemical analyses of the raw city water, and making recommendations for the treatment of the domestic hot water distribution systems for the various projects of the Housing Authority of the City of Wilmington.

"4. That upon the recommendation of the said J. K. Brown, Service Engineer, as aforesaid, chemical materials were purchased from the defendant Electric Chemical Company by the Housing Authority of the City of Wilmington, and payment made therefor.

"5. That the said J. K. Brown, acting for and in behalf of the defendant Electric Chemical Company, as its accredited representative, recommended the purchase by the plaintiff from the defendant, Electric Chemical Company, of a manual by-pass feeder to be installed on the said Domestic Hot Water Distribution System of the Dr. W. Houston Moore Terrace Project, for the purpose of injecting the chemical materials purchased from the defendant Electric Chemical Company, as recommended by the said J. K. Brown, into the said Domestic Hot Water Distribution System in said Project; that the said feeder was installed under the personal supervision of the said J. K. Brown, Service Engineer as aforesaid, while acting as Agent, Servant, or Employee of the Electric Chemical Company.

"6. That all correspondence between the said J. K. Brown, Service Engineer as aforesaid, and while acting for and in behalf of his employer, the defendant, Electric Chemical Company, and the plaintiff, was conducted on letterheads of the defendant Electric Chemical Company with the name J. K. Brown appearing as Chemist and Service Engineer thereon.

"7. That R. E. Miller had for approximately three years prior to the commencement of this action on January 26, 1956, made several visits to the City of Wilmington as the authorized representative of the defendant, Electric Chemical Company, for the purpose of consulting with the staff of the Housing Authority of the city of Wilmington, and J. K. Brown, Service Engineer as aforesaid, concerning complaints with reference to the domestic hot water distribution systems, of the Housing Authority of the City of Wilmington; that the said R. E. Miller, with the said J. K. Brown, after making certain checks, tests and investigations, made certain recommendations to the Housing Authority of the City of Wilmington with reference to the chemicals to be used as well as the manner in which they should be used, and the equipment to be used in connection therewith.

"8. That the said R. E. Miller, while acting as agent, servant or employee of the defendant Electric Chemical Company, secured the services of and personally supervised the installation of an automatic chemical feeder regulating the injection of chemicals into the domestic hot water distribution system in the Dr. W. Houston Moore Terrace Project by a local plumbing concern, the automatic chemical feeder being furnished by the defendant Electric Chemical Company, and the installation thereof being paid for by the plaintiff, for which it was later reimbursed by the said J. K. Brown, for and in behalf of the Electric Chemical Company, the defendant herein.

"9. That the said J. K. Brown and the said R. E. Miller, as agents and representatives of the defendant, Electric Chemical Company, repeatedly solicited business in the State of North Carolina, and all business transactions were consummated within the State of North Carolina.

"10. That certain personal property belonging to the defendant Electric Chemical Company was on hand at the Dr. W. Houston Moore Terrace Project at the time of the commencement of this action, to-wit: January 26, 1956, the approximate value being $575.00.

"11. That the said J. K. Brown and the said R. E. Miller were acting for and in behalf of their employer the defendant, Electric Chemical Company, as agents, servants or employees at the times and places complained of in the complaint filed in this action, and were engaged in the performance of their master's business.

"12. That the foregoing facts constitute doing business in the State of North Carolina as contemplated by the laws of this State applicable thereto.

"Upon the finding of the foregoing facts,

"IT IS ORDERED, ADJUDGED AND DECREED by the Court that the motion of the defendants with reference to service of summons and complaint upon the defendant, Electric Chemical Company, by serving the same upon R. E. Miller, Technical Director, be and the same is hereby allowed;

"AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion to dismiss the action against J. K. Brown, as agent, servant and employee of the Electric Chemical Company be and the same is hereby allowed;

"AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of the defendants with reference to service of summons and complaint, and amended complaint, upon Honorable Thad Eure, Secretary of State, of the State of North Carolina, Raleigh, North Carolina, as Process Agent for the Electric Chemical Company, as provided by law, be and the same is hereby denied."

Upon exceptions to and appeal from said judgment, the corporate defendant assigns as error: (1) the failure of the court below to make certain requested findings of fact; (2) the insufficiency of the evidence to support designated findings of fact; and (3) the conclusion of law that the service on the Secretary of State, as process agent for the corporate defendant, constituted valid service.

McClelland & Burney for plaintiff, appellee.

Stevens, Burgwin & McGhee for defendant Electric Chemical Company, appellant.

PER CURIAM. The evidence and the findings of fact have been fully considered; and the conclusion reached is that each and all of appellant's assignments of error must be overruled. The findings of fact are supported by competent evidence. On the facts so established, the corporate defendant's activities in North Carolina constituted doing business in North Carolina within the meaning of G.S. 55-38. Hence, there is no occasion to consider the constitutionality of Chapter 1143, Session Laws of 1955.

Affirmed.

JOHNSON, J., not sitting.

STATE v. W. B. EVERETT.

(Filed 10 October, 1956.)

1. Larceny § 4—

A warrant charging that defendant unlawfully and willfully authorized and directed his employee to enter upon the lands of another and carry off sand and gravel therefrom, without alleging what, if anything, the employee did pursuant to such authorization, does not charge a criminal offense. G.S. 14-80. Whether the judge of a recorder's court may return a special verdict if the statute under which the court is established does not so provide, *quaere?*

2. Criminal Law § 67(a)—

Where the warrant on which defendant was tried does not charge a criminal offense, the judgment of not guilty upon a special verdict is void, and the State's appeal therefrom will be dismissed.

JOHNSON, J., not sitting.

APPEAL by State from *Morris, J.*, July Term, 1956, of HERTFORD.

Criminal prosecution based on warrant containing this charge:

". . . on or about the 9th day of March 1956, W. B. Everett did unlawfully and wilfully authorize and direct Edward Cherry, who was employed by him upon said date as his agent or servant, to enter upon the lands of Eula Carter Jones and carry off and engage in carrying off sand and gravel being thereon, from said property, said sand and gravel being the property of said Eula Carter Jones, and under the keeping and care of C. W. Jones, the said W. B. Everett not being the present owner or *bona fide* claimant of said land or premises, against the form of the statute in such case made and provided, and contrary to the law and against the peace and dignity of the State."

Upon trial in the Recorder's Court of Hertford County, the judge thereof made certain findings of fact, designated a special verdict, and upon such special verdict found the defendant not guilty. The State gave notice of appeal.

Upon the State's appeal the Superior Court judge, considering said findings of fact insufficient to constitute a criminal offense, affirmed the judgment of the recorder's court. Thereupon, the State gave notice of appeal to the Supreme Court.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

J. Carlton Cherry and Pritchett & Cooke for defendant, appellee.

BOBBITT, J. Before the 1945 amendment (Ch. 701, 1945 Session Laws) the State had no right of appeal to the Superior Court from the judgment of an inferior court of competent jurisdiction given for the defendant upon a special verdict. G.S. 15-179; *S. v. Nichols,* 215 N.C. 80, 200 S.E. 926. The 1945 amendment implies that there may be circumstances under which the State has such right of appeal. *Quaere:* Unless the statute under which a recorder's court is established so provides, may *the judge* of such court return a *special* verdict?

On this appeal, we do not reach the question posed above. Nor do we consider whether the findings of fact are sufficient to constitute a criminal offense under G.S. 14-80.

Here the warrant charges that defendant unlawfully and wilfully authorized and directed Cherry to do certain things. What Cherry did, if anything, pursuant to such authorization and direction, is not alleged.

Lack of jurisdiction appears on the face of the record. The warrant does not charge a criminal offense. No valid judgment could be pronounced thereon. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Ivey,* 230 N.C. 172, 52 S.E. 2d 346. Therefore, the judgments of the recorder's court and of the Superior Court are void. Since the courts below had no jurisdiction, the appeal to this Court is dismissed.

Appeal dismissed.

JOHNSON, J., not sitting.

JULIA ARMSTRONG v. HYMAN H. HOWARD, MELVIN D. HOWARD, ROBERT McCRAY AND DOCK KELLY SMITH.

(Filed 10 October, 1956.)

Appeal and Error § 19—

The assignments of error must clearly and distinctly set out the asserted errors so that the Court is not compelled to go beyond the assignments themselves to ascertain the precise questions involved. Rule of Practice in the Supreme Court No. 19(3).

APPEAL by plaintiff from *Fountain, J.*, March Term 1956, WILSON.

Plaintiff seeks to recover damages for asserted injuries claimed to have been sustained as a result of a collision between the motor vehicle in which she was riding, owned by the defendant McCray, driven by the defendant Dock Smith, and a motor vehicle driven by defendant Melvin Howard, alleged to be owned by defendant Hyman Howard. Defendant Hyman Howard moved for nonsuit when plaintiff rested and renewed his motion at the conclusion of all the evidence. His motion was allowed. No exception was taken.

Separate issues were submitted to the jury on the question of whether plaintiff sustained injuries resulting from the negligence of the driver of either of the vehicles. The jury answered each issue as to the negligence of each driver in the negative. Thereupon judgment was signed dismissing the action as upon nonsuit as to the defendant Hyman Howard. It was further adjudged, in conformity with the verdict, that plaintiff was not entitled to recover anything of the other defendants.

Robert A. Farris and Lyon & Lyon for plaintiff, appellant.

Lucas, Rand & Rose for defendants McCray and Smith, appellees.

PER CURIAM. The rules promulgated by this Court are intended to aid in the performance of its duties and to assure to litigants that consideration of the asserted errors which the parties have a right to expect of the Court. The rule, 19(3), which requires the grouping and assignment of errors has been repeatedly declared to require the asserted error to be clearly and distinctly set out in the assignment so that the Court shall not be compelled to go beyond the assignment itself to ascertain

the precise question involved. A voyage of discovery through the records to pinpoint the asserted error should not be expected. Typical of plaintiff's assignment of error is: "EXCEPTIONS NINE, TEN and ELEVEN have reference to the failure of the court to explain the law as applied to the evidence in this case as indicated. (R pp 59 and 60)" This does not meet the requirements of the rule. *Thompson v. R. R.*, 147 N.C. 412, imposes the duty upon appellant in this language: ". . . always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary." This interpretation of the rule has been repeatedly applied and adhered to. *Wheeler v. Cole,* 164 N.C. 378, 80 S.E. 241; *Register v. Power Co.,* 165 N.C. 234, 81 S.E. 326; *Carter v. Reaves,* 167 N.C. 131, 83 S.E. 248; *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117; *Myrose v. Swain,* 172 N.C. 223, 90 S.E. 118; *Byrd v. Southerland,* 186 N.C. 384, 119 S.E. 2; *Cecil v. Lumber Co.,* 197 N.C. 81, 147 S.E. 735; *In re Will of Beard,* 202 N.C. 661, 163 S.E. 748; *Greene v. Dishman,* 202 N.C. 811, 164 S.E. 342; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602.

Notwithstanding the failure to comply with the rules, we have examined the record and find no error. The appeal is

Dismissed.

SAM R. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF JUDY CAROL GARDNER, v. NORTH CAROLINA STATE BOARD OF EDUCATION.

(Filed 10 October, 1956.)

State § 3b—

Evidence *held* sufficient to support the findings of fact sustaining the conclusions that school bus driver was guilty of negligence proximately causing death of child who had alighted from the bus and that the child was not guilty of contributory negligence.

JOHNSON, J., not sitting.

APPEAL by defendant from *Parker, J.*, 18 June, 1956 Term, WILSON Superior Court.

This proceeding originated before the North Carolina Industrial Commission under the Tort Claims Act, G.S. 143-291, *et seq.,* upon the ground that plaintiff's intestate, a child seven years, two months of age,

came to her death as a result of a negligent act on the part of one Leonard Weeks, school bus driver, employee of the defendant.

On 18 March, 1955, about 3:00 p.m., the driver stopped the school bus on the right-hand shoulder of a paved highway to let off seven children who lived about ¼ mile from the bus route. In order to go home, the children had to cross the highway. It was their custom to cross in front of the bus and before it moved. Among the children was Judy Carol Gardner. She got off the bus with the others. Six of the children crossed the highway in a group. The driver started the bus without ascertaining whether Judy Carol was in the group.

Clifton Gardner, brother of Judy Carol, testified: "I heard somebody holler when I got across the road. I looked back and I saw the back right wheel when it ran over Judy." The bus driver testified: "It was seven got off and I thought I watched them all go round. I do not remember seeing Judy Carol in the group. . . . After I saw the group of children going up the path to my left, I closed the door, put the stop sign out, looked in front and went on. . . . I did not see anything. I went a little ways and felt a bump and I heard someone holler, and that's when I stopped."

The hearing commissioner found that Judy Carol Gardner was killed as a proximate result of a negligent act on the part of the bus driver, that she was not guilty of contributory negligence, and awarded compensation. After appeal and review, the full commission approved. Upon appeal, the Superior Court overruled all exceptions and entered judgment affirming the award. The defendant appealed.

Chas. B. McLean and Carroll W. Weathers, Jr., for plaintiff appellee.

George B. Patton, Attorney General, Claude L. Love, Asst. Attorney General, and F. Kent Burns, Staff Attorney, for defendant appellant.

PER CURIAM. A review of the record convinces us that there was sufficient competent evidence before the Industrial Commission to support the findings of fact which in turn are sufficient to sustain the award. The findings, therefore, were binding upon the Superior Court and likewise upon us. The principles of law involved are so fully stated in the case of *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129, no useful purpose would be served by repeating them here. On the authority of that case, the judgment of the Superior Court of Wilson County is

Affirmed.

JOHNSON, J., not sitting.

DOROTHY K. SCHOENITH AND HUSBAND, J. SCHOENITH, v. TOWN & COUNTRY REALTY COMPANY, A CORPORATION.

(Filed 10 October, 1956.)

Appeal and Error § 39—

When the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent.

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

JOHNSON, J., not sitting.

APPEAL by defendant from *Campbell, J.*, June Term, 1956, of MECKLENBURG.

This is an action for specific performance. By consent of the parties, the matter was heard by his Honor without a jury.

The plaintiffs, for a valuable consideration, contracted to convey and the defendant to buy Lots Nos. 6, 7, and 8 in Block 2 of the property known as Caldwell Acres, as shown on a map thereof recorded in Map Book 3 at page 83 in the office of the Register of Deeds in Mecklenburg County.

The original developer of Caldwell Acres sold 17 of the 114 lots in the development without restrictions. He sold all but four of the remaining lots with restrictions but reserving unto the grantors the title to all the parks, streets and avenues laid out on the map referred to above, with the right to change said parks, streets and avenues so laid out, or to dispose of same as they saw fit, except the State highway known as the Salisbury or Concord Road.

One or more of the 14 lots sold without restrictions are located in five of the seven blocks in the development. The four lots owned by the developer at the time of his death were conveyed by his heirs without restrictions.

Lot No. 6 referred to above was originally sold with restrictions but was conveyed to the plaintiff Dorothy K. Schoenith without restrictions. Lots Nos. 7 and 8 referred to herein were sold to Dorothy K. Schoenith with restrictions but contained the reservation set forth above.

The court below, among other things, found that the subdivision was not developed under any general or uniform plan or scheme of development and declared the restrictions null and void and entered a decree requiring the defendant to comply with its contract. The defendant appeals, assigning error.

Kennedy, Kennedy & Hickman for plaintiff appellees.

Sol Levine for defendant appellant.

PER CURIAM. The members of the Court being evenly divided on the question as to whether or not this cause should be remanded for additional parties and a further hearing, as was ordered in *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344, the judgment below will be affirmed without becoming a precedent.

Affirmed.

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

JOHNSON, J., not sitting.

MRS. MARGARET T. BURNS, ADMINISTRATRIX OF THE ESTATE OF BEVERLY J. BURNS, DECEASED, v. A. H. GARDNER AND WIFE, LEILA S. GARDNER.

(Filed 10 October, 1956.)

Negligence § 4b—

The maintenance of an unenclosed pond or pool on one's premises is not negligence, and where there is no evidence that the owners of the land permitted children to play on or around the pond, either expressly or impliedly, the owners may not be held liable on the ground of negligence for the drowning of a small child in the pond or lake.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Campbell, J.,* 9 April, 1956, Schedule B Civil Term, of MECKLENBURG.

Upon former appeal, this Court, the six members then sitting being evenly divided, affirmed a judgment overruling defendants' demurrer to the complaint. *Burns v. Gardner,* 242 N.C. 731, 89 S.E. 2d 424. A summary of plaintiff's allegations was stated in connection with said former appeal.

At trial, at the close of plaintiff's evidence, defendant moved to dismiss as in case of nonsuit. The court allowed the motion and judgment of involuntary nonsuit was signed and entered. Plaintiff excepted and appealed.

Guy T. Carswell and George J. Miller for plaintiff, appellant.

Charles W. Bundy for defendants, appellees.

PER CURIAM. When the cause was here on former appeal, three members of the Court were of opinion that plaintiff's allegations, liberally construed, sufficiently alleged negligence to justify the overruling

of the demurrer. Upon consideration of plaintiff's evidence, we are unanimously of the opinion that such evidence, taken in the light most favorable to plaintiff, is insufficient to warrant submission to the jury of an issue as to actionable negligence of defendants.

"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." *Lovin v. Hamlet,* 243 N.C. 399, 402, 90 S.E. 2d 760, and cases cited.

Nothing appears in the evidence to show that children played in or about defendants' pond or lake *with their permission,* express or implied. The testimony of certain school children, witnesses for plaintiff, who had trespassed on defendants' premises on certain occasions to play in or about the pond or lake, shows plainly that whenever they were *caught* by defendants they were warned of the danger and ordered to keep away. Their testimony is to the effect that they knew they had no business in or about the pond or lake and made their visits when defendants were away from home or otherwise unaware of their presence.

The drowning of the child upon stepping into the pond or lake stirs the sympathetic concern of all; but, upon the evidence offered, it does not appear that this tragedy can be attributed to actionable negligence on the part of the defendants. Hence, the judgment of involuntary nonsuit must be

Affirmed.

JOHNSON, J., not sitting.

SAMUEL D. CHERRY, LUCY A. AMBROSE AND CHARLIE W. CHERRY v. DENNIS WOOLARD.

(Filed 17 October, 1956.)

1. Judicial Sales § 7—

In the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchases from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale.

2. Process § 4—

G.S. 1-95 relates solely to the maintenance of chain of process against an original defendant not properly served, and has no application to the service of process upon an additional party after service has been had on the original defendant.

3. Same—

An *alias* summons issues only when the original summons has not been served upon the party named therein, and the denomination of process "*alias* summons" does not make it so.

4. Infants § 13—

The appointment of a guardian *ad litem* for infants before service upon the infants does not render the proceeding void, but is a mere irregularity which may be cured by service on the infants thereafter and the filing of an answer by the guardian.

5. Same—

A guardian *ad litem* was appointed for infants on the same day they were made parties and served with summons. The guardian so appointed refused to serve. The court thereafter appointed another guardian who accepted the appointment and filed answer. *Held:* The appointment of the substitute guardian and the filing of answer by him after the date the infants were served cures any irregularity in the appointment of the original guardian before service on the infants.

6. Judicial Sales § 7: Judgments § 18—

Where the judgment roll discloses sheriff's return of service by delivery to named defendants "also, copies to all minor defendants," a person examining the record will not be charged with the duty of minutely examining the record to ascertain whether the words quoted were in fact a part of the return as made by the sheriff, and in the absence of actual knowledge, a purchaser at a judicial sale under the judgment acquires title unaffected by any contention of defect of service.

7. Taxation § 42—

Where the judgment roll in a tax foreclosure on lands in the county discloses proceedings in conformity with the statutes then in effect, service on all persons having an interest in the land, including minors, the appointment of guardian *ad litem* for the minors and the filing of answer by such guardian, the purchaser acquires good title.

8. Judicial Sales § 7—

The purchaser at a judicial sale is not required to see to the proper disbursement of the purchase price.

JOHNSON, J., not sitting.

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

PARKER, J., dissents.

APPEAL by plaintiff from *McKeithen, S. J.*, at May 1956 Term, of BEAUFORT.

Civil action to test the validity of a tax foreclosure proceeding.

It is stipulated and agreed by all parties:

1. . . . that on 8th day of November, 1922, one N. T. Woolard made and executed a deed to his daughter, Laura Myrten Cherry, the mother

of plaintiffs, the effective conveying words and clauses of which are as follows:

> "This deed made by N. T. Woolard (unmarried) to Laura Myrten Cherry, wife of S. B. Cherry, and her children of the second part: *WITNESSETH:* Has bargained and sold and by these presents does grant, sell and convey to the said Laura Myrten Cherry, during her life, and then to her children and their heirs and assigns. *HABENDUM:* To have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging to the said Laura Myrten Cherry, during her life, and then to her children and their heirs and assigns, to their only use and behoof forever. *COVENANT:* With the said Laura Myrten Cherry and her children reserving unto himself the sole right in the above described land during his life only."

2. ". . . that Laura Myrten Cherry and her husband, S. B. Cherry, Samuel Dallas Cherry and Lucy Alice Cherry, infants, by their Guardian *ad litem*, S. B. Cherry, instituted an *ex parte* special proceeding which is numbered 2663 in the office of the Clerk of the Court of Beaufort County. In this proceeding, Laura Myrten Cherry and husband, S. B. Cherry, individually and as Guardian *ad litem*, sought to impose upon the premises in controversy a $2000 mortgage in favor of J. F. Buckman, Sr., of Washington, North Carolina. Thereafter and in consequence of the said proceeding, a Deed of Trust was executed to one J. F. Buckman, Jr., as Trustee for J. F. Buckman, Sr., securing four notes, each in the sum of $500.00, which said instrument covered the lands in controversy. This instrument has never been foreclosed and it is agreed that for the purpose of this appeal only it is not a part of defendant's chain of title. It is stipulated and admitted that there appears of record on the said Deed of Trust a handwritten marginal entry which reads as follows:

> " 'The lands described in this Deed of Trust were foreclosed as and for non-payment of taxes under and by virtue of a judgment of the Superior Court in the action entitled Beaufort County *v.* S. B. Cherry, *et al*, and the lands herein described have been conveyed by deed from W. L. Vaughn, Commissioner, to Milton H. McGowan, *et al*, January 16, 1932, Book 291, page 350. See also Judgment Docket (Tax Sales) Office of the Clerk of Superior Court, and tax suit No. W-96 in said office. This January 18, 1932. W. L. Vaughn, Commissioner.' "

And the stipulations further show that:

I. On 30 September, 1929, a civil action was commenced in Superior Court of Beaufort County in which Beaufort County was plaintiff and S. B. Cherry and his wife, Laura Myrten Cherry, "and all other persons claiming to have any interest in the lands herein described" were named defendants, and summons therein was served on 30 November, 1929, on the Cherrys, and notice of the action, setting out that it was to foreclose tax liens for the year 1927 on the lands described in the complaint, was published in the *Washington Daily News,* etc.

II. No further action of any kind was taken in the tax foreclosure proceeding until 30 September, 1931, and when two motions, and other subsequent proceedings were had as follows:

(1) The motion was that N. T. Woolard, and infants, Samuel Dallas Cherry, Lucy Alice Cherry and Charlie Cherry be made parties defendant in this action, and that some suitable person be appointed guardian *ad litem* for said infants, and that process be served upon them in manner provided by law. Thereupon Clerk of Superior Court, finding as a fact that the persons named in the motion are proper parties to this action, entered an order that Samuel B. Cherry, father of the infants above named, as well as children of himself and his wife not *in esse,* be appointed guardian *ad litem,* of said infants, as well as the contingent interests of any other children of himself and wife, and directed to represent their interests herein and to file such pleadings within the time allowed by law. And the Clerk further ordered therein that "*alias* summons" together with copies of the complaint be served upon said N. T. Woolard and upon Samuel B. Cherry as Guardian *ad litem.*

(2) A second motion (reciting the pendency of the action for the purpose of collecting from defendants delinquent taxes for the year 1927), was made by plaintiff for permission to amend the original complaint so as to incorporate therein taxes for the years 1929 and 1930 then due and unpaid, and to issue "*alias* summons" against defendants Woolard and the Cherry Children, minors, naming them, and S. B. Cherry as Guardian *ad litem* for them, as well as for those not *in esse,* to the end that they may appear and answer or demur to the additional claim of plaintiff, and that all taxes then due plaintiff be adjudicated in one action: Thereupon the Clerk of Superior Court, finding, among other matters, *prima facie,* that the matters therein set out are true, and the petition is *bona fide,* entered an order, on 30 September, 1931, "that *alias* summons in this action issue against the defendants N. T. Woolard, Samuel Dallas Cherry, Lucy Alice Cherry and Charlie Cherry, and against S. B. Cherry as Guardian *ad litem* of the three last named defendants and any other children of said S. B. Cherry and Laura Myrten Cherry, not *in esse*"; that amended or supplemental complaint may be

filed in this action by plaintiff covering taxes alleged as due for the years 1929 and 1930; and that copies of such summons and amended or supplemental complaint be served upon said N. T. Woolard, Laura Myrten Cherry and S. B. Cherry as Guardian *ad litem* of minors (naming them), and upon him individually, requiring all defendants to appear at the office of the Superior Court of Beaufort County in Washington, N. C., within thirty days after the service of process, and show cause, if any they have, why the prayer of plaintiff be not granted and the lands, described in the complaint, condemned and sold in the manner provided by law. Such amended and supplemental complaint was filed. And summons, dated 30 September, 1931, shows sheriff's return reading: "Served Sept. 30, 1931, by delivery to S. B. Cherry, individually and as Guardian *ad litem* of all minor interests; to Laura Myrten Cherry; and to N. T. Woolard copies of summons, of motion to amend original complaint, and of amended or supplemental complaint, also copies to all minor defendants."

3. Thereafter, on 26 October, 1931, plaintiff petitioned the court and moved that S. B. Cherry be removed as guardian *ad litem*, and a substitute be appointed, for that he had not answered in behalf of his wards, and, for that, upon information and belief, he purposely intends to file no answer or pleading on behalf of his wards, or to make any appearance whatever in their behalf. Pursuant thereto the Clerk of Superior Court, reciting that upon consideration of the affidavit on which the petition is based, and that it appearing that the matters therein set out are true, entered an order that Samuel B. Cherry appear before the Clerk on day set to show cause why he should not be removed as guardian *ad litem* and some other suitable and discreet person be substituted in his stead. The sheriff's return shows service 27 October, 1931, "by delivering a copy of this petition and of the order to show cause to S. B. Cherry." And also under date of 26 October, 1931, notice of the above petition was issued to, and served upon Samuel Dallas Cherry, Lucy Alice Cherry and Charlie Cherry, minors,—the service being made by sheriff by delivery of a copy thereof to each of them, and to their father, S. B. Cherry.

4. Thereafter on 7 November, 1931, pursuant to the notice above described, the Clerk of Superior Court revoked the appointment of S. B. Cherry as such guardian *ad litem*, and appointed S. M. Blount (who is found to be a suitable, discreet and disinterested person), guardian *ad litem* of said minors and of any other children of Samuel B. Cherry and Laura Myrten Cherry, not *in esse*, and "ordered and directed him to appear for and represent the interests of the infants herein named, as well as such minor interests as may not now be *in esse*, to inquire into and examine this proceeding; and to file such answers on behalf of

said infants and those not *in esse* as in his judgment may be proper." And on same day S. M. Blount accepted the appointment and agreed "to act faithfully and diligently in such capacity."

5. Thereafter on 9 November, 1931, the Clerk of Superior Court of Beaufort County entered an interlocutory judgment of foreclosure, in which there is recited, as appearing *prima facie,* the judgment roll of the entire foreclosure proceeding from its institution on 30 November, 1929, substantially as hereinabove related, including a recitation that "S. M. Blount, Guardian *ad litem,* has filed his answer in which he admits the allegations of the complaint and of the amended complaint, and submits the determination thereof to the court." (The answer does not otherwise appear.)

In this judgment the Clerk also makes findings of the taxes, due and unpaid, for the years 1927, 1929 and 1930, and that 1931 taxes are due and unpaid; and that same constitute a prior lien upon the lands described; and it is ordered and adjudged (1) that the lands be condemned to be sold under the direction of the court for the purpose of applying the proceeds of sale on the taxes, interest and costs; (2) that a named person be appointed commissioner to sell, to the highest bidder for cash, after advertisement as directed, and to report the sale to the court, in the manner prescribed by law for sales under order of court,—the sale to be "held on such date as said commissioner may deem most expedient, Sundays excepted."

6. And in the interlocutory order above described, it is found as a fact "that a lien and deed of trust subsists upon the lands described here from Laura Myrten Cherry, individually, and as commissioner of the Superior Court of Beaufort County, N. C., and S. B. Cherry, to J. F. Buckman, Jr., Trustee, dated November 25, 1929, and of record in office of Register of Deeds for Beaufort County in Book 279, page 488, which lien is junior only to the lien of plaintiff for taxes lawfully assessed against the lands herein described." And "it is further ordered that, upon the sale of the property, as herein provided for, the costs of this action and the amount of the taxes due hereunder shall be first paid from the proceeds of sale; that any surplus funds thereafter remaining in the hands of the commissioner, arising from the sale, shall be held in the office of the Superior Court of Beaufort County, for the use and benefit of the owners of the debt secured by the aforesaid deed of trust to J. F. Buckman, Jr., Trustee, and paid over to said owners as and for the indebtedness secured by said deed of trust; and the surplus, thereafter, shall remain in the office of the Clerk of the Superior Court of Beaufort County, No. Car. and held subject to the respective rights of the defendants thereto."

7. The commissioner reported under date 21 December, 1931, sale on Monday, 21st day of December, 1931, "it being the first day of a

regular civil term of the Superior Court of Beaufort County," to J. F. Buckman, J. F. Buckman, Jr., and Edmund T. Buckman, trading as J. F. Buckman & Son at the last and highest bid of $2,500.00. This sale was confirmed by order dated 18 January, 1932, and the commissioner, among other orders, authorized and directed to make and execute deed to Milton H. McGowan and wife, Mary E. McGowan, assignees of J. F. Buckman and others, upon payment of purchase price, and to file "an account of his receipts and disbursements in accordance with this decree."

8. And plaintiffs allege in their complaint that McGowan died in possession of said lands under the commissioner's deed, and that one, Lansche, instituted a special proceeding to sell the land to make assets to pay the taxes of McGowan, and under judgment of court in said proceeding sold said lands to defendant, executing a deed conveying the fee simple estate and the defendant is now in possession of said land under said deed, "claiming and asserting title thereto, adversely to these plaintiffs, in fee simple, and his said deed and assertion of title therein is a cloud upon the title of these plaintiffs." And defendant, answering these allegations, admits that he is in possession of said land under deed from W. J. Lansche, Jr., commissioner, and that he, the defendant, claims and asserts fee simple title to said land.

Upon the trial in Superior Court plaintiffs offered oral testimony tending to show lack of service of summons upon some of plaintiffs, the minors on whom the record on its face shows service.

From judgment as of nonsuit at close of plaintiffs' evidence, plaintiffs appeal to Supreme Court and assign error.

LeRoy Scott and John A. Wilkinson for Plaintiffs, Appellants.
Rodman & Rodman for Defendant, Appellee.

WINBORNE, C. J. The sole assignment of error presented on this appeal is based upon exception to the action of the trial court in granting defendant's motion for judgment as of nonsuit at the close of plaintiffs' evidence.

At the outset it is noted that the parties agree that for the purposes of this appeal the *ex parte* special proceeding numbered 2663 in the office of Clerk of Superior Court of Beaufort County is not a part of defendant's chain of title. Therefore, the inquiry here is, and will be confined to the collateral attack made by plaintiffs upon the civil action, commenced 30 November, 1929, in Superior Court of Beaufort County, wherein Beaufort County is plaintiff and S. B. Cherry, *et al.*, are defendants for purpose of foreclosing tax liens for the year 1927 on the lands described in the complaint, amended to include tax liens for years 1929 and 1930.

There are no exceptions to any particular part of the procedure followed. But plaintiffs, appellants, in their brief filed here, raise several questions in which they contend that reversible error appears upon the face of the record.

In this connection it is well settled in North Carolina that, in the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale. *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873, citing cases. See also *Bladen County v. Breece,* 214 N.C. 544, 200 S.E. 13, and cases cited. Also *Park, Inc., v. Brinn,* 223 N.C. 502, 27 S.E. 2d 548; *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26.

Therefore in the light of statutes in effect in this State at the time of the institution and pendency of the action to foreclose, does it appear upon the face of the judgment roll that the court had jurisdiction (1) of the subject matter of the action, and (2) of the person of the minor defendants there, plaintiffs here?

Appellants state in their brief "this tax proceeding W-96 is either void or voidable with defects open and apparent on the record."

It is contended that while the minor defendants were brought into this action by what was called an *alias* summons, the calling of it "*alias* summons" does not make it so, citing *Mintz v. Frink,* 217 N.C. 101, 6 S.E. 2d 804.

But the difficulty plaintiff encounters is that the factual situation in *Mintz v. Frink, supra,* is not the same as in the case in hand,—and the statute C.S. 480, now G.S. 1-95, relied upon, is inapplicable here. The *Mintz case* was not dealing with the subject of summons for new parties, as in instant case, but with a case where the summons issued for defendant was not properly served,—the Court saying that the status of the process was the same as if service had not been made, and hence plaintiff then had the right, given by statute, C.S. 480 (now G.S. 1-95), to "sue out an *alias* . . . summons, returnable in the same manner as original process . . . a right which could and must have been exercised at any time within ninety days next after the date of the original summons." And the Court continued by saying: "In order to preserve a continuous single action referable to the date of its institution the original ineffective summons must be followed by process successively and properly issued . . . An *alias* follows next after the original . . ."

Thus, as the statute, C.S. 480, in effect in 1931, expressly states, "When the defendant in a civil action or special proceeding is not served with summons within the time in which it is returnable the plaintiff may sue out an '*alias* or *pluries* summons, returnable in the same man-

ner as original process.' " An *alias* summons issues only when the original summons has not been served upon a party defendant named therein. *Powell v. Dail,* 172 N.C. 261, 90 S.E. 194; *Rogerson v. Leggett,* 145 N.C. 7, 58 S.E. 596.

Now did the court have jurisdiction of the subject matter of the action to foreclose, and of the parties? C.S. 7987 provided in pertinent part that the lien of county taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county by which the tax list is placed in the sheriff's hands, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with the penalty and costs which shall accrue thereon, shall be paid.

And C.S. 7990 provided in pertinent part that a lien upon real estate for taxes due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the county, such action shall be prosecuted by and in the name of the county.

In an action pursuant to the provisions of C.S. 7990, it is provided by statute C.S. 451 that in all actions when any of the defendants are infants, they must defend by their general or testamentary guardian, if they have one within the State; and if they have no general or testamentary guardian in the State, and any of them has been summoned, the court in which said action is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian *ad litem,* to defend in behalf of such infants. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court, C.S. 453. See *Graham v. Floyd, supra; Park, Inc., v. Brinn, supra.*

Indeed the statute C.S. 453 declares that when a guardian *ad litem* is appointed he shall file an answer in the action admitting or denying the allegations.

Moreover, the appointment of the guardian *ad litem* before service upon the infants is an irregularity, but it does not render the proceeding void. The irregularity may be cured by the service of summons on the infants thereafter and the filing of the answer of the guardian. *Dudley v. Tyson,* 167 N.C. 67, 82 S.E. 1025; *Carraway v. Lassiter,* 139 N.C. 145, 51 S.E. 968.

In the light of these principles, the record discloses that S. B. Cherry was appointed guardian *ad litem* of his minor children, and of those not in being, on the same day they were made parties and served with sum-

mons. Apparently this was an irregularity, such as is above described, which could be cured by the service of summons on his children, and the filing of an answer by him. They were served, as the record indicates, but he did not file answer, and refused to serve as such guardian. In such event it was the duty of the plaintiff there as held by this Court in *Isler v. Murphy,* 71 N.C. 436, to have had appointed as guardian some discreet person who was willing to act and defend as the law prescribes. This is just what the plaintiff did in the present case. Upon motion of plaintiff S. B. Cherry was removed as guardian *ad litem* as aforesaid. And the record shows that accordingly S. M. Blount, who is found by the court to be a suitable, discreet and disinterested person, was appointed guardian *ad litem* of said minors and of any other children of Samuel B. Cherry and Laura Myrten Cherry, not *in esse,* and ordered and directed (1) to appear for and represent the interests of the wards for whom he was so appointed, (2) to inquire into and examine the proceeding, and (3) to file such answers on their behalf as in his judgment might be proper. And the record shows that on the same day S. M. Blount accepted the appointment and agreed "to act faithfully and diligently in such capacity." The record also shows that he filed answer in which he admitted the allegations of the complaint and of the amended complaint, and submitted the determination thereof to the court. His appointment and his filing of answer all occurred after the date the record shows the infants were served. On the face of the record this cured any irregularity that resulted from the appointment of S. B. Cherry as guardian *ad litem* before any of the infants were served.

Appellant calls attention, however, to the phraseology and punctuation in the return of the sheriff in respect to the clause "also, copies to all minor defendants," and the court is urged to study the photograph of the return shown in the record on this appeal, and to determine whether an issue should have been submitted to the jury as to whether there was any delivery of copies to the minor defendants,—that is, whether the above clause was in fact a part of the return as made by the sheriff.

In this connection this Court, adverting to a contention of similar nature in the case of *Graham v. Floyd, supra,* had this to say: "We cannot agree that one examining the title is held to constructive knowledge of so minute details. It would be otherwise if there were actual knowledge thereof." In the present case actual knowledge of the matter sought to be presented does not appear, and constructive knowledge of so minute detail will not be exacted of a purchaser for value at a sale under such proceeding,—much less of one who purchased at judicial sale to make assets to pay debts of the one who purchased at the tax foreclosure sale.

Therefore this Court holds that upon the face of the judgment roll of the tax foreclosure action, there is no such irregularity as will impair the validity of it. It is manifest that the court had jurisdiction of the parties, and of the subject matter, and that the judgment on its face authorized the sale. *Graham v. Floyd, supra,* and cases hereinabove cited.

Moreover, it was not incumbent upon the purchaser at the judicial sale to see that the money paid for the property was properly disbursed. *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365.

Indeed, as stated by *Stacy, C. J.,* in *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641, "When the purchaser paid his bid into court, or to its officer duly authorized to receive it, he was relieved of any further responsibility in connection with the interest then being sold."

Hence the judgment from which plaintiffs appeal is

Affirmed.

JOHNSON, J., not sitting.

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

PARKER, J., dissents.

ADAIR LIEB v. DR. JEROME MAYER.

(Filed 17 October, 1956.)

1. Appeal and Error § 28—

An assignment of error not set out in the brief is taken as abandoned. Rule of Practice in the Supreme Court No. 28.

2. Trial § 21—

Where plaintiff's evidence is sufficient to establish a tort and to show that plaintiff is entitled to recover nominal damages at least, nonsuit is not the proper procedure to present the contention that there is not a scintilla of evidence upon which the jury could base their verdict as to the amount of damage, since nonsuit cannot be properly allowed if plaintiff is entitled to a recovery in any view of the facts which the evidence reasonably tends to establish.

3. Damages § 12—

Damages are never presumed, but the burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule, and when

compensatory damages are susceptible of proof with approximate accuracy, they must be so proven even in actions of tort.

4. Same—

Damages to a car resulting from a collision are susceptible of proof with approximate accuracy, and when plaintiff's evidence is confined solely to general statements as to where the car was hit and mashed in, without evidence as to the value of the car before or after the collision or the cost of repair, such evidence will not justify a verdict for substantial damages.

5. Damages § 13a—

Where plaintiff seeks to recover for personal injuries and damage to her car resulting from a collision, but offers no evidence as to damages to the car which would justify a verdict for substantial damages, an instruction on the issue of damages that the jury should ascertain the damage to plaintiff's automobile and damage to her person, and add the two sums together, must be held for prejudicial error, it being impossible to tell the amount of damages, if any, the jury awarded for injury to plaintiff's car.

6. Appeal and Error § 54—

Where error relates solely to the issue of damages without affecting the other issues, the Supreme Court in its discretion may award a partial new trial limited solely to the issue of damages, the issues being separable and there being no danger of complication.

JOHNSON, J., not sitting.

APPEAL by defendant from *Bone, J.*, April Civil Term 1956 of LENOIR.

Civil action for personal injuries and damage to an automobile resulting from a collision of two motor cars.

Upon issues not excepted to, the jury found for its verdict that plaintiff was injured by the negligence of the defendant, and that plaintiff was free from contributory negligence. The third issue submitted was, "what damages is the plaintiff entitled to recover?", which issue the jury answered $6,250.00.

Judgment was entered upon the verdict, and defendant appeals.

J. Harvey Turner for Plaintiff, Appellee.
White & Aycock for Defendant, Appellant.

PARKER, J. Defendant has in the record one assignment of error as to the admission of evidence. Since this assignment of error is not set out in his brief, it is taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544 (also printed with annotations in G.S. 4 A. p. 155 *et seq.*); *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904.

Defendant assigns as error the failure of the trial court to allow his motion for judgment of nonsuit made at the close of plaintiff's case,

and renewed at the conclusion of all the evidence. However, defendant concedes in his brief there was sufficient evidence to carry the case to the jury for personal injuries to plaintiff, but contends here that his motion should have been allowed for damages to the automobile because there is not a scintilla of evidence upon which the jury could base a verdict as to the amount of damages to the plaintiff's automobile. However, plaintiff's evidence, which will be set out hereafter, tends to show that plaintiff is entitled to recover nominal damages to her car. *Moore v. Daggett,* 129 Me. 488, 150 A. 538. The Record shows that in the trial court the motions for judgment of nonsuit were made as to the whole case. This Court said in *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757: "A motion for a compulsory nonsuit cannot rightly be allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." The trial court properly refused to nonsuit the plaintiff.

All of defendant's other assignments of error, except those that are formal, relate to the charge on the third issue as to damages. Defendant assigns as error this part of the charge as to the third issue: "Now, gentlemen of the jury, in making your answer to the third issue, if you find that plaintiff is entitled to recover, you would first seek to ascertain the damage to her automobile and then the damage to her person, and add the two sums together and the total of the two would be the amount which you would write in as your answer to the third issue."

This is all of the evidence in respect to the damage to plaintiff's automobile: Plaintiff's testimony on direct examination. She owned a 1952 Chrysler. She, with her husband seated beside her, had backed her car almost to the end of the driveway in her yard. Defendant's car, driven by him, jumped the curb at her neighbor's lawn, came across a double driveway, and slammed into her car pushing it about 8½ feet from where it was. Plaintiff's testimony on cross-examination: "I looked at my car after the collision. The Chrysler's lefthand rear door was mashed in, the complete left rear fender was mashed in and the left rear wheel was about like that (indicating), and the fender was all crushed into the wheel and tire part from the beginning of the lefthand rear door to the back of my car. In speaking of beginning at the door, I mean the forward part of it, next to the front door, and that little piece that divides the body of the automobile between the two doors. That was mashed in. The impact took place on the left rear door, left fender, and the left wheel." Her husband's testimony was to the effect that defendant's car crashed into the side of his wife's car pushing it about 8½ feet; that the collision was in June, and repairs on it were made around September. Patrolman Wesley Paris, a witness for the

defendant, testified he saw the plaintiff's car which was damaged on the left side and toward the rear.

There is no evidence as to the value of plaintiff's car before the collision or as to its condition at that time. Had it ever been in a collision before this time? How many miles had it been driven? What was its value after the wreck? What was the cost of repairs? The evidence gives no answer. It is plain that plaintiff's evidence makes out a case for the recovery of nominal damages to her car, *Moore v. Daggett, supra,* but her evidence fails to show adequate facts upon which a substantial recovery for damages to her car can be based. Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule. *Berry v. Lumber Co.,* 183 N.C. 384, 111 S.E. 707; *Rice v. Hill,* 315 Pa. 166, 172 A. 289.

In *Norwood v. Carter,* 242 N.C. 152, 87 S.E. 2d 2, the Court said: " 'Where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered.' 25 C.J.S. 496." The continuation of the last above sentence quoted from C.J.S. reads: "and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in actions of tort." That damages to an automobile are susceptible of proof with approximate accuracy is not debatable.

The jury was left to guess at a verdict for damages to plaintiff's car from mere general statements or vague and indefinite testimony. Such evidence, as we have here, will not justify a verdict for substantial pecuniary damages to her car. *Rankin v. Helms, ante,* p. 532, 94 S.E. 2d 651; *Transport Co. v. Ins. Co.,* 236 N.C. 534, 73 S.E. 2d 481; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Rice v. Hill, supra; Crowley v. Snellenburg,* 89 Pa. Super. 263; *Smith v. Calley,* 103 Cal. App. 735, 284 P. 974; *Tingler v. Lahti,* 87 W. Va. 499, 105 S.E. 810.

Due to the insufficiency of the evidence to support a verdict for substantial damages to plaintiff's car, we are compelled to hold that the trial judge committed prejudicial error in instructing the jury that they could award substantial damages for injury to plaintiff's car. Of course, it is impossible to tell the amount of damages, if any, the jury awarded for injury to plaintiff's car. However, they may have awarded substantial damages, for they had an opportunity to do so under the judge's charge, and, such being the case, we think that the defendant is entitled to a partial new trial on the issue of damages alone.

We perceive no good reason why the plaintiff should again be put to trial on the first and second issues. The statement of *Walker, J.,* for the Court in *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164, has been quoted many times by us with approval: "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." This case comes within the rule stated by *Justice Walker* as to when a partial new trial will be ordered, and in awarding a partial new trial upon the issue of damages alone, we find precedents in our following decisions: *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Jackson v. Parks,* 220 N.C. 680, 18 S.E. 2d 138; *Messick v. Hickory,* 211 N.C. 531, 191 S.E. 43; *Gossett v. Metropolitan Life Ins. Co.,* 208 N.C. 152, 179 S.E. 438; *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690, Ann. Cas. 1915 A 598; *Rushing v. R. R.,* 149 N.C. 158, 62 S.E. 890.

A new trial is ordered in this case, limited, however to the issue of damages.

Partial new trial.

JOHNSON, J., not sitting.

ETHEL AGNES FLYNN, ADMINISTRATRIX OF THE ESTATE OF TERRY EUGENE FLYNN, DECEASED, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 17 October, 1956.)

1. State § 3a—

Under the State Tort Claims Act recovery is permitted for injuries resulting from a negligent act, but not those resulting from a negligent omission on the part of State employees. G.S. 143-291.

2. Same: Highways § 6—

Recovery cannot be had under the State Tort Claims Act for injuries in a wreck resulting from the negligent failure or omission of the responsible employees of the Highway Commission to repair a hole in a State highway.

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

APPEAL by plaintiff from *Froneberger, J.*, February-March 1956 Civil Term, BUNCOMBE Superior Court.

This proceeding originated before the North Carolina Industrial Commission upon a claim for wrongful death as a result of alleged negligent acts of certain named employees of the defendant, in that they failed to repair a break or hole in the road surface which in turn caused the fatal wreck. It was stipulated that J. T. Snipes was highway Commissioner for the Thirteenth Highway Division, E. H. Aiken was county maintenance superintendent, Frazier Head was section foreman, and Hubert Roberts and Clyde Hensley were maintenance employees of the State Highway & Public Works Commission. The foregoing employees were charged with the duty of maintaining roads of the State highway system, including the Cane Creek Road.

The Hearing Commissioner found the following facts:

"1. That on Sunday, July 25, 1954, at about 5:30 p. m. the plaintiff Gene Flynn was operating his 1935 Ford pickup truck North on Cane Creek Road, in Buncombe County, North Carolina, at a speed between 30 and 35 miles per hour; that the road was dry and the sun was shining; that his wife, Ethel Agnes Flynn, and Arthur Long were riding with him on the seat of said truck; that his five children, namely Ethel Mae Flynn, Margaret Gene Flynn, Mary Ellen Flynn, Tommy Larry Flynn and Terry Eugene Flynn were riding in the back of said truck; that this was a panel truck with the side boards on it about three feet high.

"2. That Cane Creek Road in Buncombe County is a public highway approximately eighteen feet wide, paved with asphalt, and is a highway of the State Highway System and is maintained by the State Highway & Public Works Commission; that when the plaintiff Gene Flynn was rounding a curve to his right travelling North, he met another motor vehicle travelling South in the sharpest point of the curve; that upon meeting and passing said motor vehicle the right front wheel of his truck ran into a hole on the east edge of the pavement on his right shoulder of the road, causing him to lose control of his truck; that it ran into an embankment on the right hand shoulder of the highway throwing said motor vehicle into a ditch across the road and into an embankment on his left hand side of the highway resulting in the almost instant death of Terry Eugene Flynn and injuring all of the other occupants of said truck.

"3. That the Cane Creek Road at the place of said accident and for more than 300 feet both to the North and to the South of said hole was open country road; that the hole on the East edge of said highway was on the right hand shoulder of said highway going

North, and extended into the paved portion of said highway approximately 16 inches, that this hole was crescent shaped, approximately 35 inches in length, 16 inches in width and varied from 1½ to 8 inches in depth; that this hole had existed in substantially the same condition for approximately 30 days prior to July 25, 1954; that due to the topography of the surroundings and the particular location of the hole, it was somewhat difficult to see, but during said month other motor vehicles had travelled in and through said hole in safety and with little difficulty; that only in passing in and through said hole had it been observed and called to the attention of the various witnesses."

The Commissioner also found there was no actual notice to the defendant's employees of the defect in the road and that the facts were not sufficient to constitute constructive notice.

Upon the foregoing findings, the Hearing Commissioner made an award denying liability. The claimant duly assigned errors, among them the failure to make requested findings, and appealed to the full Commission. The full Commission, after hearing and review, adopted as its own the findings, conclusions, and award made by the Hearing Commissioner. Upon appeal, the Judge Superior Court of Buncombe County overruled all exceptions and assignments of error and entered judgment affirming the findings and award made by the full Commission. The claimant duly excepted and appealed to this Court.

William J. Cocke, Sam M. Cathey, for plaintiff, appellant.
Kenneth Wooten, Jr.,
Harkins, Van Winkle, Walton & Buck,
By: O. E. Starnes, Jr., for defendant, appellee.

HIGGINS, J. The claim in this case is based on the alleged negligent failure of the named employees of the State Highway & Public Works Commission to repair a hole or break in the surface of the Cane Creek Road caused by public travel over it. In passing another vehicle, the father of plaintiff's intestate drove his pickup truck into the hole, lost control of it, wrecked it, with the result that Terry Flynn, age four years, was killed and the remaining seven occupants were injured. The claimant contends the break in the road surface was of such size and had existed for such length of time as to give the defendant's agents, naming them, constructive notice of its existence; and their failure to repair it was negligence. The claimant further contends she has the right to prosecute a claim for damages against the defendant under the Tort Claims Act, G.S. 143-291. The pertinent part of the Act in effect at the time the claim arose is here quoted:

"The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. If the Commission finds there was such negligence on the part of a State employee while acting within the scope of his employment which was the proximate cause of the injury and there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of eight thousand dollars ($8,000.00)."

In order to authorize the payment of compensation, the Industrial Commission's findings must include (1) a negligent act, (2) on the part of a State employee, (3) while acting in the scope of his employment, etc. The first requirement is that the claimant show a *negligent act.* Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act? The requirement of the statute is not met by showing negligence, for negligence may consist of an act or an omission. Failure to act is not an act. We think it was the intent of the Legislature to permit recovery only for the *negligent acts* of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts *and omissions* of State employees. The Industrial Commission then would be authorized to award damages resulting from a negligent act or from a negligent failure to act.

That the interpretation here given is correct, we think, is shown conclusively by subsequent legislative enactments. Chapter 400, Session Laws of 1955, ratified 31 March, 1955, amended the Tort Claims Act by inserting after the words, "negligent act," the words, "or omission." By inserting the additional words the conclusion is inescapable the Legislature did not consider they were already included. However, on 16 May, 1955, Chapter 1361, an amendment to Chapter 400, was passed, striking out the words, "or omission." By taking these words out, the conclusion is likewise inescapable that it was the legislative intent they should not be included.

From the foregoing we conclude the claim of damages as the result of failure to repair Cane Creek Road is not compensable under G.S. 143-291 and amendments thereto. Consequently, the judgment of the Superior Court of Buncombe County is

Affirmed.

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

STATE v. EDNA SHUFORD DAVIS.

(Filed 17 October, 1956.)

Criminal Law § 62f—

Evidence *held* to support findings by the court that the defendant allowed people to congregate and remain in her home at nighttime with such frequency and in such numbers as to raise an inference that she was engaged in fortune telling or aiding in prostitution contrary to the terms of a suspended judgment against her, so as to justify the order putting into effect the sentence.

JOHNSON, J., not sitting.

APPEAL by defendant from *Dan K. Moore, J.*, August Term, 1956, of CATAWBA.

This case was before this Court at the Spring Term 1956 and was remanded for further hearing. See *S. v. Davis*, 243 N.C. 754, 92 S.E. 2d 177.

The findings of the court below are set forth in its judgment: "This cause coming on to be heard and being heard upon the appeal from an order of the judge of the Municipal Court of the City of Hickory, dated the 11th day of Nov. 1955, wherein the court found that the defendant had violated the second condition of the suspended sentence entered by the said court against the defendant on the 27th day of May 1955, wherein the defendant entered a *nolo contendere* to the charges of telling fortunes without a license and with abetting prostitution, said cases being consolidated for judgment, and a sentence of two years imposed, but suspended for three years on the following conditions: 1st, that the defendant not violate any of the laws of the State of N. C.; 2nd, that she not permit or allow people to congregate or remain in her home after the hours of darkness; 3rd, that she pay the costs of each case and pay a fine of $600.00. The fine and costs were paid; and this cause having been heard *de novo* at this term of the Superior Court of Catawba County, upon the sworn testimony of C. E. Buchanan, a police officer of the City of Hickory, M. J. Dellinger, officer of the City of Hickory, Ned Whitener, A.B.C. officer, M. P. Pope, an A.B.C. officer,

R. P. Sigmon, Dep. Sheriff of Catawba County, Wade E. Davis, Sheriff of Catawba County, and Edna Bowman, a white female, and from the testimony so offered the court finds as a fact that, after the judgment was signed on May 27, 1955 in the Municipal Court of the City of Hickory, many cars continued to visit the home of the defendant, after the hours of darkness, from one to four being there on numerous occasions, and remaining there various times ranging from a few minutes until hours; that the occupants of these cars were at various times seen entering and leaving the home of the defendant, and were white men and white women, the defendant being a Negro; that white women were seen leaving the home and meeting white men at a short distance from the home; and that on various occasions a white woman was called by the defendant and when this woman arrived at said home white men were found there drinking in company with the defendant; and that this white woman in company with the defendant left the home for the purpose of procuring additional whiskey, and returned to the home where the men and the defendant continued to drink.

"From this evidence and from the facts found the court finds that the defendant allowed people to congregate and 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.

"The court, therefore, finds as a fact that the defendant has violated the following conditions of said suspended sentence: 1st, that she not violate any of the laws of the State of N. C.; 2nd, that she not permit or allow persons to congregate or remain at her home after the hours of darkness; it is therefore ordered that capias and commitment issue forthwith to put the prison sentence into effect."

From the foregoing judgment, the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Deal, Hutchins & Minor for defendant.

PER CURIAM. If the defendant, a Negro, has ceased telling fortunes in violation of the law, and has not engaged in abetting prostitution, since 27 May, 1955, and has not violated the law in any other respect, it is an unusual and peculiar circumstance that her home has continued to be the mecca for so many white men and white women during the hours of darkness. *S. v. Davis, supra.*

We think the facts found by his Honor are supported by competent evidence, and are sufficient to sustain the order putting into effect the sentence imposed on 27 May, 1955, in the Municipal Court of the City of Hickory.

Affirmed.

JOHNSON, J., not sitting.

STATE v. I. J. SPARROW, JR.

(Filed 17 October, 1956.)

Criminal Law § 81a—

No appeal lies from the discretionary determination of application for new trial for newly discovered evidence.

JOHNSON, J., not sitting.

APPEAL by defendant from *Moore (Clifton L.), J.*, June Special Criminal Term, 1956, WAYNE Superior Court.

The Superior Court denied defendant's motion for a new trial on the ground of newly discovered evidence and the defendant appealed.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Edmundson & Edmundson, LaRoque & Allen, and John G. Dawson for defendant, appellant.

PER CURIAM. The case was before this Court at its Spring Term, 1956, and is reported *ante*, 81, 92 S.E. 2d 448. Upon the certification of this Court's opinion to the Superior Court of Wayne County, the defendant in apt time filed an affidavit and made a motion in the cause for a new trial upon the ground of newly discovered evidence. After hearing, the trial judge, in his discretion, denied the motion. "No appeal lies to this Court from the discretionary determination of an application for a new trial for newly discovered evidence." *S. v. Williams, ante*, 459. On the authority of that case and others therein cited, the appeal is

Dismissed.

JOHNSON, J., not sitting.

STATE v. BENNY MOORING.

(Filed 17 October, 1956.)

Criminal Law § 52a (2)—

The State is not precluded from showing the facts to be otherwise than as stated by one of its witnesses, and where in no aspect does the State's evidence establish a complete defense, defendant's motion to nonsuit on that ground is properly denied.

JOHNSON, J., not sitting.

APPEAL by defendant from *Bone, J.*, March Criminal Term 1956 of LENOIR.

Criminal prosecution upon a bill of indictment charging assault with a deadly weapon with intent to kill resulting in serious injury, a violation of G.S. 14-32.

Plea: Not Guilty. Verdict: Guilty of an assault with a deadly weapon.

From a judgment of imprisonment for 12 months to be assigned to work the public roads, defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

White & Aycock for Defendant, Appellant.

PER CURIAM. The State introduced evidence: the defendant none. Defendant assigns as error the denial of his motion for judgment of nonsuit. However, defendant falls into error in contending that the State's evidence made out for him a complete defense. Of course, if it had, the case should be reversed. *S. v. Tolbert*, 240 N.C. 445, 82 S.E. 2d 201.

On the night of 28 June 1955 Walter Clark and three companions, all marines stationed at Camp Lejeune, were traveling in a car from Jacksonville to Kinston, and stopped at defendant's filling station and store to buy gasoline. This station and store had connected with it a dwelling compartment, in which defendant, his father and defendant's wife lived. All four went into the store. They met inside two marines in civilian clothes. Clark had been drinking beer before his arrival. In the store they bought and drank several "shots" of whiskey at 50 cents a "shot." Clark was "pretty high" from drinking, "but not to where I didn't actually know what I was doing." About 30 minutes after their arrival, all the marines left. Clark was the last one to go out. Clark testified: "I started out and the next thing I remember something caught me in the leg. I went down. . . . While we were in the place of business,

there were no harsh words, argument or anything in the way of disorderly conduct on my part, or anything else, that I know of. . . . I was shot in the leg. . . . I heard that I made an effort to knock on the door or attempt to get back in, but I can't say truthfully. I do not have an opinion as to how far I was from the door to this place at the time I fell on the ground after being shot." On cross-examination Clark testified: "I can't swear this defendant shot me. . . . I don't know what I was doing at the time I was struck by a bullet, except I was heading out of the place."

Daniel Monroe, a companion of Clark, testified in substance: Clark was the last marine to come out of the store. He turned around, and started knocking on the door. A person inside asked what he wanted, and he replied he forgot his change. Clark kept pounding on the door, and the lights inside went out. When the first shot was fired Clark was still pounding on the door. After the first shot was fired Clark started staggering away, and when the second shot was fired he fell. Monroe also testified: "Clark was knocking on the door. I hollered at him and he started toward my car. Another shot was fired, and he went to the ground." Clark fell about 10 yards from the door.

Defendant told Thomas H. Sutton, a deputy sheriff of Lenoir County, he shot Clark under these circumstances: "He said they were beating, slamming and cursing on the front of the house like they were going to break in; he said, 'I went to the back, came around and asked them to leave and one of them started for me. I didn't take no sight at all, I just pulled the trigger; I did not intend to hit the man.' "

The State's evidence was presented by the three witnesses above mentioned. The State offered in evidence the statement of the defendant, but that did not prevent the State from showing that the facts were different. *S. v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132.

The State's evidence does not make out a complete defense for the defendant, and was sufficient to carry the case to the jury.

Defendant's other assignments of error, except those that are formal, are to the charge and the judge's failure to charge. A close study of the evidence and the charge shows that the judge fairly and accurately declared and explained the law arising on the evidence given in the case, and these assignments of error are without merit.

The evidence was conflicting. After a fair trial the defendant was convicted by a jury of his peers, and he must abide the consequences of his unlawful act.

No error.

JOHNSON, J., not sitting.

E. McLAMB, TRADING AS McLAMB MONUMENT COMPANY, v. R. J. DAWSON.

(Filed 17 October, 1956.)

APPEAL by defendant from *Bone, J.*, March, 1956, Term, WAYNE Superior Court.

On 10 September, 1954, the parties signed a written instrument under the terms of which the plaintiff agreed to manufacture and erect a specifically described monument at the tomb of the defendant's wife in Westview Cemetery, Kinston, North Carolina. The price agreed upon was $1,200. After the execution of the paper writing, according to plaintiff's allegations and evidence, a slight modification in design was agreed upon and made a part of the contract. The contract contained the following: "No verbal agreement allowed to vary the terms *of* conditions of this contract and this order is not subject to cancellation unless expressly stated herein." According to the plaintiff's allegations and evidence the marble for the monument was procured and the work completed with the exception of the inscription when, on 3 December, 1954, the defendant "asked" the plaintiff to cancel the contract and forbade the erection of the monument. The plaintiff asked for judgment of $1,200, the price of the monument.

The defendant admitted signing an order but denied it was a contract to purchase a monument and alleged and offered evidence tending to show that verbal conditions were attached to the delivery of the writing to the effect that the plaintiff would ascertain whether a Mr. Dail (with whom defendant had conferred about the purchase of a similar monument) could deliver a monument as desired by the defendant and, if so, the order should be deemed cancelled. The defendant denied any agreement for a change or modification in the design as alleged by the plaintiff. The defendant offered evidence tending to show that the monument the plaintiff offered to deliver was smaller and different from that called for in the order.

The jury found (1) the parties contracted as alleged, (2) the defendant breached the contract, and (3) the plaintiff was entitled to recover as damages the sum of $750.00. From judgment on the verdict, the defendant appealed.

James N. Smith for plaintiff, appellee.
J. Faison Thomson & Son for defendant, appellant.

PER CURIAM. The evidence at the trial was conflicting. The jury accepted the plaintiff's version. After examination of all the exceptive assignments, we find in the trial below

No error.

JOHNSON, J., not sitting.

J. EUSTICE BIZZELL, ADMINISTRATOR OF THE ESTATE OF JOHNNIE LASSITER, v. MRS. HELEN CLEMENTS.

(Filed 17 October, 1956.)

APPEAL by plaintiff from *Bone, J.*, March Term, 1956, of WAYNE.

Civil action growing out of an automobile collision that occurred about 7:00 a.m., 23 February, 1955, in Wayne County, at the intersection of the Eureka-Goldsboro road and the Faro-Pikeville road.

Approaching the intersection, plaintiff's intestate was driving south on the Eureka-Goldsboro road, the dominant highway, passing a highway Crossroads Sign; and defendant was driving west on the Faro-Pikeville road, the servient highway, passing a highway Stop Sign.

Evidence offered by plaintiff tended to show that her intestate was driving some 30-40 miles per hour, on his right side of the highway; that defendant could be observed approaching the Stop Sign and intersection "pretty fast"; that, without stopping or reducing speed, defendant drove into the intersection; and that the collision occurred when defendant's car struck the left side of the car of plaintiff's intestate.

Evidence offered by defendant tended to show that, while she did not come to a complete stop, she almost stopped; that she looked, saw nothing coming, and drove into the intersection at a speed of 5-10 miles per hour; and that, while attempting to cross the intersection, the car of plaintiff's intestate came on at an unlawful speed, to wit, 60 miles per hour, striking the right front wheel of her car.

Plaintiff's intestate died from injuries caused by said collision; also, his automobile was damaged.

The jury answered the negligence issue "Yes," and also answered the contributory negligence issue "Yes." Upon the verdict, judgment was entered for defendant. Plaintiff excepted and appealed, assigning errors.

J. Faison Thomson & Son for plaintiff, appellant.

Edmundson & Edmundson for defendant, appellee.

PER CURIAM. Under the pleadings and evidence, the issues of negligence and contributory negligence were properly submitted; and, while the contributory negligence issue might have been answered otherwise,

the jury upon conflicting evidence saw fit to resolve it in favor of defendant.

A careful examination of plaintiff's assignments of error fails to disclose prejudicial error in the challenged rulings on evidence or as to challenged features of the charge. Indeed, it appears that the presiding judge fully and correctly instructed the jury as to the law applicable to the factual situations having support in the evidence.

No error.

JOHNSON, J., not sitting.

MRS. KATE ZIMMERMAN, WIDOW, MRS. KATE ZIMMERMAN, MOTHER AND NEXT FRIEND OF EDWARD ZIMMERMAN, SON, AND MARTIN ZIMMERMAN, SON, OF EDWARD ZIMMERMAN, DECEASED; ANNE PARRISH, WIDOW OF JOSEPH PARRISH; AND AUDREY L. BRICKHOUSE v. ELIZABETH CITY FREEZER LOCKER, EMPLOYER, AND ROYAL INDEMNITY COMPANY, CARRIER.

(Filed 31 October, 1956.)

1. Master and Servant §§ 40c, 40d—

In order to be compensable under the Workmen's Compensation Act, an injury must result from an accident "arising out of and in the course of the employment," and the words "out of" refer to the cause of the accident, while the words "in the course of" have reference to the time, place and circumstances under which it occurs.

2. Master and Servant § 40d—

An accident arises "in the course of" the employment if at the time the employee is at his place of work performing the duties of his employment.

3. Master and Servant § 40d—Evidence held sufficient to support finding that shooting of fellow employees arose out of the employment.

The evidence tended to show that an employee, because of a mental disturbance, had diffuse feelings of hatred against people generally, that because of bickerings and altercations arising in connection with the employment, he had animosity against certain of his fellow employees in particular, that due to an incident when the employee reported to his draft board, the employee became exceedingly angry, went to the room where he lodged, procured a gun, and went to the place of his employment where he shot three fellow employees, fatally wounding two of them. The employee made a statement to the effect that he did not attempt to kill anyone on the street on his way to his place of employment because he preferred to kill someone at the plant whom he knew. *Held:* Notwithstanding that the incident at the place of the draft board "triggered" the mental disturbance of the employee, there was evidence of a causal connection between the

shooting of the fellow employees and the employment, there being no evidence that the assailant had any contacts with them outside of the employment.

JOHNSON, J., not sitting.

APPEAL by defendants from *Grady, Emergency Judge,* March Term, 1956, of PASQUOTANK.

These three claims for compensation under our Workmen's Compensation Act were consolidated for hearing. They arose as a result of the killing of Edward Zimmerman and Joseph Parrish, and the injury of Audrey L. Brickhouse, by a fellow employee, Robert Jordan, on 9 September 1954.

When this cause came on for hearing before the deputy hearing Commissioner, the parties entered into the following stipulations:

1. That all parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; that the defendant employer employs more than five persons.

2. That on the day giving rise to these claims, the deceased Edward Zimmerman and the deceased Joseph Parrish and the claimant Audrey L. Brickhouse were employees of the defendant employer; that the relationship of employer-employee existed between the defendant employer and said parties on said date.

3. That Edward Zimmerman and Joseph Parrish died as a result of bullet wounds received from the rifle of Robert Jordan on 9 September 1954.

4. That the average weekly wage of the deceased Edward Zimmerman was $60.00; the average weekly wage of the deceased Joseph Parrish was $60.00; and the average weekly wage of Audrey L. Brickhouse was $41.25.

The evidence discloses that Robert Jordan (referred to in the evidence as Jordan or Bobby), was 18 years of age when he went to work for the defendant employer in 1950; that he was employed by J. W. Collins, the manager of the Elizabeth City Freezer Locker plant, as an apprentice meat cutter; that the employee worked for his employer regularly until the summer of 1953 when his foreman, Warren Riggs, discharged him. Riggs fired him because he gave him an order to fill for a customer and Jordan told him if he wanted it filled, to fill it himself, and a few minutes later Jordan jumped up and rushed at him with a six-inch boning knife in his hand. Riggs ducked past him and ran. Jordan called Riggs later and apologized and requested his job back, but Riggs declined to re-employ him at that time.

Some time later some of the customers of the defendant employer became interested in Jordan and requested that he be re-employed. The manager of the defendant employer gave his approval to the re-

employment and Jordan returned to work. The manager testified that Jordan was hot tempered; that he had seen him lose his temper on occasions, he could not say how many; that his worst problem with Jordan had been that when he got mad he would take a piece of equipment and throw it on the floor and break it; that on one occasion he took an automatic tape machine which cost $27.00 and threw it on the floor and broke it because he got mad about something. The manager further testified that he had numerous complaints from some of the personnel about Jordan when he was working there in 1951, 1952, and 1953.

Only a few weeks before the shooting, the evidence tends to show that a very heated argument took place between Jordan and Zimmerman; that it was part of Zimmerman's duties to maintain and repair certain equipment. The manager heard the argument and immediately went to investigate the trouble. He heard part of the conversation. Zimmerman said, "there is absolutely no sense in Bobby throwing a piece of meat down on this salt carrier so hard and tearing it up; I just repaired it a few days ago for the same trouble, now I'll have to do it again." Bobby said, "now look here, G— d— it, don't jump all over me, it is none of your d— business what I do." Bobby then took up a knife, and the manager told Zimmerman to go back to his work. The manager then called Bobby off and talked to him for some ten minutes and reminded him of the tape machine and the other equipment he had broken as a result of his temper and that it would have to stop. He apparently got in a good humor and returned to work. There is evidence, however, that Jordan said shortly after his argument with Zimmerman and as he returned to work after Collins talked to him, "G— d— it, I will get you one way or the other."

About six weeks prior to 9 September 1954, Jordan began to skylark with the deceased Parrish. Parrish, instead of participating in the skylarking or horseplay, reprimanded Jordan for throwing a pork loin at him and knocking off his glasses; whereupon, they had an argument and Jordan became extremely angry and remained so for some time. Later, however, he appeared to be on friendly terms with Parrish.

The evidence further tends to show that one of the duties of the claimant, Miss Brickhouse, consisted of relaying orders received from customers to other employees. She would frequently relay such an order to Jordan, whose duty it was to take the order and fill it. During certain hours of the day, Miss Brickhouse would give Jordan a considerable number of orders in a very short time; that on such occasions Jordan would often become angry and curse her because she gave him the orders; that Jordan resented taking orders from Miss Brickhouse.

The evidence also tends to show that Jake Cox was working with Jordan on one occasion when Jordan got mad because he had difficulty

in cutting a hog, the saw got hung up and he took it and threw it to the opposite end of the corridor. Cox reported him and refused to work with him because of his temper. Jordan got mad with Cox because he reported him. This event occurred about three weeks before the shooting.

Shortly before 9 September 1954, Jordan received a notice to report to his draft board for induction into the Armed Services. He reluctantly reported to the local board pursuant to the notice, but did not do so until the local board called his employer. When he arrived at the office of the local board, he was severely reprimanded by a lady clerk in charge of the office, in the presence of several fellow draftees, for being late in reporting. The fellow draftees began to kid Jordan, whereupon, he became extremely angry with the lady clerk, walked out of the office of the draft board without being examined, and returned to his rooming house. This was about 8:00 a.m., 9 September 1954. Jordan loaded his .22 automatic rifle and walked four blocks from his rooming house to his place of employment; that he saw several persons on and along the street as he walked toward the Freezer Locker; that he did nothing and said nothing to the people he saw, except to a taxi driver whom he knew he waved a hand of greeting.

The front lobby of the defendant employer's plant was used at the time as a sales room; it was approximately 15 feet wide and 53 feet long, and there was a long corridor to the left of the lobby which was about 12 feet wide and 45 feet in length. Jordan walked into the lobby from the front door, he saw the claimant, Miss Brickhouse, behind the counter to his left, and fired at her twice, one bullet missed her and the other struck her in the right shoulder. Miss Brickhouse fell to the floor and Jordan walked from the lobby into the corridor; as he walked through the door he met the deceased Parrish and shot and killed him. He then saw Riggs but made no effort to kill his foreman. There were some ten people in the corridor, most of whom were customers. He saw Cox and began shooting at him, firing the rifle from his hip. None of the bullets hit Cox, but a stray bullet struck and killed Alec Johnson, a customer.

After the people had run from the corridor, some of them leaving by the rear door, Cox and others escaping into the refrigeration room, Jordan returned to the front lobby where he met Zimmerman and shot and killed him. He then went to a rear room in the locker plant where he remained for approximately thirty minutes before surrendering to the local police.

W. C. Owens, a police officer, testified as follows: "On September 9, 1954, after the shooting down at the Freezer Locker, I talked to Bobby Jordan, approximately an hour and a half after the shooting, about 9:30. He stated that he had been to the local Draft Board and returned

to his home on Dyer Street where he got his rifle and proceeded down Dyer Street towards the Freezer Locker. At that point I asked him why he went to the Freezer Locker and why he killed the people in the Freezer Locker instead of someone else. He said he wanted to kill someone who (*sic*) he knew and I asked him did he see anyone he knew on the way to the Freezer Locker. He stated that he did, one person by the name of Sample, who is a taxi driver . . . At this point I asked him why he went to the Freezer Locker; why didn't he shoot Sample; he said, well, he'd rather kill someone there where he knew; I asked him for what reason; he said, well everybody dominates me . . ."

There is no evidence tending to show that any friction arose between Robert Jordan and any of his fellow employees over any matter except in connection with his employment.

Upon the stipulations and findings of fact, the deputy hearing Commissioner held that the injury to Miss Brickhouse and the injuries which led to the deaths of Edward Zimmerman and Joseph Parrish arose out of and in the course of their employment. Awards were made in favor of the claimants. The defendants appealed from these awards to the full Commission. The full Commission, after a hearing and review of all the evidence, findings of fact and conclusions of law, adopted the facts and conclusions found by the deputy hearing Commissioner and affirmed the awards.

The defendants appealed to the Superior Court, where each one of their exceptions was overruled and the cause remanded to the Industrial Commission to the end that it may proceed according to the course and practice of the courts. The defendants appeal, assigning error.

J. W. Jennette for Mrs. Kate Zimmerman, et al.
M. B. Simpson for Mrs. Anne Parrish.
John H. Hall for Miss Audrey L. Brickhouse.
LeRoy & Goodwin and Smith, Moore, Smith, Schell & Hunter
by: Stephen Millikin
for defendant appellants.

DENNY, J. The appellants submit for our consideration and determination the following question: "Is there competent evidence in the record sufficient to support the findings and conclusions that the injuries and deaths of the employees in question arose out of and in the course of their employment with the defendant Elizabeth City Freezer Locker, as made by the hearing Commissioner and affirmed by the full Commission and the Superior Court?"

The record in this appeal presents a pathetic story. It tends to show that Robert Jordan had an unhappy early life. His mother died when he was five years of age, and he has not had a real home since. After

the death of his mother, he was sent from place to place to live with relatives. Thereafter, for some time he lived with his father and stepmother, but did not like his stepmother and left home when he was about eleven or twelve years of age. He returned home later and for a time lived with his father and second stepmother. He finished high school in Elizabeth City in 1950. During his years of insecurity, he developed a feeling of inferiority, which was made worse by his rejection by the Army in 1951. He experienced periods of moodiness and depression which appeared with greater frequency following his rejection and he then underwent a period of general withdrawal from other people, which withdrawal took the form of feelings of hatred toward the world and a feeling that he had never been given a fair chance in life. This emotional type of confusion was diagnosed by doctors at the State Hospital in Raleigh as schizophrenia, and it was the opinion of these doctors that Jordan "had developed a rather strong, diffuse, hostile reaction or feeling of hatred toward people about him over a period of years."

Robert Jordan's deposition was taken at the State Hospital in Raleigh, North Carolina, in November 1954 and offered in evidence before the hearing Commissioner. After reciting the many places he had lived, he stated, "My father had divorced my first stepmother and had remarried. I was 16 when I went to Elizabeth City. I lived with my second stepmother two or three years. The second stepmother and I had some arguments. I didn't see eye to eye with her on everything and I couldn't stand being dominated by anybody." He named eleven people with whom he had difficulty at the Freezer Locker plant, some of whom had quit work there prior to 9 September 1954. Among those named were Audrey L. Brickhouse, Edward Zimmerman, Joseph Parrish, J. W. Cox, Warren Riggs, his foreman, and J. W. Collins, manager of the plant. He also told of a difficulty he had with a Mr. White with whom he had boarded after he took the job at the Locker plant. He testified, "I don't recall disagreements with anyone else that didn't work at the freezer locker besides White and my father and stepmother. . . . I had right much temper during this period. . . . I think after I got out of high school it became a lot worse; I went to work. My temper became worse. I had trouble controlling my temper when things didn't go right. . . . I got so I didn't enjoy working . . . just didn't enjoy working any time." With respect to his arguments with people at the plant, he stated, "I would get over it. Generally, I wouldn't make the first step to apologize to anybody." The witness continued, "Following my rejection by the Army in 1951, I did not have any desire to enlist in the Army or to be recalled. . . . I think I decided not to report before I received the notice. . . . I swore I wasn't going. I took this oath to myself."

On the night of 8 September 1954, Jordan wrote a letter, sealed it and wrote on the envelope, 'To be opened in the event of my sudden death or completely destroyed existence in this normal world." The letter was addressed "To WHOM IT MAY CONCERN," and the first paragraph read as follows: "I cannot escape my fate, the fate I was created for, I am a sheep among wolves, persecuted at every turn; alas, the world is completely against me. But persecution must end somewhere and I am confident it ends with the grave." There were four other paragraphs in similar vein. The witness testified that after the lady "bawled" him out at the draft board, he lost his head and left. "I think I pretty much realized what I was doing after that. . . . I had in mind when I was walking on back to kill somebody. That idea first came in my mind right after I left the draft board."

Dr. Marion M. Estes, who was admitted to be a medical expert specializing in psychiatry, and who is connected with the State Hospital in Raleigh, testified before the hearing Commissioner. It appears from his testimony that Jordan was admitted to the State Hospital on a court order for psychiatric observation and examination; that approximately fifteen doctors were present when Jordan appeared before the staff for evaluation and diagnosis. Among other things, Dr. Estes testified, "It seems that this call to the draft board . . . served as just a sufficient trigger mechanism to turn loose this diffuse, hostile inward sort of hatred that had been latent for several years. I am saying that the draft board incident was the cause. . . . I think that certainly this irrational act of violence is consistent with a schizophrenic outburst of behavior . . ." The medical testimony further reveals that it was admitted at the staff meeting that no one could explain why Jordan passed people on the street and did not kill them while on his way to his place of employment.

Compensation for injuries under our Workmen's Compensation Act requires that the accident be one "arising out of and in the course of the employment." G.S. 97-2(f). The words "out of" refer to the cause of the accident, while the words "in the course of" have reference to the time, place and circumstances under which it occurred. *Bell v. Dewey Bros. Inc.*, 236 N.C. 280, 72 S.E. 2d 680; *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370.

Certainly the injuries involved in this cause occurred "in the course of" the employees' employment. The employees at the time of the shooting were in their employer's place of business, performing the duties which their employment required.

The hearing Commissioner found in his thirteenth finding of fact, "That the incident which took place at the local draft board . . . trig-

gered the mental disturbance with which Jordan was suffering, thereby causing the acts of violence hereinafter set forth."

The appellants vigorously contend that the above finding of fact negatives completely the conclusion of law that the injuries and deaths arose "out of the employment." Therefore, they contend the awards against the defendants cannot stand. We do not concur in this view. Let us concede that the incident which took place at the draft board "triggered the mental disturbance" that ultimately culminated in the claimant's injury and the death of Parrish and Zimmerman. We do not concede that the above finding is decisive and controlling on the question raised. If Jordan, after leaving the draft board, decided to kill somebody, as he says he did, and went to his room and loaded his rifle, walked four blocks to his place of employment, not attempting to kill anyone he passed on the street, because he preferred to kill someone there at the plant whom he knew, as he said he did, and then injured the claimant and killed Parrish and Zimmerman for the reason given by him, to wit, "everybody dominates me," then there was a causal connection between the injuries and deaths and the employment. There is no evidence that Jordan had any contacts with the claimant or Parrish or Zimmerman outside the employment that might have angered him or caused him to feel that they tried to dominate him.

In the case of *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266, the claimant and another employee, named Squires, engaged in a conversation pertaining to their work, and Squires addressed to the claimant language deemed by the latter to be insulting. The claimant struck Squires with a shovel; Squires left the shop, went to the employer's office and received his wages. About half an hour later he went back to the shop, put the barrel of a shotgun through a hole in the wall and shot the claimant in the back, thereby inflicting serious and permanent injury. *Adams, J.*, speaking for the Court, said: "There must be some causal relations between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." The Court held the injury inflicted was an accident that arose out of and in the course of the employment. *Withers v. Black, supra; Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97; *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918; *Ashley v. Chevrolet Co.*, 222 N.C. 25, 21 S.E. 2d 834; *Wilson v. Boyd & Goforth, Inc.*, 207 N.C. 344, 177 S.E. 178.

In *Hegler v. Mills Co., supra*, Ernest Hegler and Grady Smith were employed as scrubbers in the Cannon Mills. They worked together for about a year. Then Hegler, who was the foreman of the scrubber crew, was given other work and transferred to the supply room. Smith succeeded him as foreman of the scrubber crew. Friction developed be-

tween the two—it continued for nearly a year—because Hegler sought to direct Smith's work. Hegler complained of the manner in which the scrubbing was done and finally reported the matter to the officials of the company. This report angered Smith and he threatened to get even with Hegler. Two days later, Smith was in the department where Hegler worked. He assaulted him and Hegler died from the injuries. *Stacy, C. J.*, speaking for the Court, said: "It is true, the assailant had been heard to say that he was going to kick the deceased all over the cloth room before leaving, but this was because of resentment over the impeachment of his work. Undoubtedly the friction between the two employees, which continued with intermittent bickerings for nearly a year, had its origin in the employment. While the assault may have resulted from anger or revenge, still it was rooted in and grew out of the employment." *Chambers v. Oil Co.*, 199 N.C. 28, 153 S.E. 594; *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N.E. 530.

Likewise, in the case of *Wilson v. Boyd & Goforth, Inc., supra,* the claimant was at work for the defendant on a job assigned to him. One Gilbert, also an employee of the defendant in another department, who was intoxicated, interfered with the work of the claimant and assaulted him. The claimant undertook to get away from Gilbert and in doing so, fell and broke his leg. The award in favor of the claimant was upheld. It would seem clear that the intoxication of Gilbert was what caused him to interfere with the work of the claimant, but that did not insulate or prevent the accident resulting from his conduct while intoxicated from being an accident arising out of and in the course of the claimant's employment. Neither do we think, upon a careful consideration of the record in the instant case, that the incident at the draft board insulated or prevented Jordan's subsequent acts from constituting an accident arising out of and in the course of the employment of the claimant and Parrish and Zimmerman.

We hold that the findings of the hearing Commissioner, adopted by the full Commission, are supported by competent evidence. Therefore, the judgment of the Superior Court is

Affirmed.

JOHNSON, J., not sitting.

R. BRUCE ETHERIDGE, INDIVIDUALLY, AND T. S. MEEKINS, JR., AND PERCY MEEKINS, EXECUTORS OF T. S. MEEKINS ESTATE, v. ESSIE N. WESCOTT AND HUSBAND, G. T. WESCOTT, JR.

(Filed 31 October, 1956.)

1. Quieting Title § 2: Ejectment § 16—

It is competent for a witness to state whether or not a deed or a series of deeds covers the lands in dispute when he is stating facts within his own knowledge.

2. Quieting Title § 1—

In an action to quiet title it is required only that plaintiff have such an interest in the land as to make the claim of defendant adverse to him.

3. Quieting Title § 2—

The owner of lands executed deed to one person and a contract to convey to another. Upon his death his executors, with the joinder of the grantee, instituted action to cancel the contract to convey as a cloud on title, and introduced evidence of a perfect paper title in the deceased. *Held:* Plaintiffs could maintain the action even without the joinder of the grantee, and it was not necessary to submit an issue as to the grantee's title in order to determine whether or not the contract to convey constituted a cloud on the title warranted to the grantee.

4. Quieting Title § 2—

Where, in an action to cancel a registered contract to convey as a cloud on title, it appears that the contract was under seal and was not void on its face, a peremptory instruction that if the jury believed the evidence, they should find that the contract conveyed no interest in the real property described therein, is error, it not being established as a matter of law that the contract had been abandoned or was barred by the statute of limitations.

5. Limitation of Actions § 6d—

Where a contract to convey stipulates that the vendor should execute deed to the purchaser as soon as the land is clear of encumbrance and the vendor is in position to make warranty deed, the statute of limitations does not begin to run in favor of the vendor until the removal of the encumbrance or encumbrances.

6. Vendor and Purchaser §§ 23, 24—

Where the owner has conveyed the property to a third person, the purchaser in a registered contract to convey theretofore executed may sue for specific performance or abandon the contract and insist only upon a refund of the purchase price paid, with interest, if such right has been preserved and is not barred by the statute of limitations.

7. Husband and Wife § 4a—

Since C.S. 454 has not been brought forward in our General Statutes, the husband is not a necessary or proper party to an action to cancel a contract to convey executed to the wife alone, in which the wife sets up a counterclaim for specific performance or return of the purchase price paid.

8. Pleadings § 10—

The owner of lands executed a deed to one person and a contract to convey to another. The grantee was joined as a party plaintiff in an action to cancel the contract as a cloud on title, and defendant set up a counterclaim for specific performance or return of the purchase price paid, with interest. *Held:* The contract to convey was the sole basis of plaintiffs' action and defendant's counterclaim, and therefore, the counterclaim could be set up in the action, G.S. 1-137, even though recovery of the purchase price was not sought and could not be had as against plaintiff grantee in any event.

9. Quieting Title § 2: Vendor and Purchaser § 24—

Where defendant, in an action to cancel a contract to convey as a cloud on title, properly sets up a counterclaim for specific performance or recovery of the purchase price paid, with interest, it is error for the court to exclude evidence tending to show the consideration paid on the purchase price under the contract.

JOHNSON, J., not sitting.

APPEAL by defendants from *Phillips, J.*, January Term, 1956, of DARE.

This is an action instituted by the plaintiffs on 28 September 1954 to declare a claim of the defendants to be a cloud upon the title of the plaintiff Etheridge and to remove such cloud from his title.

T. S. Meekins, immediate predecessor in title to the lands in controversy, died in February 1954, and T. S. Meekins, Jr., and Percy Meekins are the duly qualified and acting executors of his estate. Mrs. T. S. Meekins died in July 1954.

T. S. Meekins (who is the same person as Theo. S. Meekins) executed and delivered to Mrs. Essie Wescott (who is the same person as the defendant Essie N. Wescott) a contract under seal, reading as follows:

"It is agreed by the undersigned that the following property situated in Nags Head Shores will be deeded to Mrs. Essie Wescott when same is clear of encumbrance and the undersigned is in position to make deed warranty conveyance;

"Beginning at the Northeast corner of a tract of land deeded to said Mrs. Essie Wescott September 26, 1932, and running thence a Westwardly course along the North line of said lands to the east side of Wright Memorial Ave. if it were extended; thence a northwardly course along said Wright Memorial Ave., if extended, 111 feet; thence an eastwardly course parallel with first line to the Atlantic Ocean at a point 111 feet north of beginning; thence a southwardly course along the Atlantic Ocean 111 feet to place of beginning, same being situated in Nags Head Shores.

"Witness my hand and seal, this the 6th day of January, 1933. Theo. S. Meekins (SEAL). Witness: E. H. Peel."

The above contract was duly acknowledged before the Clerk of the Superior Court of Dare County and registered in the office of the Register of Deeds in said county on 9 February 1934.

The plaintiffs allege that R. Bruce Etheridge is the owner in fee simple of the premises described in the above contract, by virtue of a deed executed to him by T. S. Meekins and wife, dated 28 September 1935, and duly filed for registration on 4 August 1936, conveying a one-half interest in said premises, and a deed executed by T. S. Meekins and wife to R. Bruce Etheridge dated 23 April 1940, conveying to him their remaining interest in said premises, which instrument was duly recorded in the office of the Register of Deeds in Dare County on 8 May 1940.

The defendants in their answer deny that the plaintiff Etheridge is the owner of the lands in controversy. However, they admit that the description of the lands he claims, as set forth in paragraph two of the complaint, is identical with the description of the lands contained in the contract between T. S. Meekins and the defendant Essie N. Wescott.

The defendants set up a counterclaim in which they allege that the defendant Essie N. Wescott paid to T. S. Meekins a consideration of $1,138.00 for the premises described in the aforesaid contract; that a demand was made on T. S. Meekins for a deed in compliance with the terms of the contract before 9 February 1935; that the said Meekins claimed the lands were still not clear of encumbrances and that he was not in a position to comply with the contract and requested the defendant Essie N. Wescott to take no action against him, and that he would comply with the terms of his contract when he was in a position to do so. It is alleged that demands were made on T. S. Meekins one or more times each year thereafter until the year 1953 or 1954; that at all times T. S. Meekins admitted the validity of the contract and in each instance expressed or implied his engagement not to plead the statute of limitations if such indulgence was granted; that the defendant Essie N. Wescott relied on the sincerity of the promises and representations made by the said Meekins, and refrained from bringing suit under said contract solely on the promises of the said Meekins. Whereupon, the defendants prayed the court for an order directing the executors of the estate of T. S. Meekins to convey the premises in controversy to the defendant Essie N. Wescott, but if actual title could not be vested in her, that she then have judgment against the estate of T. S. Meekins in the sum of $1,138.00 with interest thereon from such date as the evidence might justify. The defendant G. T. Wescott, Jr., husband of the *femme* defendant, moved in apt time for a judgment as of nonsuit as to him. The motion was denied and he excepted to the ruling.

At the close of all the evidence the plaintiffs moved for judgment as of nonsuit as to the defendants' counterclaim. The motion was allowed, and the defendants excepted.

The court instructed the jury that if they believed the evidence they should answer the issues as contended by the plaintiffs. Defendants excepted to this instruction. The jury answered the issues as follows:

"1. Is the paper writing dated January 6, 1933, and recorded in Book 15, page 527, sufficient in law to convey any interest in the real property described in paragraph 2 of the plaintiffs' complaint? Answer: No.

"2. Is the paper writing referred to in section third of the complaint, and recorded in Dare County, North Carolina, Public Registry, Book 15, page 527, a cloud on plaintiff Etheridge's title? Answer: Yes.

"3. If so, are the plaintiffs entitled to have said cloud removed? Answer: Yes."

Upon the verdict, it was adjudged and decreed that (1) the plaintiff R. Bruce Etheridge is the owner in fee of the lands, the subject matter of this action; (2) the defendants have no right, title or interest in and to said lands; (3) the paper writing dated 6 January, 1933, between T. S. Meekins and the defendant Essie N. Wescott, constitutes a cloud on the title of plaintiff R. Bruce Etheridge to said lands, and that said cloud is removed and the said paper writing adjudged of no force or effect as against the said plaintiff's title to said lands; and (4) judgment of involuntary nonsuit is hereby entered as to defendants' alleged counterclaim set up in their answer.

The defendants appeal, assigning error.

McCown & McCown, LeRoy & Goodwin, and John H. Hall for plaintiff appellees.

Worth & Horner for defendant appellants.

DENNY, J. The record in this case presents 120 assignments of error. Obviously, we will not consider them *seriatim*. We think, however, the appeal may be disposed of by a consideration of the following questions:

1. Was it competent for a witness on behalf of the plaintiffs to testify that certain deeds in Etheridge's chain of title covered the lands in dispute?

2. Did the court err in failing to submit an issue as to the title of the lands claimed by the plaintiff Etheridge?

3. Was it error to give peremptory instructions on the issues submitted in light of the evidence adduced in the trial?

4. Did the court err in refusing to sustain the motion for judgment as of nonsuit as to the defendant G. T. Wescott, Jr.?

5. Is the defendant Essie N. Wescott entitled to maintain her cross-action against the estate of T. S. Meekins to recover the alleged pur-

chase price of the lands Meekins agreed to convey to her in the contract dated 6 January 1933?

6. Did the court err in excluding the evidence offered by the defendants tending to show that the defendant Essie N. Wescott paid a consideration of $1,138.00 for the lands T. S. Meekins contracted to convey to her, and the evidence tending to repel the statute of limitations?

We shall consider these questions in the order stated.

1. Exceptions Nos. 2, 3, and 4 are directed to the admission of testimony to the effect that the witness knew of his own knowledge that the descriptions in the grant and in the several deeds offered in evidence by the plaintiffs covered the lands in dispute. It is competent for a witness to state whether or not a deed or a series of deeds cover the lands in dispute when he is stating facts within his own knowledge. *McQueen v. Graham*, 183 N.C. 491, 111 S.E. 860; *Singleton v. Roebuck*, 178 N.C. 201, 100 S.E. 313. These exceptions are overruled.

2. Etheridge and the defendant Essie N. Wescott claim all their right, title and interest in the premises in controversy from a common source, to wit: T. S. Meekins. No question is debated as to the validity of the title into Meekins. And while the defendants in their answer denied Etheridge's title, it is apparent they did so solely on the contention that the contract, executed by T. S. Meekins on 6 January 1933, conveyed to the defendant Essie N. Wescott such an interest in the lands described therein that upon registration of the contract it constituted a claim superior to any rights Etheridge obtained under subsequently executed deeds from T. S. Meekins and wife.

In order to remove a cloud from a title, it is not necessary to allege and prove that at the commencement of the action, and at its trial, the plaintiff or plaintiffs had an estate in or title to the lands in controversy. It is only required, under the provisions of G.S. 41-10, that the plaintiff or plaintiffs have such an interest in the lands as to make the claim of the defendant or defendants adverse to him or them. *Plotkin v. Bank*, 188 N.C. 711, 125 S.E. 541. The plaintiffs clearly established in evidence a perfect paper title from the state by grant and *mesne* conveyances to T. S. Meekins. It follows, therefore, that the personal representatives of T. S. Meekins could have brought this action without making Etheridge a party. *Plotkin v. Bank, supra. Cf. Veasey v. King*, 244 N.C. 216, 92 S.E. 2d 761. Consequently, it was unnecessary to submit an issue as to Etheridge's title in order to determine whether or not the contract between T. S. Meekins and the defendant Essie N. Wescott constituted a cloud on the title warranted to Etheridge by T. S. Meekins. The contentions of the defendants in this respect are without merit. However, if the plaintiff Etheridge desires an adjudication of his title, in addition to the removal of the alleged cloud therefrom, an issue as to the title to the lands claimed by him should be

submitted to the jury in view of the express denial thereof in the answer filed by the defendants.

3. In our opinion, the written agreement between T. S. Meekins and Mrs. Essie Wescott is not null and void on its face. Therefore, it was error to give peremptory instructions to the jury that if they believed the evidence they should answer the first issue "No." The contract is under seal, which imports consideration. *Thomason v. Bescher,* 176 N.C. 622, 97 S.E. 654, 2 A.L.R. 626; *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158; *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 763. Consequently, if the defendant Essie N. Wescott paid to T. S. Meekins $1,138.00 as the purchase price of the lands described in the contract executed on 6 January 1933, as alleged in the defendants' further answer and counterclaim, it became the duty of T. S. Meekins to remove the encumbrance or encumbrances on the lands involved and to deliver to the purchaser a good and indefeasible fee simple title thereto. Furthermore, in the absence of a renunciation of the contract by T. S. Meekins, the statute of limitations would not begin to run in his favor and against the purchaser until Meekins removed the encumbrance or encumbrances which were on the property at the time of the execution of the contract, this being the time fixed by him to execute the warranty deed to the defendant Essie N. Wescott. Whether the contract is valid and enforceable at this time depends on whether or not it has been abandoned or barred by the statute of limitations, as asserted by the plaintiffs. It may be that the defendant Essie N. Wescott abandoned the contract after the conveyances were made to Etheridge and insisted only upon a refund of the alleged purchase price, with interest. If such is the case, then her right to recover the agreed purchase price with interest, if paid as alleged in her further answer and counterclaim, depends upon whether or not such right has been preserved or is barred by the statute of limitations.

4. The correctness of the ruling of the court below on the motion of G. T. Wescott, Jr., for a dismissal or nonsuit of this action as to him, depends on whether or not he is a necessary or proper party to the action.

The appellees are relying on what is said in McIntosh, North Carolina Practice and Procedure, section 258, page 244, as follows: "The Martin Act (1911) confers upon the married woman the power to bind herself as to her property by contract without the joinder of her husband, except as to conveyances of her land and certain restrictions in dealing with her land, and it is said that this absolute freedom of contract carries with it the privilege and liability of suing and being sued alone (citing C.S. 2507, now G.S. 52-2, and *Royal v. Southerland,* 168 N.C. 405, 84 S.E. 708, Ann. Cas. 1917B, 623). The general result of the statutes and construction may be stated as follows: (a) The hus-

band may always be joined by the wife as plaintiff, as against third persons, but he is only a formal party and may be left out (citing *Patterson v. Franklin,* 168 N.C. 75, 84 S.E. 18; *Shore v. Holt,* 185 N.C. 312, 117 S.E. 165). (b) She may sue alone where it concerns her separate property; and all her property is her separate property, including, under recent statutes, the right to her earnings and to recover for personal injury. (C.S. 2513, now G.S. 52-10.) (c) As between herself and her husband, she may sue and be sued alone. (d) She may be sued alone on her contracts (citing *Lipinsky v. Revell,* 167 N.C. 508, 83 S.E. 820; *Warren v. Dail,* 170 N.C. 406, 87 S.E. 126), and since the husband is not now liable for her torts, it would seem that she could be sued alone for her torts. (e) *The husband may always be joined with the wife as defendant and it is safe to do so until the wording of the statutes is changed,*" citing *Shore v. Holt, supra; Bell v. McCoin,* 184 N.C. 117, 113 S.E. 561. (Emphasis added.)

McIntosh, North Carolina Practice and Procedure, 2nd Edition, Volume 1, section 696, page 386, states: "For a number of years the statute required joinder of the husband, except in specified cases, the most important exception being suits involving her separate property. The passage of the Martin Act in 1911 and the enactment of Chapter 13, Public Laws of 1913, rendered joinder of the husband ordinarily unnecessary by granting freedom of contract and specifically authorizing a married woman to sue alone for personal services or in tort. Since the statute (C.S. 454) requiring joinder is no longer in force, it is now unnecessary to join the husband unless he has an interest in his own right or unless the action is one involving a conveyance to which the husband must give written assent."

Since C.S. 454 has not been brought forward in our General Statutes, it is our opinion, and we hold, that G. T. Wescott, Jr., has no such interest in the subject matter of this action or in the counterclaim set up on behalf of Essie N. Wescott as to make him a necessary or a proper party to the action. *Lipinsky v. Revell,* 167 N.C. 508, 83 S.E. 820; *Williams v. Hooks,* 200 N.C. 419, 157 S.E. 65. Hence, the motion of G. T. Wescott, Jr., for dismissal of the action as to him, should have been granted.

5. The question raised by this assignment of error is whether or not the defendant Essie N. Wescott is entitled to maintain her counterclaim, or, more strictly speaking, her cross-action, against the personal representatives of T. S. Meekins.

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."

Clearly, the contract between T. S. Meekins and the defendant Essie N. Wescott was the sole ground set forth in the plaintiffs' complaint as the foundation of plaintiffs' claim. Likewise, all the claim Essie N. Wescott has, if any, is based upon the same contract.

In *Smith v. French,* 141 N.C. 1, 53 S.E. 435, *Hoke, J.,* in considering a counterclaim under the above statute, said: "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of the defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him in the same state of facts."

In *Plotkin v. Bank, supra,* the plaintiff was successful in having a deed of trust removed as a cloud on the title to a house and lot which plaintiff had conveyed by warranty deed to third parties who were not parties to the action. The court in its judgment set out in the record on appeal, but not set out in the opinion, not only decreed that the deed of trust be canceled but that the cause be retained for trial on the issues arising on the pleadings growing out of the cancellation of the deed of trust and its removal as a cloud on the title the plaintiff had warranted to his grantees.

In the instant case, if it should be determined that Essie N. Wescott is entitled to a conveyance of the premises described in the complaint, as demanded in the answer of the defendants, the plaintiff Etheridge would be a necessary party in order for the court to cancel and remove his deeds as a cloud on the title of the defendant Essie N. Wescott. On the other hand, if it should be determined that the defendant Essie N. Wescott has abandoned her rights under the contract, except with respect to a refund of the alleged purchase price, she cannot obtain a money judgment against Etheridge, and no such judgment is sought against him. Even so, we think it is within the purview of the provisions of G.S. 1-137 to permit the counterclaim to be litigated between the defendant Essie N. Wescott and the personal representatives of the estate of T. S. Meekins in the present action.

6. The court below excluded the evidence offered by the defendants which tended to support the allegations of Essie N. Wescott's counterclaim. The excluded evidence of G. T. Wescott, Jr., and others tended to show that the defendant Essie N. Wescott paid T. S. Meekins

$1,138.00 for the lands he contracted to convey to her when the same were free of the encumbrance which was on the lands at the time of the execution of the contract and which, according to plaintiffs' evidence, was removed on 19 April 1940. The evidence also tended to show that Meekins had repeatedly, down through the years and as late as a few weeks before his death, promised to comply with the terms of his contract with Essie N. Wescott, and urged that she not bring an action against him.

In view of the conclusions we have reached on questions Nos. 4 and 5, we hold it was error to exclude the evidence offered by the defendants tending to show that the defendant Essie N. Wescott paid a consideration of $1,138.00 to T. S. Meekins for the lands he contracted to convey to her on 6 January 1933, as well as the evidence tending to repel the statute of limitations, where the evidence was otherwise competent.

For the reasons heretofore stated, the judgment which decreed the removal of the 1933 contract between T. S. Meekins and the defendant Essie N. Wescott as a cloud on Etheridge's title is reversed. We also hold there was error in denying the motion of G. T. Wescott, Jr., to dismiss the action as to him, and, likewise, in entering the judgment of nonsuit as to the counterclaim of the defendant Essie N. Wescott.

Reversed as to plaintiffs.

Reversed as to defendant G. T. Wescott, Jr.

Reversed as to counterclaim of defendant Essie N. Wescott.

JOHNSON, J., not sitting.

IN THE MATTER OF: STATE TRUST COMPANY, TRUSTEE, v. KATIE B. TOMS, M. F. TOMS, CHARLES FRENCH TOMS, MRS. ALBERT TOMS BROWN, MAURICE TOMS, MARGARET TOMS.

(Filed 31 October, 1956.)

1. Judgments § 20—

Where the judgment roll in a proceeding for the appointment of a successor trustee fails to show the judge's approval of the clerk's order appointing the successor trustee as required by G.S. 36-12, the court may, upon motion in the cause, hear evidence, and upon its finding therefrom that the presiding judge did in fact approve the order and that the order of approval was lost without having been spread upon the minutes as required by G.S. 2-42(9), order that the minutes be corrected to speak the truth.

2. Same—

Upon the hearing of a motion in the cause to correct the minutes of the court to make them speak the truth, the loss and contents of missing records may be established by affidavits.

3. Same—

Where the records of a court are corrected upon a motion in the cause to make them speak the truth, the record as corrected has the same efficacy as though the proper entries had been made at the time.

4. Trusts § 9—

Where a trustee of an active trust resigns and a successor is appointed by the clerk and approved by the judge, the fact that the successor trustee failed to give the bond specified in G.S. 36-17 does not render the appointment void.

5. Same—

Where a successor trustee is duly appointed, the beneficiaries of the trust may not wait 16 years, during which time they joined in a proceeding to authorize the successor trustee to sell assets for reinvestment and during which time the income of the trust was paid to the life beneficiary, and then, upon discovering that the successor trustee had embezzled the assets thus realized, seek to hold the original trustee liable on the ground that the successor trustee failed to file bond as required by G.S. 36-17.

JOHNSON, J., not sitting.

APPEAL by Katie Toms and Maurice Toms from judgment of *Pless, J.*, in Chambers, March 1956.

On 13 September, 1955, Maurice A. Toms filed in the Superior Court of Henderson County a motion in the above-entitled cause in which he alleged: In August 1926, Central Bank and Trust Company of Asheville was appointed trustee of certain properties and funds pursuant to the will of Marion C. Toms, that the beneficiaries of the trust were Katie B. Toms, 87 years of age, a resident of New Orleans, for the term of her natural life, and subject to the life interest of Katie B. Toms said trust was held for the benefit of Margaret Toms Scott, a resident of Asheville, M. F. Toms, a resident of Hendersonville, Charles French Toms, Jr., a resident of Asheville, Mrs. Albert Toms Brown, a resident of Asheville, and movant, "a resident and citizen of Cuyahoga County, State of Ohio, temporarily residing at 40 Woodward Avenue, Asheville, North Carolina"; that each of said beneficiaries in remainder had a one-fifth interest; that on 10 February, 1931, State Trust Company "was duly appointed substitute Trustee in lieu of the said Central Bank and Trust Company, with the same powers and duties . . ." He alleged that State Trust Company, seeking to be relieved of its duties as trustee, filed a petition with the clerk of the Superior Court, and upon such petition an order was, on 26 April, 1937, signed by the clerk directing

that the trust estate and assets be turned over to Thomas H. Franks as successor trustee. Said order, recorded in the special proceeding minute docket, is by reference incorporated in the motion. Movant alleges that Thomas H. Franks is now serving a term in the penitentiary for embezzlement. He avers that the order of 26 April, 1937, appointing Franks successor trustee purports to have been made pursuant to the provisions of art. 3, Ch. 36, of the General Statutes; that the order was ineffectual to appoint Thomas H. Franks as trustee or to relieve State Trust Company of its duties as trustee for that (1) the order was never submitted to or approved by the judge as required by G.S. 36-12, and (2) the bond required by G.S. 36-17 was not given by Franks. He alleges that Franks began converting the trust funds "almost immediately after the said trust funds were turned over to him," but the fact of the conversion was concealed and unknown to movant until October 1953. He asks (1) that Franks be made a party respondent, (2) that the order of 26 April, 1937, be declared void and ineffectual and set aside for incompleteness, (3) that State Trust Company be declared liable for all funds by it paid to Franks as successor trustee pursuant to the order of 26 April, 1937, and that it be required to pay said sums into court, (4) that the court appoint a new trustee to receive said funds and that the new trustee be directed to pay the interest thereon to Katie B. Toms for life, and (5) for such other relief as to the court may seem proper.

Thereafter Katie B. Toms entered an appearance and adopted the motion filed by Maurice Toms as a motion made by her.

State Trust Company answered the motion and asserted that the order of the clerk entered 26 April, 1937, permitting it to resign and appointing Franks as successor trustee was submitted to and approved by Judge Clement while he was regularly holding courts in Henderson County in the spring of 1937. It alleges that after the order permitting it to resign had been signed, it delivered the trust assets to Thomas H. Franks, and that he actively entered upon the performance of his duties as successor trustee. State Trust Company alleges that all the original papers in the proceeding under which it was permitted to resign and Franks was appointed as successor trustee have been lost or misplaced and cannot, after due diligence, be found, and the order of Judge Clement approving the proceeding was lost without being recorded. It denies that Franks as successor trustee failed to give bond and, for want of information, any embezzlement by Franks. It pleads laches and the ten-year statute of limitations.

A hearing on the motion was had by the clerk of the Superior Court of Henderson County, who found that a diligent search had been made for the original papers in Special Proceeding 935 entitled: "IN THE MATTER OF STATE TRUST COMPANY, TRUSTEE," being the proceeding in

which State Trust Company was permitted to resign; that the original papers could not be located, and that they had been lost or unlawfully removed from the office of the clerk of the Superior Court of Henderson County; and that the records of the Superior Court of Henderson County show that Judge J. H. Clement was the judge presiding over the Superior Courts of the Eighteenth Judicial District during the 1937 Spring Terms. He found there is no minute of an order signed by Judge Clement approving the order of 26 April, 1937.

The clerk of the court found as a fact that the order of 26 April, 1937, appointing Franks successor trustee, was approved by Judge Clement. This finding is based on affidavits of Monroe M. Redden, who conducted the proceeding for State Trust Company in 1937, and of Thomas H. Franks. The loss of the original papers was also supported by an affidavit of the clerk.

The clerk denied the motion. Movants appealed to Judge Pless, who likewise found that Judge Clement, holding the courts in Henderson County in the spring of 1937, had signed an order approving the order made by the clerk on 26 April, 1937, and that the order of Judge Clement had been lost without having been spread on the minutes. He found that movant and all other beneficiaries were properly before the court when the order of 26 April was signed, and that they were also properly before the court in July 1937 when an order was entered in a proceeding by the life tenant against the remainder beneficiaries which authorized Franks, as successor trustee, to sell certain of the assets delivered to him in April 1937 by State Trust Company; that all the beneficiaries were, on 26 April, 1937, more than twenty-one years of age. He found that neither party offered any direct evidence tending to show that Franks, as successor trustee, had or had not given a bond except that movants offered the book which the clerk was required to keep and in which he was required to record all bonds and said record did not show that any bond had been given. Thereupon, Judge Pless denied the motion.

O. B. Crowell and R. Lee Whitmire for appellee.

M. F. Toms, Jr., and Ward & Bennett for Katie B. Toms, appellant.

Maurice A. Toms in propria persona.

RODMAN, J. The record presents these questions:

(1) When the original judgment roll has been lost or destroyed, is it permissible, by motion in the cause, to show that only a portion of the proceeding has been docketed and recorded and the contents of the missing portions?

(2) If so, may the loss and contents of the missing portion be established by affidavits?

(3) Is an order permitting a trustee to resign and appointing a successor void if the court does not compel the successor trustee to give the statutory bond?

(4) Should movants be denied relief because of laches?

The evidence supports the finding of fact that the original papers have been lost. The statute, G.S. 2-42(9), requires the clerk to keep a special proceeding docket "which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive."

Such a docket was kept by the clerk of the Superior Court of Henderson County. The proceeding of State Trust Company *v.* Katie B. Toms, or a part of said proceeding, was there recorded, namely, the petition seeking authority to resign with a detailed statement of the assets and liabilities as of 18 February, 1937, showing a net principal balance of $25,055, a statement of income and disbursements from 25 March, 1931, through 18 February, 1937; the order of the clerk dated 26 April, 1937, accepting the tendered resignation of State Trust Company and appointing Thomas H. Franks as successor trustee with a direction to State Trust Company "to turn over said assets to said Successor Trustee and to accept his receipt therefor as a complete settlement of the property on hand belonging to the estate"; a statement of principal account from 18 February, 1937, through 29 April, 1937, with an affidavit of the trust officer of respondent that the statement of the principal account was correct, and that the assets as listed had been delivered to Thomas H. Franks, successor trustee; a statement of income account from 18 February, 1937, through 29 April, 1937; and an affidavit of the trust officer of respondent that the statement was correct, and that he had paid Thomas H. Franks, successor trustee, the sum of $154.52, the balance shown in the income account.

The parties stipulated that Katie B. Toms, Maurice Toms, and Margaret Toms Scott were in 1937 served by publication; the other beneficiaries were personally served.

Movants offered the special proceeding docket, insisting that the docket constituted the judgment roll and as such was binding on the parties. They insist that the record discloses no approval of the clerk's order by the judge as required by G.S. 36-12, nor does the order contain any provision for bond nor is there any record of a bond given by the successor as required by G.S. 36-17. Movants assert that the docket is conclusive and cannot be supplemented, modified, or corrected.

The attack here made on the order of resignation is not a collateral attack. It is a motion in the cause in which the court, upon the asser-

tion of respondent that all of the record has not been recorded, has the power and should determine what in fact was done.

It is to provide a permanent record and guard against loss of the original papers that the statute (G.S. 2-42) directs the clerk to keep books in which the papers may be transcribed. The failure of the clerk to comply with the statute by neglecting to record all or a part of a proceeding does not render the proceeding void. Any interested party may, by motion, require the proceeding to be recorded and when a part of the papers has been lost without being recorded, the proceeding does not, because of that fact, lose its vitality or cease to give the protection which the complete record would afford. The power of a court to make its records speak the truth cannot be doubted. To hold otherwise would make a mockery of justice. *S. v. Cannon, ante,* p. 399.

"It is well settled that in any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc* provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." *Creed v. Marshall,* 160 N.C. 394, 76 S.E. 270; *S. v. Cannon, supra; Galloway v. McKeithen,* 27 N.C. 12; *Mayo v. Whitson,* 47 N.C. 231; *Kirkland v. Mangum,* 50 N.C. 313; *Freshwater v. Baker,* 52 N.C. 404; *Pendleton v. Pendleton,* 47 N.C. 135; *McDowell v. McDowell,* 92 N.C. 227; *Oliver v. Highway Commission,* 194 N.C. 380, 139 S.E. 767; 30 Am. Jur. Judgments 108. Additional authorities are assembled in the notes 10 A.L.R. 565 and 67 A.L.R. 837.

The finding by Judge Pless, "Upon due consideration of all the evidence offered by both sides and the available records in the office of the Clerk of Superior Court of Henderson County, the Court finds as a fact that the order of April 26, 1937, was approved by J. H. Clement, then Superior Court Judge . . .," is sufficient to meet the requirements of G.S. 36-12 and is authority to the clerk to correct his minute docket to conform to the facts.

It was competent to prove by affidavit the fact that Judge Clement had made an order approving the proceeding and the loss of this order before it was spread on the minutes. This very question was debated and decided by this Court in the case of *Mayo v. Whitson, supra. Nash, C. J.,* speaking with reference to the competency of proof by affidavit said: "When the object of the petition is considered it will at once be seen that the testimony was competent. It is the duty of the Court to see that their records speak the truth, and their general power to do so is not questioned. The Court, in discharging its duty in this particular, may hear any testimony which is calculated to satisfy its judgment. It is not deciding a question of property between litigating parties, but one touching the correctness of its officer in the performance of his

clerical duties. It was inquiring whether its records speak the truth? Whether its order has been obeyed? It is entitled to draw evidence from any pure source." *Moye v. Petway,* 75 N.C. 165; *Creed v. Marshall, supra; Springs v. Schenck,* 106 N.C. 153; *Davis v. Shaver,* 61 N.C. 18; *McLendon v. Jones,* 42 Am. Dec. 640.

The court's finding on competent evidence that Judge Clement by order approved the proceeding and particularly the order authorizing State Trust Company to resign and appointing Franks as successor is conclusive. The record thus corrected has the same efficacy as if the original order signed by Judge Clement had been offered in evidence.

Movants assert that the resignation authorized and settlement consequent thereon can have no validity because the bond which the clerk is directed by G.S. 36-17 to require of a new trustee was not given, or, if given, was not recorded as required by that statute.

The clerk found: "movant did not offer any evidence tending to show no bond was given by the Successor Trustee other than the evidence hereinbefore referred to; (that is, the minute docket where the proceeding is recorded and the absence of the original papers) that it is the usual custom in proceedings of this kind for the bond to be filed in the jacket with the original papers and without being recorded." This finding of fact was reiterated by Judge Pless in the identical language of the clerk with this addition: the court "fails to find as a fact that the bond required of a successor Trustee in a proceeding of this nature was not filed with the Court."

It was stated on the oral argument that Franks, as successor trustee, had made income payments to Katie B. Toms, the beneficiary for life, until 1953. Presumably he regularly filed accounts showing his receipts and disbursements with the clerk and the beneficiaries. If such accounts were filed, they would presumably show the amounts, if any, paid by Franks as premiums and to whom paid. The record does not disclose whether Franks in fact filed any accounts nor what premiums, if any, were paid.

If it be conceded that Judge Pless should have found as a fact that Franks as successor trustee had not given bond, would that fact invalidate the settlement made by State Trust Company with Franks in 1937 in conformity with a duly approved order of a court with jurisdiction of the subject matter and of the parties?

This Court has not heretofore been called upon to decide what is the effect of the failure to give the bond specified in G.S. 36-17. It will be noted that this section applies to executors, administrators, guardians, trustees, and other fiduciaries. All are put in the same class. No good reason appears why the rule applicable to the original appointment of such fiduciaries should not apply to the appointment of a successor.

Our statutes make provision for the giving of bonds by the fiduciaries of the kind named in G.S. 36-17.

With certain specific exceptions, a foreign executor must give bond before intermeddling with the estate. G.S. 28-35(1). Every administrator and collector, before letters are issued, must give bond payable to the estate. G.S. 28-34. No guardian appointed for a minor or other incompetent is permitted to receive property of his ward "until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court." G.S. 33-12.

The language of these statutes is as imperative as the language of G.S. 36-17. Nevertheless, it has been consistently held that the failure to require a bond does not under those statutes make the appointment void. It is but an irregularity relating to the qualification of the appointee. *In re Estate of Pitchi,* 231 N.C. 485, 57 S.E. 2d 649; *Batchelor v. Overton,* 158 N.C. 395, 74 S.E. 20; *Plemmons v. R. R.,* 140 N.C. 286; *Howerton v. Sexton,* 104 N.C. 75; *Garrison v. Cox,* 95 N.C. 353; *Hughes v. Hodges,* 94 N.C. 56; *Spencer v. Cohoon,* 18 N.C. 27; *In re Shin Mee Ho,* 73 Pac. 1002 (Cal.).

Whether the absence of a provision in the order of April 1937 requiring the successor trustee to give bond was an error to be corrected by appeal in due time or rendered the judgment irregular need not now be determined. The time to appeal elapsed many years ago. If the judgment was irregular, movants were required to act with diligence in an effort to correct it. They could not, with knowledge of the terms of the order, the transfer of the trust fund from respondent to Franks, knowledge that he was acting as trustee, making payments of the income to the life beneficiary for nearly seventeen years, expect the court to declare its judgment a nullity. There was nothing which prevented movants during the period from April 1937 to the discovery of the defalcation in 1953 from seeking an order compelling Franks to give an adequate bond. One must be diligent in seeking the correction of an irregular judgment. *Collins v. Highway Comm.,* 237 N.C. 277, 74 S.E. 2d 709; *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227; *Gough v. Bell,* 180 N.C. 268, 104 S.E. 535; *Currie v. Mining Co.,* 157 N.C. 209, 72 S.E. 980; *Glisson v. Glisson,* 153 N.C. 185, 69 S.E. 55; *Harrison v. Hargrove,* 109 N.C. 346.

Movants take no exception to the finding that they were properly before the court in Special Proceeding 675 which authorized Franks to sell for reinvestment a portion of the trust assets, which he received from State Trust Company. This order was entered 27 July, 1937. It contains this recital: "Whereas, on the 26th day of April, 1937, Thomas H. Franks of Hendersonville, N. C., was duly appointed successor trustee to said State Trust Company . . ."

So far as the record discloses, Mrs. Katie B. Toms never made any complaint about the failure of Franks to give bond, although she is recited as the petitioner in the proceeding filed in the summer of 1937 to sell for reinvestment part of the trust assets. Movant Maurice A. Toms merely says: "That your respondent Maurice A. Toms, being served by publication, *had no immediate opportunity of checking* and seeing that the statutes were followed in the said proceeding, and thereby make an attempt to preserve his interest in the said trust fund." (Emphasis added.) He avers that he did not ascertain until October 1953 that Franks had embezzled the trust fund, but he nowhere gives any indication as to when he learned that Franks had not given bond, if such is a fact. He nowhere gives any indication as to when he made an investigation or why he delayed for sixteen years in making an investigation. He did not, in July 1937, when Franks as successor trustee was applying to the court for permission to sell the very assets received from State Trust Company, offer any objection to the sale and reinvestment in a form which enabled the trustee to consummate the very embezzlement now complained of. State Trust Company was not then before the court; movant was.

This record does not indicate diligence on the part of movants. The facts found by Judge Pless are supported by the evidence. The judgment appealed from is

Affirmed.

JOHNSON, J., not sitting.

PURVIS GRAHAM LILES AND METTIE PACE LILES, PARENTS AND NEXT OF KIN OF GRAHAM RAY LILES, DECEASED, v. FAULKNER NEON & ELECTRIC COMPANY, EMPLOYER, AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 31 October, 1956.)

1. Master and Servant § 53b—

The amount of an award of compensation under the Workmen's Compensation Act is prescribed by statute, and under the statute, as distinguished from a common law action for tort or a statutory action for wrongful death, recovery is based upon the injured employee's earnings rather than his earning capacity. G.S. 97-2(e).

2. Same—

Where the employee has worked less than 52 weeks prior to the accident, his average weekly wage as a basis of compensation must be determined by

dividing his earnings over the period of employment by the number of weeks or parts thereof during which the employee earned wages, subject to the proviso that by such method results fair and just to both parties will be obtained.

3. Same—

The provisions of G.S. 97-2(e) authorizing the Industrial Commission to have regard to the average weekly wage which a person of the same grade and character employed in the same class of employment would earn, or such other method of computing the average weekly wage as will most nearly approximate the amount the injured employee would be earning were it not for the injury, are predicated upon a finding by the Commission that results fair and just to both parties would not be obtained by computing the injured employee's average weekly wage, and the words "fair and just" must be related to the standard set up by the statute.

4. Same—

Where the injured employee is a part-time worker, a person of the same grade and character employed in the same class of employment, within the purview of G.S. 97-2(e), would be a part-time and not a full-time worker.

5. Master and Servant § 55d—

Whether the computation of the average weekly wage of the injured employee would not be fair and just to both parties upon the particular facts of the case, is a question of fact, but the Commission's findings in this regard are not conclusive if not supported by competent evidence or if predicated on an erroneous construction of the statute.

6. Master and Servant § 53b—

The fatally injured employee was a college student employed part time during vacation and after school, with his hours of work during a week varying from 17½ to 51 hours. There was no evidence that at the time of his injury he was earning or could thereafter earn greater wages in his part-time employment than he had previously earned. *Held:* The evidence does not warrant a finding that his average weekly wage during the term of his employment as a basis of compensation would not obtain results fair and just to both parties, compensation under the terms of the statute being based upon wages actually earned rather than earning capacity, and the standard set up by the statute being the amount which the injured employee would have earned had it not been for the accident.

7. Master and Servant § 55h—

Where the Supreme Court finds error in the Commission's decision in respect of the sole controversy presented by the appeal, G.S. 97-88 does not apply, and provision in the judgment appealed from that the insurer should pay costs, including attorney fee, will be stricken.

JOHNSON, J., not sitting.

PARKER, J., dissents.

APPEAL by defendants from *Fountain, Special Judge,* March Term, 1956, of WILSON.

Proceeding under Workmen's Compensation Act.

Defendants admit liability. The controversy relates solely to the amount of "average weekly wages" on which to base the award.

The only evidence was that offered by plaintiffs. It appears therefrom that decedent, upon graduation from Wilson High School, attended Atlantic Christian College for three semesters; that he then served two years in the armed services; that he then attended the University of North Carolina for one semester; that in 1954 he reentered Atlantic Christian College; and that on 16 October, 1954, he sustained an injury by accident, resulting in his death, which arose out of and in the course of his employment by defendant Faulkner Neon & Electric Company.

Mr. Littlejohn Faulkner, who was president of the Faulkner company and controlled its operations, testified in substance as follows:

Decedent was employed as a helper. He worked all or parts of eleven weeks. He was paid 75c an hour. Because of his school schedule, he had no set hours. "If he got off early in school, he came in early, and if he got off late, he came in late." He worked some hours practically every working day. One week he worked 51 hours. Another week he worked 49 hours. This was during the interval between summer school and the regular Fall Term. He worked 17½ hours the week ending October 8th, less than any other week. "He worked every available hour he could work . . . the average over the 11 weeks that he worked for us, the average that he earned, was $26.88 according to our books." His total wages for the eleven weeks were $295.72. The period of decedent's said employment was the employer's "peak work season." Other college boys were employed, also as helpers, on the same basis. There was no employee, except a full-time mechanic, who had worked for the employer as long as a year.

On direct examination, this question was asked: "Now, Mr. Faulkner, what was the average work week of the men doing work similar to Graham Ray Liles during the time that he was employed?" Over objection by defendants, the witness answered: "Well, it was 46 and a half hours at 75 cents, is the average." His further testimony was that 46½ hours was considered a full work week; and that if decedent had worked full time instead of going to school part of the time he would have earned $34.88 per week, being wages for 46½ hours at 75c per hour.

The findings of fact made by the Hearing Commissioner include the following: "1. That Graham Ray Liles was a student at Atlantic Christian College at the time of his death; that he was 23 years of age and had never been married; that during the time when he was not attending classes and was not busy with his studies he was employed in a part-time capacity by the defendant; (that by reason of the short-

ness of time during which Graham Ray Liles was employed or the casual nature or terms of his employment it would be impractical to compute his average weekly wage by basing same on his average earnings for the previous 52 weeks;) (that the deceased employee's average weekly wage, based upon the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community, was $34.88.)"

By proper exceptions and assignments of error, defendants challenged the findings indicated by parentheses and the competency of designated portions of the evidence.

The conclusions of law made by the Hearing Commissioner included the following: "Three methods are given by statute for computing average weekly wage: (a) where the employment has been continuous for at least 52 weeks; (b) where the employment has extended over a period of less than 52 weeks, and (c) where, by reason of a shortness of time or the casual nature or terms of the employment it is impracticable to compute the average weekly wages by method (a) or (b). G.S. 97-2(e). The Commission concludes as a matter of law that results fair and just to both parties cannot be obtained by methods (a) or (b) above set out; that by reason of the casual nature or terms of his employment it would be impractical to compute his average weekly wage by basing same on his average earnings for the previous 52 weeks; and that the deceased employee's average weekly wage, based upon the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community, was $34.88. *Mion v. Marble & Tile Co.*, 217 N.C. 743; *Munford v. Construction Co.*, 203 N.C. 247."

By proper exceptions and assignments of error, defendants challenged the quoted conclusions of law.

Based on the findings of fact and conclusions of law of the Hearing Commissioner the award made was at the rate of $20.93 (60% of $34.88) per week for a period of 350 weeks from 17 October, 1954.

Upon appeal, the Full Commission adopted as its own the findings of fact and conclusions of law of the Hearing Commissioner and affirmed the award based thereon.

Upon appeal therefrom, the court below overruled defendants' assignments of error to the findings of fact and conclusions of law made by the Full Commission; and the said award was affirmed.

The judgment signed and entered in Superior Court also contained this provision: "It appearing to the Court and the Court finding that the proceedings here were brought by an appeal by the insurer and that the insurer should pay the plaintiffs' costs, it is ordered that the costs to the plaintiffs of these proceedings, including a reasonable fee to their

attorneys to be determined by the Industrial Commission, shall be paid by the insurer."

Defendants excepted and appealed. They assign as error, *inter alia*, the indicated findings of fact and conclusions of law and the quoted provision of the judgment relating to the payment by them of plaintiffs' costs.

Carr & Gibbons for plaintiffs, appellees.

Ruark, Young & Moore for defendants, appellants.

BOBBITT, J. Is the evidence sufficient to support the Commission's conclusion that it would be unfair and unjust to compute decedent's "average weekly wages" by dividing his total earnings by eleven, whereby the result would be $26.88, and to warrant the finding and conclusion that the award should be based on "average weekly wages" of $34.88? The court below answered in the affirmative. We are constrained to hold that controlling statutory provisions necessitate a negative answer.

Unquestionably, decedent had the capacity to earn $34.88 per week "in the employment in which he was working at the time of the injury." The fact is that he earned "average weekly wages" of $26.88. Presumably, full-time work would have been available to him in this employment. The fact is that "he was employed in a part-time capacity." He worked whenever he was free to do so. The fact is that while attending college he was not available for full-time work.

In a common law tort action, or in a statutory action for wrongful death, earning capacity, present and prospective, is an important and proper element of damages. A workman's compensation claim, which is not based on tortious conduct, is unknown to the common law; and the basis for the award as well as the validity of the claim is determinable solely by the provisions of the statute. Under applicable statutory provisions, may an award be based on *earning capacity* of the injured employee in the employment in which he was working at the time of the injury?

Under G.S. 97-2(e), "average weekly wages" of the employee "in the employment in which he was working at the time of the injury" must be related to *his earnings* rather than to his earning capacity. The word "average" is defined by Webster as "a mean proportion, medial sum or quantity made out of unequal sums or quantities." *Stevens v. Black, Sivalls & Bryson*, 39 N.M. 124, 42 P. 2d 189. Within the statutory limits, the method for determining such "average weekly wages" depends on the facts of each case.

If the employee has worked in such employment during the period of fifty-two weeks immediately preceding the day of injury, the prescribed

(first) method is to divide his total earnings during that period by fifty-two. The "average weekly wages" so determined may exceed the employee's weekly wages at the time of his injury, for example, where his compensation during the early part of the 52-week period exceeds his compensation during the latter part thereof. *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426. The Commission found that "it would be impractical to compute his (decedent's) average weekly wages by basing same on his average earnings for the previous 52 weeks." Obviously, it would be impossible to do so.

The said first method does not apply when as here the period of employment prior to injury is less than fifty-two weeks. In such case the prescribed (second) method is to divide the employee's earnings over the period of employment by the number of weeks or parts thereof during which the employee earned wages, subject to the proviso that by such method results fair and just to both parties will be obtained. If determined by this method, decedent's "average weekly wages" were $26.88.

If results fair and just to both parties will not be obtained by application of the said second method, another (third) method is prescribed, viz.: "Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, *regard shall be had* to the average weekly amount *which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment* in the same locality or community." (Italics added.)

A further provision is in these words: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, *such other method* of computing average weekly wages may be resorted to *as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*" (Italics added.) This provision, while it prescribes no precise method for computing "average weekly wages," sets up a standard to which results fair and just to both parties must be related.

The Commission undertook to apply the said third method. Careful consideration of the evidence impels the conclusion that there is no factual basis for its application. There is no evidence as to the average weekly amount being earned during the fifty-two weeks previous to decedent's injury by a person of the same grade and character employed in the same class of employment. Nor is there evidence as to the average weekly amount a part-time worker, employed as a helper, had earned during the fifty-two weeks previous to decedent's injury, while working for this employer or any other in the same locality or

community. A person of the same grade and character employed in the same class of employment would be a part-time, not a full-time worker. This construction is in accord with decisions in other jurisdictions having similar statutory provisions. *In re Rice,* 229 Mass. 325, 118 N.E. 674, Ann. Cas. 1918E 1052; *White v. Pinkerton Co.,* 155 Tenn. 232, 291 S.W. 448; *Ruppert v. Plattdeutsche, Volksfest Verein,* 263 N.Y. 338, 189 N.E. 240; *Barlog v. Board of Water Com'rs,* 239 App. Div. 225, 267 N.Y.S. 822; *Derion v. Gilford Mfg. Co.,* 282 App. Div. 788, 122 N.Y.S. 2d 444; *State Road Commission v. Industrial Commission,* 56 Utah 252, 190 P. 544; *Brisendine v. Skousen Bros.,* 48 Ariz. 416, 62 P. 2d 326, 112 A.L.R. 1089. There is no evidence that any part-time worker, the nature of whose employment was similar to that of decedent, earned "average weekly wages" over *his period of employment* greater than $26.88. The inescapable fact is that the Commission determined the "average weekly wages" of a part-time employee to be the amount *he would have earned* had he been a full-time employee.

In *Munford v. Construction Co.,* 203 N.C. 247, 165 S.E. 696, decedent had been employed some three months at the time of his injury. The Commission had found as a fact that decedent's work "in the beginning of his employment . . . was not regular, but later he was assigned a truck and placed upon regular duty." Based thereon, the Commission made a further unchallenged finding of fact that results fair and just to both parties would not be obtained by said second method; and this Court upheld an award based on the average weekly amount earned by a person of the same grade and character employed in the same class of employment, to wit, a full-time truck driver.

In *Mion v. Marble & Tile Co., Inc.,* 217 N.C. 743, 9 S.E. 2d 501, the decedent, who had worked less than fifty-two weeks prior to his injury, had twice received an increase in hourly pay. This Court held erroneous an award based on his average weekly wages during the last seven weeks of his employment, during which his compensation was greater than during the preceding portion of his period of employment. As stated by *Winborne, J.* (now *C. J.*): "There is no finding that under the method provided as stated above (second method) for ascertaining the average weekly wage, the results here would be unfair to both parties, nor is there evidence tending to show such state of facts."

In *Early v. Basnight & Co.,* 214 N.C. 103, 198 S.E. 577, decedent, who had been a warehouse clerk for three years or thereabout, was promoted to the position of salesman some six months before his fatal accident. When injured his salary was $100.00 per month, or $23.07 per week, substantially more than he had earned as warehouse clerk. This Court held the evidence sufficient to support these findings by the Commission: "(4) That for exceptional reasons the average weekly wage of the plaintiff's deceased over the twelve months immediately

preceding his injury and death would be unfair to the deceased employee and his dependents. (5) That the plaintiff's deceased would have been earning $23.07 per week if it had not been for the injury." It is noted that this statement appears in the opinion of the Commission: "The Full Commission has not taken into consideration the anticipated increase, but has given consideration to the actual increase that the deceased received from 1 January to 16 March." This Court held that the words, "the foregoing," in the second paragraph of G.S. 97-2(e) referred *to the three methods* set out in the first paragraph thereof. *Winborne, J.* (now *C. J.*), speaking for this Court, said: "Hence, it is manifest that where exceptional reasons are found which make the computation on the basis of either of 'the foregoing' methods unfair to the employee, the Legislature intended that the Industrial Commission might resort to such other method of computing the average weekly wages *as would most nearly approximate the amount the injured employee would be earning if he were living.*" (Italics added.)

True, as stated by *Clarkson, J.*, in *Munford v. Construction Co., supra,* all provisions of G.S. 97-2(e) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the said second method is a question of fact; and in such case a finding of fact by the Commission controls decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute.

The words "fair and just" may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of G.S. 97-2(e), consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury. In *Munford v. Construction Co., supra,* the actual earnings of the employee at the time of his injury were the wages of a full-time truck driver; and in *Early v. Basnight & Co., supra,* the actual earnings of the employee at the time of his injury were those of a salesman, not those of a warehouse clerk.

When G.S. 97-2(e) is so construed, the evidence does not warrant a finding of fact or conclusion of law that the said second method would not obtain results fair and just to both parties. There is no evidence that decedent at the time of his injury was earning or would thereafter earn greater wages in his said part-time employment than he had previously earned. On the contrary, his greater earnings in his said part-time employment were before the regular college term began; and, when

the said second method is applied, plaintiffs get the benefit of his greater earnings during that period.

We are mindful of persuasive reasons in favor of statutory provisions under which the rule contended for by appellees would be applied. In a similar situation, *Brickley, J.*, speaking for the Supreme Court of New Mexico in *Stevens v. Black, Sivalls & Bryson, supra,* aptly said: "However this may be, it is beyond our power to regulate, our sole task is to ascertain the measure of compensation fixed by the statute. If the statute does not work with justice to the workmen, this is a matter for the Legislature."

After the decision in the *Stevens case* (1935), *supra,* the New Mexico statute was amended. As amended, it provided in substance that where an employee is being paid by the hour the daily wage of such employee, as basis for an award, is to be determined by multiplying the number of working hours in the day of the employee's injury by his hourly rate of pay; and that his weekly wage is to be determined by multiplying his said daily wage by the number of working days or fractions thereof in the week of the employee's injury. A new formula was thus substituted for the original provisions. *La Rue v. Johnson,* 47 N.M. 260, 141 P. 2d 321 (1943). In the *La Rue case, Brice, J.*, cites and discusses cases from other jurisdictions based on statutory provisions similar to those contained in the *amended* New Mexico statute. In doing so, he draws the distinction between such statutory provisions and those where compensation "is based upon actual earnings, and not upon capacity to earn." Unfortunately for appellees, our statute falls into the latter classification.

Upon this record, the "average weekly wages" of decedents are to be computed in accordance with the said second method prescribed by G.S. 97-2(e). Hence, there is error in the judgment of the court below; and, upon certification of this opinion, the court below will remand the proceeding to the Commission to the end that it enter an award based on "average weekly wages" under G.S. 97-2(e) as construed herein.

Also, there is error in the portion of the judgment of the court below requiring defendant carrier to pay plaintiffs' costs, including attorney fee, incident to the appeal by defendants from the Commission to the Superior Court. G.S. 97-88 does not apply when as here this Court finds error in the Commission's decision in respect of the sole controversy presented by the appeal.

Error and remanded.

JOHNSON, J., not sitting.

PARKER, J., dissents.

NANCY JANE BURRELL v. DICKSON TRANSFER COMPANY AND GEORGE VERNON BURRELL.

(Filed 31 October, 1956.)

1. Pleadings § 22—

If a complaint is subject to amendment, the allowance of such amendment is addressed to the discretion of the trial judge, G.S. 1-131, G.S. 1-161, G.S. 1-163, and where motion for leave to amend is made at term, the statutory provision as to notice of such motion does not apply. G.S. 1-131.

2. Same: Courts § 5—

Where a judge of the superior court sustains demurrer to the complaint and grants plaintiff time to file amended complaint, the order is in effect a ruling that the complaint contains a defective statement of a good cause of action and is subject to amendment, and therefore another superior court judge is bound by such ruling even if the ruling be erroneous, since it could not be set aside by another superior court judge for error of law, nor could it be reviewed on appeal in the absence of exception thereto.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Phillips, J.*, 30 April, 1956, Term, of FORSYTH.

Plaintiff's appeal is from a judgment dismissing the action. Only pleadings and judgments relating thereto are involved.

Plaintiff's action grows out of these *alleged* facts. A tractor-trailer, owned by Dickson Transfer Company and operated in its behalf by its employee, proceeded eastwardly on Twelfth Street in Winston-Salem. The driver, ignoring the stop sign at the entrance to Highland Avenue, "swung" the tractor-trailer to the right into Highland Avenue, the dominant highway. To avoid collision with the tractor-trailer, George Vernon Burrell, originally a defendant herein, operating plaintiff's passenger car northwardly on Highland Avenue, was forced to run into and over the curb on the north side of Twelfth Street, into and against a mailbox, etc., on account of which plaintiff, who was riding in her said passenger car, was injured.

In her original complaint, plaintiff sought to recover damages for personal injuries from both defendants on account of their alleged joint negligence, alleging in detail the respects in which each defendant was negligent. Each defendant answered, denying negligence on its (his) part but unequivocally admitting plaintiff's allegations of negilgence against its (his) codefendant; and the corporate defendant pleaded the alleged negligence of Burrell, plaintiff's driver, in bar of plaintiff's right to recover from it.

On 2 June, 1955, after the aforesaid pleadings had been filed, judgment of voluntary nonsuit was entered by Sharp, J., as to defendant Burrell, whereby the action as to him was dismissed.

On 7 June, 1955, Sharp, J., signed and entered an order worded as follows:

"This cause coming on to be heard . . . upon the demurrer to the complaint *ore tenus* by the defendant, Dickson Transfer Company, and the Court upon due consideration being of the opinion the demurrer should be sustained.

"NOW, THEREFORE, it is accordingly ADJUDGED that the demurrer be and it is hereby sustained; and the plaintiff is allowed thirty days from this date in which to file an amended complaint."

The record does not show that exception was taken either to said judgment of nonsuit or to said order of 7 June, 1955.

Thereafter, on 5 July, 1955, plaintiff filed amended complaint against the Dickson Transfer Company, then the sole defendant, setting forth therein substantially the same allegations she had made in her original complaint concerning the alleged negligence of said defendant but omitting all allegations of the original complaint concerning alleged negligence on the part of Burrell.

On 20 July, 1955, defendant answered the amended complaint, pleading, *inter alia*, the negligence of Burrell, plaintiff's agent, in bar of plaintiff's right to recover.

On 3 May, 1956, the court below signed and entered the following judgment:

"This cause coming on to be heard and being heard before His Honor F. Donald Phillips, Judge Presiding at the April, 1956, Term of the Superior Court, and it appearing to the court that said cause is calendared for trial at said term and being heard upon a motion of the defendant, Dickson Transfer Company, to dismiss the action, and it further appearing to the court that at a prior term of this court beginning on May 23, 1955, lasting for three weeks when this case was calendared for trial on the second week thereof, upon a demurrer *ore tenus* by the defendant, Dickson Transfer Company, heard on May 31, 1955, Her Honor Susie Sharp, Judge Presiding, sustained the demurrer and thereafter on June 2, 1955, and before formal order was entered sustaining the demurrer, the plaintiff took a voluntary nonsuit against the co-defendant, George Vernon Burrell, and thereafter a formal order was also entered on June 7, 1955, sustaining the demurrer of the said defendant, from which order sustaining said demurrer the plaintiff did not appeal, and at the same time the court allowed the plaintiff thirty days in which to file an amended complaint against the defendant, Dickson Transfer Company, and the plaintiff did file an amended complaint as appears of record, and it further appearing to the court that the plaintiff's counsel admitted in open court that George Vernon Burrell was the servant and agent of the plaintiff.

"NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the plaintiff alleged and stated a defective cause of action against the defendant, Dickson Transfer Company, and the demurrer of said defendant was properly allowed by Judge Sharp, and since the plaintiff alleged a defective cause of action, *the dismissal of her suit against the said defendant was final* and the order allowing thirty days in which to file an amended complaint was surplusage and the plaintiff's cause should be and is hereby dismissed with the costs of the court to be taxed against the plaintiff, and it is so ordered." (Italics added.)

Plaintiff excepted and appealed, assigning as error the signing and entry of said judgment of 3 May, 1956.

Fred M. Parrish, Jr., and Ingle, Rucker & Ingle for plaintiff, appellant.

Deal, Hutchins & Minor for defendant Dickson Transfer Company, appellee.

BOBBITT, J. It appears from recitals in the judgment of Judge Phillips that the hearing before Judge Sharp on Dickson Transfer Company's demurrer *ore tenus* was held 31 May, 1955; that Judge Sharp then sustained said demurrer, albeit the formal order was not signed until 7 June, 1955; and that between these dates the judgment of voluntary nonsuit as to Burrell was entered. Whether Judge Sharp on 31 May, 1955, announced a positive ruling as distinguished from an intended ruling, the fact is that no order was signed until 7 June, 1955. Apart from that, had Judge Sharp on 31 May, 1955, signed a judgment sustaining the demurrer *ore tenus*, such judgment would have been *in fieri* during the term, subject to being set aside, modified or amended by her further order. *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407. While sustaining the demurrer, Judge Sharp allowed plaintiff to file an amended complaint. The amended complaint was filed within the time allowed. Defendant answered the amended complaint.

Defendant insists that Judge Sharp should have dismissed the action; that it was not a matter within her discretion as to whether plaintiff should have been allowed to file an amended complaint; and that this is true because the cause of action alleged in the original complaint was a defective cause of action as distinguished from a defective statement of a good cause of action.

"Where there is a defective statement of a good cause of action, the complaint is subject to amendment; and the action should not be dismissed until the time for obtaining leave to amend has expired. G.S. 1-131. But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered." *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Teague v. Oil Co.*, 232 N.C. 469,

61 S.E. 2d 345. The following cases disclose *clear* instances where the "plaintiff's supposed grievance is not actionable." *Scott v. Veneer Co.*, 240 N.C. 73, 77, 81 S.E. 2d 146; *Lewis v. Ins. Co.*, 243 N.C. 55, 89 S.E. 2d 788; *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135.

If the original complaint was subject to amendment, the allowance of such amendment was addressed to the discretion of the trial judge. G.S. 1-131; G.S. 1-161; G.S. 1-163; *Hood, Comr. of Banks, v. Motor Co.*, 209 N.C. 303, 183 S.E. 529; *McKeel v. Latham*, 203 N.C. 246, 165 S.E. 694. And where motion for leave to amend is made at term, the statutory provision as to notice of such motion does not apply. G.S. 1-131; *Harris v. Board of Education*, 217 N.C. 281, 7 S.E. 2d 538.

The fact is that Judge Sharp, while sustaining the demurrer *ore tenus*, allowed plaintiff to file an amended complaint; and in so doing Judge Sharp in effect ruled that the original complaint contained a defective statement of a good cause of action. Whether it contained a defective statement of a good cause of action or a statement of a defective cause of action was a question of law. If Judge Sharp's decision thereon was incorrect, her order was *erroneous*. It could not be set aside for error of law by another Superior Court judge at a subsequent term. *Mills v. Richardson, supra; Hoke v. Greyhound Corp., supra.* Nor will it be reviewed by this Court in the absence of exception taken thereto.

True, the judgment of Judge Phillips recites that "the plaintiff's counsel admitted in open court that George Vernon Burrell was the servant and agent of the plaintiff." However, the amended complaint does not allege that any negligence on the part of Burrell caused or concurred in causing plaintiff's injury.

The portion of Judge Phillips' judgment, to wit, "the dismissal of her suit against the said defendant was final," is erroneous, being in direct conflict with Judge Sharp's order of 7 June, 1955, which did not dismiss plaintiff's suit but on the contrary granted leave to plaintiff to file an amended complaint.

When the cause came before Judge Phillips, the relevant subsisting pleadings were the amended complaint and the answer thereto. The original complaint had been superseded by the amended complaint. *Zagier v. Zagier*, 167 N.C. 616, 83 S.E. 913; *Griggs v. Griggs*, 213 N.C. 624, 627, 197 S.E. 165.

The conclusion reached is that the case is now pending for trial on said amended pleadings. Therefore, the judgment of Judge Phillips dismissing plaintiff's action is

Reversed.

JOHNSON, J., not sitting.

MINNIE FLEMING, ADMINISTRATRIX OF THE ESTATE OF JESSIE M. FLEMING, v. JAMES VAUGHN TWIGGS AND ROSETTA KILPATRICK TWIGGS.

(Filed 31 October, 1956.)

1. Automobiles § 36: Negligence § 17—

Negligence is not presumed from the mere fact of an accident and injury.

2. Same—

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in performance of some legal duty which defendant owed plaintiff under the circumstances and that such negligent breach of duty was the proximate cause of the injury.

3. Trial § 23a—

There must be legal evidence of every material fact necessary to support the verdict and evidence which raises a mere guess or speculation is insufficient.

4. Negligence § 19b(1)—

If the evidence fails to establish either negligence or proximate cause, nonsuit is proper, and whether there is enough evidence to support a material issue is a matter of law.

5. Automobiles § 38—

A witness' testimony that she was sitting in an automobile and did not look back until she heard tires as brakes were applied, that she then saw a car approaching from the rear as it was some seven or nine feet from a pedestrian in the rear of her automobile, and then looked away before the impact, discloses lack of opportunity on her part to form an opinion as to the car's speed, and her testimony as to its speed is without probative force.

6. Automobiles § 41b—

Evidence to the effect that defendant's car was being driven on the open highway, without evidence of circumstances requiring a reduction of speed from the statutory maximum, that defendant's car struck a pedestrian attempting to cross the highway from the rear of a stationary car, that the brakes were applied before defendant's car hit the pedestrian, and that tire marks on the highway were 40 to 50 feet in length, with evidence that the car was traveling at a lawful speed shortly before the accident and without evidence of probative force that the car was traveling at an excessive speed at the time of the accident, is insufficient to present the question of excessive speed.

7. Automobiles § 33—

A motorist has the right to assume that a pedestrian attempting to cross a highway at a place where there is no road intersection or crosswalk, will yield the right of way to the vehicle and not attempt to cross until such movement can be made in safety.

8. Automobiles § 41 (1)—

Evidence tending to show that an automobile, traveling along a straight and level highway, hit a pedestrian attempting to cross the highway from the rear of a car parked on the motorist's right side of the highway, without evidence that the automobile was traveling at excessive speed and with no evidence to indicate that the motorist was put on notice that the pedestrian would attempt to cross in the path of his oncoming vehicle, or that the motorist could have avoided the injury after ascertaining the pedestrian had exposed himself, is insufficient to overrule defendants' motion for nonsuit.

JOHNSON, J., not sitting.

APPEAL by defendant from *Moore (Dan K.), J.*, June, 1956 Civil Term, MADISON Superior Court.

Civil action for wrongful death alleged to have resulted from the negligence of James Vaughn Twiggs in the operation of an automobile registered in the name of his mother, Rosetta Kilpatrick Twiggs. The defendants denied negligence on the part of James Vaughn Twiggs and alleged contributory negligence on the part of Jessie M. Fleming.

The accident occurred on 19 August, 1955, at about two o'clock p.m., on Highway No. 209 in a rural section of Madison County. The asphalt surface of the highway is 18 feet wide and the highway runs north and south. From the point of the accident it is straight and practically level for almost a mile in either direction. Shortly before the accident the plaintiff's intestate had been a passenger in the Ford sedan owned and operated by his son, Steve Fleming. Also in the Ford were Steve Fleming's wife, Blulah Fleming, and two small boys. Here is the story of the accident as told by Blulah Fleming: "My husband pulled over and stopped the car on the right-hand side of the road, and my father-in-law got out on the right-hand side and went around behind the car, . . . I did not see the Twiggs' car until I heard a noise. When I heard a noise, I looked around and the car was coming sideways on the left-hand side of the road. I did not see the car when it struck my father-in-law. I saw my father-in-law just prior to the time the car struck him. At that time he was crossing over the highway. . . . I saw the car that hit him when it made the noise. . . . At that time it was seven or nine feet back of my car. It was something like the distance of this courtroom behind my car at the time I saw it. I would say it was making around 70 miles per hour in my opinion. . . . He was crossing the highway to the left when I saw him. I would say he was midways of the highway, walking slowly. . . . That was the first time I saw him from the time he got out. . . . The next thing I heard was a noise and saw him flying in the air, I didn't see him hit. . . . When I saw the automobile I turned my head. . . . I didn't want to see it."

There was evidence that the left front light and left front fender of the Twiggs' car were damaged. There was evidence that the Fleming car was parked about half on and half off the hard surface, facing north. The Twiggs' car was going north.

Steve Fleming, for the plaintiff, testified: "I did not see the Twiggs' car before the impact and don't know what his speed was."

Dean Ledford, another plaintiff's witness, testified that he was going south, meeting the Twiggs' car, and he saw it about ¼ mile away and that it was running 45 or 50 miles per hour; that the skid marks extended back about 45 or 50 feet from where the car stopped. Except for the Fleming and Twiggs cars, there was no other traffic on the highway.

Nellie Duckett, also a plaintiff's witness, testified that she was mowing her yard a few feet away and "Uncle Jess Fleming got out of the car, went up the side of the car and behind it, like he was going to cross the highway. . . . The next thing I saw of him he was falling in the ditch on the other side of the road. When I saw his body go into the ditchline, I saw the automobile trying to get stopped."

No other plaintiff's witness saw the accident.

James Vaughn Twiggs testified in substance that he saw the Fleming car parked on the highway and also saw a car approaching (evidently the Ledford car); that he was driving about 40 to 45 miles per hour. "When I first saw him he walked out from behind the car. I pulled over to the left, giving him a little more room, and applied my brakes. I blew my horn and pulled to the left side of the road, and he started running when he saw me, across in front of me. I would say he was 40 feet from my car when he started running."

The jury answered issues of negligence and contributory negligence for the plaintiff and awarded $6,000 damages. From the judgment in accordance with the verdict, the defendant appealed, assigning errors.

Harkins, Van Winkle, Walton & Buck for defendants, appellants.
McLean, Gudger, Elmore & Martin for plaintiff, appellee.

HIGGINS, J. The defendant made timely motions for judgment of nonsuit and assigned as error the refusal of the court to allow them. The motions raised two questions: First, was the evidence sufficient to go to the jury on the issue of negligence? And, second, if so, did the evidence show that Jessie Fleming was guilty of contributory negligence as a matter of law?

"Negligence is not to be presumed from the mere fact that an accident has occurred." *Merrell v. Kindley*, 244 N.C. 118, 95 S.E. 2d 671. "It is appropriate to say that no inference of negligence arises from the mere fact of an accident or injury." *Adams v. Service Co.*, 237

N.C. 136, 74 S.E. 2d 332. "Negligence is not presumed from the mere fact of injury or that the intestate was killed." *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Ray v. Post,* 224 N.C. 665, 32 S.E. 2d 168; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Pack v. Auman,* 220 N.C. 704, 18 S.E. 2d 247. "In order to establish actionable negligence the plaintiff must show: (1) That there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances under which they were placed; and (2) that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed." *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84. "There must be legal evidence of every material fact necessary to support the verdict and the verdict must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C.J. 51; *Shuford v. Scruggs,* 201 N.C. 685, 161 S.E. 315; *Denny v. Snow,* 199 N.C. 773, 155 S.E. 874. "If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law." *Mills v. Moore, supra.*

Measured by the foregoing rules, was there enough evidence, when taken in the light most favorable to the plaintiff, to go to the jury on the issue of negligence? We may eliminate as without probative force the statement of Mrs. Blulah Fleming that Twiggs was traveling 70 miles per hour. The facts and circumstances detailed by her clearly indicate lack of opportunity on her part to form such opinion of speed as would amount to evidence. Mr. Fleming was walking across the road behind the car in which she was sitting. She did not look to the rear until she heard tires as the brakes were applied. She looked back, saw Mr. Fleming in the middle of the road and the car seven or nine feet, or half the length of the courtroom behind the Fleming car. She looked away before the impact. "When a witness has had no reasonable opportunity to judge the speed of an automobile, it is error to permit him to testify in regard thereto." *S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327, citing Anno. 70 A.L.R. 547; Anno. 94 A.L.R. 1192; *Davidson v. Beacon Hill Taxi Service,* 278 Mass. 540.

The following is a quotation from the *Davidson case:* "The intervening time from when he first saw it (approaching car) until the plaintiff was struck could have been at most only a few seconds. During that time he was running to escape being struck. It is inconceivable that he could have any intelligent opinion as to the speed of the taxicab in

those circumstances. His estimate of speed was too unreliable and untrustworthy to aid the jury upon that question. It was of no value as evidence."

In the *Becker case,* Mrs. Phillips observed the moving car for about 15 feet. Commenting on her evidence as to the speed of the car, *Justice Denny* for this Court said: "In our opinion, under the facts and circumstances disclosed by the evidence of Mrs. Phillips, she had no reasonable opportunity to judge the speed of the defendant's car, and her evidence with respect thereto was without probative value."

Apart from the testimony of Mrs. Fleming, there was no evidence of excessive speed. The road was straight and level. The brakes were applied before the car made contact with plaintiff's intestate. The tire marks on the highway were 40 to 50 feet in length, clearly indicating the car traveled for a shorter distance after contact. Plaintiff's witness Ledford saw the car for several hundred yards. He fixed the speed at 45 to 50 miles per hour. We conclude there was no evidence of speed in the case.

The accident occurred in the open country where, nothing else appearing, the defendant had the right to drive 55 miles per hour. He had the right to pass the Fleming car parked half on and half off the hard surface. He was approaching from the rear and it was therefore necessary for him to pass to the left of the parked vehicle. It was his duty to watch the Fleming car for possible movement into his lane of traffic. The Ledford car was meeting him. It was some distance away. It was his duty to watch it.

There was no road intersection and no crosswalk for pedestrians at the place of the accident. Twiggs had the right to assume and to act on the assumption that any pedestrian on the highway would recognize that the driver of the automobile had the right of way and would not attempt to cross until such movement could be made in safety. There was nothing in the evidence to indicate that the defendant was put on notice that Mr. Fleming would attempt the crossing. Likewise, there is nothing in the evidence to indicate the defendant in the exercise of due care could have avoided the injury after ascertaining the deceased had exposed himself.

We conclude the evidence was insufficient to support an issue of negligence. This conclusion makes unnecessary any discussion of contributory negligence. The Superior Court of Madison County should have allowed the motion for nonsuit, and its failure to do so makes it necessary that the judgment be, and the same is

Reversed.

JOHNSON, J., not sitting.

STATE v. JOHNNIE DANIELS, SR., AND JOHNNIE DANIELS, JR.

(Filed 31 October, 1956.)

1. Courts § 11: Criminal Law § 12c—

The County Court of Wayne County has jurisdiction of statutory as well as of common law misdemeanors, Ch. 697, Public-Local Laws of 1913, as amended by Ch. 346, Public-Local Laws of 1937, it being apparent that the amendatory Act intended to add the words "or by statute" in line 26 of the original Act rather than in line 6 as specified in the amendment.

2. Statutes § 9—

Where the reference in an amendatory Act to line 6 rather than line 26 of a section of the original Act is obviously a clerical error, the error may be corrected in order to carry out the clear legislative intent.

3. Criminal Law §§ 12f, 56—

Where a county court and a Superior Court have concurrent jurisdiction, the pendency of a prosecution in the county court for the identical criminal offense will support a plea in abatement and motion in arrest of judgment in the Superior Court. G.S. 7-64.

4. Intoxicating Liquor § 2—

The unlawful possession of non-taxpaid whiskey for the purpose of sale, a violation of G.S. 18-50, and the unlawful possession of non-taxpaid whiskey, a violation of G.S. 18-48, are separate and distinct offenses of equal degree, and a violation of the one is not a lesser degree of the offense defined in the other.

5. Criminal Law § 12f—

The pendency in a county court of a prosecution on a warrant charging unlawful possession of non-taxpaid whiskey for the purpose of sale, G.S. 18-50, will not support a plea in abatement and motion in arrest of judgment in the Superior Court in a prosecution for unlawful possession of non-taxpaid whiskey, G.S. 18-48, since the two offenses are not identical but are separate and distinct.

JOHNSON, J., not sitting.

APPEAL by defendant Johnnie Daniels, Sr., from *Bone, J.*, April Term, 1956, of WAYNE.

Criminal prosecution on bill of indictment charging that Johnnie Daniels, Sr., and Johnnie Daniels, Jr., on 30 September, 1953, unlawfully "did have and possess five one-half gallon jars of intoxicating whiskey upon which taxes imposed by the State of North Carolina, and the Congress of the United States has not been paid, against the form of the Statute . . ."

As to defendant Johnnie Daniels, Jr., the jury returned a verdict of not guilty; and he is not involved in this appeal.

As to defendant Johnnie Daniels, Sr., the jury returned a verdict of guilty; and judgment was pronounced imposing a prison sentence of six months.

The said bill of indictment on which this prosecution was based was returned at May Term, 1955, Wayne Superior Court, at which time another (separate) bill of indictment was returned charging that Johnnie Daniels, Sr., and Johnnie Daniels, Jr., on 30 September, 1953, "unlawfully, wilfully, did have and possess five and one-half gallons of whiskey, upon which the taxes due to the State of North Carolina, and the Congress of the United States had not been paid *for the purpose of sale,* against the form of the Statute . . ." (Italics added.)

By plea in abatement and by motion in arrest of judgment, appellant challenged the jurisdiction of the Superior Court on the ground that the prosecution was then pending on a warrant in the County Court of Wayne County.

The record shows that on 30 September, 1953, separate warrants were issued by a justice of the peace for the arrest of Johnnie Daniels, Sr., and Johnnie Daniels, Jr., on which they were bound over to the County Court of Wayne County. The separate warrants charged substantially the same offense, the pertinent part of the warrant relating to Johnnie Daniels, Sr., charging that on or about 30 September, 1953, he "did unlawfully, willfully receive, and have in his possession a quantity of non tax paid whiskey *for the purpose of sale,* (amended to read 'Did have in his possession a quantity of whiskey, to wit: 5 one half gallons and 1 quart, upon which the taxes imposed by the laws of North Carolina, and the laws of the Congress of the United States had not been paid, *for the purpose of sale'*) against the form of the Statute . . ." (Italics added.)

While the record is not clear, appellant's interpretation thereof discloses this sequence in the proceedings, viz.:

1. On 11 May, 1954, after defendants had demanded a jury trial on said warrants, the cases were transferred to the Superior Court for trial.

2. The cases so transferred were pending in the Superior Court at May Term, 1955, when the said bills of indictment were returned.

3. On 8 June, 1955, the cases on said warrants were remanded by the Superior Court to the County Court of Wayne County, for trial by a jury; and no further action was taken in the County Court of Wayne County until the cases on said warrants were dismissed on 10 April, 1956.

(Attention is called to section 3, chapter 697, Public-Local Laws of 1913, bearing upon the transfer of cases by the County Court of Wayne County to the Superior Court and the transfer of cases by the Superior Court to the County Court of Wayne County.)

It appears from the foregoing that when said bills of indictment were returned at May Term, 1955, the cases on the said warrants were then pending in the Superior Court but that at April Term, 1956, the cases on said warrants were pending in the County Court of Wayne County.

Defendant Johnnie Daniels, Sr., excepted to and appealed from the judgment pronounced in the Superior Court, assigning as error (1) the court's action in overruling his plea in abatement and motion in arrest of judgment, (2) designated rulings as to evidence, and (3) designated portions of the charge.

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

J. Faison Thomson & Son for defendant Johnnie Daniels, Sr., appellant.

BOBBITT, J. The evidence offered by the State was amply sufficient to support the verdict. Indeed, defendant made no motion for judgment as in case of nonsuit. Moreover, careful consideration of the assignments of error relating to rulings on evidence and to the charge do not disclose any error of law deemed sufficiently prejudicial to warrant a new trial or to require particular discussion.

Appellant lays major emphasis upon assignments of error relating to the denial by the court of his plea in abatement and motion in arrest of judgment. These assignments present a jurisdictional question, technical in nature, wholly unrelated to the guilt or innocence of appellant.

We agree with appellant's contention that under Ch. 697, Public-Local Laws of 1913, as amended by Ch. 346, Public-Local Laws of 1937, the County Court of Wayne County had jurisdiction of statutory misdemeanors. The Attorney-General, with commendable diligence, discovered and has called to our attention the fact that the said 1937 Act amends the said 1913 Act by adding "after the words 'common law' in line six of section four, the words 'or by statute';" when in fact the words "common law" appear in line *twenty-six* of section four and *not elsewhere* in section four of the said 1913 Act. Even so, it is manifest that the intent of the General Assembly was to confer upon the County Court of Wayne County jurisdiction of statutory as well as common law misdemeanors. The reference to line six of section four rather than to line twenty-six of section four is obviously a clerical error, subject to correction by the Court in order to carry out the clear legislative intent. *S. v. Sizemore,* 199 N.C. 687, 155 S.E. 724.

We agree with appellant's further contention that, by reason of G.S. 7-64, the County Court of Wayne County and the Superior Court had concurrent original jurisdiction of statutory misdemeanors. It follows

that if at the time of appellant's trial in the Superior Court on said bill of indictment there was pending in the County Court of Wayne County a criminal prosecution based on a warrant charging the *identical* criminal offense there would be sound basis for appellant's plea in abatement and motion in arrest of judgment. G.S. 7-64; *S. v. Reavis,* 228 N.C. 18, 44 S.E. 2d 354; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907.

However, we are confronted by the fact that the warrant in the case pending in the County Court of Wayne County contains a single count, to wit, unlawful possession of non-taxpaid whiskey *for the purpose of sale,* a violation of G.S. 18-50, whereas the bill of indictment on which appellant was tried in the Superior Court contains a single count, to wit, unlawful possession of non-taxpaid whiskey, a violation of G.S. 18-48.

The statutory misdemeanors created by G.S. 18-48 and by G.S. 18-50 are separate and distinct offenses of equal degree. Each is a specific statutory misdemeanor, complete within itself; and a violation of G.S. 18-48 is not a lesser degree of the offense defined in G.S. 18-50. *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629; *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591. As stated by *Ervin, J.,* in *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189: "The authority of the *Peterson* and *McNeill cases* on this precise point is not impaired in any degree by *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894, . . ."

It appears from the foregoing that the only statutory misdemeanor of which the County Court of Wayne County acquired jurisdiction was that charged in said warrant, to wit, a violation of G.S. 18-50, and that the Superior Court had original jurisdiction to proceed on bill of indictment to try appellant for a violation of G.S. 18-48.

It is noted that the said warrant was dismissed in the County Court of Wayne County on 10 April, 1956. The inference is that the State elected to prosecute in the Superior Court on a bill of indictment charging a violation of G.S. 18-48 rather than to prosecute in the County Court of Wayne County on the warrant charging a violation of G.S. 18-50.

We conclude that the court below was correct in overruling appellant's plea in abatement and motion in arrest of judgment.

No error.

JOHNSON, J., not sitting.

R. C. HARRINGTON v. CROFT STEEL PRODUCTS, INC.

(Filed 31 October, 1956.)

1. **Process § 8d: Constitutional Law § 21—**

G.S. 55-38, providing that process on a foreign corporation may be served on the Secretary of State when the corporation is doing business in this State and has failed to name an officer or agent upon whom process may be served, is constitutional.

2. **Same—**

A foreign corporation is "doing business in this State" within the purview of G.S. 55-38 if it exercises in this State some of the functions for which it was created.

3. **Same—**

A foreign corporation which merely takes orders in this State to be transmitted to its home office for acceptance and shipment of its goods into this State by common carrier is not doing business here within the meaning of G.S. 55-38, but if it transports its goods to this State in its own trucks and thus completes the transaction by making deliveries here, it performs here one of its essential purposes and is doing business here within the purview of the statute.

JOHNSON, J., not sitting.

APPEAL by defendant from *Burgwyn, E. J.*, 14 May, 1956 Civil Term, MECKLENBURG Superior Court.

Civil action instituted on 3 February, 1956, to recover $13,599.20 commissions. Summons and complaint were served on the Secretary of State of North Carolina. The defendant filed "a special appearance and motion to quash the summons and vacate and dismiss the service" for that (1) the defendant is a foreign corporation; (2) that the defendant is not now and never has been engaged in doing business in North Carolina; (3) that the attempted service on the Secretary of State is void under the laws of North Carolina and in violation of the defendant's rights under the Fourteenth Amendment to the Constitution of the United States.

In support of its motion, the defendant filed an affidavit in substance: (1) that it is a New York corporation; that it has no officer or other employee in North Carolina authorized to collect money or to transact business; (2) that it has not domesticated and has no property in North Carolina; (3) that it is not doing business in North Carolina; (4) that all sales of its products made in North Carolina were pursuant to orders transmitted to its home office in Jamestown, New York, for approval; (5) that all of its products sold in North Carolina were exclusively in interstate commerce.

In reply, the plaintiff filed an affidavit in substance (1) that he is a resident of North Carolina and that the contract sued on was to be performed in this State; (2) that the action arose out of the production, manufacture, and distribution of goods with the expectation that they would be, and they actually were used by dealers and merchants in North Carolina, and particularly in the towns of Asheboro, Asheville, North Wilkesboro and Sparta; (3) that at the time suit was instituted and summons and complaint served on the Secretary of State "the defendant was doing business in North Carolina in the following manner: that defendant habitually shipped its goods into North Carolina in its own trucks, which said goods were delivered to its customers by its own agents and employees in charge of said trucks, who also delivered to said customers, along with said shipment of goods, bills of lading covering said shipments and accepted receipts for same and delivered them to the defendant." The verified complaint alleged that beginning in July, 1954, and including November, 1955, the defendant delivered its goods to Buchan and Lowe at their stores in the above named towns of the total value of $647,447.97; and that small deliveries were made to other customers.

The court found (1) that the cause arose out of a contract to be performed in this State and out of the production, manufacture, and distribution of goods with the reasonable expectation that those goods were to be used in said State and they were so used; (2) that at the time this suit was instituted, summons and complaint served, the defendant was doing business in North Carolina; (3) that the defendant has failed to appoint and maintain a process agent in this State. Upon the findings, the court held that service on the Secretary of State was valid and that the court had acquired jurisdiction over the defendant. The court ordered the defendant to answer or otherwise plead within 30 days. To the order, the defendant excepted and from it appealed.

W. H. McElwee, Jr., W. L. Osteen, and Ralph Davis for defendant, appellant.

Whitlock, Dockery, Ruff & Perry

By: P. C. Whitlock, James O. Cobb, Jr., for plaintiff, appellee.

HIGGINS, J. The defendant is a foreign corporation. It has neither obtained a certificate of authority to do business in this State nor appointed a process agent. Process was served on the Secretary of State. The plaintiff contends that service was effective to bring the defendant into court under G.S. 55-38 upon the ground the defendant was doing business in North Carolina. The plaintiff further contends that if the court should fail to find the defendant was doing business here, the court should find that the contract sued on was made in this

State, to be performed here, and the cause of action arose out of the production, manufacture, and distribution of goods with the reasonable expectation that they were to be used in this State and in fact were so used. The service, therefore, should be held valid under G.S. 55-38.1 (1) (3).

On the other hand, the defendant contends that it was not doing business in this State and that service of process under G.S. 55-38 was not authorized. The defendant further contends that G.S. 55-38.1 (1) (3) is unconstitutional in that it is an interference with interstate commerce and deprives the defendant of its rights under the due process clause of the 14th Amendment to the Constitution of the United States.

G.S. 55-38 provides that process may be served upon the Secretary of State against a foreign corporation if it is doing business in North Carolina and has failed to name an officer or agent upon whom process may be served. *Lunceford v. Association,* 190 N.C. 314, 129 S.E. 805. The act is not in contravention of constitutional guaranties. *Currie v. Mining Co.,* 157 N.C. 209, 72 S.E. 980; *Fisher v. Ins. Co.,* 136 N.C. 217, 48 S.E. 667, 145 A.L.R., Anno. 630, 667. The defendant's counsel in the argument very frankly conceded the service was valid if the defendant was doing business in North Carolina.

Actually, the question presented is whether the finding of the trial court that the defendant was doing business here is supported by evidence. *Radio Station v. Eitel-McCullough,* 232 N.C. 287, 59 S.E. 2d 779. In considering the motion, the trial court had before it the verified complaint, to which was attached copy of the contract under which the plaintiff acted as commission agent to sell defendant's products throughout North Carolina. The complaint alleged that sales were made to customers, among others, in the towns of Asheboro, Asheville, North Wilkesboro, and Sparta, beginning in July, 1954 and ending when the defendant canceled the contract in November, 1955. The total amount of the purchase price for the goods sold was approximately $650,000.00. During the 17 months the contract was in force deliveries amounted to $12,000 for one month, $15,000 for one month, $35,000 per month for three months, $40,000 per month for five months, and $45,000 per month for seven months. The court also had before it the plaintiff's affidavit that the defendant transported the goods into North Carolina in its own trucks, operated by its own agents who delivered the goods to the customers and took receipts for the deliveries. The affidavit also stated that the defendant was doing business in like manner at the time this action was instituted and the process served on the Secretary of State. Does this evidence support the finding the defendant was doing business in North Carolina?

In the case of *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11, this Court (opinion by *Barnhill, C. J.*) said: "Doing business in this State

means doing some of the things or exercising some of the functions in this State for which the corporation was created." *Heath v. Mfg. Co.*, 242 N.C. 215, 87 S.E. 2d 300; *Radio Station v. Eitel-McCullough, supra; Motor Lines v. Transportation Co.*, 225 N.C. 733, 36 S.E. 2d 271, 162 A.L.R. 1419; *C. T. H. Corp. v. Maxwell*, 212 N.C. 803, 195 S.E. 36.

In the case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, *Chief Justice Stone* said: "Presence in this State in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also gave rise to the liabilities sued on even though no consent to be sued or authorization to an agent to accept service has been given." *International Harvester Co. v. Kentucky*, 234 U.S. 407; *St. Louis & Northwestern Railway v. Alexander*, 227 U.S. 218; *Pennsylvania Lumbermen's Ins. Co. v. Meyer*, 197 U.S. 407; *St. Clair v. Cox*, 106 U.S. 350.

It must be conceded the taking of orders in this State to be transmitted to the home office of a foreign corporation for acceptance and the shipment by common carrier of its goods into this State is not doing business within the meaning of G.S. 55-38. In that case the foreign corporation's activities do not take place here. The corporation's control over the shipment ceases at the time and place of delivery to the carrier. However, in this case the defendant not only manufactured the goods, but it transported them to North Carolina in its own trucks. It completed the transactions by making deliveries here. One of the essential purposes of the corporation necessarily was the placing of its manufactured products in the hands of its customers. In making the deliveries here the defendant was performing an essential part of its business. We conclude the evidence before the trial court was sufficient to support the finding the defendant was doing business in North Carolina. Other findings may be treated as surplusage.

It becomes unnecessary to consider or pass upon the constitutionality of G.S. 55-38.1(1)(3), although invited to do so by the parties both in the oral arguments and in the briefs.

The judgment of the Superior Court of Mecklenburg County is

Affirmed.

JOHNSON, J., not sitting.

STATE v. CLARENCE SUTTON, JR.

(Filed 31 October, 1956.)

1. Automobiles § 63: Criminal Law § 12a—

The fact that the arrest of defendant was illegal because municipal police officers pursued defendant and arrested him outside the corporate limits of the municipality does not affect the jurisdiction of the court over the offense for which defendant was arrested, and the court may try defendant on a valid warrant charging him with driving at a speed in excess of 80 miles per hour.

2. Automobiles § 65—

An instruction that a person is guilty of reckless driving if he intentionally violates a traffic law must be held for prejudicial error, even though in other parts of the charge the court correctly defines reckless driving.

3. Criminal Law § 83—

Where there is no error in the trial on one count, but the sentence thereon is made to begin at the expiration of the sentence on another count upon which a new trial is awarded, the judgment on the count upheld must be set aside and the cause remanded for judgment.

JOHNSON, J., not sitting.

APPEAL by defendant from *Bone, J.*, March Term, 1956, of LENOIR.

This is a criminal action. The defendant was charged in a warrant issued on 15 January 1956 by the Municipal-County Court of the City of Kinston and Lenoir County, North Carolina, with (1) speeding in excess of 80 miles per hour, (2) reckless driving, and (3) malicious damage to property. A second warrant was issued on the above date by the same court charging the defendant of an assault on Jack Chase with a deadly weapon, to wit, a knife, inflicting serious bodily injury. A third warrant was issued by the same court on 27 January 1956 charging that on 15 January 1956 the defendant did (1) assault F. H. Hart with a deadly weapon, to wit, an automobile, (2) disturb a public meeting, and (3) commit a breach of the public peace.

The defendant was tried and convicted on each count in the respective warrants in the Municipal-County Court. He appealed to the Superior Court where the cases were consolidated for trial and heard *de novo*.

The State's evidence tends to show among other things that the defendant fled from the City of Kinston in his automobile at a high and excessive rate of speed while being pursued by police officers of the City, who continued to pursue him beyond the corporate limits of the City of Kinston. The officers were unable to overtake and arrest the defendant until he reached his father's home, 15 miles from Kinston,

although they pursued him at times at a rate of speed in excess of 90 miles an hour.

At the close of the State's evidence the defendant moved for judgment as of nonsuit as to each count in the three warrants. The motion was allowed as to all the charges except speeding in excess of 80 miles per hour and reckless driving. The jury returned a verdict of guilty on both counts. The court imposed a judgment of 60 days in jail and assigned the defendant to work the roads under the supervision of the State Highway and Public Works Commission on the reckless driving count. A similar judgment was imposed on the count of speeding, the sentence for speeding to commence at the expiration of the sentence for reckless driving.

The defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Behrends for the State.

J. Harvey Turner for defendant.

DENNY, J. The defendant in his first assignment of error challenges the right of the State to put him on trial for speeding and reckless driving on the ground that he was arrested by a policeman of the City of Kinston outside the corporate limits of the City, citing *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907.

In the above cited case, *Winborne, J.,* now *Chief Justice,* in considering the authority of a municipal police officer to make an arrest outside the corporate limits of his municipality, said: ". . . in the absence of statutory authority, the power of a sheriff or other peace officer is limited to his own county, township, or municipality, and he cannot with or without warrant make an arrest out of his own county, township or municipality, where the person to be arrested is charged with the commission of a misdemeanor. Beyond the limits of his county, township, or municipality his right to arrest for misdemeanor is no greater than that of a private citizen." G.S. 160-21.

We concur in what was said in the above case. Even so, we know of no authority that prohibits or bars a prosecution because the arrest was unlawful.

In 15 Am. Jur., Criminal Law, section 317, page 15, *et seq.*, it is said: "As a general rule, the mere fact that the arrest of an accused person is unlawful is of itself no bar to a prosecution on a subsequent indictment or information, by which the court acquires jurisdiction over the person of the defendant." *Kerr v. Illinois,* 119 U.S. 436, 30 L. Ed. 421; *S. v. May,* 57 Kan. 428, 46 P. 709; *Commonwealth v. Tay,* 170 Mass. 192, 48 N.E. 1086; *People v. Miller,* 235 Mich. 340, 209 N.W. 81; *People v. Ostrosky,* 95 Misc. 104, 34 N. Y. Crim. Rep. 396, 160 N.Y.S. 493; *S. v.*

McClung, 104 W. Va. 330, 140 S.E. 55, 56 A.L.R. 257. For additional authorities in support of the above view, see Anno. 56 A.L.R. 260.

It is likewise said in 22 C.J.S., Criminal Law, section 144, page 236, *et seq.*: "The illegal arrest of one charged with crime is no bar to his prosecution if all other elements necessary to give a court jurisdiction to try accused are present, a conviction in such a case being unaffected by such unlawful arrest."

In the instant case, the defendant does not challenge the validity of the warrant upon which he was tried. Moreover, he concedes in his brief that in those jurisdictions where the question he is raising has been raised, the general rule is that the illegality of arrest does not affect the jurisdiction of the court. This assignment of error is overruled.

The defendant's ninth assignment of error is to the following portion of the court's charge to the jury: "Now a mere unintentional violation of a traffic law will not constitute reckless driving, but if one intentionally violates a traffic law, that constitutes reckless driving."

In another part of the charge, the court instructed the jury with respect to reckless driving in substantial compliance with what this Court said on the subject in *S. v. Folger,* 211 N.C. 695, 191 S.E. 747, in which case the Court, speaking through *Connor, J.,* said: "A person is guilty of reckless driving (1) if he drives an automobile on a public highway in this State, carelessly and heedlessly, in a wilful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." Nevertheless, in our opinion, this instruction did not cure the unequivocal statement complained of, to wit, "if one intentionally violates a traffic law, that constitutes reckless driving."

The defendant is entitled to a new trial on the count charging him with reckless driving, and it is so ordered.

We find no error in the trial below on the count charging the defendant with speeding in excess of 80 miles per hour. However, since the sentence on that count is to begin at the expiration of the sentence on the count charging the defendant with reckless driving, the judgment on the speeding count is set aside and the cause remanded for judgment.

Remanded for judgment on the count charging the defendant with speeding.

New Trial on the count charging the defendant was reckless driving.

JOHNSON, J., not sitting.

HARDY & NEWSOME, INC., A CORPORATION, v. E. D. WHEDBEE, W. E. BALLANCE AND COLONY PINE COMPANY, A CORPORATION, AND R. C. BENNETT, INDIVIDUALLY, AND R. C. BENNETT, TRUSTEE FOR JAMES BENNETT AND GUNTER BENNETT, MINORS, PURPORTEDLY PARTNERS TRADING AS R. C. BENNETT BOX COMPANY.

(Filed 31 October, 1956.)

1. Appearance § 1—

An appearance for the purpose of requesting continuances is a general appearance.

2. Appearance § 2—

A general appearance waives service of process and gives the court jurisdiction to render a personal judgment.

3. Same: Partnership § 7—

The general appearance of one partner gives the court jurisdiction to render judgment against the appearing partner individually and against the partnership property.

4. Partnership § 6d—

The liability of partners for the torts of the partnership is joint and several.

5. Automobiles § 54f—

An admission that the driver of a tractor was employed by a partnership precludes nonsuit on the issue of *respondeat superior*.

JOHNSON, J., not sitting.

APPEAL by defendants R. C. Bennett Box Company and R. C. Bennett, trustee, from *Bone, J.*, February 1956 Term, LENOIR.

Plaintiff, seeking to recover damages sustained as the result of the negligent destruction of its truck and cargo in February 1954, caused summons to issue for E. D. Whedbee, W. E. Ballance, and Colony Pine Company. Thereafter, on motion of plaintiff, process issued for "R. C. Bennett, individually, and R. C. Bennett, Trustee for James Bennett and Gunter Bennet, minors, purportedly partners trading as R. C. Bennett Box Company . . ." An answer was filed by "the defendants, R. C. Bennett, individually, and as Trustee for James Bennett and Gunter Bennett . . ." The answer was verified by Kenneth W. Forbes as "the manager of the R. C. Bennett Box Company, and the agent of R. C. Bennett individually and as Trustee for James Bennett and Gunter Bennett . . ."

The jury found that plaintiff was not injured by the negligence of defendant Whedbee.

The second issue, "Was the property of the plaintiff damaged through the negligence of the defendants, R. C. Bennett Box Company and

R. C. Bennett, Trustee, as alleged in the complaint?", was answered in the affirmative. Damages were assessed by the jury.

No answer having been filed by defendant Ballance, judgment by default and inquiry was rendered as to him prior to the trial.

Judgment was entered on the verdict against the defendants Ballance, R. C. Bennett Box Company, and R. C. Bennett, trustee. The latter two appealed.

Whitaker & Jeffress and John G. Dawson for plaintiff appellees.

Jones, Jones & Jones and Jones, Reid & Griffin for defendant appellants.

RODMAN, J. Appellant assigns as error: (1) that the court did not allow the motion to dismiss the action as to R. C. Bennett Box Company; (2) failure to nonsuit as to R. C. Bennett and R. C. Bennett, trustee.

The complaint alleges in section 5 that W. E. Ballance "was employed by the defendants E. D. Whedbee and Colony Pine Company, Inc., and by R. C. Bennett, individually, and as trustee for James Bennett and Gunter Bennett, minors, purportedly a partnership and trading as R. C. Bennett Box Company, and that the defendant Ballance was at the time and place hereinafter alleged acting in furtherance of the business of said parties and within the scope of said employment." The answer filed by defendant Bennett admits in section 5 that Ballance "was employed to drive said tractor by R. C. Bennett Box Company."

It is insisted: (1) that R. C. Bennett Box Company, the partnership composed of R. C. Bennett, individually, and as trustee for James Bennett and Gunter Bennett is not a party to the action. Hence, it is said no judgment can be rendered against the partnership. (2) that Ballance was an employee of R. C. Bennett Box Company, a partnership, and not an employee of the individuals composing the partnership. Hence, it is said the motion of R. C. Bennett individually and as trustee to nonsuit should have been allowed.

We do not understand it to be suggested that R. C. Bennett as an individual and as trustee raises any question as to the service of summons or the authority of his counsel to enter a general appearance and to request and obtain continuances. Such an appearance is the equivalent of valid service of process. It waives the service of process and gives to the court the right to render a personal judgment. *Youngblood v. Bright*, 243 N.C. 599, 91 S.E. 2d 559; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848. Hence the question is: Does the appearance of the partners defending an action in which liability is asserted against the partnership give the court authority to enter a judgment against the partnership? The answer is: Yes. *Winborne, J.* (now *C. J.*), speaking

in *Dwiggins v. Bus Co.*, 230 N.C. 234, said: "it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless even after judgment such partner could be brought in and made a party." *Heath v. Morgan,* 117 N.C. 504; *Palin v. Small,* 63 N.C. 484.

All members of the partnership are before the court by service of process or voluntary appearance.

The liability of partners for the torts of the partnership is joint and several. *Johnson v. Gill,* 235 N.C. 40, 68 S.E. 2d 788; *Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444; *Bagging Co. v. Byrd,* 185 N.C. 136, 116 S.E. 90; *Smoak v. Sockwell,* 152 N.C. 503, 67 S.E. 994. It being admitted that Ballance was employed by R. C. Bennett Box Company, it follows from this admission that the motion of the individual partners for nonsuit on the theory that they are not liable for the acts of Ballance was properly overruled. *Weaver v. Marcus,* 165 F. 2d 862, 175 A.L.R. 1305.

There is

No error.

JOHNSON, J., not sitting.

B. P. ELLIOTT v. RICHARD OWEN.

(Filed 31 October, 1956.)

1. Frauds, Statute of, § 3—

The burden is on the party declaring on a contract required by the Statute of Frauds to be in writing to show that the memorandum of the contract was executed in compliance with the Statute.

2. Frauds, Statute of, § 2—

Where the memorandum of a contract to convey realty fails to identify the buyer in any manner, the memorandum is insufficient under the Statute of Frauds, and the identity of the buyer may not be shown by parol.

JOHNSON, J., not sitting.

APPEAL by defendant from *Seawell, J.,* April Term 1956 of GRANVILLE.

Civil action for specific performance of a written memorandum.

The written memorandum upon which this suit is based is as follows:

"Richard Owen
405 Hillsboro St.
Oxford, N. C.

Joining on East by standard oil on West By J. W. Jenkins. Contains_____feet.
Want possession 1 Year

5629

8-31. 53
Rec. 20.00 in cash on House and Lot. Balance $4,980.00.
Signed Richard Owen."

The jury answered the issues submitted to them in plaintiff's favor. From a judgment decreeing that the defendant execute and deliver to plaintiff a deed conveying the land mentioned in the written memorandum upon payment to him of $4,980.00, or if he refuses to do so, that a commissioner named in the judgment should execute and deliver such a deed, the defendant appeals to this Court.

Royster & Royster for Plaintiff, Appellee.
C. J. Gates and M. E. Johnson for Defendant, Appellant.

PARKER, J. This is a suit to enforce specific performance of a written memorandum allegedly given for the sale of a house and lot. The burden was on the plaintiff to show that the memorandum was executed in compliance with the Statute of Frauds.

The written memorandum does not even indicate the name of a vendee. The courts have held with great uniformity that the substantive parts of the contract or memorandum for the sale of property, to be sufficient to satisfy the Statute of Frauds, must appear in the writing; therefore, the name, or a sufficient description of the party seeking enforcement of the contract or memorandum, is indispensable, because without it no complete contract is shown. The authorities are clear that such a contract or memorandum is fatally defective, unless the buyer or vendee is therein identified. *Grafton v. Cummings*, 99 U.S. 100, 25 L. Ed. 366; *Lewis v. Wood*, 153 Mass. 321, 26 N.E. 862, 11 L.R.A. 143; *Kamens v. Anderson*, 99 N. J. Eq. 490, 133 Atl. 718; *Oglesby Grocery Co. v. Williams Mfg. Co.*, 112 Ga. 359, 37 S.E. 372; *Kohlbrecher v. Guettermann*, 329 Ill. 246, 160 N.E. 142; *Dewar v. Mintoft*, 1912, 2 K.B. 373; 70 A.L.R. pp. 196 *et seq.;* 49 Am. Jur., Statute of Frauds, p. 649; 37 C.J.S., Statute of Frauds, sec. 193.

This Court said in *Smith v. Joyce,* 214 N.C. 602, 200 S.E. 431: "In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol. *Gwathmey v. Cason,* 74 N.C. 5; *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104; *Timber Co. v. Yarbrough,* 179 N.C. 335, 102 S.E. 630; *Keith v. Bailey,* 185 N.C. 262, 116 S.E. 729. The memorandum need not be contained in a single document but may consist of several papers properly connected together. As was said in *Mayer v. Adrian,* 77 N.C. 83: 'It (the memorandum) may be one or many pieces of paper, provided the several pieces are so connected physically or by internal reference that there can be no uncertainty as to their meaning and effect when taken together. But this connection cannot be shown by extrinsic evidence.' *Simpson v. Lumber Co.,* 193 N.C. 454, 137 S.E. 311."

Mayer v. Adrian, 77 N.C. 83, was an action for specific performance. The Court said: "The agreement must adequately express the intent and obligation of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely. . . . Who are the parties in this memorandum of sale? It is settled to be indispensable that it should show not only who is the person to be charged, but also who is the bargainor. The name of the purchaser is required by statute to be signed. So, no question can be made of the necessity of his name in the writing. But it is equally well established that the name, or a sufficient description, of the other party is indispensable. 'How,' said *Mansfield, C. J.,* 'can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties?' *Champion v. Plummer,* 4 B. and P., 253; 3 Pars. on Contr., 13 and note; Benjamin on Sales, 169."

In an agreement of sale there can be no contract without both a vendor and vendee. There can be no sale without a buyer. The memorandum here is insufficient, because no buyer therein is identified in the slightest degree.

Defendant's assignment of error that the trial court erred in overruling his motion for judgment of nonsuit is good.

The judgment below is

Reversed.

JOHNSON, J., not sitting.

STATE v. BURL MERRITT.

(Filed 31 October, 1956.)

1. Criminal Law §§ 37, 38b—

The time of defendant's release from jail was material to the controversy. The jailer was permitted to identify the record of arrest and testify that items entered thereon were in his handwriting. He was then permitted to testify as to the hour of defendant's release. *Held:* The State was not attempting to prove the contents of the record, but the writing was merely used by the witness for the purpose of refreshing his memory, and it was competent for the witness to use the writing for this purpose.

2. Automobiles § 70: Indictment and Warrant §§ 9, 11½—

Where a defendant goes to trial without moving to quash a warrant charging that he operated a motor vehicle while under the influence of "intoxicating liquor, opiates or narcotic drugs," he waives any duplicity resulting from the use of the disjunctive "or."

JOHNSON, J., not sitting.

APPEAL by defendant from *Bone, J.*, June 1956 Term of LENOIR.

Defendant was tried on an indictment containing two counts: one charging the operation of a motor vehicle on the public highways of North Carolina while under the influence of intoxicating liquor, opiates, or narcotic drugs; the other charging the operation of a motor vehicle on the public highways in a careless and heedless manner in disregard of the rights and safety of others. The jury found him guilty of operating a motor vehicle under the influence of intoxicating liquor and not guilty of reckless driving. From a judgment on the verdict defendant appealed.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

White & Aycock for defendant appellant.

RODMAN, J. The assignments of error relate to the testimony of the jailer of Lenoir County. Defendant was arrested about 4:00 p.m. He testified that he was not intoxicated, had had only one glass of wine during the afternoon before his arrest, and that he was released from jail about 7:30 p.m. He contended that if he had been intoxicated as testified by the arresting and other officers, he would not have been released in such a short time. The State, to rebut the testimony of defendant as to his hour of release, called the jailer as a witness. He was handed a paper and asked if he had any handwriting on it, to which he replied that he did. He was asked:

"Q What handwriting do you have on there?

"A It shows the date of release from the jail, date and the hour." He testified that the record was the arrest and jail record of the defendant Burl Merritt.

"Q And you say you placed your handwriting or yourself, the notations on here?

"A The date and the hour at which he was released from the County jail . . .

"Q Did you write the name of this party here, Jesse Raynor, is that your handwriting?

"A Yes, sir.

"Q Was he the bondsman?

"A Yes, sir.

"Q Now, when was he released from jail, at what hour, Mr. Phillips?

"A He was released at 10:00 P.M. on December 4, 1955."

The defendant objected to the question as to the hour of release, insisting that the record itself was the best evidence of its contents. The answer is that the State was not attempting to prove the contents of the record. It was merely used by the witness for the purpose of refreshing his memory. The question and answer do not purport to relate to the contents of the document. They are directed to a specific fact, namely, the date and hour of release. It was competent for the witness to use his record for the purpose of refreshing his recollection as to the exact time of release from jail. *S. v. Peacock,* 236 N.C. 137, 72 S.E. 2d 612; *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114.

Defendant moves this Court to quash the bill of indictment and in arrest of judgment. The bill follows the language of the statute and charges the operation of a motor vehicle "while under the influence of intoxicating liquor, opiates or narcotic drugs." The defendant insists that the use of the disjunctive "or" instead of the conjunctive "and" which might have been used renders his conviction void for uncertainty. Had the bill used the conjunctive word, no question could have been raised as to the sufficiency of the bill. The defendant could have required separate counts, one charging operation of a motor vehicle while under the influence of intoxicating liquor, the other charging the operation while under the influence of narcotics. By going to trial without making a motion to quash, he waived any duplicity which might exist in the bill. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *S. v. Puckett,* 211 N.C. 66, 189 S.E. 183; *S. v. Burnett,* 142 N.C. 577; *S. v. Hart,* 116 N.C. 976; *S. v. Mundy,* 182 N.C. 907, 110 S.E. 93; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. The motion is denied. In the trial there is

No error.

JOHNSON, J., not sitting.

RUBY MATTHEWS LAWSON v. POWELL DENNIS LAWSON.

(Filed 31 October, 1956.)

1. Divorce and Alimony § 12—

The burden is upon the husband to establish his plea of adultery of the wife as a bar to her right to subsistence and counsel fees *pendente lite*, and the refusal of the court to make affirmative finding in favor of the husband on this defense is a sufficient denial thereof to support its order for alimony *pendente lite*.

2. Divorce and Alimony § 5d—

The complaint in this action for alimony without divorce and for custody of the minor child of the marriage *is held* sufficient as against demurrer.

3. Divorce and Alimony § 16: Contempt of Court § 2b: Appeal and Error § 12—

Pending appeal from an order for alimony *pendente lite* the trial court has no jurisdiction to hear a motion to attach defendant for contempt for wilful failure to comply with the order.

JOHNSON, J., not sitting.

APPEAL by defendant from *Johnston, J.*, at Chambers, 14 June, 1956, FORSYTH.

On 12 May, 1956, plaintiff began this action, seeking alimony without divorce and the custody of the minor child of the marriage. Her complaint alleges facts sufficient to conform to the requirements of G.S. 50-16.

Defendant answered. He admitted the marriage and the birth of the infant whose custody plaintiff sought. He denied the allegations which would suffice for a divorce and asserted as an additional defense the adultery of plaintiff.

The cause came on for hearing on Saturday, 9 June, on plaintiff's motion for alimony *pendente lite* and counsel fees. Affidavits were submitted by the parties. This hearing lasted an hour and three quarters. Defendant contends that the affidavits offered by him suffice to establish the fact of plaintiff's adultery. At the end of the hearing, the court stated that he would award custody of the minor to defendant and deny plaintiff's application for alimony and attorney's fees. He requested counsel for defendant to prepare an order to that effect to be submitted to him the following week. Dissatisfied with his reasoning which led to the conclusion that plaintiff was not entitled to alimony or the custody of the minor, the court that afternoon notified counsel that he would hold a further hearing before entering any order in the matter. Pursuant to this notice, a hearing was had on Thursday, 14 June. Plaintiff and defendant were represented at this hearing. Following

the hearing, the court, on 14 June, entered an order in which it is stated: "after hearing further arguments of counsel, the Court announced that it would not find the plaintiff guilty of adultery; and that that question should be passed upon by a jury; that the Court thereupon makes the finding of fact that for the purposes of this hearing defendant's plea of plaintiff's adultery cannot be sustained."

The court thereupon awarded custody of the child to the plaintiff and awarded alimony and support *pendente lite* in the sum of $20 per week and counsel fees. From this order defendant appealed.

Elledge & Johnson for plaintiff appellee.
W. Scott Buck for defendant appellant.

PER CURIAM. Defendant predicates his appeal on the failure of the court to find the facts in conformity with a judgment tendered by him; and the asserted failure to make any finding with respect to the adultery of the wife. One of the requested findings is that plaintiff committed adultery. The others are merely evidentiary and do not purport to do more than suggest plaintiff's adultery.

Defendant has the burden of establishing his plea of the adultery of the wife. Judge Johnston finds that defendant has failed to carry the burden. The wife's right to alimony is not defeated till the adultery is established; and because the adultery has not been established, plaintiff is not deprived of alimony *pendente lite*, counsel fees, and custody of the child as directed by the order.

Defendant demurred here for that the complaint failed to state a cause of action. The demurrer is overruled. Plaintiff alleges, *inter alia*, that defendant separated himself from his wife and child and failed to provide them with necessary subsistence; that she was forced under threats of physical violence to sign a separation agreement; that he has repeatedly threatened to beat her; that he has on numerous occasions and in the presence of sundry persons falsely charged her with adultery, claiming that he is not the father of the child she is now carrying; that he has forced her to seek employment and has, by force, required her to turn over to him the largest part of her earnings. The allegations of the complaint, if established on the trial, are sufficient to base an award of alimony.

Defendant gave notice of appeal on 15 June. The court allowed him sixty days in which to serve case on appeal, and appellee, thirty days thereafter to serve countercase. By agreement of counsel made within the time fixed for defendant to serve his case on appeal, the time was extended to 30 August. The case on appeal was served in due time. On 23 July, 1956, plaintiff caused a notice to be served on defendant that she would move on 28 July for an order attaching defendant for

contempt for wilful failure to comply with the order of 14 June. Pursuant to this notice, a hearing was had before Judge Johnston. He found that defendant had wilfully and intentionally refused to comply with the order of 14 June, 1956. The court ordered defendant committed to jail until he complied with the order of 14 June, 1956. Defendant filed with this Court a petition for a writ of *supersedeas*. The petition is allowed. The appeal taken by the defendant divested the Superior Court of jurisdiction. The adjudication of contempt and the order of imprisonment are void. They will be vacated. *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E. 2d 496.

The order of 14 June allowed counsel fees for plaintiff. Thereafter, plaintiff applied to Judge Armstrong, holding the Forsyth courts, for an order for additional counsel fees. Judge Armstrong denied the order for want of jurisdiction as the cause was then pending on appeal to this Court. Plaintiff now files with this Court a motion for the allowance of additional counsel fees. The motion is denied without prejudice to the right of plaintiff to apply to the Superior Court when it has jurisdiction for such counsel fees as are just and proper.

The judgment appealed from is

Affirmed.

JOHNSON, J., not sitting.

PAUL JARVIS, ADMINISTRATOR OF THE ESTATE OF L. P. JARVIS, DECEASED, AND PAUL JARVIS, INDIVIDUALLY, v. PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 31 October, 1956.)

Insurance § 43b—

In an action on a policy providing payments for injury by accident "while in or upon, entering or alighting from" a truck, the burden is upon plaintiff to show injury within the coverage of the policy, and evidence merely tending to show that the injured person was on the highway approaching the truck from the rear when he was run down and killed by a car, and that the doors to the truck remained closed and undamaged, is insufficient to overrule insurer's motion for nonsuit.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Olive, J.*, April-May Term, 1956, WILKES Superior Court.

Civil action to recover medical payments under insurance policy issued Paul Jarvis on a one-half ton Chevrolet truck. The policy con-

tained the following provision: "Coverage C—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary surgical, ambulance, hospital, professional nursing, and funeral services to or for each person who sustains bodily injury, sickness or disease caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission."

It is admitted that L. P. Jarvis was operating the Chevrolet truck with the permission of Paul Jarvis, the named insured. Liability is made to depend on whether at the time of the injury L. P. Jarvis was entering the truck. The evidence disclosed that the Jarvis truck, driven by L. P. Jarvis, broke down on Highway No. 15 in the nighttime; that it was parked on the right-hand side of the road without lights and with the left wheels slightly on the hard surface. Charles Comer stopped his car some distance behind the Jarvis truck for the purpose of rendering assistance. L. P. Jarvis left the truck, walked back to the Comer car, and after a conference started back to the truck. The evidence disclosed that a 1933 Ford, driven by one Barrett, passed the Comer car, ran over and killed Jarvis. After the accident the body of Jarvis was lying in the center of the road beyond the parked truck. All doors to the Jarvis truck were closed and undamaged. However, the "left rear fender and the left rear corner of the Jarvis pickup was damaged." There is evidence that the deceased was approaching and close to the truck. There is no evidence, however, that he was attempting to enter it at the time he was hit.

From judgment of involuntary nonsuit at the close of all the evidence, the plaintiff appealed.

Hayes & Hayes for plaintiff, appellant.
Larry S. Moore for defendant, appellee.

PER CURIAM. The burden of proof was upon the plaintiff to show coverage under the quoted provision of the policy. That is, that the deceased was entering the truck at the time of the accident. The evidence viewed in the light most favorable to the plaintiff shows no more than that Jarvis was in the highway approaching the truck from the rear when run down by the Barrett car and killed. The doors to the truck were closed and undamaged. We must conclude the evidence was insufficient to show the deceased was entering the car at the time of the accident. For that reason, the judgment of the Superior Court of Wilkes County is

Affirmed.

JOHNSON, J., not sitting.

STATE v. CLAUDE EDMUNDSON, HARVEY BARFIELD, McKINLEY BRASWELL AND LEE HARVEY.

(Filed 31 October, 1956.)

Intoxicating Liquor § 5b—

Evidence of defendants' guilt of possession of material and equipment designed and intended for the purpose of manufacturing whiskey *held* sufficient. G.S. 18-4. The use of abbreviations in court pleadings, minutes, judgments and records is not approved.

JOHNSON, J., not sitting.

APPEAL by defendants from *Bone, J.*, at April 1956 Criminal Term, of WAYNE.

Criminal prosecution upon a warrant issued by a "J. P." (assumedly a justice of the peace) on affidavit charging that on given date and place defendants, Claude Edmundson, Harvey Barfield, Lee Harvey and McKinley Braswell did unlawfully and willfully "have in their possession material and equipment for the purpose of manufacturing whiskey (Amended: Designed and intended for the purpose of manufacturing whiskey)," returnable to the County Court of Wayne County, and tried in Superior Court on appeal thereto by each of defendants from judgment of County Court.

The State offered evidence, as this Court holds, tending to support the charge. Defendants offered no evidence. And defendants Claude Edmundson, Harvey Barfield and Lee Harvey moved for judgment as of nonsuit at close of State's evidence. The motions were denied, and named defendants excepted. Defendant McKinley Braswell did not move for judgment as of nonsuit.

Verdict: Each of defendants is guilty as charged.

Judgment: Each defendant, naming all four, be confined in common jail of Wayne County for a period of four months, assigned to work the roads under the supervision of the State Highway and Public Works Commission.

Each defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Samuel Behrends, Jr., for the State.

Edmundson & Edmundson for Defendants Appellants.

PER CURIAM. Defendants challenge the ruling of the trial court in denying their motions made in Superior Court for judgment as of nonsuit. Suffice it to say, in this connection, the Court holds the evidence

offered by the State, taken in the light most favorable to the State, as is done when considering demurrer to the evidence, G.S. 15-173, is sufficient to take the case to the jury and to support the verdict of guilty as to each defendant. See *S. v. Jaynes,* 198 N.C. 728, 153 S.E. 410; *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537, and cases cited.

The motion of defendant McKinley Braswell for *certiorari* is denied. The case on appeal reveals evidence of an alleged confession by him, and that he did not move for judgment as of nonsuit or for a directed verdict.

Under the statute, G.S. 18-4, as interpreted and applied in cases cited above, it is held that in the judgment from which defendants appeal, there is no error.

(Note: The use of abbreviations, such as "J. P." for "justice of the peace"; "P. N. G." for "pleads not guilty," and the like, in court pleadings, minutes, judgments and records is not approved. See *Edwards v. Edwards,* 235 N.C. 93, 68 S.E. 2d 822.)

No error.

JOHNSON, J., not sitting.

FRANK C. AUSBAND, RECEIVER OF SOUTHSIDE BUILDING SUPPLY CO., v. HARRELL V. PACK, TRADING AS SUPERIOR CONSTRUCTION COMPANY.

(Filed 31 October, 1956.)

Appeal and Error § 19—

Questions not presented by exceptions duly noted in the record will not be considered.

JOHNSON, J., not sitting.

APPEAL by defendant from *Phillips, J.,* 19 March, 1956, Term, FORSYTH.

Plaintiff alleged defendant was indebted to him in the sum of $1,928.60 with interest from 21 August, 1954, for goods purchased in 1953 as shown on an itemized statement of account. Defendant admitted making the purchases as shown by the account, pleading payment as his defense.

An issue was submitted and answered:

"What amount, if any, is the plaintiff entitled to recover of the defendant?

"Answer: $1928.60 with interest from July 1954."

Thereupon the court rendered judgment against defendant for $1,928.60 with interest from 21 August, 1954, as claimed in the complaint. Defendant appealed.

Oren W. McClain and Hastings, Booe & Mitchell for plaintiff appellee.

L. V. Scott for defendant appellant.

PER CURIAM. The only assignment of error is to the judgment. It is not perceived how defendant can be prejudiced by limiting the interest to 21 August, the date claimed by plaintiff, instead of July, as fixed by the jury.

In his brief appellant states the questions presented as:

"1. Did the Court fail to explain the law arising on the evidence in the case?

"2. Did the Court instruct the jury fully as to the burden of proof?

"3. Did the charge to the jury satisfy the requirements of Chapter 1, Section 180 of the General Statutes of North Carolina?"

The record shows no exceptions on which to predicate these questions. The brief of appellant refers to neither exceptions nor assignments of error.

No error.

JOHNSON, J., not sitting.

STATE v. ELOISE CRUMLIN.

(Filed 31 October, 1956.)

Appeal and Error § 19: Criminal Law § 78c—

Where no exceptions to the charge are taken and set out in the record, exceptions appearing only in connection with the assignments of error are insufficient and will not be considered.

JOHNSON, J., not sitting.

APPEAL by defendant from *Armstrong, J.*, July Term, 1956, of FORSYTH.

This is a criminal prosecution tried upon a bill of indictment charging the defendant with the murder of Johnnie Mae Thompson. The solicitor announced in open court 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 jury returned a verdict of guilty of manslaughter. From the judgment imposed, the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Buford T. Henderson for defendant.

PER CURIAM. The evidence adduced in the trial below is sufficient to support the verdict, and the assignments of error point out no error that would justify a new trial. Moreover, the exceptions to the charge appear only in connection with the assignments of error; no exceptions were taken and set out in the record to the portions of the charge of which the defendant complains. Therefore, the assignments of error relating to the charge have no exceptions upon which such assignments may rest. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *S. v. Taylor,* 240 N.C. 117, 80 S.E. 2d 917.

No error.

JOHNSON, J., not sitting.

MRS. ANNA D. WATSON v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

(Filed 31 October, 1956.)

1. Appeal and Error § 19—

An assignment of error not supported by exception is ineffectual and presents no question of law for the Supreme Court.

2. Appeal and Error § 38—

Assignments of error not set out and supported by reason or argument in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

JOHNSON, J., not sitting.

APPEAL by defendant from *Phillips, J.,* 13 February, 1956, Term, of FORSYTH.

Civil action to recover on $4,000.00 policy issued by defendant, insuring plaintiff from loss by fire in respect of household and personal

property located in designated dwelling occupied by her as tenant. The fire occurred 6 October, 1954.

The court submitted and the jury answered the following issues: "1. Did the defendant issue its fire insurance policy number 916132, dated May 3, 1954, in favor of the plaintiff, Mrs. Anna D. Watson, in the sum of $4,000.00, as alleged in the complaint? ANSWER: Yes. 2. If so, was said policy in full force and effect on the date of the fire alleged in the complaint, to wit, on the 6th day of October, 1954? ANSWER: Yes. 3. Did the plaintiff breach the terms and conditions of the policy by failing and neglecting to use all reasonable means to save and preserve the property at and after the loss? ANSWER: No. 4. Did the plaintiff void the policy by the misrepresentation of a material fact as to the interest of the insured in the items covered by the policy? ANSWER: No. 5. Did the plaintiff increase the hazard of the fire occurring by any means within her knowledge or control? ANSWER: No. 6. What amount, if any, is the plaintiff entitled to recover of the defendant? ANSWER: $4,000.00."

The first and second issues were answered, "Yes," by consent. The third, fourth and fifth issues indicate the new matters alleged by defendant in bar of plaintiff's right to recover. The sixth issue related to *the amount* of plaintiff's loss.

Judgment, in accordance with the verdict, was entered for plaintiff. Defendant excepted and appealed, assigning errors.

W. Reade Johnson and Frank C. Ausband for plaintiff, appellee.
Hayes & Wilson for defendant, appellant.

PER CURIAM. No exception to the charge as given or to the court's failure to charge appears in the case on appeal. Hence, there is no basis for assignments of error #7-#17, both inclusive; and they present no question of law to this Court for decision. *Tynes v. Davis, ante,* 528, 94 S.E. 2d 496, and cases cited. Moreover, there is no exception in the case on appeal on which to base assignments of error #3 and #4.

Appellant must set forth in his case on appeal his exceptions and thereby give notice to appellee of the specific matters upon which his assignments of error will be based. Whether the case on appeal is challenged by appellee may turn upon what exceptions appear therein. See, *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602.

Assignments of error directed to the denial of appellant's motions for judgment of nonsuit are overruled. Indeed, they are deemed abandoned; for no reason or argument is stated and no authority is cited in appellant's brief in support thereof. Rule 28, Rules of Practice in

the Supreme Court, 221 N.C. 544, 563; *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104.

The remaining assignments disclose no error of law deemed sufficiently prejudicial to warrant a new trial. Indeed, were we to consider the said *unsupported* assignments of error it appears that the ensuing result would be the same.

No error.

JOHNSON, J., not sitting.

DORIS MARSH PACE v. B. HARRISON PACE.

(Filed 31 October, 1956.)

1. Appeal and Error § 33—

The pleadings are a necessary part of the record proper and may not be dispensed with by consent of the parties or by stipulation as to their contents.

2. Parent and Child § 5—

It is a public policy of this State that a father shall provide necessary support for his minor children, which duty he may not contract away or transfer to another.

JOHNSON, J., not sitting.

APPEAL by defendant from *Johnston, J.,* 4 August, 1956, in Chambers, from FORSYTH.

Civil action (as the parties stipulate, among other things) under the provisions of G.S. 50-16, instituted 30 March, 1949, upon a verified complaint of plaintiff (mother), a copy of which with summons was personally served 31 March, 1949, on defendant (father), wherein plaintiff prayed the court for custody of the child, Patricia Grey Pace, born to the parties, and for support and counsel fees.

The record contains stipulation of counsel as to record on appeal, in which it is agreed (1) "That the portions of the pleadings in this case not involved in the appeal shall not become a part of the record"; (2) That the various proceedings had were as therein narrated including (a) an order dated 22 July, 1950, signed by *Clement, J.,* and consented to by the parties respecting matter of custody and a lump sum settlement for support, and (b) an order dated 4 August, 1956, signed by *Johnston, J.,* after hearing on motion of defendant for partial custody of the child, and on motion of plaintiff for retention by her of custody

of the child, and for order that defendant contribute to the support of the minor child and for reasonable counsel fees,—in which, upon facts found, custody was awarded to plaintiff, with right of visitation in defendant, and defendant was ordered to pay into office of Clerk of Superior Court monthly the "sum of $100.00 for the support, maintenance and benefit of his minor daughter, Patricia Grey Pace." It is stipulated that these two orders and the motions, and certain affidavits filed by the parties, respectively, be made a part of the record. The pleadings are not included as part of the record on the appeal.

It is stipulated that defendant excepted to the signing of the order of 4 August, 1956, by *Johnston, J.*, and in apt time gave notice of appeal to Supreme Court.

Robert L. Styers for Plaintiff Appellee.

Leake & Phillips for Defendant Appellant.

PER CURIAM. At the threshold of this appeal it is noted that the pleadings are not contained in the record filed in this Court. Pleadings are a necessary part of the record proper upon appeal—Rule 19, Section 1, of the Rules of Practice in the Supreme Court, 221 N.C. 544, at page 553. And Rule 20 of Rules of Practice provides that "Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent." Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal. See among others *S. v. Lumber Co.*, 207 N.C. 47, 175 S.E. 713, and cases cited. See also Shepard's North Carolina Citations, headnote 1, of *S. v. Lumber Co., supra,* including *Griffin v. Barnes,* 242 N.C. 306, 87 S.E. 2d 560.

Nevertheless, in the light of the public policy of this State that a father shall provide necessary support for his minor children, "a duty he may not shirk, contract away, or transfer to another," *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414, error in the order of 4 August, 1956, is not made to appear.

Appeal dismissed.

JOHNSON, J., not sitting.

LOLA COLEMAN STANLEY v. NATIONAL BANKERS LIFE INSURANCE COMPANY.

(Filed 31 October, 1956.)

APPEAL by plaintiff from *Clarkson, J.*, February, 1956 Civil Term, GASTON Superior Court.

Civil action to recover benefits under hospital and surgical policy of insurance issued to Marion Stanley and wife, Lola Coleman Stanley, by the defendant. On 21 December, 1951, the defendant collected from the Stanleys $6.00 registration fee and $5.25 premium for one month. The policy was issued as of 9 January, 1952, and monthly premiums in the same amount were due thereafter on the 9th of each month. The policy provided that loss or disability resulting from hypertension should be covered only if it originated after the policy had been in force for six months; and further, that the policy should be incontestable as to date of origin of any disability if premiums had been paid without lapse for a period of two years. The insured Marion Stanley filed a claim for $513.50 for disability as a result of hypertension. The defendant contended the disability arose within the first six months, and refused payment. The insured entered the Gaston Memorial Hospital on 3 January, 1954 (less than two years after the date of the policy) and the defendant thereafter refused to accept payment of premiums and canceled the policy. The plaintiff brought suit for $513.50 actually due under the terms of the policy, and for $25,000 punitive damages for wilful, malicious, and fraudulent conduct in failing to include all the terms of the agreement in the policy and by leaving out certain standard provisions required by North Carolina law; and by fraudulently inducing the insured to buy a worthless policy.

At the trial the parties stipulated that if the illness described in the policy is covered, the amount payable is $500.00. The court, after examining the policy, held the illness was covered. And gave the jury peremptory instructions to find for the plaintiff. Judgment for $500.00 was rendered accordingly. The plaintiff tendered an issue of punitive damages which the court refused to submit upon the ground the issue did not arise on the pleadings and the evidence. From the refusal of the court to submit the issue of punitive damages, the plaintiff appealed, assigning the same as error.

Hugh W. Johnston for plaintiff, appellant.
James E. Walker for defendant, appellee.

PER CURIAM. Careful examination of the record reveals that the allegations of the complaint and the evidence offered are insufficient to

justify or sustain an issue as to punitive damages. No useful purpose would be served by setting out and discussing the allegations and the evidence offered thereon.

The judgment of the Superior Court of Gaston County is Affirmed.

JOHNSON, J., not sitting.

STATE OF NORTH CAROLINA v. WILLIAM DAVID CAULEY

AND

STATE OF NORTH CAROLINA v. DOROTHY HEATH CAULEY.

(Filed 7 November, 1956.)

1. Criminal Law § 81c(3)—

An exception to the admission of testimony over objection cannot be sustained when testimony to the same effect is theretofore and thereafter admitted without objection.

2. Criminal Law § 79—

Exceptions set forth in defendant's brief, but in support of which no argument or reason is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Assault and Battery § 13: Criminal Law § 30½—

Testimony of a witness that she heard one of defendants beating the child in question is competent when the witness testifies that she knew the voices of defendants, and that she recognized their voices and heard them use vile and profane language to the child and heard the blows and the cries of the child, and motion to strike such testimony is properly denied.

4. Assault and Battery § 14—

Evidence in this prosecution of a mother and stepfather for felonious assault on her three-year-old child, *is held* amply sufficient as to the stepfather on the charge of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, and as to the mother in aiding and abetting commission of the offense with full knowledge of the felonious intent.

5. Assault and Battery § 5—

In order to be a deadly weapon it is not required that the instrument be a deadly weapon *per se*, but it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used, in which instance whether it is a deadly weapon becomes a question for the jury under proper instructions from the court.

6. Assault and Battery § 14—

Evidence tending to show that the stepfather of a three-year-old girl beat the child mercilessly from 10:00 p.m. to 6:00 a.m. with a leather belt with a metal buckle, inflicting serious injury and leaving the child in a critical condition, is sufficient to be submitted to the jury upon the question whether the weapon, in the manner and circumstances of its use, was a deadly weapon.

7. Assault and Battery § 5—

Intent to kill is a mental attitude which ordinarily must be proven by circumstantial evidence, and such intent may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

8. Assault and Battery § 14—

Evidence that the male defendant beat this three-year-old stepdaughter with a belt with a metal buckle from the hours of 10:00 p.m. to 6:00 a.m. so brutally and savagely as to inflict a recurrent pattern of stripes on her body with bruises and edema, eyes swollen shut and eyeballs hemorrhaged, leaving the child in a critical condition, is sufficient to be submitted to the jury upon the question of intent to kill.

9. Husband and Wife § 8—

If a wife, in the presence of her husband, commits an assault, there is a *prima facie* presumption, in the absence of evidence to the contrary, that she committed the offense under constraint by him, but the presumption is rebuttable, and if the wife acts of her own free will and without any constraint on the part of her husband, she is held to the same responsibility as any other person, and her coverture is no defense.

10. Same: Criminal Law § 8b—

Evidence that the male defendant mercilessly beat his three-year-old stepdaughter in the presence of the child's mother, that during the hours the offense was committed the wife was heard cursing and laughing, and that she thereafter said the wounds inflicted on the child were the result of the child's falling from an automobile, *is held* sufficient to take the case to the jury upon the theory that the wife was present, aiding and abetting her husband of her own free will and volition in the commission of the felonious assault.

11. Assault and Battery § 13: Criminal Law § 34e—

Testimony that while a three-year-old child was in the hospital, the child, in the presence of her mother, said in reference to a bruised area, "They hit me," referring to the child's mother and stepfather, *is held* competent against the mother as an implied admission of guilt, since the accusation was made under circumstances calling for a reply from her.

12. Criminal Law § 81c(3)—

The admission of testimony against the *femme* defendant that the male defendant upon being arrested told her, the *femme* defendant, "don't tell anything," *is held* harmless.

13. Criminal Law § 81c(4)—

Where the jury makes no reference to one count, it is equivalent to a verdict of not guilty thereon, and the charge of the court to the jury in regard thereto cannot be prejudicial, even if erroneous.

14. Criminal Law § 8b—

The charge of the court as to what constitutes aiding and abetting *held* without error.

15. Criminal Law § 53g—Instruction as to permissible verdicts that might be returned against each defendant, respectively, held sufficient.

The male defendant was charged with assault on his three-year-old stepdaughter with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, and the *femme* defendant was charged with aiding and abetting in the felonious assault. *Held:* The court's charge correctly defining the permissible verdicts that might be returned against each defendant respectively, and instructing the jury that if it acquitted the male defendant, it should also acquit the female defendant, *is held* sufficient on this aspect, and not objectionable on the ground that the court did not instruct the jury that it could return a verdict of guilty as to the male defendant and not guilty as to the female defendant.

16. Criminal Law § 78e(1)—

Assignments of error to the charge not set out in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

17. Husband and Wife § 8—

In a prosecution of the wife for aiding and abetting her husband in the commission of a felonious assault in her presence, the failure of the court to charge as to the rebuttable presumption that she acted under his constraint must be held for prejudicial error.

JOHNSON, J., not sitting.

BOBBITT, J., dissenting in part.

HIGGINS, J., dissenting.

APPEAL by defendants from *Joseph W. Parker, J.*, August Term 1956 of LENOIR.

Criminal prosecution of William David Cauley upon an indictment charging him with an assault with a deadly weapon with intent to kill upon Dorothy Dianne Heath, a three-year-old child, inflicting serious injuries not resulting in death, a violation of G.S. 14-32, and a criminal prosecution of Dorothy Heath Cauley upon an indictment with two counts, the first count charging her with being an accessory after the fact to the felony of an assault with a deadly weapon with intent to kill by William David Cauley upon Dorothy Dianne Heath inflicting serious injuries not resulting in death, and the second count charging her with aiding and abetting William David Cauley in making an assault with a deadly weapon with intent to kill upon Dorothy Dianne Heath inflicting upon her serious injuries not resulting in death.

The cases were consolidated for trial. Both defendants pleaded Not Guilty. The jury returned a verdict of guilty as charged in the bill of indictment against the male defendant, and a verdict of guilty of aiding and abetting in the commission of a felony against the female defendant.

From judgments of imprisonment in the State's Prison as to each defendant, both defendants appeal.

George B. Patton, Attorney General, and Claude L. Love, Assistant Attorney General, for the State.

Jones, Reed & Griffin for Defendants, Appellants.

PARKER, J. This is a summation of the evidence favorable to the State:

In February 1956 William David Cauley and Dorothy Heath were married. By a prior marriage Dorothy Heath had a son, William Brunell Heath, who was four years old in April 1956, and a daughter, Dorothy Dianne Heath, who was three years old the same month. After the marriage the two children lived with their mother and stepfather.

On 27 June 1956 this family was living about a mile and a half outside the city of Kinston on Route 4. Near neighbors were Mr. & Mrs. J. P. Shivar. Their houses were 12 steps or 36 feet apart, and the bedrooms of the two houses faced each other. It was a warm night, and the bedroom windows in each house were up.

J. P. Shivar was not at home that night. Mrs. Shivar had known William David Cauley about 15 years, and Dorothy Heath Cauley during the four or five months they had been neighbors. She knew their voices. On this night Mrs. Shivar retired early. About 10:00 o'clock she was awakened by hearing a child crying. The child was being whipped, and she heard the licks in her house. From 10:00 o'clock until 1:00 o'clock she heard the child whipped several times, and from 1:00 o'clock to 6:00 o'clock she heard the child whipped constantly. The child was crying, and every now and then uttered a loud, terrifying cry. She heard the male defendant calling the child a b—— and a s. o. b., and saying, "I ought to cut your G—— d—— head off." During this time she heard the female defendant cursing and laughing: she recognized her voice. Prior to this night she had heard the female defendant say they made the children stay in the corner, because they wetted the bed or their pants. During this night she heard the male defendant saying: "Go bring her some water: I will make her drink enough to burst her G—— d—— self open." He made her drink water several different times, and as he tried to make her drink water, she heard him beating her. He told her: "Drink that water, every G—— d—— drop or I will beat you to death." She could hear the child's

body hit the floor, and the male defendant saying, "Get up, G—— d—— you, or I will beat you to death." She heard the female defendant saying, "until it run in my ears": "Walk Dianne, don't go to sleep, walk." She heard the male defendant saying: "Run, G—— d—— you, don't walk, run." She heard this until 6:00 a.m. The lights were on all that night at the Cauley Home. Mrs. Shivar did not see or hear anyone there that night except the defendants and the children. She heard nothing from the little boy. After 10:00 o'clock the male defendant left in his car, but in a short time returned. Mrs. Shivar did not sleep that night after 10:00 o'clock.

The next morning the defendants carried this little girl to the Lenoir Memorial Hospital. There at 9:30 a.m. she was seen in the emergency room of the hospital by Dr. Oscar W. Cranz. The child was semi-conscious, she would not respond, and was in a condition of shock. Dr. Cranz gave this description of her condition: She "was black and blue over most of the body, including her head down, eyes practically closed and swollen, dark bluish areas over the entire body of the child, at least 95% or more of it, eyes, the lids were closed. . . . Both eyes were swollen shut." Dr. Cranz considered the child's condition critical: he could not tell whether the injuries were permanent—it might take six months or a year to determine that. He had pictures taken of the child. The bruises were mostly transversely across the front and back of the child's body: "there was a pattern all over the body." Dr. Cranz called in Dr. W. E. Kieter, a pediatrician, and also made a report to the sheriff's office.

The defendants told Dr. Cranz the child fell out of a moving car. Dr. Cranz testified that injuries sustained in a fall from a moving car are described as brush burns, and he saw no evidence of brush burns on the child.

Dr. W. E. Kieter testified that the little girl had bruises, ecchymosis and edema from the top of her scalp to the bottom of her feet; the scalp was soggy; the eyelids were black and completely swollen shut; a cut on the right temple was oozing blood and serum; the eyeballs had hemorrhaged in the white of the eye; the connection between the upper lip and gum was broken; face, chest and extremities were all bruised; little areas of baldness on the head. He testified the most striking feature of the child's condition was the absence of brush burns and fractures, which often occur in a fall from a moving car. X-ray pictures showed the area of bruising on the child was enormous and tremendous. He testified: "I have never seen anything like it." There was, according to the testimony of Dr. Kieter, a recurrent pattern of stripes on the child's chest, and a recurrent pattern of a U shape or horseshoe shaped pattern six or eight times over the body. The female defendant told Dr. Kieter the child fell from a car. Dr. Kieter testified he had seen

quite often people who had fallen from a moving car and said he didn't "feel that the injuries I observed about the body and head of the child could have been caused by falling from a moving vehicle."

While the defendants and the little girl were at the hospital the morning of the 28th of June, Margaret Shivar (a 15-year-old daughter of Mrs. J. P. Shivar), Betty Jean Taylor and Ruth Holloway, all neighbors, went into the defendants' home. In the bedroom they saw bloody rags and towels, blood on the pillow of a bed, a man's leather belt with a metal buckle lying beside the bed, and a mat of hair on the floor, which two of these witnesses testified, without objection, came from the head of the little girl.

B. A. Holloway lives across the road from the defendants. Several times during the night of 27 June he heard a little child screaming at the Cauley home. He didn't sleep a wink that night.

Sheriff H. C. Broadway, in response to a call, went to the hospital the morning of 28 June. He saw there the nude body of Dorothy Dianne Heath. The child's body was black and blue, and kind of reddish in places, over her body from the thighs to the head. He testified, without objection, "those wounds resembled a person's belt buckle: there were whelps and marks of that description of a belt buckle which I am wearing now."

Mrs. Shivar did not see any blows or licks inflicted upon this three-year-old girl. All she knew about the assault was what she heard. She testified, without objection, that at 10:00 o'clock that night she was awakened "by the whipping of the child and her crying. I heard her being whipped and she was crying." She was then asked: "Tell what you did hear?" She replied: "The child was being whipped. I heard her being whipped, and she was crying." The defendants objected. The objection was overruled, and they excepted and assign this as error. Immediately afterwards she testified, without objection: "I know she was being whipped because I could hear the licks from my house." The assignment of error is without merit for the reason that her testimony to the same effect was admitted in evidence without objection before and after the challenged testimony was admitted. *S. v. Rich*, 231 N.C. 696, 58 S.E. 2d 717; *S. v. King*, 226 N.C. 241, 37 S.E. 2d 684. That the little girl was the victim of the beating is manifest from the male defendant's statement, "go bring her water, I will make her drink enough to burst her G—— d—— self open," from the female defendant's statement, "walk Dianne, don't go to sleep, walk," and from her condition the next morning when she was admitted in the hospital.

On direct examination Mrs. Shivar was asked this question: "Was any statement made about wetting the bed?" She answered: "I had heard Mrs. Cauley say before that was the reason they made them stay in the corner was wetting the bed or their pants." After the an-

swer was given the defendants objected. Their objection was overruled They excepted, and assign this as error. On direct examination she was asked: "You did not go to sleep?" She answered: "No sir, nobody could go to sleep and hear what I heard that night. I couldn't go to sleep. I did not." The defendants objected. Their objection was overruled. They excepted and assign this as error. While these exceptions are set forth in the defendants' brief, in support of them no reason or argument is stated or authority is cited, and they are taken as abandoned. Rules of Practice in the Supreme Court, Rule 28. 221 N.C. 544.

The only other assignment of error as to the testimony of Mrs. Shivar is the failure of the court to strike out all the testimony of Mrs. Shivar as to the whipping of the child. The court very properly denied their motion to strike.

The defendants, who have filed a joint brief, assign as error the denial by the court of their separate motions for judgments of nonsuit. However, their brief states that if the Supreme Court is of the opinion that Mrs. Shivar's testimony is competent, they concede there was sufficient evidence to take the case to the jury as to the male defendant.

It is significant that the defendants in their brief make no contention that the evidence is insufficient to support the charges that a deadly weapon was used in the assault and battery on the helpless three-year-old girl. A deadly weapon is not one that must kill. It is an instrument which is likely to produce death or great bodily harm, under the circumstances of its use. *S. v. Watkins,* 200 N.C. 692, 158 S.E. 393; *S. v. Archbell,* 139 N.C. 537, 51 S.E. 801. Some weapons are *per se* deadly, *e.g.* a rifle or pistol: others, owing to the great and furious violence and manner of use, become deadly. *S. v. Archbell, supra; S. v. Huntley,* 91 N.C. 617. "The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself." *S. v. Archbell, supra.* Where the deadly character of the weapon is to be determined by the facts and circumstances, the relative size and condition of the parties and the manner in which it is used, it becomes a question for the jury under proper instructions from the court. *S. v. Watkins, supra; S. v. Beal,* 170 N.C. 764, 87 S.E. 416; *S. v. Archbell, supra; S. v. Norwood,* 115 N.C. 789, 20 S.E. 712. In *S. v. Norwood, supra,* the pushing of two pins—one a black pin worn in defendant's hair, and the other a black pin worn in her dress—down a baby's throat, whereby death ensued, was held to be a killing with a deadly weapon. In *S. v. Archbell, supra,* the defendant, a very strong, large and robust man, assaulted his wife, a very frail and weak woman, by severely beating her with a large leather strap, being part of a buggy trace, about 2½ feet long. The jury convicted the defendant of an assault with a deadly weapon. In upholding the trial this Court said: "An instru-

ment which might be harmless when used upon a strong man, may become deadly when used upon a very frail and delicate woman." In the present case the jury could reasonably infer and find from the evidence that the three-year-old girl on the night of 27 June 1956 was severely beaten from the hours of 10:00 p.m. to 6:00 a.m. by the male defendant with a man's leather belt with a metal buckle, leaving her in a critical condition. Whether this belt, considering the manner in which it was used, the relative size and condition of the male defendant and the helpless three-year-old girl, and her condition when she was admitted in the hospital the next morning, was a deadly weapon was a question for the jury.

It is also significant that the defendants make no contention in their brief that the evidence was insufficient to carry the case to the jury against the male defendant on the felony charge of an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, and against the female defendant of aiding and abetting in such an assault with full knowledge of its felonious character. That serious injury not resulting in death was inflicted on the little girl cannot be successfully denied. An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. An intent to kill "may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *S. v. Revels,* 227 N.C. 34, 40 S.E. 2d 474. In *Pallis v. State,* 123 Ala. 12, 26 So. 339, 82 Am. St. Rep. 106, the defendant placed her new born babe on the side of a public road in a sand bed, without clothing or wrapping, and left it there covered only by straw and leaves. The child was found the next day in a critical condition, but was revived and restored to health by a physician. A conviction of an assault upon a child with intent to murder was upheld by the Supreme Court of Alabama. Without setting forth all the evidence in the instant case, when we consider the evidence that this grown man used a man's leather belt with a metal buckle for hours so brutally and savagely upon this helpless three-year-old child as to leave a recurrent pattern of stripes on her body, with bruises, ecchymosis and edema from the top of her scalp to the bottom of her feet, with both eyes swollen shut, and the eyeballs having hemorrhaged into the white of the eyes, with the area of bruising enormous and tremendous to an extent that Dr. Kieter testified "I have never seen anything like it," and with her condition the next morning at the hospital critical, and when we consider the vile and profane language he used to this child, we are of the opinion, and so hold, that the evidence was sufficient to carry the case to the jury for them to determine, from all the facts and circumstances, whether the criminal intent to kill existed

in the mind of the male defendant at the time he was so mercilessly beating this child with the leather belt with metal buckle. The trial court properly overruled the motions for judgment of nonsuit made by the male defendant.

The female defendant contends that her motions for judgment of nonsuit should have been allowed on two grounds: one, because of the insufficiency of the evidence as to her, and second, that such acts as she committed were in the presence of her husband and under his constraint, and she is therefore excused. On the second ground she cites only the case of *S. v. Williams*, 65 N.C. 398.

If a wife, in her husband's presence, acts of her own free will and free from any constraint upon the part of her husband in committing a crime, she is held to the same responsibility as any other person, and her coverture is no defense. *S. v. Nowell*, 156 N.C. 648, 72 S.E. 590; *S. v. Seahorn*, 166 N.C. 373, 81 S.E. 687; 41 C.J.S., Husband and Wife, sec. 221; 27 Am. Jur., Husband and Wife, p. 237; 4 A.L.R. 267. However, with certain exceptions not material to consider here, it is generally held that there is a rebuttable presumption that a married woman was acting under the influence or coercion of her husband where she committed a criminal act in his presence. *S. v. Williams, supra; S. v. Nowell, supra; S. v. Seahorn, supra;* 41 C.J.S., Husband and Wife, pp. 716-718; 27 Am. Jur., Husband and Wife, secs. 640 and 642; 4 A.L.R. p. 271 *et seq.;* 71 A.L.R. p. 1118 *et seq.* It is said in *S. v. Williams, supra:* "It seems to be admitted by all the authorities that if a wife commit any felony (with certain exceptions not material now to consider) in the presence of her husband, it shall be presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and she is therefore excused. . . . It is also conceded by all the authorities that the presumption may be rebutted by the circumstances appearing in evidence, and showing that in fact the wife acted without constraint; or by the nature of the offense." In *S. v. Nowell, supra,* the Court said: "The presence of the husband makes out a *prima facie* case of coercion only, and is subject to be controlled by evidence that the wife acted voluntarily and not by compulsion." Some courts think this presumption is out of place in this age, and hold against it, and some states have abolished it by statute. See *S. v. Seahorn, supra.* Some courts have taken the view that, under Married Women's Acts completely removing the disabilities of coverture and emancipating married women, this common law presumption no longer exists. See 27 Am. Jur., Husband and Wife, p. 240.

If a wife voluntarily and free from any compulsion or constraint on the part of her husband joins with her husband in committing a crime, both are equally guilty. 41 C.J.S., Husband and Wife, p. 719.

Whether the evidence is sufficient to rebut this presumption depends, of course, upon the facts of the individual case. However, practical weight must be given to this presumption, and in the absence of any evidence to rebut it, the wife's conviction cannot be sustained. The evidence that the severe and brutal beating of this little helpless girl went on from 10:00 p.m. to 6:00 a.m., that during this time the female defendant was heard cursing and laughing and kept saying "walk Dianne, don't go to sleep, walk," and that in her testimony she did not claim to be acting under the constraint of her husband, but testified that the child's injuries resulted from a fall from a moving automobile, tends to show that the wife acted of her own free will and volition and free from any compulsion of her husband. There is not a shred of evidence to show that the mother was crying or pleading with her husband to desist from striking the child. We hold that it was a question for the jury to say whether or not the testimony on the whole rebutted this rebuttable presumption. The evidence was sufficient to carry the case to the jury as to the wife on the theory that she was present, aiding and abetting her husband of her own free will and volition, and free from any constraint by him, in an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, with full knowledge of the assault's felonious character, as charged in the second count in the indictment upon which she was convicted.

R. Jack Rider, who operates a newspaper in Kinston, saw Dorothy Dianne Heath in the hospital and talked with her in the presence of her mother. He was asked what the little girl said to him about the bruises on her body. Both defendants objected. The court overruled the objection of the female defendant, and sustained the objection as to the male defendant, instructing the jury that the evidence was only competent as to Mrs. Cauley. Rider testified that she said in reference to a little split on her left big toe that looked like a sore, she fell down on the porch and hurt it, and that in reference to a bruised area on the right thigh, she said: "They hit me." The female defendant did not say anything. On re-cross-examination of Mrs. Cauley she testified that when Rider was talking to her daughter, she was in the bathroom, did not hear all was said, and did not hear her say, "they beat me."

In *S. v. Wilson*, 205 N.C. 376, 171 S.E. 338, the three-year-old grandchild of the prosecuting witness said to the defendant: "You burned our cow." The defendant made no answer, but soon left. This Court held in an elaborate opinion by *Stacy, C. J.*, as to the competency of this evidence that the accusation was made under circumstances calling for a reply by defendant, and was competent as an implied admission. It would seem that the statement of the little girl to Rider in the presence of the female defendant comes within the rule so clearly stated by the learned *Chief Justice* as to when such accusations are competent.

At any rate, considering all the evidence in the case, its admission in evidence is not sufficiently prejudicial to justify a new trial.

Sheriff Broadway arrested the defendants on the charges here. He testified the male defendant told his wife, "don't tell anything." After the answer was given the defendants objected. The objection was overruled, they excepted and assign this as error. The identical evidence was testified to later without objection. The defendants in their brief say this statement to his wife while competent against him was not competent against her. It is a well known fact that lawyers frequently advise their clients when arrested not to talk. It would seem that the admission of this evidence as to the wife was harmless.

We have carefully examined the other assignments of error as to the admission of evidence. While some of the solicitor's questions were technically objectionable, none of these assignments of error are sufficiently prejudicial to disturb the result below.

The defendants have fourteen assignments of error to the charge.

The first two assignments of error are as to the first count in the indictment found against the female defendant. The jury found the female defendant guilty on the second count in the indictment against her, and said nothing as to the first count. That was equivalent to a verdict of Not Guilty as to the first count. *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. This part of the charge excepted to did not in the slightest degree affect the trial on the second count. If this part of the charge was erroneous, it became harmless, because the female defendant was in practical effect acquitted on that charge. *Quaere:* Can a wife be convicted of harboring her husband, who has committed a felony? See: 4 A.L.R. 281.

The defendants have two assignments of error to the charge of the court as to what constitutes aiding and abetting. The part of the charge challenged here was taken almost verbatim from *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358, and *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272, and is in accord with our decisions.

The defendants assign as error that the court did not instruct the jury that it could return a verdict of guilty as to the male defendant and not guilty as to the female defendant. However, a reading of the charge shows that the court carefully and plainly made it clear to the jury that it could convict the male defendant of the crime as charged, or convict him of an assault on a female, or acquit him, and that it could convict the female defendant of aiding and abetting in the crime as charged, or convict her of aiding and abetting in an assault on a female, or acquit her. The court also charged that if the jury acquitted the male defendant, it should return a verdict of not guilty as to the female defendant.

Two assignments of error to the charge are deemed abandoned, because they are not set out in the defendants' brief. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 544. Two assignments of error refer to the court's statements of the contentions of the State.

Many of the exceptions to the charge are attenuate in character with no authorities cited in support of the brief argument made. It would be supererogatory to discuss them all *seriatim* in an opinion. Nevertheless, they have been thoroughly considered. None has been overlooked. A careful reading of the charge as a whole fails to show prejudicial error sufficient to justify a new trial as to William David Cauley.

However, assignment of error 19, based upon exception 32, by the female defendant is good. In reference to that assignment of error, the court instructed the jury that, if the State has satisfied them beyond a reasonable doubt from the evidence, that the female defendant aided and abetted the male defendant in an assault with a deadly weapon with intent to kill, resulting in serious injury not resulting in death, it would be their duty to return a verdict of guilty against her of aiding and abetting in the commission of a felony. Neither here, nor anywhere else in the charge, did the judge instruct the jury that when a wife commits a crime like the offense charged in the present case in the presence of her husband, there is a rebuttable presumption that she acted under his constraint, and that before the jury could convict the wife, the State must carry the burden of proof of rebutting this presumption and of satisfying the jury beyond a reasonable doubt from the evidence that the wife in such case was acting of her own free will and volition and free from any constraint upon the part of her husband in committing the crime. In failing to charge this principle of law, the female defendant was deprived of a substantial right, which entitles her to a new trial. The defendants' brief, while setting forth this assignment of error and discussing it, does not make this point.

No Error as to the defendant William David Cauley.

New Trial as to the defendant Dorothy Heath Cauley.

JOHNSON, J., not sitting.

BOBBITT, J., dissenting in part: A felonious assault, as defined by G.S. 14-32, consists of these essential elements: (1) an assault, (2) with a deadly weapon, (3) with intent *to kill*, and (4) the infliction of serious injury not resulting in death. *S. v. Hefner,* 199 N.C. 778, 155 S.E. 879; *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5.

The words "with intent to kill" are self-explanatory. *S. v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10. An intent *to injure* does not suffice.

I agree that the evidence for the State afforded a sufficient basis for a verdict that the male defendant was guilty of an assault with a deadly

weapon inflicting serious injury not resulting in death. But, while such evidence indicates clearly that the child was treated shamefully and whipped mercilessly, I do not think the evidence sufficient to support a finding that the assault was made with intent *to kill* her.

I concur in awarding a new trial for the *feme* defendant. For the reason stated above, I think a new trial should be awarded the male defendant.

HIGGINS, J., dissenting: The evidence in this case, if true, and the jury found it was, disclosed cruelty almost beyond belief. But I do not think it shows intent to kill. If two grown people had such intent, all either had to do was to grasp the little girl by her throat and maintain the hold for a few seconds, and all would be over. To say the cruel and barbarous treatment was inflicted for the purpose of taking life, taxes credulity. That such conduct on the part of the defendants deserves severe punishment, I concede. But to sustain the verdict and judgment would require stretching the law. The evidence is plenary to show assault, but not intent to kill. I think the trial judge committed error in submitting the felony charge to the jury. On that ground, I vote for a new trial.

E. L. TRAVIS, SR., v. BEN H. JOHNSTON, MRS. ALLA JOHNSTON, M. R. JOHNSTON, SALLIE J. MACINTOSH AND ALVIN J. DICKENS, THE LAST TWO NAMES BEING MINORS UNDER TWENTY-ONE YEARS OLD AND WITHOUT GENERAL OR TESTAMENTARY GUARDIAN, AND ALL CHILDREN WHO MAY HEREAFTER BE BORN IN WEDLOCK OF BEN H. JOHNSTON OR SALLIE J. MACINTOSH, AND ROBERT L. JOHNSTON, GUARDIAN AD LITEM OF MERCER L. MACINTOSH AND ALVIN J. DICKENS.

(Filed 7 November, 1956.)

1. Appeal and Error § 22—

Unnumbered exceptions to the findings of fact which do not point out the particular findings challenged or the particular findings which the court failed to make as requested, and equally general assignments of error thereon, are insufficient and will not be considered. Rules of Practice in the Supreme Court Nos. 21 and 19(3).

2. Appeal and Error § 21—

An exception to the judgment presents the sole question whether the facts found are adequate to support the judgment.

3. Judgments § 27b: Taxation § 40f—

A judgment in a tax foreclosure suit is not void if it is rendered by a court which has authority to hear and determine questions in dispute and

jurisdiction over the parties to the controversy or their interest in the property.

4. Taxation § 40b—

The clerk of the Superior Court has authority to order sale of land in tax foreclosure proceedings where the answer filed raises no issue of fact. G.S. 1-209.

5. Same—

Where land is taxed in the name of one of the life tenants, but in an action to foreclose a tax sale certificate (C.S. 8037) the minor remaindermen are served, personally or by publication, and a guardian *ad litem* duly appointed, who files answer, the court has jurisdiction of the parties, and the contention that the court lacked jurisdiction because the land was not properly listed for taxation is untenable.

6. Infants § 13—

No impropriety can be implied from the fact that the guardian *ad litem* accepts service of summons instead of requiring service by the sheriff.

7. Infants § 15½—

A judgment against an infant on the answer filed by his guardian *ad litem* is not voidable unless and until it is established that the guardian *ad litem* did not in good faith act in the representation of his ward.

8. Taxation § 42—

An innocent purchaser at the foreclosure of a tax sale certificate, or an innocent purchaser from such purchaser, is protected from attacks on the order of sale and decree of confirmation when there is no defect appearing on the record.

9. Judgments § 17b—

Upon motion in the original cause presenting solely the question of the validity of the order of sale and decree of confirmation in the foreclosure of a tax sale certificate, the court is not called upon to adjudicate the title of a subsequent purchaser, and such adjudication will be stricken on appeal.

JOHNSON, J., not sitting.

APPEAL by movant from *Pless, J.*, March 1956 Special Term of HALIFAX.

Alvin J. Dickens, in February 1954, made a motion to vacate and set aside an asserted void order of sale and the confirmation thereof entered in 1932 in an action then pending in the Superior Court of Halifax County entitled "E. L. Travis, Sr. *v.* Ben H. Johnston, Mrs. Alla Johnston, M. R. Johnston, Sally J. McIntosh, Mercer L. McIntosh, and Alvin J. Dickens, the last two named being minors under twenty-one years old, and without general or testamentary guardian, and all children that may hereafter be born in wedlock of Ben H. Johnston, or Sally J. McIntosh." Movant also asked that the deed executed pur-

suant to said orders and all subsequent conveyances be declared void and of no effect. The motion was heard by the clerk. He decided adversely to movant. Movant appealed from the judgment of the clerk to Judge Pless, duly assigned to hold the March Special Term of Halifax Court. Judge Pless made findings of fact and denied the motion. Movant appealed.

A. A. McDonald, Bryant, Lipton, Strayhorn & Bryant, and Robert I. Lipton for movant appellant.

W. Bernard Allsbrook and Dickens & Dickens for Lucius King and James Willis King.

Dickens & Dickens for Robert L. Johnston, Guardian ad Litem of Mercer L. MacIntosh and Alvin J. Dickens, W. O. McGibony, Trustee, and The Federal Land Bank of Columbia, S. C.

RODMAN, J. Movant's exceptions are set forth in the appeal entries noted on the judgment. They are stated thus:

"The petitioner-movent further objects to the findings of fact set forth for the reasons that said findings of fact are contrary to and not supported by the evidence in the case.

"The petitioner-movent further objects and excepts to the failure of the Honorable J. Will Pless, Jr. to enter the judgment heretofore tendered by the petitioner-movent to the court and for the further failure of the court to find the facts as set forth in the judgment tendered and refused.

"The petitioner-movent further objects and excepts to the conclusions of law set forth in the judgment of the Honorable J. Will Pless, Jr., dated the 12th day of June 1956, for the reasons that said conclusions of law are erroneous and are not based upon the evidence in this cause.

"The petitioner-movent further objects and excepts to the failure of the court to find the facts as submitted to the court by the petitioner-movent and for the further failure of the court to find the conclusions of law to be such as have been submitted to the court by the petitioner-movent."

None of the exceptions are numbered. The judgment rendered takes five pages of the record. It has twenty findings of fact. The judgment tendered by movant takes nearly six pages of the record. It sets out ten findings of fact, one of which has thirteen subsidiary findings. A casual comparison of the judgment tendered with the judgment rendered shows that many of the facts movant asks the court to find are made findings of fact by Judge Pless, but not always in the identical language suggested by movant.

The assignments of error are typified by Assignment No. 1: "That the court erred in finding the facts set forth in the judgment of the court dated June 12, 1956." It is manifest that the Rules of the Court have not been complied with. Rule 21 requires an appellant to state briefly and clearly as well as number his exceptions. Rule 19(3) requires the exceptions taken to be grouped and the error complained of concisely but definitely set out as a part of the assignment. The Court will not consider assignments not based on specific exceptions and which do not comply with its rules. *Highway Com. v. Brann,* 243 N.C. 758, 92 S.E. 2d 146; *S. v. Bittings,* 206 N.C. 798; *Thompson v. R. R.,* 147 N.C. 412; *Spruce Co. v. Hunnicutt,* 166 N.C. 202; *Lambert v. Caronna,* 206 N.C. 616, 175 S.E. 303; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *McKinnon v. Morrison,* 104 N.C. 354.

The failure of movant to take proper exceptions to the findings of fact and the failure to comply with the rules limit him to his fourth assignment of error, namely, to the judgment itself. This presents the question: Are the facts found adequate to support the judgment? *Byrd v. Thompson,* 243 N.C. 271, 90 S.E. 2d 394; *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912; *Surratt v. Insurance Agency, ante,* p. 121.

The findings of fact made by Judge Pless may be summarized as follows:

John R. Johnston died in 1910, seized of three parcels of land described in a deed from A. Paul Kitchin, commissioner, to M. R. Johnston, recorded in Book 423, page 77.

John R. Johnston devised these lands to his wife, Alla Johnston, and his children, Ben H. Johnston and Sallie MacIntosh, for their lives, and at their deaths to the children of Ben H. Johnston and Sallie J. MacIntosh.

Movant Alvin J. Dickens is the lawful son of Sallie J. MacIntosh.

Among the records of Halifax County is a tax list for the year 1929 in the following form:

"FULL NAME: Ben Johnson — Managed by Crews - farm
"TOWNSHIP:
"Real Estate Owned
Farm Lands

"No. Acres	Description of Property	Value
469	J. R. Johnston tract	10,212
125	Whitaker "	3,000
25	Allen "	510
		13,722

"Total Value Real Estate $13,722
"Grand Total All Property $13,722"

R. L. Johnson was a licensed attorney in 1932.

E. L. Travis, Jr., the son of E. L. Travis, Sr., was duly qualified and acting clerk of the Superior Court of Halifax County during 1931 and 1932.

On or about 30 October, 1931, E. L. Travis, Sr., plaintiff, instituted a suit and filed a verified complaint under the provisions of North Carolina Statutes to foreclose a tax lien against certain property described in said complaint listed for taxation in the name of Ben Johnson.

Summons was issued by the clerk of the Superior Court of Halifax County on 30 October, 1931, to the sheriff of Wake County, commanding him to summon Alvin J. Dickens, and said summons was returned endorsed: "Received November 7, 1931. Served November 7, 1931 by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: Alvin J. Dickens (signed) N. F. Turner, Sheriff Wake County, by J. W. Peebles, D.S." Alvin J. Dickens was at that time approximately nineteen years of age.

On 17 April, 1932, E. L. Travis, Sr., moved for the appointment of a suitable and discreet person as guardian *ad litem* of Alvin J. Dickens. Robert L. Johnson was appointed guardian *ad litem* for movant. Summons issued for the guardian *ad litem* on 7 April, 1932, and was returned "service of this summons accepted and copy of complaint received April 8, 1932, Robert L. Johnson, guardian *ad litem* of Alvin J. Dickens and Mercer L. McIntosh."

"That on May 2, 1932, said guardian *ad litem* filed an answer in manner and form as set forth in the record." The record shows that the answer of Robert L. Johnson as guardian *ad litem* of Mercer L. MacIntosh and Alvin J. Dickens admits each of the six allegations of the complaint. It was verified by him before A. L. Hux, deputy clerk of the Superior Court on 2 May, 1932. The complaint to which this answer responded may be summarized briefly as alleging in section 1 the death of John R. Johnston in 1910, owning the lands here in controversy; in section 2, that he devised said lands to his wife and two children during their natural lives and upon their death to the children born in lawful wedlock of Ben H. Johnston and Sallie J. MacIntosh; in section 3, that the lands were listed for taxation in the name of Ben H. Johnston for the year 1929 and taxes were not paid, that they were sold on 2 June, 1930, by the sheriff of Halifax County in the manner prescribed by law and after due advertisement; in section 4, that the sheriff of Halifax County issued plaintiff, the purchaser at the tax sale, a tax sale certificate which permitted the owners one year in which to redeem; in section 5, that the year for redemption had elapsed, that

redemption has not been made, that the sum of $230.07 paid at the tax sale, with interest as prescribed by law, was a lien superior to all other liens on the lands described; in section 6, that Ben H. Johnston had never married and had no children, that Sallie J. MacIntosh had married twice and had children, movant and Mercer L. MacIntosh. It prays for the recovery of the sum of $230.07 with interest, costs, and reasonable attorney's fees, and that the land be sold by a commissioner to satisfy the amount adjudged to be owing.

On 27 June, 1932, the clerk of the Superior Court ordered the land sold to satisfy the tax lien. A. Paul Kitchin was appointed commissioner for that purpose. The order of sale recites, *inter alia,* that the action was instituted the 30th day of October, 1931, that summons was issued on that date to Halifax and Wake Counties; that there was personal service on the defendant Alvin J. Dickens, a minor; that the other defendants were nonresidents of the State and could not, after due diligence, be found, and that service was had on the other defendants by publication in the *Roanoke News;* "that further notice was published in said newspaper for four successive weeks, by order of court, and posted for thirty days at the courthouse door, requiring all persons claiming an interest in said lands to appear and set up such claims within six months from the date of said notice, which was November 8, 1931, and to present and defend their claims within said time or they would be forever barred and foreclosed of any and all interests or claims in or to said property . . ."; the appointment of Robert L. Johnson as guardian *ad litem,* the issuance of summons for him, that he accepted service, and filed an answer in which he admitted all the allegations of the complaint to be true and that no answer has been filed to the complaint by any of the defendants except by said guardian *ad litem.* It was thereupon adjudged that plaintiff, E. L. Travis, Sr., was entitled to have the tax sale certificate foreclosed and the defendants and all other persons claiming or having an interest in the land barred of any equity of redemption.

On 8 August, 1932, the commissioner reported to the court that he had sold the land in accordance with the order of the court and recommended that the sale be confirmed.

On 30 August, 1932, the clerk of the court entered an order confirming the sale and directed the commissioner to execute and deliver to the purchaser, M. R. Johnston, a deed in fee for the land so sold. The order directs the commissioner to pay from the proceeds of sale the amount paid for the tax sale certificate issued in 1930 with interest as prescribed by statute, $215 for 1930 taxes with interest, and the costs of the action, including an allowance of $25 to the commissioner and $10 to the guardian *ad litem.*

The commissioner filed his account showing his receipts and disbursements.

In conformity with the order of 30 August, 1932, Kitchin, commissioner, executed a deed to M. R. Johnston, dated 30 August, 1932, recorded in Book 423, page 77, Halifax records.

Alvin J. Dickens, the movant, was subject to the jurisdiction of the Superior Court of Halifax County and was properly before the court at the time the court rendered its judgment of foreclosure on 27 June, 1932, and on 30 August, 1932, when the court signed the judgment confirming the sale.

The court further found that M. R. Johnston, in 1934, executed a mortgage securing a note to the Federal Land Bank Commissioner, that there was a sale under this mortgage in 1941 and Federal Farm Mortgage Corporation purchased, that the Mortgage Corporation in 1942 conveyed the land to Maggie B. King, that she and her husband in 1947 conveyed the land to James W. King, reserving a life estate in Maggie B. King, that in 1949 Maggie King and husband and James W. King executed a mortgage to Federal Land Bank, that Maggie King is now dead, Ben Johnston and Sallie J. MacIntosh are still living, and James Willis King is an innocent purchaser for value; that he and his predecessors in title have been in peaceful, open, notorious, and adverse possession of the lands under color of title for more than seven years next preceding the filing of this motion.

"That Alvin J. Dickens, movent, is guilty of laches in that he, for more than 20 years after having attained his majority, failed to file his motion in this cause, and that in the meantime the rights of innocent purchasers for value have intervened."

On the facts found, Judge Pless adjudged:

"That the Judgment of the Clerk of Superior Court of Halifax County appointing A. Paul Kitchin Commissioner, and ordering the sale of the land described in the motion, the report of sale made by the commissioner, the order of the clerk confirming the sale in manner and form set forth in the record, and the deed made by the commissioner are declared valid, and that James Willis King is the owner of the fee simple title to the land subject to recorded encumbrances, and that the judgment of the Clerk of Superior Court of Halifax County dated November 15, 1955 denying the motion of Alvin J. Dickens, movant, in the manner and form set forth in the record is hereby in all respects approved and confirmed . . ."

Do the facts found support the conclusion that the decree of foreclosure, the sale pursuant thereto, and the confirmation thereof are binding on movant? The decrees are not void if the court which rendered them had jurisdiction. To have validity a judgment must be rendered by a court which has authority to hear and determine the ques-

tions in dispute and control over the parties to the controversy or their interest in the property which is the subject matter of the controversy. When these tests are met, the judgment rendered by the court is not void. *Jones v. Brinson*, 238 N.C. 506, 78 S.E. 2d 334; *High v. Pearce*, 220 N.C. 266, 17 S.E. 2d 108; *White v. Lumber Co.*, 199 N.C. 410, 154 S.E. 620; *Williams v. Williams*, 188 N.C. 728, 125 S.E. 482.

Prior to 1927 the holder of a tax sales certificate had an option as to how he would divest the owner of any right to redeem. He could demand a deed from the sheriff upon compliance with the statutory provisions, C.S. 8028 *et seq.*, or he could foreclose the owner's right to redeem by civil action, C.S. 8037.

In 1927 the right of the holder of a tax sale certificate to call on the sheriff for a tax deed was terminated. The only remedy of the holder of the certificate was by civil action to foreclose the owner's right of redemption. Ch. 221, P.L. 1927. It provided, *inter alia:* "Such action shall be governed in all respects as near as may be, by the rules governing actions to foreclose a mortgage. Any one who has paid taxes on the subject-matter of the action, or who holds a certificate of sale, or claims any other interest in said lands, shall be made a party if his lien, interest or claim is disclosed by the records at the time of the filing of the complaint in said action, *and his rights enforced therein.*" (Emphasis supplied.) The act provides that notice shall be given by publication to all persons whose interest is not disclosed by the records.

Clerks of the Superior Court were, by ch. 92, P.L. Ex. Sess. 1921 (G.S. 1-209), given authority to enter judgment by default final on notes, bonds, or other evidences of debt, and when the debt so evidenced was secured by mortgage and deed of trust, to decree a sale of the mortgaged property. The clerk had, however, no specific authority to adjudge the sale of real estate for nonpayment of taxes. If such authority existed, it had to be implied from the language of the statute that the foreclosure should "be governed in all respects as near as may be, by the rules governing actions to foreclose a mortgage." To put at rest any question as to the power of the clerk in tax foreclosure proceedings, the 1929 Legislature gave clerks of the Superior Court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. Ch. 204, P.L. 1929. The substance of this statute now appears as the last paragraph of G.S. 1-209.

The right of the Superior Court of Halifax County to take cognizance of the tax foreclosure proceedings is too apparent to admit of debate.

Movant insists that notwithstanding the general jurisdiction given to clerks in tax foreclosure proceedings, the court did not have jurisdiction in this case for that, as he claims, the land was not properly listed for taxation and that such listing is a requisite to jurisdiction. In support

of his contention he cites and relies on *Rexford v. Phillips,* 159 N.C. 213, 74 S.E. 337; *Stone v. Phillips,* 176 N.C. 457, 97 S.E. 375; and *Wake County v. Faison,* 204 N.C. 55, 167 S.E. 391. The *Rexford* and *Stone cases* arose under the statute authorizing the execution of a tax deed by the sheriff. They have no application to this factual situation. *Wake County v. Faison, supra,* must be interpreted in the light of the record in the case and two other decisions appearing in the same volume, *Guy v. Harmon,* 204 N.C. 226, 167 S.E. 796, and *Forsyth County v. Joyce,* 204 N.C. 734, 169 S.E. 655.

An examination of the record in the *Faison case* shows the land in controversy was, as stated in the opinion, owned by H. H. Powell. The property was listed for taxes by the county auditor in the name of Mrs. O. J. Shell estate. There was no personal service of process on anyone. The only attempted service was by publishing a notice entitled "Wake County *v.* Mrs. J. L. Seawell and J. L. Seawell, her husband, and all heirs at law of Mrs. O. J. Shell, deceased, in being or not in being, together with their respective wives or husbands, if any, whose names and residences are unknown." The notice was to the effect that the action was to foreclose a tax lien "against certain tracts or lots of land in St. Matthews Township, Wake County, described as follows: 40 acres, more or less, known as 'Oaks.' Owned or formerly owned by O. J. Shell Estate."

Appellant and appellee in their briefs raised the question of the power of the court to bind the owner when he was not before the court. Wake County undertook to maintain the validity of the tax foreclosure proceeding by insisting that due process was accorded the real owner of the property by giving notice to the persons in whose name the real estate had been listed for taxation. The Court's opinion was in answer to that contention and in effect held that the real owner could not be deprived of his property by a listing in a fictitious name with notice only to the fictitious taxpayer. Viewed in this light, the opinion is in harmony with *Guy v. Harmon, supra; Forsyth County v. Joyce, supra; Hines v. Williams,* 198 N.C. 420, 152 S.E. 39, and complements the decisions in *Orange County v. Jenkins,* 200 N.C. 202, 156 S.E. 774, and *Orange County v. Wilson,* 202 N.C. 424, 163 S.E. 113.

Here movant was properly before the court by valid service of process and by guardian *ad litem* as shown by the record. All of the elements were present requisite to authorize a sale of the land to satisfy the tax lien and to enter a decree confirming the sale so authorized.

It is contended that the guardian *ad litem* did not properly protect the interest of movant, then a minor, for that he accepted service of summons and filed an answer in which he admitted the allegations of the complaint. So it is urged if the judgment is not void, it is irregular and should be set aside.

No impropriety can be implied from the fact that the guardian *ad litem* accepted service of summons instead of requiring service by the sheriff. Where a guardian *ad litem* has been properly appointed and the record recites that he is a competent person to represent the minor defendant, a judgment rendered on an answer filed by him is not voidable unless and until it is established that the guardian *ad litem* did not in good faith act in the representation of his ward. *Ayers v. Banks,* 201 N.C. 811, 161 S.E. 550; *Hines v. Williams, supra.* One who accepts appointment as guardian *ad litem* of a person under disability owes a high duty to his ward. He should carefully investigate the facts and must exercise diligence in the protection of the rights and estate of his ward. For failure to perform the solemn duty he has undertaken, he is liable in damages for any loss caused thereby.

The court has found that James W. King, presently asserting ownership of the land, is an innocent purchaser for value, tracing his claim of ownership to the sale made by Kitchin, commissioner. Since no defect has been made to appear of record, he is protected against the attack now made on the order of sale and the decree of confirmation. *Cherry v. Woolard, ante,* p. 603; *Welch v. Welch,* 194 N.C. 633, 140 S.E. 436; *Hopkins v. Crisp,* 166 N.C. 97, 81 S.E. 1069; *Yarborough v. Moore,* 151 N.C. 116, 65 S.E. 763; *Harrison v. Hargrove,* 120 N.C. 96; *England v. Garner,* 90 N.C. 197.

The only question the court was called upon to decide by motion of Alvin J. Dickens was the validity of the order of sale and the decree confirming the sale. The judgment declaring these valid and binding on Alvin J. Dickens is affirmed. The court was not called upon to go beyond that and adjudicate the title of James Willis King or any encumbrances thereon. Hence the judgment will be modified by deleting that portion adjudging James Willis King the owner in fee simple of the land, subject to recorded encumbrances.

Modified and affirmed.

JOHNSON, J., not sitting.

HOWARD R. KELLOGG v. IDELL ANDREWS THOMAS AND HARRY THOMAS.

(Filed 7 November, 1956.)

1. Automobiles § 7—

A motorist driving on a level, straight road approaching a place on the highway protected by warning signs, where a number of men are working

and a ditching machine is in operation on the side of the highway, piling dirt some 6 feet on the hard surface, is required by law to take notice of conditions at the scene.

2. Same—

A motorist is under duty to drive with due caution and circumspection and at a speed or in a manner so as not to endanger or be likely to endanger person or property, and when special hazards exist by reason of highway conditions, to decrease speed as may be necessary to avoid collision with any person on or entering the highway. G.S. 20-140, G.S. 20-141.

3. Same—

Regardless of statute, it is the duty of a motorist to keep a proper lookout, and in approaching a place where men are working on or near the highway with plainly visible warnings and signs, to blow the horn and when the workman is apparently oblivious of danger, to drive at such speed and have the automobile under such control, in view of the situation, as to avoid injuring a workman.

4. Automobiles § 33—

A workman crossing a highway in an area marked by signs reading "Men Working" is in a place where he has a lawful right to be and is entitled, when apparently oblivious of danger, to warning by horn of an approaching motorist. G.S. 20-174(e).

5. Automobiles § 41l—

Evidence tended to show that a motorist on a clear morning on a level, straight road, drove into an area protected by warning signs, with workmen and machinery clearly visible, at a rate of speed of 30 to 35 miles per hour, and, without blowing the horn or slackening speed, struck a workman crossing the highway, is sufficient to carry the case to the jury on the ground of negligence and proximate cause.

6. Automobiles § 33—

Evidence that a workman was employed in connection with the laying of a water main along the side of the highway, that he had just alighted from the employer's vehicle in the area where the work was progressing and was attempting to cross the highway when struck, is sufficient to support the inference that he was crossing the highway in the performance of the duties of his employment and was therefore rightfully on the highway.

7. Same—

A worker laboring at his job on a highway protected by warning signs does not occupy the same status as an ordinary pedestrian, and though he is required to exercise due care for his own safety in accordance with the rule of the reasonably prudent man in like circumstances, while engaged in the performance of his duties requiring the diversion of his attention from approaching traffic, is not required to exercise the same vigilance to traffic as an ordinary pedestrian. This exception to requirement of vigilance to traffic does not apply if the workman is not at a place his work requires him to be or if he is not engaged in work requiring diversion of his attention.

8. Same—

A workman engaged in the performance of his duties on or along a highway protected by warning signs has the right to assume that motorists will see the warning signs and the extraordinary conditions plainly visible in the area, and so operate the automobile and keep it under such control as not to endanger or be likely to endanger any workmen in the area.

9. Automobiles § 42k—

Whether plaintiff workman was guilty of contributory negligence in attempting to cross the highway in front of defendant's car without seeing the car until it was approximately 20 feet from him, *held* a question for the jury upon evidence tending to show that he first looked in both directions before attempting to cross, that defendant's car was traveling at excessive speed under the plainly visible conditions and failed to give warning of its approach, and that plaintiff was in the performance of his duties at the time and had a right to be on the highway, and the granting of nonsuit on the ground of contributory negligence was error.

10. Automobiles § 54f—

Admission of the male defendant that he was the owner of the automobile being operated by his wife and that she was operating it with his consent at the time, takes the issue of *respondeat superior* to the jury under the provisions of G.S. 20-71.1.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Stevens, J.*, March Term 1956 of NEW HANOVER.

Civil action for damages for personal injuries.

This is a summation of the evidence favorable to the plaintiff:

On 25 June 1953 plaintiff was employed by Henry von Oesen, who was doing the engineering work for the laying of a water main within the corporate limits of the Town of Burgaw along State Highway No. 53. His job was to run the instrument, and his foreman read the chain. He left Wilmington with the engineering crew in an automobile, called a carry-all, and arrived within the corporate limits of Burgaw about 9:30 a.m. Within the limits of the town the carry-all was parked in the middle of a town block on the right shoulder of the highway as one goes from Wilmington to Kenansville. The carry-all was parked off the highway: its right wheels were over by the ditch. Two automobiles were parked on the side of the highway ahead of the carry-all, and two behind it.

Across the road from the parked carry-all was a ditch digging machine of N. E. Brewer Company, which company was ditching and laying cast iron water mains within the town limits. The engine of the machine was running, the machine was ditching and making a loud noise. The ditch being dug was about 36 inches deep, and was about six feet from the pavement of the highway. The pavement of the high-

way was about 16 feet wide, and the dirt thrown from the ditching operation covered a good 6 feet of the highway.

The work being done by the ditching machine was about 200 feet long. 50 feet from each end of the work two warning signs were placed 50 or 75 feet apart in the center of the highway. These warning signs had on them words in black letters about six inches high on a yellow background. The signs farthest from the ditching machine were about a foot by a foot and a half in size, and had on them the words "Men Working": the signs closest to the machine were 4 feet square with the words "Slow, 15 Miles an Hour" thereon. The carry-all was parked 50 or 75 feet past the second warning sign, which was closest to the ditching machine. 14 men were working in that area.

The highway approaching the warning signs from both directions was level and straight for some distance. It was a clear bright morning with the sun shining.

Plaintiff got out of the right front door of the carry-all, and walked in front of it. These are his words: "When I reached the edge of the highway, I looked to the left and right. I did not see any traffic within the last warning sign at the time I looked to the left, and I did not see any traffic on the other side. After I looked, I stepped out on the highway. I took approximately two steps. I noticed a car coming, but it was too late to avoid getting hit. The right front fender of the car hit me." Robert Benson, a witness for the plaintiff, testified he was 15 feet from plaintiff when he was struck, and that plaintiff when hit by the automobile was closer to the white line in the center of the road than he was to the side, and must have been five or six feet in the road. On cross-examination plaintiff said he first saw the car 15 or 20 feet away, and that it was so close to him that he could not get out of its way at the speed it was traveling. There was nothing in the highway to prevent him from seeing an automobile approaching from either direction. Plaintiff and plaintiff's witnesses, who saw the car strike him, heard no signal, by horn or otherwise, given by the approaching car. The right front bumper of the car struck plaintiff's leg.

The automobile, which struck plaintiff, was driven by Idell Andrews Thomas, the female defendant. She is the wife of Harry Thomas, the male defendant. The complaint alleges that the automobile was owned by Harry Thomas as a family purpose car, and that at the time Idell Andrews Thomas was driving it as a family purpose car with the knowledge, consent and permission of her husband, and for family purposes as his agent, servant and employee, and within the scope of her agency or employment, and for purposes of family use. The joint answer of the defendants admits that the automobile at the time was being operated by the female defendant with the consent of the male defendant

who owned it, but the other allegations of the complaint set forth above are denied.

The female defendant was driving the car on Highway No. 53 going in the direction of the Town of Kenansville. J. H. Huffham, pipe foreman for the N. E. Brewer Company, and a witness for plaintiff, testified that he first saw the automobile driven by the female defendant within the area, which had warning signs, about 75 feet from the last sign bearing the words "Slow, 15 Miles an Hour." That he observed the car continuously from then until it struck plaintiff, and that in his opinion the automobile was traveling at a speed of 30 to 35 miles an hour. From the time the defendant passed this sign, he could not notice that she slackened her speed at any time. The car gave no signal by horn or otherwise of its approach. The right front bumper of the car struck plaintiff throwing him into the air, and the car went down the road about 100 feet before it stopped, according to one witness, and about 50 feet according to another. Plaintiff fell from the air about 15 feet down the road and on its edge. Plaintiff testified: "I remember saying I didn't see her, and she told me the same thing."

The defendants pleaded contributory negligence of the plaintiff as a defense.

At the close of plaintiff's case the defendants made a motion for judgment of nonsuit. The court allowed the motion "on the ground that plaintiff's negligence was a contributing cause of his injuries."

From the judgment entered, plaintiff appeals.

Hogue & Hogue and Elbert A. Brown for Plaintiff, Appellant.
McClelland & Burney for Defendants, Appellees.

PARKER, J. Plaintiff's case is not that of an ordinary pedestrian crossing a highway, nor that of a workman actually at work on the road with warning signs displayed in the road for his protection. Plaintiff was a workman crossing the road under the protection of signs placed in the center of the highway 50 feet from each end of the work being done, bearing the words "Men Working" and "Slow 15 Miles an Hour," and under conditions in the protected area of 14 men working, of the ditching machine in operation making a loud noise, and of dirt thrown from the ditching machine covering a good 6 feet of the 16 feet width of the hard surfaced portion of the highway.

Mrs. Thomas on a clear, bright morning with the sun shining was driving an automobile approaching this area of work and driving into it on a level, straight road. The extraordinary conditions on the highway ahead of her were plainly visible, and of these conditions she was required by law to take notice. *Chaney v. Moore,* 101 W. Va., 621, 134

S.E. 204, 47 A.L.R. 800; 5 Am. Jur., Automobiles, p. 611; 60 C.J.S., Motor Vehicles, pp. 956-957.

"It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

G.S. 20-140 required Mrs. Thomas at all times to drive her automobile with due caution and circumspection and at a speed or in a manner so as not to endanger or be likely to endanger any person or property, and G.S. 20-141 made a similar requirement that she shall operate her automobile with due regard to the width, traffic and condition of the highway, and, when special hazard exists by reason of highway conditions, speed shall be decreased as may be necessary to avoid collision with any person on or entering the Highway. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676. These statutes prescribe a standard of care, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 360, 82 S.E. 2d 331.

Regardless of statutes regulating the operation of automobiles, it was the duty of Mrs. Thomas in the operation of her automobile to exercise the care which a person of ordinary prudence would exercise under similar conditions to prevent injury to persons on the highway: that is, it was her duty in keeping a proper lookout to see and take notice of the signs advising her that the portion of the highway on which she was about to enter had men working on or near it, to blow her horn giving notice of her approach or attempt to pass the place where work was going on to any workman crossing the road apparently oblivious of her approach, and to drive at such a speed, and at all times to have her automobile under such control in view of the situation, as to avoid injuring such a workman. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462; *Wall v. Bain, supra; Murray v. R. R.,* 218 N.C. 392, 401, 11 S.E. 2d 326; 5 Am. Jur., Automobiles, sec. 194; 60 C.S.J., Motor Vehicles, pp. 956-957, and sec. 288; Blashfield Cyclopedia of Automobile Law and Practice, Vol. 2A, sec. 1571; 47 A.L.R. 807-808; Anno. 5 A.L.R. 2d pp. 761-764.

G.S. 20-174(e) requires every driver of a motor vehicle to give warning to pedestrians upon any roadway by sounding the horn when necessary. *Williams v. Henderson, supra.* A workman crossing a highway in an area marked by signs reading "Men Working" is in a lawful place where he has a right to be, and consideration must be given to that fact. Certainly such workman, when apparently oblivious of danger, is entitled to a signal of approach as much as, if not more than, an ordinary pedestrian in the highway. "A driver of a vehicle being warned by barriers, signs, or other evidences of the presence of workmen in the

street must in the exercise of due care be cognizant of the fact that such workmen may not constantly attend to traffic, and his conduct should be in the light of such knowledge." *Reid v. Owens,* 98 Utah 50, 93 P.(2d) 680, 126 A.L.R. 55.

The evidence tending to show that Mrs. Thomas, on a clear, bright morning and on a level, straight road, warned by signs in the highway "Men Working" and "Slow 15 Miles an Hour," which it was her duty in the exercise of ordinary care to see, drove into this area at a rate of speed of 30 to 35 miles an hour, that the eye witnesses heard her give no signal of her approach, that six feet of the highway had dirt on it from a ditching operation, that the ditching machine was making a loud noise, that 14 men were working in the area, that the plaintiff was crossing the highway apparently oblivious of her approach, and that without slackening speed she struck him with her automobile, is sufficient to carry the case to the jury against her on the ground that she was negligent, and such negligence was a proximate cause of plaintiff's injuries.

Plaintiff was employed by Henry von Oesen, who was doing the engineering work for the laying of a water main for the Town of Burgaw. His job was to run the instrument—the evidence does not show what sort of instrument it was—and his foreman read the chain. N. E. Brewer Company was ditching and laying cast iron water mains for the town within its corporate limits. A carry-all brought Oesen's engineering crew to the place protected by warning signs reading "Men Working" and "Slow 15 Miles an Hour," and parked on the shoulder of the highway opposite from the Brewer Company's ditching machine, which was in operation making a loud noise. Plaintiff got out of the carry-all, which had two automobiles parked on the shoulder of the highway ahead of it, and two parked likewise behind it, went around the front of it, looked in both directions, and seeing no approaching vehicle within the last warning sign started to cross the highway toward the ditching machine. According to his testimony he had taken two steps into the highway, and according to Robert Benson's testimony he was near the center line of the highway, when an automobile driven by Mrs. Thomas at a speed of 30 to 35 miles an hour with no signals given of its approach—the eye witnesses testified they heard no signals—collided with him. He was struck by her right front bumper, hurled into the air and down the road about 15 feet. The evidence does not disclose why plaintiff was crossing the road, and does not show whether he was carrying anything in his hands or not. Considering the evidence in the light most favorable to plaintiff, as we are required to do on a motion for judgment of nonsuit, it would seem to be a fair inference that he was crossing the highway in the performance of the duties of

his employment. If so, plaintiff was rightfully on the highway in the performance of his work.

A worker, whose duties of employment require his presence at work on a street or highway protected by warning signs of "Men Working" and "Slow 15 Miles an Hour," cannot utterly disregard the matter of his own safety. However, he occupies a different status from an ordinary pedestrian crossing a street, and this status must be considered in determining the degree of care he must exercise for his own safety, and in determining the question of contributory negligence. Because he is not required to neglect his work to escape collision with motorists not exercising reasonable care for his safety, or not obeying statutes regulating in the interests of public safety the operation of motor vehicles, he is not obliged to keep a constant lookout for approaching vehicles, and his failure to do so, does not necessarily constitute contributory negligence as a matter of law. Whether such a worker has exercised reasonable care for his own safety in view of his work and surrounding circumstances is ordinarily for the jury under proper instructions from the court. *Byrd v. Galbraith,* 172 Ark. 219, 288 S.W. 717; *State Comp. Ins. Fund v. Scamell,* 73 Cal. App. 285, 238 P. 780; *Mecham v. Crump,* 137 Cal. App. 200, 30 P. 2d 568; *Pfaff v. H. T. Smith Exp. Co.,* 120 Conn. 553, 181 A. 621; *Dube v. Keogh Storage Co.,* 236 Mass. 488, 128 N.E. 782; *O'Donnell v. Lang,* 162 Mich. 654, 127 N.W. 691, Ann. Cas. 1912 A. 847; *Lozio v. Perrone,* 111 N.J.L. 549, 168 A. 764; *Cecola v. 44 Cigar Co.,* 253 Pa. 623, 98 A. 775; *Riley v. Tsagarakis,* 50 R.I. 62, 145 A. 12; 5 A.L.R. 770 *et seq.;* 61 C.J.S., Motor Vehicles, pp. 69-70; Blashfield Cyc. of Automobile Law and Practice, sec. 1577.

Winborne, J., now *C. J.,* said for the Court in *Murray v. R. R., supra:* "A laborer whose duties require him to be on the highway may assume that operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their cars under reasonable control, and that they will observe and obey the rules of the road." If a worker laboring at his job on a highway protected by warning signs should be required to exercise the same degree of care for his own safety as an ordinary pedestrian, it is obvious that in many instances, because of his failure to look almost continuously for approaching automobiles, it would be necessary to hold him guilty of contributory negligence as a matter of law.

The sound general rule that a workman laboring at his job on a highway is not required to exercise the same degree of care for his own safety required of an ordinary pedestrian does not apply where the worker is at a place where his work does not require him to be or is not actually engaged in work at the time of his injury which requires the diversion of his attention from approaching traffic, or to phrase it differently, if his particular activity at the time of his injury is one where he

is free to take precautions for his own safety. *Copertino v. Chrobak,* 346 Pa. 49, 29 A. 2d 504; *Reid v. Owens, supra; Gunning v. King,* 249 Wis. 176, 23 N.W. 2d 602; 61 C.J.S., Motor Vehicles, p. 70; 5 A.L.R. 2d 784; Blashfield op. cit. Vol. 2 A. pp. 518-519. It seems clear that when a worker, whose job requires his presence on a highway, is not engaged in some activity at the time of his injury which diverts his attention from vehicular traffic, but is merely in the act of crossing the highway in his work, he may be expected to exercise the same reasonable care for his own safety that an ordinary person is required to exercise under the same circumstances. 5 A.L.R. 2d 840.

However, as the Supreme Court of Utah said in *Reid v. Owens, supra:* "The circumstances may be such in a particular case that a workman crossing a street in the line of his work, though he be carrying nothing and doing nothing except crossing, would not be required to exercise the same degree of watchfulness as a pedestrian if barriers or signs have been placed or there is other evidence of work being prosecuted on or in the immediate vicinity of the street; but such a workman cannot be said to act as a reasonably prudent person under the circumstances if he is altogether indifferent to traffic hazards. What is due care depends on all the surrounding facts and circumstances. A workman actively laboring in the street must exercise due care. But that care must be determined from a different standpoint than the care to be exercised by a pedestrian on the same street. The former must devote some attention to the prosecution of his work; the latter is free of any duty which would interfere with keeping a vigilant lookout. A driver of a vehicle being warned by barriers, signs, or other evidences of the presence of workmen in the street must in the exercise of due care be cognizant of the fact that such workmen may not constantly attend to traffic, and his conduct should be in the light of such knowledge. He may not in case of injury to such a workman point to the latter's attention to his work as negligence on the latter's part. But a pedestrian devoting so much of his attention to other than the traffic as the workman devotes to his work may well be guilty of contributory negligence. A workman merely crossing a street should doubtless be required to be more watchful than one sweeping streets, shoveling dirt, repairing rails, or filling holes, whose duty not only compels him to be in the highway but also to devote a very large part of his attention to his work." See also: *Ellis v. Whitmeyer* (La. App.), 183 So. 77; *Riley v. Tsargarakis, supra; Leoni v. McMillan,* 287 Ill. App. 579, 5 N.E. 2d 742; *Sprinkle v. Davis,* 111 F. 2d 925, 128 A.L.R. 1101.

The plaintiff here, viewing the evidence in the light most favorable to him, was in the act of crossing the highway toward the ditching machine in the performance of the duties of his employment. Plaintiff was lawfully in the highway. He had a right to assume that Mrs. Thomas

would see the warning signals displayed in the road and the extraordinary conditions there visible, particularly of 14 men working in the area, that she would use reasonable care commensurate with such extraordinary visible conditions and special hazards then and there existing, and decrease her speed by reason thereof, to avoid collision with persons on or entering the highway, and so operate her automobile as not to endanger or be likely to endanger any person on or entering the area of men working, that she would observe and obey the rules regulating the operation of automobiles, and that she would drive through the area protected by these warning signs with her automobile under reasonable control. *Murray v. R. R., supra; Wall v. Bain, supra; Aldridge v. Hasty, supra; Weavil v. Myers,* 243 N.C. 386, 391, 90 S.E. 2d 733. "The extent of care which he was required to exercise depended upon all the dangers which he should reasonably have anticipated in the circumstances." *Ferrairs v. Hewes,* 301 Mass. 116, 16 N.E. 2d 674.

Plaintiff before entering the highway looked down the highway to the left and to the right, and seeing no cars within the last warning signs, stepped out into the highway and started to cross, and did not see Mrs. Thomas' automobile until it was too close to him to avoid getting hit. Whether the plaintiff under the extraordinary conditions there existing and plainly visible exercised the same care for his own safety that an ordinarily prudent man would have exercised for his own safety under such conditions is a question upon which reasonable men can draw different conclusions. In our opinion it cannot be held as a matter of law that the plaintiff is guilty of contributory negligence in view of all the attendant facts existing at the scene at the time of his injury. The right to trial by jury is a basic feature of our jurisprudence, and to deprive the plaintiff of the benefit of a jury trial, considering all the evidence in the light most favorable to him, would not seem to be justified here.

The defendants filed a joint answer in which it is admitted that the male defendant was the owner of the automobile being operated by his wife, and that she was operating it with his consent at the time. Such admission by virtue of the provisions of G.S. 20-71.1 is sufficient to carry the case to the jury on the question of the legal responsibility of the male defendant for the operation of the automobile by his wife. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309.

The assignment of error that the court erred in nonsuiting the case is good.

Reversed.

JOHNSON, J., not sitting.

HUBERT A. ROBINSON v. ETHEL M. THOMAS AND CHARLOTTE RENTAL CO., INC.

(Filed 7 November, 1956.)

1. Appeal and Error § 38—

Exceptive assignments of error not supported by argument, reason, or authority are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Pleadings § 24—

Evidence in support of allegations in the complaint which have been stricken on motion is properly excluded.

3. Landlord and Tenant § 11—

In an action by a tenant against a landlord for injuries received as a result of defective condition of the premises, evidence as to other properties owned by the landlord and as to repairs of the premises made after the injury, is properly excluded.

4. Negligence § 19b(1)—

Nonsuit is proper in an action for negligent injury if the evidence, considered in the light most favorable to plaintiff and giving him the benefit of all permissible inferences therefrom, fails to show a violation of some legal duty owed plaintiff by defendants and that the injury was a proximate result of that breach of duty.

5. Landlord and Tenant § 11—

The landlord is liable to the tenant for injuries received as a result of defective condition of the premises only if the defect was latent and the landlord had actual or constructive knowledge of such dangerous defect and failed to give warning thereof, and the tenant was not aware of the danger and could not by the exercise of ordinary diligence have discovered it.

6. Same—Evidence held insufficient to show liability of landlord or rental agent for injury from latent defect in premises.

This action was instituted by a tenant against the landlord and the landlord's rental agent for injuries received when a porch floored with tile over concrete gave way with the tenant because of the rotting of the supporting timbers. The space beneath the porch was enclosed so that the defect was latent. The evidence disclosed that the landlord acquired the property some years after the construction of the building and thereafter employed the rental agent, that both the landlord and the rental agent had knowledge of the development of cracks in the floor of the porch, and that the landlord refused to repair the cracks, but there was no evidence that either knew of latent and dangerous defects in the construction and maintenance of the porch floor which caused it to give way, and wrongfully concealed such knowledge from defendant. *Held:* Nonsuit was proper.

7. Same—

The fact that the landlord advises a tenant to go ahead and use a porch floor pending repairs to cracks therein does not amount to a representation

that the premises were safe so as to charge the landlord with liability for injuries received when the porch gave way because of a latent defect, the porch being firm at the time of the advice and there being no evidence of knowledge of the landlord of any latent defect.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Campbell, J.*, 6 February, 1956 Term, MECKLENBURG Superior Court.

Civil action against the owner and her rental agent to recover for personal injuries resulting from a fall when the porch collapsed as the plaintiff sought to enter the front door of the apartment he occupied as tenant. The essential allegations of negligence in the plaintiff's complaint are: "The collapse of the floor had been imminent and readily apparent to any person having a knowledge of the manner in which it had been constructed. . . . The defendant, Ethel M. Thomas, and the defendant, Charlotte Rental Company, Inc., knew of the manner in which the aforesaid building had been constructed and knew, or should have known the inherent inadequacy and dangerous nature of the method by which the porch had been constructed and was being maintained by them, and knew, or had the means of acquiring knowledge of the actual condition of the porch at the time they were notified of the cracks. . . . That the defendants were negligent in erecting and maintaining a building so constructed as rental property and in allowing him (plaintiff) and his family to occupy the premises as a tenant, in failing to advise the plaintiff of the imminently dangerous condition of the porch floor, and in failing to make proper repairs thereto or to advise the plaintiff that they would not be made." And that the defendants were negligent in allowing the plaintiff to continue to use the porch pending repairs.

Before answer, the defendants moved to strike certain allegations of the complaint. The plaintiff duly excepted to the order allowing the motion.

The defendants by answer entered a general denial of all allegations of negligence. Particularly, they denied any knowledge (1) of defects in the construction of the building, (2) that discoverable defects developed during use which rendered it unsafe, and (3) that if such defects developed the plaintiff should have known of them and if, after such knowledge, he continued to occupy the premises he assumed the risk incident to further occupancy, and that he was guilty of contributory negligence which was the proximate cause or one of the proximate causes of his injury.

The evidence tended to show that plaintiff occupied the downstairs apartment on the east side of the building which contained three other apartments—one opposite the plaintiff's on the first floor, and two

others on the second floor. In front of the plaintiff's apartment was a porch 5 x 12 feet, with a surface of tile set in concrete. The tile was about ¾-inch thick and the concrete base approximately one inch thick. The slab of tile and concrete constituting the porch floor was not reinforced. It rested on wood sleepers 2 x 6 or 2 x 8 inches. The porch was a part of plaintiff's apartment. Entrance through the front door required its use. Entrance through the side door did not. Under the porch floor there was an open or excavated space approximately 10 feet deep. This space was enclosed by masonry walls with no opening for ventilation. That the open space under the porch existed could not be discovered by casual inspection. Although the plaintiff had access to the basement under his apartment during his two years occupancy, he did not know in what manner the porch floor was supported. He testified: "When I first moved in there was a long crack from near the south corner of the porch over towards the east side of the front door. There was one other crack that came in afterwards. I believe that crack had started when I moved in. The one from the south corner . . . stayed like it was. The shorter one is the only one that got longer. It did not get any wider. . . . From the time I moved in . . . until immediately before my fall the porch was firm. The cracks in the tile were about 1/16 of an inch wide." The plaintiff did not know whether there was any crack in the concrete. He noticed near the door a depression developing which was visible when there was water on the porch. About two months after plaintiff moved in he had a conversation with Mr. Drake, agent of the corporate defendant, and Mr. Drake said, "that he had known about the porch and had made reports and that Mrs. Thomas said she wasn't going to spend any more money on those places."

On 1 July, 1953, Mr. Drake came to the apartment, looked at it, and said he would have someone out to fix it on the 7th (the 4th of July holidays intervening) and in the meantime for the plaintiff to go ahead and use it.

The plaintiff's wife testified she called an employee of the corporate defendant some time in May, 1953, complained that the cracks were unsightly and that she was ashamed for her friends to see them. Mr. Drake replied that he would see what he could do about it.

On 6 July, 1953, the plaintiff and his son, age 13 years, crossed the porch for the purpose of entering the apartment through the front door. As the plaintiff opened the screen and stepped to one side to permit the son to unlock the door, a part of the porch floor suddenly gave way beneath plaintiff's feet and in the fall he sustained painful, severe and permanent injuries. The evidence tended to show that the wooden sleepers supporting the porch had decayed because of lack of ventilation and the plaintiff's weight caused the collapse of the floor.

The plaintiff adversely examined Mrs. Thomas, the individual defendant, and Mr. Drake and Mr. Spearman, agents of the corporate defendant. The following is the substance of the testimony developed by these examinations: The apartment building was constructed in 1923 for Mr. W. E. Thomas, husband of the individual defendant. Mr. Thomas died in 1944 and at that time Mrs. Thomas became the owner. Immediately thereafter she employed the Charlotte Rental Company, the corporate defendant, as her rental agent. The company collected the rents and looked after repairs. Mrs. Thomas knew nothing about the manner in which the building was constructed. In fact, she never at any time examined the building and she had no knowledge of its condition. There had been no changes in the porch structure since Mrs. Thomas became owner. Prior to that time the corporate defendant had nothing whatever to do with the building.

At the close of plaintiff's evidence, the court sustained the defendants' motion for nonsuit. From the judgment accordingly, the plaintiff appealed, assigning errors.

Carpenter & Webb,

By: William B. Webb, for plaintiff, appellant.

Helms & Mulliss, Fred B. Helms, Wm. H. Bobbitt, Jr., for defendant Ethel M. Thomas, appellee.

Cochran, McCleneghan & Miller,

By: F. A. McCleneghan, for defendant Charlotte Rental Company, Inc., appellee.

HIGGINS, J. The plaintiff abandoned his exceptive assignment to the order striking parts of the complaint by his failure to support the assignment by argument, reason, or authority. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544. The plaintiff offered evidence relating (1) to the stricken allegations of the complaint, (2) to other properties owned by the defendant, Mrs. Thomas, and (3) to the repairs made by the defendants after the plaintiff's injury. All the foregoing evidence was properly excluded.

Left for consideration is the sole question whether the evidence when considered in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences which may be drawn from it, presents a case for the jury. If the evidence, when so considered, shows the defendants violated some legal duty they owed to the plaintiff and his injury and damage were the proximate result of that breach of duty, then he is entitled to have the jury pass upon his cause. Otherwise it ends here. Admittedly, there was no contract or guaranty the tenant would be safe in the leased premises. The law does not imply such a

contract. The test of the landlord's liability is given in *Harrill v. Refining Co.*, 225 N.C. 421, 35 S.E. 2d 240:

> "Ordinarily, the doctrine of *caveat emptor* applies to the lessee; *Gaither v. Hascall-Richards Steam Generator Co., supra; Hudson v. Silk Co.*, 185 N.C. 342, 117 S.E. 165; *Fields v. Ogburn*, 178 N.C. 407, 100 S.E. 583. To avoid foreclosure under this doctrine in an action for tortious injury, he must show that there is a latent defect known to the lessor, or which he should have known, involving a menace of danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor. 'If the landlord is without knowledge at the time of the letting of any dangerous defect in the premises, he is not responsible for any injuries which result from such defect.' *Covington v. Masonic Temple Co.*, 176 Ky. 729, 197 S.E. 420. And he is not liable if he did not believe or suspect that there was any physical condition involving danger. *Charlton v. Brunelle*, 82 N.H. 100, 130 A. 216, 43 A.L.R. 1281."

Ordinarily, the landlord is under no duty to make repairs. *Moss v. Hicks*, 240 N.C. 788, 83 S.E. 2d 890. The owner is not liable for personal injury caused by failure to repair. *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E. 2d 627; *Simons v. Lebrun*, 219 N.C. 42, 12 S.E. 2d 644; *Tucker v. Yarn Mill Co.*, 194 N.C. 756, 140 S.E. 744. Even in case of a contract to repair, liability for personal injury resulting from a breach of the agreement is ordinarily not within the contemplation of the parties. *Mercer v. Williams*, 210 N.C. 456, 187 S.E. 556; *Jordan v. Miller*, 179 N.C. 73, 101 S.E. 550. Only in case of repairs negligently made is there liability. *Fields v. Ogburn*, 178 N.C. 407, 100 S.E. 583.

The plaintiff seeks to exclude himself from the application of the foregoing rules by alleging the defendants knew of latent and dangerous defects in the construction and maintenance of the porch floor and wrongfully concealed them from the plaintiff. There is no evidence in the record that Mrs. Thomas had any actual or constructive knowledge that the apartment was inherently dangerous, either by reason of construction or maintenance. In fact, there is no evidence she had ever seen the apartment. The only evidence in the record relating to her knowledge of the apartment was the testimony of the plaintiff that Mr. Drake told him he had complained to Mrs. Thomas about the cracks in the porch floor and that she replied she did not intend to spend any more money on the property. That was almost two years before the plaintiff's injury. The plaintiff's wife complained to Mr. Drake that the cracks in the floor were unsightly. There was no complaint

that the condition was dangerous. In fact, the plaintiff's own testimony shows lack of apparent danger: "From the time I moved into the apartment until immediately before my fall, the porch was firm."

There is no evidence the corporate defendant had knowledge the porch was insecure. That two cracks had developed, yes. The larger one had been there for more than two years and the shorter one for the greater part of that time. Actually, there is no evidence that the break was along the line of either of these cracks. The inference is at least as strong the break occurred at the place where the depression in the floor had recently developed. The space under the floor was enclosed by masonry walls built 23 years before Mrs. Thomas became the owner and before the Charlotte Rental Company became agent. The cause of the breakthrough was the deterioration of the sleepers under the floor after 31 years use.

Finally, the plaintiff argues the defendants should be held liable because Mr. Drake told the plaintiff to go ahead and use the porch pending repairs. The floor was then firm. Mr. Drake seldom saw it. The plaintiff knew that. The plaintiff knew that he was in a much better position to know about the condition than Mr. Drake was. What Mr. Drake said was nothing more than the expression of his opinion. It is difficult to see how the statement could have been understood otherwise. After all, there is no evidence that any person had known of the vacant space since the day the builder sealed it up, and that was in 1923. The plaintiff's evidence shows the defendants knew of the two cracks in the floor. It fails to show anything else.

The judgment of the Superior Court of Mecklenburg County is Affirmed.

JOHNSON, J., not sitting.

STATE v. WILLIAM ROBERT McNEELY.

(Filed 7 November, 1956.)

1. Criminal Law § 79—

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

2. Criminal Law § 53d—

The failure of the court to define "an attempt" to commit the offense will not be held for prejudicial error when the term is used in accordance with its ordinary meaning and is clearly understandable.

3. Criminal Law § 53g—

The court is not required to charge the jury as to a less degree of the crime when there is no evidence of guilt of a less degree.

4. Robbery § 3—

Where, upon indictments charging robbery, the court submits the case to the jury on the less degree of an attempt to commit the offenses, the failure of the court to submit the question of defendant's guilt of assault will not be held for error when defendant makes no contention and introduces no evidence and fails to request instructions in regard to guilt of assault.

5. Same: Criminal Law § 54b—

In this prosecution on indictments charging robbery, the case was submitted to the jury solely on the question of defendant's guilt of an attempt to commit the offenses. *Held:* A verdict of guilty as charged will be interpreted in the light of the facts in evidence and the charge of the court, and is sufficient to support the judgment.

6. Robbery § 1a—

Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or by putting him in fear, and is an infamous crime.

7. Criminal Law § 2—

An attempt to commit an offense is composed of an intent to commit the crime, together with a direct ineffectual act done towards its commission.

8. Criminal Law § 3: Robbery § 3—

An attempt to commit the crime of robbery is an infamous crime punishable as provided in G.S. 14-3.

JOHNSON, J., not sitting.

APPEAL by defendant from *Rudisill, J.*, at February Term 1956, of MECKLENBURG.

Criminal prosecution upon two bills of indictment numbers 23785 and 23786, each containing two counts, the first of which in each bill pertains to robbery with firearms, one in respect to Henry Jay Plummer, and the other to John Riley Johnson; and the second count in each bill pertains to common law robbery, one in respect to said Plummer and the other to Johnson, consolidated for purpose of trial. Defendant pleaded not guilty.

And upon trial in Superior Court, and when the State had finally rested its case, the trial court (1) allowed motion of defendant for judgment as of nonsuit as to the first charge, armed robbery, in each bill of indictment, and (2) ruled that the case "could go to the jury on the common law theory of robbery on the matter of attempt"; and in accordance therewith the trial judge instructed the jury that he was sub-

mitting the case to the jury "as to the charge of common law robbery, that is, the attempt to rob."

The record of case on appeal shows that the case was submitted to the jury upon the contention of the State, on the one hand, that the verdict of the jury in each case should be guilty of an attempt to rob, and upon the contention of the defendant, on the other hand, that he did not attempt to rob, the jury should return a verdict of not guilty. The court charged in accordance with these respective contentions.

Verdict: Guilty as charged.

Judgment: That defendant be confined in the State Prison, in No. 23785, for a term of not less than 7 nor more than 10 years at hard labor, and, in No. 23786, for a term of not less than five nor more than 7 years, the latter to begin at the expiration of the former sentence.

Defendant excepted thereto, and appeals to Supreme Court and assigns error.

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

Charles V. Bell and Peter H. Bell for Defendant Appellant.

WINBORNE, C. J. The record of the case on appeal here presented discloses assignments of error substantially as follows:

Numbers 1 and 2 are directed to exceptions to two portions of the charge given to the jury. It is noted, however, that in brief filed in this Court neither of the exceptions to the designated portions of the charge is set out by appellant, nor is reason or argument stated or authority cited in support of them. Hence the assignments of error are taken as abandoned by appellant. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at 562. Nevertheless, reading the charge as a whole, prejudicial error in the portions covered by the exceptions is not made to appear.

Number 3 is based upon Exception No. 3 to the action of the court "in failing to charge the jury on the law applicable to the case as required by G.S. 1-180" in five particulars:

(a) As the law applies to an attempt to commit robbery. In North Carolina it is provided by statute, G.S. 15-170, that "upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." In accordance with this statute, and in the light of the evidence in the case, the trial judge ruled that the only issue in the case was whether or not defendant was guilty of an attempt to commit common law robbery. While the judge did not define in detail what is meant by "an attempt to commit robbery," the language used is accordant

with ordinary meaning of the word attempt, and is clearly understandable. *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465. Indeed, defendant was not contesting the meaning of the term.

(b) and (c): As to assault, and as to the return of verdict of assault or simple assault: The principle upon which a defendant may be convicted of a less degree of the crime charged in the bill of indictment applies only where there is evidence of guilt of a less degree. *S. v. Spain,* 201 N.C. 571, 160 S.E. 825. Here the trial judge ruled that under the evidence in the case defendant was guilty, if at all, of an attempt to commit common law robbery. And where all the evidence tends to show that the crime of an attempt to commit common law robbery, a lesser degree of the crime alleged in the bill of indictment, and defendant relies upon another defense, and does not contend that he might be found guilty of a lesser degree of the crime, and introduces no evidence to that effect, and makes no request that the court instruct the jury thereon, the failure of the court to so instruct the jury will not be held for error. *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402.

(e) As to verdict of guilty as charged "when . . . defendant was not charged with an attempt to commit robbery." As hereinabove stated a verdict of guilty of an attempt to commit robbery is permissible under a bill of indictment charging common law robbery. G.S. 15-170. "It is the rule with us, both in civil and criminal actions," as declared by *Stacy, C. J.,* writing for the Court in *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338, "that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admission of the parties, and the charge of the court," citing *S. v. Snipes,* 185 N.C. 743, 117 S.E. 500, and many other cases. See also *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764, and cases cited. Tested by this standard, it would seem that the verdict as recorded is responsive to the charge in the light of the evidence, and is sufficient to support the judgment.

Reverting to (d)—That the court committed error in pronouncing judgment on the verdict of the jury: In this connection this Court in *S. v. Hare,* 243 N.C. 262, 90 S.E. 2d 550, in opinion by *Denny, J.,* declared that "At common law an attempt to commit a felony was a misdemeanor," and that "our law in this respect remains unchanged *except where otherwise provided by statute,*" citing *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1, and *S. v. Surles,* 230 N.C. 272, 52 S.E. 2d 880.

And it is provided by statute G.S. 14-3 that "All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be

guilty of a felony and punished by imprisonment in the county jail or State Prison for not less than four months nor more than ten years."

It appears that defendant was sentenced under this statute, G.S. 14-3.

The question then is whether an attempt to commit the crime of robbery is an infamous crime.

Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear. *S. v. Burke,* 73 N.C. 83; *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. Common law robbery, therefore, is a felony, and an infamous crime. *U. S. v. Evans,* 28 D.C. 264, cited in Anno. 24 A.L.R. 1016.

Moreover, "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission . . . 'An indictable attempt, therefore, consists of two important elements: (1) An intent to commit the crime, and (2) a direct ineffectual act done toward its commission.' " *S. v. Surles, supra,* and cases cited.

Hence in the light of the principle discussed and applied in *S. v. Surles, supra,* this Court holds that an attempt to commit the offense of common law robbery is an infamous crime,—and punishable as provided in G.S. 14-3.

After careful consideration of all points raised or attempted to be raised by appellant on this appeal, sufficient reason is not shown for disturbing the verdict and judgment in the case.

No error.

JOHNSON, J., not sitting.

J. W. WILLCOX AND WIFE, CORRINNE A. WILLCOX, v. MARY ADALINE COOK CRESCIMANNO DI CAPADARSO AND HUSBAND, CRESCIMANNO DI CAPADARSO.

(Filed 7 November, 1956.)

1. Abatement and Revival § 14½—

Where damages and injunctive relief are sought in an action for trespass to try title, the conveyance of the land by the plaintiffs after institution of the action by deed exempting the *locus in quo* from the warranty does not work an abatement, since plaintiffs are entitled to prosecute the action to final judgment in respect to the damages alleged.

2. Appeal and Error § 3—

An appeal will not lie from the overruling of a demurrer for failure of the complaint to state a cause of action. Rule of Practice in the Supreme Court No. 4(a).

3. Abatement and Revival § 14½ : Injunctions § 8—

Where, after the institution of the action, plaintiffs convey the property, the temporary order issued at their instance in connection with their use of the land must be vacated and the costs of appeal taxed against them, since they no longer have any property rights to be protected by the injunction.

JOHNSON, J., not sitting.

APPEAL by defendants from orders entered in Chambers on 8 September, 1956, in action pending in MOORE Superior Court, by *McKeithen, Special Judge,* residing in the Twentieth Judicial District.

The amended complaint, in substance, alleges:

A 27-foot alley or roadway lies between the described land of plaintiffs and that of defendants, which roadway provides access to plaintiffs' garage and generally to the rear of plaintiffs' residence premises. Plaintiffs and their predecessors in title have used the roadway under claim of right and under color of title continuously and openly since 1934. Plaintiffs, under their deed, own in fee simple a portion of said 27-foot roadway, to wit, a strip two feet wide along the northwest boundary thereof. Plaintiffs, under their deed and also by adverse user, own an easement vesting in them the right to use the remaining twenty-five feet for roadway purposes.

On 5 May, 1956, defendants unlawfully constructed upon plaintiffs' land, to wit, approximately along the northwest line of said 27-foot roadway, a mesh wire fence about four feet high, nailed to trees, thereby preventing plaintiffs' use of said roadway as a means of access to their garage and premises. Plaintiffs have been damaged by defendants' wrongful acts: (1) on account of damages to their property by defendants' trespass thereon; (2) on account of loss of use of said roadway as a means of access thereto; and (3) because a purchaser of plaintiffs' property, by reason of defendants' conduct, refused to accept plaintiffs' tendered deed therefor.

Plaintiffs prayed: (1) that they be declared the owners of an easement in and to said 27-foot roadway; (2) for an injunction requiring immediate removal of the fence and enjoining further obstruction of said roadway; (3) for damages and costs.

Defendants demurred on the ground that the amended complaint did not state facts sufficient to constitute a cause of action.

The court below in separate orders overruled defendants' demurrer and granted injunctive relief. In respect of such injunctive relief the court ordered that, pending the final determination of the action, defendants immediately remove said fence; and defendants were enjoined from obstructing said 27-foot roadway or interfering with plaintiffs' use thereof. Defendants excepted to each order and appealed.

Rowe & Rowe for plaintiffs, appellees.
H. F. Seawell, Jr., for defendants, appellants.

PER CURIAM. Defendants have filed in this Court a motion to dismiss plaintiffs' action. Attached to said motion is a photostatic copy of a deed dated 10 September, 1956, filed for registration 18 September, 1956, and duly registered in the Moore County Registry, whereby the plaintiffs herein conveyed the lands allegedly owned by them when this action was commenced to Benson C. McWhite and Tobitha L. McWhite, in fee simple. In this deed, after the usual covenants of warranty, it is expressly provided: "The warranties contained in this Deed do not apply to nor cover alley or right-of-way adjoining the property herein conveyed on its southeast side."

It is noted that, although plaintiffs alleged ownership in fee of the 2-foot strip embraced therein, plaintiffs' allegations are to the effect that the entire twenty-seven feet constitute the alleged alley or roadway between the adjoining properties.

Thus, it appears affirmatively that plaintiffs do not now own the land described in the amended complaint or an easement in said 27-foot roadway; that they are not obligated by warranty in respect of said roadway; and that, since their said conveyance to the McWhites, they have had no legal interest either in said land or in said roadway. Even so, this does not work a discontinuance of plaintiffs' right to prosecute this action to final judgment in respect to such damages, if any, as plaintiffs may have sustained by defendants' alleged wrongful acts. Therefore, defendants' motion in this Court to dismiss plaintiffs' action is denied.

Defendants had no right of appeal from the order overruling their demurrer. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766. Defendants' exception thereto has been noted; and, if properly brought forward, will be considered by this Court in the event of an appeal by defendants from an adverse final judgment.

Defendants had the right to appeal from the order granting injunctive relief, both mandatory and prohibitory; but, since plaintiffs no longer have property rights affected by the injunction, such order of injunction, whether correct or incorrect when entered, must be vacated and the costs of this appeal taxed against plaintiffs.

In their brief, *plaintiffs* state that "The sale took place about a week after the injunction was issued," and further that "the purchaser intends to be added as a party plaintiff in this case but has not done so." *Quaere:* If the purchaser should desire to proceed, would the proper procedure be by independent action rather than as an additional party plaintiff herein? Suffice it to say, nothing herein bears upon the rights, if any, of the McWhites.

Upon certification of this opinion, and after answer filed by defendants, the case will stand for trial in so far as it relates to damages, if any, recoverable by plaintiffs on account of defendants' alleged wrongful conduct.

The order of injunction is vacated and the cause remanded for further proceedings in accordance with this opinion.

Order of injunction vacated and cause remanded.

JOHNSON, J., not sitting.

NANCY B. ROGERS AND HUSBAND, L. W. ROGERS, PETITIONERS, v. C. LECTON BRANTLEY; SOUTHERN BOND AND MORTGAGE COMPANY, INC.; JESSIE C. BRANTLEY, G. B. BRANTLEY AND WIFE KATHERINE T. BRANTLEY, DEFENDANTS.

(Filed 7 November, 1956.)

Appeal and Error § 3—

An appeal from orders allowing attorneys of record to withdraw from the case and as commissioners to sell the lands in controversy, and for allowance of reasonable attorney's fees, will be dismissed *ex mero motu* as fragmentary and premature, the proceeding for the sale of the land being pending in the Superior Court.

JOHNSON, J., not sitting.

APPEAL by petitioner Nancy B. Rogers and by defendant Southern Bond & Mortgage Company, Inc., respectively, from *Hobgood, J.*, at Regular March 1956 Term, of WAKE.

Special proceeding instituted 13 January, 1953, for the sale of real estate for partition among petitioners and defendants as tenants in common.

It appears in the record docketed in this Court that in March 1956 petitions were filed: (1) By Robert B. Broughton, to be permitted to withdraw as counsel for petitioners and as commissioner to sell the property involved in the proceeding, and for an allowance of reasonable attorney's fees payable out of the proceeds on deposit with Clerk of Superior Court; and (2) by J. L. Emanuel to be permitted to withdraw as counsel of record for G. B. Brantley and Southern Bond & Mortgage Company, Inc., and as commissioner, and for an allowance of reasonable attorney's fees as attorney for the said parties; and that upon said petitions orders were entered at March Term 1956, to which petitioners and defendants, respectively, excepted and gave notice of appeal, and appealed to the Supreme Court, and assign error.

Taylor & Mitchell for Appellants.
J. L. Emanuel and Robert B. Broughton for Appellees.

PER CURIAM. It being made to appear to this Court in connection with motion suggesting diminution of record that this special proceeding is still pending in the Superior Court, and that no final judgment has been entered, this Court holds *ex mero motu* that the appeals are fragmentary and premature, and, therefore, must be dismissed,—and it is so ordered, preserving, nevertheless, exceptions of the respective parties to the said orders, staying execution of the orders, and holding *in statu quo* sufficient funds in the hands of the Clerk of Superior Court for compliance with said orders, if eventually approved, all pending final determination of the proceeding.

Appeal dismissed.

JOHNSON, J., not sitting.

JOHN C. JEFFRIES v. SUPER SERVICE GARAGE, INC., BENJAMIN WEINSTEIN AND ALEXANDER WEINSTEIN.

(Filed 7 November, 1956.)

Trial § 47—

The lower court has no jurisdiction to hear a motion for new trial for newly discovered evidence after the appeal from its judgment has been withdrawn by consent.

JOHNSON, J., not sitting.

APPEAL by defendants from *Fountain, Special Judge,* May Term, 1956, of WAKE.

This is a civil action instituted 5 April 1955 and tried at the November Term 1955, resulting in a verdict in favor of the plaintiff. From the judgment entered on the verdict the defendants gave notice of appeal to the Supreme Court but did not perfect their appeal.

On 9 April 1956, the defendants through their counsel and the plaintiff through his counsel consented in writing to the entry of an order by the judge then holding a term of Superior Court in Wake County, in which order the court found that the appeal of the defendants had been abandoned and decreed that the judgment theretofore entered shall be and remain in full force and effect.

A motion for a new trial for newly discovered evidence was made by the defendants on 27 April 1956, the day after the adjournment of the

next succeeding term following the entry of the consent order of 9 April 1956. The court held it was without authority to entertain such motion and entered an order accordingly.

The defendants appeal, assigning error.

Simms & Simms and R. Roy Carter for plaintiff.

J. C. B. Ehringhaus, Jr., for defendants.

PER CURIAM. When the defendants consented to the withdrawal of the appeal on 9 April 1956, no right existed thereafter to grant a motion for a new trial on the ground of newly discovered evidence at the next succeeding or any other term of the Superior Court. *Lancaster v. Bland,* 168 N.C. 377, 84 S.E. 529; *S. v. Casey,* 201 N.C. 620, 161 S.E. 81. Moreover, it was agreed, in connection with the withdrawal of the appeal, that the judgment shall remain in full force and effect. Thus, it became a consent judgment which may not be set aside without the consent of the parties, except for fraud or mutual mistake. *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323.

The court below correctly held that it had no power to entertain the motion of the defendants for a new trial on the ground of newly discovered evidence.

Affirmed.

JOHNSON, J., not sitting.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, TED P. FURR, CHARLES W. PICKLER AND H. WELLS ROGERS, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUD GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, PETITIONERS, v. ELIZA JANE DOBY AND J. LILLIAN DOBY, RESPONDENTS.

(Filed 7 November, 1956.)

APPEAL by respondents from *Armstrong, J.,* February, 1956 Term, STANLY Superior Court.

This proceeding was instituted in 1954 under G.S. 115-85 (now G.S. 115-125) for the purpose of acquiring a suitable site for a senior high school plant in the Albemarle City Administrative Unit, Stanly County. The petitioners alleged, and the respondents admitted the petitioners had determined that a senior high school plant is necessary in the

Administrative Unit and that its Board of Trustees "has determined that the only suitable site for the location of said senior high school plant in the Albemarle City Administrative Unit is the 26.972-acre tract of land belonging to respondents." The parties stipulated the petitioners were unable to acquire the site by gift or purchase. Other pertinent facts are set forth in a former appeal reported in 242 N.C. 462. Appraisers appointed for that purpose fixed the amount of compensation to be paid at $37,660. From the order of the Superior Court of Stanly County confirming the report, the respondents excepted and appealed. The jury in the Superior Court fixed the amount of damages to be paid to the respondents at $40,000. From the judgment on the verdict, the respondents appealed, assigning errors.

Staton P. Williams for petitioners, appellees.

Sedberry, Clayton & Sanders

By: J. C. Sedberry, for respondents, appellants.

PER CURIAM. Upon failure to acquire by gift or purchase, discretionary power existed in the petitioners to select and take land (not exceeding 30 acres) for school purposes. No right to stay the taking existed in the respondents. *Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180. The respondents' rights are limited to the recovery of damages. The petitioners' liability is to pay them. The parties failed to agree as to the amount. The jury, in accordance with applicable rules of law, decided the issue. No reason appears why the result should be disturbed.

No error.

JOHNSON, J., not sitting.

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

APPENDIX.

ADVISORY OPINION IN RE GENERAL ELECTION.

(Filed 17 July, 1956.)

His Excellency, Luther H. Hodges, Governor of the State of North Carolina, addressed to the Chief Justice and Associate Justices of the Supreme Court of North Carolina the following communication:

June 28, 1956

Gentlemen:

The Advisory Committee on Education, appointed pursuant to Resolution 29 of the 1955 Session of the General Assembly, filed its report on April 5, 1956.

The Committee recommended the calling of a special session of the General Assembly to consider submitting to the people the question of changes in our Constitution so that the General Assembly might have power to enact legislation to give effect to the Committee recommendations.

It is my opinion, concurred in, I think, by the vast majority of the citizens of our State, that how we should solve our educational problems should be free of partisan politics.

For that reason, I did not seek the advice and consent of the Council of State to a special session of the General Assembly until after the Statewide Primary.

A special session of the General Assembly has now been called to convene at noon on July 23. I propose to submit the report of the Advisory Committee on Education and to recommend that the Assembly submit a constitutional amendment to the people, and enact legislation to implement the amendment, if it should be approved at an election to be held for that purpose.

Because of my feeling that the problem ought not in any manner to be involved in partisan politics, I desire to recommend to the General Assembly that such amendment, as it may propose, be submitted to the people of the State at a time other than the election of constitutional officers, and that the only questions to be submitted to the electorate at that time shall be amendments to the Constitution.

The Constitution requires amendments to be submitted "at the next general election." The Constitution does not define "general election."

The Attorney General has advised me that, in his opinion, an election to be held prior to November and in conformity with the general election laws and for the sole purpose of considering constitutional amendments would meet the requirements of Article XIII of our Constitution.

The question is, however, of such great importance that I feel justified in seeking an opinion of the Supreme Court. Hence, I respectfully

request, if in keeping with the proprieties and functions of the Court, an advisory opinion on the following question:

> May the General Assembly, at its special session to be held in July, provide for the holding, prior to November, of a Statewide election, so as to meet the constitutional requirements of a general election, when the only questions which may be submitted to the electorate on the day designated for the election are the ratification or rejection of:
>
> (a) Constitutional amendments proposed by Chapters 1169, 1245, and 1253 of the 1955 Session of the General Assembly, and
>
> (b) Such constitutional amendment or amendments as may be duly proposed at the special session of the General Assembly.

Your opinion on the question presented will be appreciated and will guide me in the recommendations which I shall make to the special session of the General Assembly as to appropriate means to be taken looking to the solution of our educational problem.

Sincerely,
LUTHER H. HODGES,
Governor

Raleigh, North Carolina
16 July, 1956

To His Excellency, Luther H. Hodges,
Governor of North Carolina

We have received your communication of June 28, 1956, submitting to us the following question:

> May the General Assembly, at its special session to be held in July, provide for the holding, prior to November, of a Statewide election, so as to meet the constitutional requirements of a general election, when the only questions which may be submitted to the electorate on the day designated for the election are the ratification or rejection of:
>
> (a) Constitutional amendments proposed by Chapters 1169, 1245, and 1253 of the 1955 Session of the General Assembly, and
>
> (b) Such constitutional amendment or amendments as may be duly proposed at the special session of the General Assembly.

The undersigned, each for himself, answers the question posed in the affirmative: Provided, such election is held in conformity with the

general election laws. See Opinions of the Justices, 204 N.C. 806, *et seq.* and 207 N.C. 879, *et seq.*

Respectfully,

M. V. BARNHILL
Chief Justice
J. WALLACE WINBORNE
Associate Justice
EMERY B. DENNY
Associate Justice
JEFF. D. JOHNSON, JR.
Associate Justice
R. HUNT PARKER
Associate Justice
WM. H. BOBBITT,
Associate Justice
CARLISLE W. HIGGINS
Associate Justice

WORD AND PHRASE INDEX.

Abatement and Revival—Abatement of criminal prosecution for pendency of prior prosecution, *S. v. Daniels*, 671; abatement of civil action for pendency of prior action, *Hill v. Spinning Co.*, 554; abatement for transfer of title or interest, *Willcox v. Di Capadarso*, 741.

Abbreviations—Use of abbreviations in court records disapproved, *S. v. Edmundson*, 693.

Academic Questions—Supreme Court may decide case on merits in public interest notwithstanding appeal has become academic, *Joyner v. Board of Education*, 164.

"Accidental Means"—Death of insured as result of wrongful assault made by him is not death by accidental means within coverage of policy, *Scarborough v. Insurance Co.*, 502.

Accomplices—Court need not charge jury to scrutinize testimony of accomplices in absence of request, *S. v. Stevens*, 40.

Actions—Particular actions and prosecutions see particular titles of actions and crimes; trial of actions see Trial and Criminal Law; venue see Venue; election of remedies see Election of Remedies; distinction between forms of action, *Hayes v. Ricard*, 313.

Active Trusts—Trust property as subject to execution, *Cornelius v. Albertson*, 265.

Administration—See Executors and Administrators.

Administrative Law—Appeal, *certiorari* and review of orders of administrative boards, *Sanford v. Oil Co.*, 388.

Admissions—Admission in answer of employee *held* incompetent against employer, *Brothers v. Jernigan*, 441.

Adultery—Burden of proving plea of adultery as defense to alimony, *Lawson v. Lawson*, 689.

Advancements—Advancement of child's full share of the estate, *Price v. Davis*, 229.

Agriculture—Priority between landlord's lien for rent and laborer's lien, *Eason v. Dew*, 571.

Air—Pollution of air by operation of oil refinery may be nuisance *per accidens*, *Causby v. Oil Co.*, 235.

A. B. C. Act—See Intoxicating Liquor.

Alias Summons—*Cherry v. Woolard*, 603.

Alimony—See Divorce and Alimony.

Allegata—Evidence in support of allegations which have been stricken, is properly excluded, *Robinson v. Thomas*, 732.

Amendment—Of pleadings see Pleadings.

Answer—See Pleadings.

Appeal and Error—Appeals from inferior courts to Superior Court, see Courts; appeal in criminal cases see Criminal Law; nature and grounds of appellate jurisdiction, *Fox v. Comrs. of Durham*, 497; *Paul v. Neece*, 565; supervisory jurisdiction of Supreme Court and matters cognizable *ex mero motu*, *Joyner v. Board of Education*, 164; *Edwards v. Butler*, 205; *Shaver v. Shaver*, 309; judgments appealable, *Hall v. Mica Corp.*, 182; *Jenkins v. Trantham*, 422; *Harris v. Upham*, 477; *Clements v. Simons*, 523; *Wilkes v. Dillingham*, 522; *Willcox v. Di Capadarso*, 741; *Rogers v. Brantley*, 744; motion to amend in Supreme Court, *Surratt v. Ins. Agency*, 121; jurisdiction of lower court after appeal, *Shaver v. Shaver*, 311; *S. v. Arthur*, 586; *Lawson v. Lawson*, 689; objections, exceptions and assignments of error, *Tynes v. Davis*, 528; *Ausband v. Pack*, 694; *S. v. Crumlin*, 695; *Watson v. Assurance Corp.*, 696; *Tillis v. Cotton Mills*, 587; *Armstrong v. Howard*, 598; *Surratt v. Ins. Agency*, 121; *Travis v. Johnston*, 713; *Allen v. Allen*, 446; *S. v. Mills*, 487; *Millikan v. Simmons*, 195; *S. v. Thomas*, 212; *Tillman v. Talbert*, 270; exceptions to proceedings in Superior Court upon

appeal from inferior court or board, *Conner v. Rubber Co.*, 516; pleadings are necessary part of record, *Pace v. Pace*, 698; charge not in record presumed correct, *Harris v. Davis*, 579; failure to discuss exceptions in the brief, *Paul v. Neece*, 565; *Lieb v. Mayer*, 613; *Watson v. Assurance Corp.*, 696; *Robinson v. Thomas*, 732; presumptions and burden of showing error, *In re Gamble*, 149; *Schoenith v. Realty Co.*, 601; harmless and prejudicial error, *Browning v. Weissinger*, 471; *In re Gamble*, 149; *Allen v. Allen*, 446; *Brittain v. Blankenship*, 518; review of findings or of judgments on findings, *Rubber Co. v. Shaw*, 170; *Mimidis v. Papoulias*, 479; *Rich v. R. R.*, 175; *Lowe v. Department of Motor Vehicles*, 353; review of judgments on motions to nonsuit, *Poindexter v. Bank*, 191; partial new trial, *Lieb v. Mayer*, 613; remand, *Peel v. Moore*, 512; interpretation of decisions, *Carpenter v. Carpenter*, 286; law of the case, *Hinson v. Dawson*, 23.

Appearance—*Waters v. McBee*, 540; *Hardy & Newsome v. Whedbee*, 682; *Brittain v. Blankenship*, 518.

Architects—*Tillman v. Talbert*, 270.

Argument of Counsel—Counsel not entitled to argue irrelevant law, *S. v. Crisp*, 407; of solicitor, *S. v. Conner*, 109.

"Arising Out of"—Within meaning of Workmen's Compensation Act, *Zimmerman v. Freezer Locker*, 628.

Arrest—Fact that arrest by municipal police officers was outside corporate limits does not preclude prosecution for offense for which arrest was made, *S. v. Sutton*, 679; force permissible, *Lowe v. Department of Motor Vehicles*, 353; right to arrest without warrant, *Lowe v. Department of Motor Vehicles*, 353.

Arrest of Judgment—*S. v. Lucas*, 53; *S. v. Cox*, 57; *S. v. Baucom*, 61; motion in arrest of judgment may be made in Supreme Court, *S. v. Lucas*, 53.

Assault—Death of insured as result of wrongful assault made by him is not death by accidental means within coverage of policy, *Scarborough v. Insurance Co.*, 502; action for civil assault, *Nance v. Fike*, 368; criminal prosecution, *S. v. Cauley*, 701.

Assessments—Appeal from assessment for street improvements, *Sanford v. Oil Co.*, 388.

Assignments of Error—Broadside exception and assignment of error to charge, *S. v. Stevens*, 40; *S. v. Thomas*, 212; *Tillman v. Talbert*, 270; assignment not supported by exception is ineffectual, *Tynes v. Davis*, 528; *Ausband v. Pack*, 694; *S. v. Crumlin*, 695; *Watson v. Assurance Corp.*, 696; must present question involved without necessity of voyage through record, *S. v. Mills*, 487; *Tillis v. Cotton Mills*, 587; *Armstrong v. Howard*, 598; exceptions and assignments of error not discussed in the brief are deemed abandoned, *S. v. Garner*, 79; *S. v. Thomas*, 212; *S. v. Hairr*, 506; *Paul v. Neece*, 565; *Lieb v. Mayer*, 613; *Watson v. Assurance Corp.*, 696; *S. v. Cauley*, 701; *Robinson v. Thomas*, 732; *S. v. McNeely*, 737.

Attachment—*Harris v. Upham*, 477.

Attempt—To commit offense, *S. v. McNeely*, 737.

Attorney and Client—Examination of attorney with respect to communication with client entitles opposing party to cross-examine in regard thereto, *Hayes v. Ricard*, 313; counsel not entitled to argue irrelevant law, *S. v. Crisp*, 407; appeal from order allowing attorneys to withdraw and allowing fees, *Rogers v. Brantley*, 744; allowance of fee upon appeal from Industrial Commission, *Liles v. Electric Co.*, 653.

Attractive Nuisance—Distinction between temptation to enter and implied invitation to enter, *Jessup v. R. R.*, 242; maintenance of unenclosed pond on land is not negligence, *Burns v. Gardner*, 602.

Automobiles—Liability of promoters of stock car racing for injury to participant, *Blevins v. France*, 334;

State Tort Claims Act, see State; automobile insurance, see Insurance; liability of members of partnership for negligent operation of partnership vehicle, *Hardy & Newsome, Inc., v. Whedbee*, 682; safety statutes, *McNair v. Richardson*, 65; attention to road, *Kellogg v. Thomas*, 722; stopping and parking, *Royal v. McClure*, 186; following vehicle, *Royal v. McClure*, 186; intersections, *Alford v. Washington*, 132; *Wright v. Pegram*, 45; bicycles, *Harris v. Davis*, 579; pedestrians, *Merrell v. Kindley*, 118; *Shinault v. Creed*, 217; *Fleming v. Twiggs*, 666; *Kellogg v. Thomas*, 722; pleadings, *Royal v. McClure*, 186; presumptions, *Fleming v. Twiggs*, 666; *Merrill v. Kindley*, 118; opinion evidence of speed, *Fleming v. Twiggs*, 666; doctrine of rescue, *Alford v. Washington*, 132; last clear chance, *Lambert v. Bland*, 283; punitive damages, *Hinson v. Dawson*, 23; *respondeat superior*, *Brothers v. Jernigan*, 441; *Hardy & Newsome v. Whedbee*, 682; *Kellogg v. Thomas*, 722; homicide, *S. v. Powell*, 280; speeding, *S. v. Sutton*, 679; reckless driving, *S. v. Sutton*, 679; drunken driving, *S. v. Hairr*, 506; *S. v. Merritt*, 687; *S. v. Garner*, 79; *S. v. Barham*, 80.

"Average Weekly Wage"—As basis for computation of award under Workmen's Compensation Act, *Liles v. Electric Co.*, 653.

Bailment—Conversion of cargo by truck driver, *Peed v. Burleson's, Inc.*, 437.

Bastards—Willful failure to support, *S. v. Coppedge*, 590.

Beer—Transportation of beer in truck unregistered for this purpose, illegal, *S. v. McCullough*, 11.

Belt—May be deadly weapon, *S. v. Cauley*, 701.

Best and Secondary Evidence—Where record is used not to prove contents but to refresh witness' memory, best and secondary evidence rule does not apply, *S. v. Merritt*, 687.

Bias—Party entitled to cross-examine witness for purpose of showing bias, *S. v. Rowell*, 280.

Bicyclist—Evidence of contributory negligence of cyclist *held* sufficient for jury, *Harris v. Davis*, 579.

Bill of Discovery—*Hayes v. Ricard*, 313; *Construction Co. v. Housing Authority*, 261; *Cates v. Finance Co.*, 277; *Tillis v. Cotton Mills*, 587.

Bills and Notes—Where note is protected by insurance procured by holder, maker may set up loss covered by insurance as defense, *Trust Co. v. Currin*, 102.

Bill of Particulars—Cannot supply fatal deficiency in warrant or indictment, *S. v. Cox*, 57; motion for bill of particulars is addressed to the discretion of the court, *S. v. Flowers*, 77; party is confined to items specified in his bill of particulars, *Hill v. Spinning Co.*, 554.

Bonds—Validity of school bonds not affected by federal decision against enforced segregation, *Constantian v. Anson County*, 221.

Boundaries—Witness may testify from own knowledge as to whether land is included in description, *Etheridge v. Wescott*, 637; processioning proceedings, *Jenkins v. Trantham*, 422.

Brief—Exceptions and assignments of error not discussed in the brief are deemed abandoned, *S. v. Garner*, 79; *S. v. Thomas*, 212; *S. v. Hairr*, 506; *Paul v. Neece*, 565; *Lieb v. Mayer*, 613; *Watson v. Assurance Corp.*, 696; *S. v. Cauley*, 701; *Robinson v. Thomas*, 732; *S. v. McNeely*, 737.

Broadside Exceptions—Broadside exception and assignment of error to charge, *S. v. Stevens*, 40; *S. v. Thomas*, 212; *Tillman v. Talbert*, 270.

Buggery—*S. v. Lance*, 455.

Building Contractors—Action on construction contract, *Construction Co. v. Housing Authority*, 261; *Rankin v. Helms*, 532.

Burden of Proof—In ejectment, see Ejectment; in homicide prosecutions, see Homicide; in proceedings to establish boundary, see Bounda-

ries; upon affirmative defense, *Blevins v. France*, 334; on issue of contributory negligence, *Harris v. Davis*,, 579; of proving parol trust, *Paul v. Neece*, 565; of proving plea of adultery as defense to alimony, *Lawson v. Lawson*, 689; charge on burden of proof, *Paul v. Neece*, 565.

Burden of Showing Error—Appellant has burden of showing prejudicial error, *S. v. Stevens*, 40; *In re Gamble*, 149.

Burglary—*S. v. Neill*, 252.

Bus Companies — Intra-urban bus fares, *Utilities Commission v. Greensboro*, 247.

Carriers—Whether carrier is agent of purchaser or seller, *Peed v. Burleson's, Inc.*, 437; fares, *Utilities Com. v. Greensboro*, 247.

Certiorari—*Sanford v. Oil Co.*, 388.

Charge—See Instructions.

Chattel Mortgage—In action on chattel mortgage note, defendant may set up that chattel was damaged by risk covered by policy and have insurer joined as party defendant, *Trust Co. v. Currin*, 102.

Checks—Check as constituting payment, *Paris v. Builders Corp.*, 35.

Children—Service of process on, and appointment of guardian for minors, see Infants; injury to children on premises, see Negligence; assault on minor child by step-father and mother, *S. v. Cauley*, 701; duty to support, *Pace v. Pace*, 698; illegitimate children, see Bastards.

Circumstantial Evidence—Court need not charge on circumstantial evidence in absence of request, *S. v. Stevens*, 40; sufficiency of circumstantial evidence to overrule nonsuit in general, *S. v. Stephens*, 380; of guilt of homicide *held* sufficient to overrule motion to nonsuit, *S. v. Simpson*, 325; *S. v. Stephens*, 380; of conspiracy, *S. v. McCullough*, 11.

Clerical Error—Correction of, in statute, *S. v. Daniels*, 671.

Clerks of Court—Jurisdiction of Superior Court on appeal, *Rich v. R. R.*, 175; appointment of successor trustee must be approved by judge, *Trust Co. v. Toms*, 645; authority to order sale of land for taxes, *Travis v. Johnston*, 713.

Cloud on Title—Actions to remove, see Quieting Title.

"Collision"—Striking of limb by cab of truck is collision within meaning of insurance policy, *Griffin v. Insurance Co.*, 484.

Common Knowledge—Judicial notice of matters within common knowledge, *Scarborough v. Veneer Company*, 1; that person does not become intoxicated immediately upon drinking is matter of common knowledge, *S. v. Hairr*, 506.

Communications With Decedent—Examination of witness in regard to communications with decedent entitles opposing party to cross-examine witness in regard thereto, *Hayes v. Ricard*, 313.

Compensation Act—See Master and Servant.

Complaint—See Pleadings; pleadings are necessary part of record proper, *Pace v. Pace*, 698.

Compromise and Settlement—*Davis v. Hargett*, 157.

Condition—Estates upon condition, *Board of Education v. Edgerton*, 576.

Consideration—Sufficient to support deed, see Deeds; not necessary to support parol trust, *Paul v. Neece*, 565.

Conspiracy—*S. v. McCullough*, 11; *S. v. Thomas*, 212.

Constitutional Law—Assignment of school children, *Joyner v. Board of Education*, 164; statute providing for removal to Superior Court upon demand for jury trial in recorder's court is valid, *S. v. Register*, 480; question of constitutionality of statute may not be raised by person not having present right to protect, *Fox v. Comrs. of Durham*, 497; conflict between State and Federal Constitutions, *Constantian v. Anson County*, 221; making of law is for Legislature and not Court, *Jenkins v. Department of Motor Vehicles*, 560; equal application of law, *Constan-*

tian v. Anson County, 221; due process, *Harrington v. Steel Products*, 675; necessity for indictment, *S. v. Underwood*, 68.

Construction Companies—Action on construction contract, *Construction Co. v. Housing Authority*, 261; *Rankin v. Helms*, 532.

Contempt of Court—*Lawson v. Lawson*, 689.

Contentions—Fact that statement of State's contentions is longer than that of defendant not ground for objection, *S. v. Sparrow*, 81; inadvertence in statement must be brought to trial court's attention in apt time, *Millikan v. Simmons*, 195.

Continuance—*S. v. Stevens*, 40; *S. v. Flowers*, 77.

Continuing Offense—*S. v. Coppedge*, 591.

Contractors—Action on construction contract, *Construction Co. v. Housing Authority*, 261; *Rankin v. Helms* 532.

Contracts—Required to be in writing, see Frauds, Statute of; action on construction contract, *Construction Co. v. Housing Authority*, 261; *Rankin v. Helms*, 532; enjoining commissioners from making payments under contract for appraising tax values, *Hyder v. McBride*, 485; contracts of employment, see Master and Servant; written and parol provisions, *Rankin v. Helms*, 532; contracts against public policy, *Electronics Co. v. Radio Corp.*, 114; *Tillman v. Talbert*, 270; performance or breach, *Construction Co. v. Housing Authority*, 261; contracts to convey, see Vendor and Purchaser; nonresident may be served by publication in order to enforce contract to convey, *Harris v. Upham*, 477.

Contributory Negligence—Nonsuit for contributory negligence, *Wright v. Pegram*, 45; *Hedrick v. Akers*, 274; *Blevins v. France*, 334; on part of person attempting rescue, *Alford v. Washington*, 132; of cyclist *held* sufficient for jury, *Harris v. Davis*, 579; question of contributory negligence may be submitted on issue of plaintiff's negligence in cross-action, *Atkins v. Daniel*, 218; burden of proof on, *Harris v. Davis*, 579.

Controversy Without Action—*Griffin v. Springer*, 95; *Peel v. Moore*, 512; *Eason v. Dew*, 571.

Conversion—Trover and conversion, see Trover and Conversion.

"Corner"—Within proviso of zoning ordinance, *Bryan v. Sanford*, 30.

Coroner—Whether coroner's death certificate competent as to cause of death, *quære*, *Blalock v. Durham*, 208.

Corporations—Action by corporation for misappropriation of president not bar to action by president for salary, *Hill v. Spinning Co.*, 554; service of process on foreign corporation by service on Secretary of State, *Housing Authority v. Brown*, 592; *Harrington v. Steel Products, Inc.*, 675; location of principal office, *Noland Co. v. Construction Co.*, 50; liability of officers for torts of corporation, *Peed v. Burleson's, Inc.*, 437.

Costs—In proceedings under Workmen's Compensation Act, *Liles v. Electric Co.*, 653.

County—Order enjoining commissioners from making payments under contract for appraising tax values, *Hyder v. McBride*, 485.

County Courts—Exclusive or concurrent jurisdiction of Superior Courts and inferior courts, *S. v. McCullough*, 11; *S. v. Baucom*, 61; general county court, *Waters v. McBee*, 540.

Courts—Jurisdiction in general, *Hart v. Motors*, 84; *Waters v. McBee*, 540; *appeals to Superior Court* from inferior courts, *Clements v. Booth*, 474; appeals from clerk, *Rich v. R. R.*, 175; jurisdiction after orders of another Superior Court judge, *Burrell v. Transfer Co.*, 662; county, municipal and recorders' courts, *Waters v. McBee*, 540; *S. v. Everett*, 596; *S. v. Daniels*, 671; exclusive or concurrent jurisdiction of Superior Courts and inferior courts, *S. v. McCullough*, 11; *S. v. Baucom*, 61;

jurisdiction of Superior Court after appeal, *Shaver v. Shaver*, 311; defendant may be tried on original warrant on appeal from conviction in inferior court, *S. v. Underwood*, 68; power of trial court to amend and correct its records, *S. v. Cannon*, 399; *S. v. Arthur*, 582; *S. v. Arthur*, 586; *Trust Co. v. Toms*, 645; court may not determine issue of fact raised by pleadings, *Hayes v. Ricard*, 313; right of judge to discharge grand juror, *S. v. Stevens*, 41; court may ask witness questions of clarifying nature, *S. v. Stevens*, 40; expression of opinion by court, *Brittain v. Blankenship*, 518.

Crime Against Nature—*S. v. Lance*, 455.

Criminal Law—Qualification and selection of grand jury, see Grand Jury; defendant may be tried on original warrant on appeal from conviction in inferior court, *S. v. Underwood*, 68; attempts, *S. v. McNeely*, 737; felonies and misdemeanors, *S. v. McNeely*, 737; mental capacity, *S. v. Duncan*, 374; limitations, *S. v. Underwood*, 68; aiders and abettors, *S. v. Cauley*, 701; jurisdiction, *S. v. Sutton*, 679; *S. v. Daniels*, 671; *S. v. Baucom*, 61; *S. v. McCullough*, 11; *S. v. Register*, 480; former jeopardy, *S. v. Coppedge*, 590; judicial notice, *S. v. Hairr*, 506; competency of evidence, *S. v. Cauley*, 701; examination of experts, *S. v. Simpson*, 325; silence as implied admission, *S. v. Cauley*, 701; best and secondary evidence, *S. v. Merritt*, 687; competency of wife, *S. v. Dillahunt*, 524; cross-examination, *S. v. Conner*, 109; *S. v. Rowell*, 280; evidence competent to impeach witness, *S. v. Crisp*, 407; evidence obtained by unlawful means, *S. v. White*, 73; continuance, *S. v. Stevens*, 40; *S. v. Flowers*, 77; order of proof, *S. v. Thomas*, 212; interrogation of witness by court, *S. v. Stevens*, 40; argument to jury, *S. v. Conner*, 109; *S. v. Crisp*, 407; sufficiency of evidence and nonsuit, *S. v. Simpson*, 325; *S. v. Crisp*, 407; *S. v. Mooring*, 624; *S. v. Stephens*, 380; instructions, *S. v. Hairr*, 506; *S. v. McNeely*, 737; *S. v. Stevens*, 40; *S. v. Sparrow*, 81; *S. v. Cauley*, 701; *S. v. Conner*, 109; form and sufficiency of verdict, *S. v. McNeely*, 737; arrest of judgment, *S. v. Lucas*, 53; *S. v. Cox*, 57; *S. v. Coppedge*, 590; *S. v. Baucom*, 61; newly discovered evidence, *S. v. Williams*, 459; punishment, *S. v. McNeely*, 737; suspended judgments, *S. v. Thompson*, 282; *S. v. Davis*, 621; appeals, supervisory jurisdiction, *S. v. Everett*, 596; effect of appeal, *S. v. Arthur*, 586; exceptions and assignments of error, *S. v. Mills*, 487; *S. v. Crumlin*, 695; *S. v. Dillahunt*, 524; *S. v. Stevens*, 40; *S. v. Thomas*, 212; *S. v. Cauley*, 701; the brief, *S. v. Garner*, 79; *S. v. Thomas*, 212; *S. v. Hairr*, 506; *S. v. Cauley*, 701; *S. v. McNeely*, 737; nature and grounds of appellate jurisdiction, *S. v. Neill*, 252; *S. v. Williams*, 459; *S. v. Sparrow*, 623; *S. v. Kay*, 117; presumptions and burden of showing error, *S. v. Stevens*, 40; harmless and prejudicial error, *S. v. Hairr*, 506; *S. v. Conner*, 109; *S. v. Cauley*, 701; *S. v. Riddle*, 78; *S. v. Thomas*, 212; review of judgments on motions to nonsuit, *S. v. Stephens*, 380; motions in Supreme Court, *S. v. Lucas*, 53; remand, *S. v. Sutton*, 679; proceedings in lower court after remand, *S. v. Arthur*, 582.

Crops—Crop lien, *Eason v. Dew*, 571.

Cross-Examination—Scope of cross-examination, *S. v. Conner*, 109; cross-examiner not concluded by answers to collateral matters tending to show bias, *In re Gamble*, 149; party entitled to cross-examine witness for purpose of showing bias, *S. v. Rowell*, 280.

Cyclist—Evidence of contributory negligence of cyclist *held* sufficient for jury, *Harris v. Davis*, 579.

Damages—*Hinson v. Dawson*, 23; *Rankin v. Helms*, 532; *Lieb v. Mayer*, 613.

Deadly Weapon—Intentional pointing of pistol, *Lowe v. Dept. of Motor*

Vehicles, 353; within meaning of charge of assault with deadly weapon, *S. v. Cauley*, 701; presumptions from killing with deadly weapon, *S. v. Crisp*, 407.

Death Certificate—Whether coroner's death certificate competent as to cause of death, *quære*, *Blalock v. Durham*, 208.

Decedent—Examination of witness in regard to transactions with decedent entitles opposing party to cross-examine witness in regard thereto, *Hayes v. Ricard*, 313.

Declaration—Of agent incompetent to prove fact of agency, *Brothers v. Jernigan*, 441.

Dedication—*Bryan v. Sanford*, 30.

Deeds—Purchaser may join in action of trespass to try title, *Veasey v. King*, 216; creation of estate by entirety, see Husband and Wife; creation of resulting and constructive trusts, see Trusts; sufficiency of deed to convey title may be adjudicated by controversy without action, *Peel v. Moore*, 512; witness may testify from own knowledge as to whether land is included in description, *Etheridge v. Wescott*, 637; necessity for words of conveyance, *McLamb v. Weaver*, 432; consideration, *Hayes v. Ricard*, 313; execution, *Monteith v. Welch*, 415; registration of deeds of gift, *Harris v. Briley*, 526; general rules of construction, *Griffin v. Springer*, 95; estates and interests created, *Griffin v. Springer*, 95; *Blanchard v. Ward*, 142; *Edwards v. Butler*, 205; *Grant v. Toatley*, 463; rule in *Shelley's case*, *Griffin v. Springer*, 95; rule against perpetuities, *Griffin v. Springer*, 95; conditions subsequent, *Board of Education v. Edgerton*, 576; reservations, *Edwards v. Butler*, 205; warranties, *Shimer v. Traub*, 466; timber deeds, *Scarborough v. Veneer Co.*, 1.

Deeds of Trust—See Mortgages.

Default Judgment—See Judgments.

Deficiency—After foreclosure, *Fleishel v. Jessup*, 451.

Demurrer—See Pleadings; appeal will not lie from overruling of demurrer for misjoinder of causes or failure of complaint to state cause of action, *Wilks, Inc., v. Dillingham*, 522; *Clements v. Simmons*, 523.

Descent and Distribution—Heirs of the blood of the ancestor, *Peel v. Moore*, 512; advancements, *Price v. Davis*, 229.

Desegregation—Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Directed Verdict—*Millikan v. Simmons*, 195.

Discovery—See Bill of Discovery.

Discrimination—Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Disjunctive—Use of disjunctive "or" in indictment, *S. v. Merritt*, 687.

Divorce and Alimony—Affidavits and jurisdiction, *Carpenter v. Carpenter*, 286; alimony without divorce, *Allen v. Allen*, 446; *Lawson v. Lawson*, 689; alimony *pendente lite*, *Lawson v. Lawson*, 689; validity and attack of domestic decrees, *Carpenter v. Carpenter*, 286; *Shaver v. Shaver*, 309.

Doctrine of Rescue—*Blevins v. France*, 334.

Doctrine of Sudden Emergency—*Blevins v. France*, 334.

"Doing Business in This State"—*Housing Authority v. Brown*, 592; *Harrington v. Seel Products, Inc.*, 675.

Domesticated Corporations — Change of location of principal office of domesticated corporation, *Noland Co. v. Construction Co.*, 50.

Drain Pipe—Liability for fall of pedestrian over drain pipe across sidewalk, *Hedrick v. Akers*, 274.

Drunken Driving—Driving while intoxicated, *S. v. Garner*, 79; *S. v. Barham*, 80; *S. v. Hairr*, 506; *S. v. Merritt*, 687.

Dust—Enjoining discharge of dust into air incident to mica mining, *Hall v. Mica Corp.*, 182.

Dynamite—Homicide by use of, *S. v. Stephens*, 380.

Ejectment—Sale of land pending action *held* not to abate it, *Willcox v. Di Capadarso*, 741; action for possession is action in ejectment, *Hayes v. Ricard*, 313; burden of proof, *Hayes v. Ricard*, 313; witness may testify of her own knowledge as to boundaries, *Etheridge v. Wescott*, 637.

Election of Remedies—*Surratt v. Ins. Agency*, 121; *Jenkins v. Trantham*, 422; *Davis v. Hargett*, 157.

Electricity—Electrocution as accident arising out of and in course of employment, *Blalock v. Durham*, 208; negligence of power distributor, *Alford v. Washington*, 132.

Employer and Employee—See Master and Servant.

Entirety, Estate by—See Husband and Wife.

Equal Protection and Application Laws—Integration does not affect validity of bonds, *Constantian v. Anson County*, 221; assignment of school children, *Joyner v. Board of Education*, 164.

Escrow—Deed of gift not registered within two years is void, *Harris v. Briley*, 526.

Estate by Entirety—See Husband and Wife.

Estates—Upon condition, *Board of Education v. Edgerton*, 576; merger of estates, *Blanchard v. Ward*, 142; life estates and remainders, *Griffin v. Springer*, 95; *Stanley v. Foster*, 201; *Blanchard v. Ward*, 142; in personalty, *Ridge v. Bright*, 345.

Estoppel—By judgment, see Judgments; estoppel of child by release of any claim for distributive share in parent's estate, *Price v. Davis*, 229; persons estopped, *Hayes v. Ricard*, 313; pleading estoppel, *Wright v. Ins. Co.*, 361.

Evidence—Sufficiency of evidence to overrule nonsuit, see Nonsuit; judicial notice, *Sarborough v. Veneer Co.*, 1; burden of proof, *Blevins v. France*, 335; privileged communications, *Hayes v. Ricard*, 313; impeaching witness, *In re Gamble*, 149; *Nance v. Fike*, 368; cross-examination, *In re Gamble*, 149; *S. v. Rowell*, 280; transactions with decedent, *Hayes v. Ricard*, 313; parol evidence, *Rankin v. Helms*, 532; admissions in pleadings, *Brothers v. Jernigan*, 441; opinion evidence, *Rankin v. Helms*, 532; expression of opinion by court on evidence, *S. v. Stevens*, 40; *S. v. Sparrow*, 81; interrogation of witness by court *held* to constitute expression of opinion on testimony, *In re Will of Holcomb*, 391; order of proof, *S. v. Thomas*, 212; inspection of writings, see Bill of Discovery; motion for new trial for newly discovered evidence, *S. v. Williams*, 459; *S. v. Sparrow*, 623; *Jeffries v. Garage*, 745; inadmissibility of parol evidence under Statute of Frauds, *Elliott v. Owen*, 684; evidence in support of allegations which have been stricken, properly excluded, *Robinson v. Thomas*, 732; admission of evidence, objections and exceptions thereto, see Trial; inadvertence in statement must be brought to trial court's attention in apt time, *Millikan v. Simmons*, 195; harmless and prejudicial error in admission or exclusion of evidence, *S. v. Conner*, 109; *In re Gamble*, 149; *S. v. Cauley*, 701.

Ex Mero Motu—Supreme Court may take notice of defect of parties, *Shaver v. Shaver*, 309; Court will dismiss fragmentary appeal, *ex mero motu*, *Rogers v. Brantley*, 744.

Exceptions—Broadside exception and assignment of error to charge, *S. v. Stevens*, 40; *S. v. Thomas*, 212; *Tillman v. Talbert*, 270; exceptions to findings of fact, *Travis v. Johnston*, 713; *Conner v. Rubber Co.*, 516; no objection or exception necessary to admission of incriminating statement made by wife of defendant, *S. v. Dillahunt*, 524; exception to judgment or signing of judgment, *Surratt v. Insurance Agency*, 123;

Travis v. Johnston, 713; assignment not supported by exception is ineffectual, *Tynes v. Davis*, 528; *Ausband v. Pack*, 694; *S. v. Crumlin*, 695; *Watson v. Assurance Corp.*, 696; assignment should present question involved without compelling the Court to go beyond assignments themselves, *Tillis v. Cotton Mills*, 587; exceptions and assignments of error not discussed in the brief are deemed abandoned, *S. v. Garner*, 79; *S. v. Thomas*, 212; *S. v. Hairr*, 506; *Watson v. Assurance Corp.*, 696; *S. v. Cauley*, 701; *Robinson v. Thomas*, 732; *S. v. McNeely*, 737.

Execution—Suspended judgments and executions, *S. v. Thompson*, 282; evidence *held* to support finding of breach of condition of suspension, *S. v. Davis*, 621; property subject to execution, *Cornelius v. Albertson*, 265; supplemental proceedings, *Ibid.*

Executors and Administrators—Estoppel of child by release of any claim for distributive share in parent's estate, *Price v. Davis*, 229; operation of business by administrator, *Poindexter v. Bank*, 191.

Expert Witnesses—Hypothetical question assuming existence of fact not supported by evidence is incompetent, *S. v. Simpson*, 325.

Expression of Opinion—By court on evidence, *S. v. Stevens*, 40; *S. v. Sparrow*, 81; *In re Will of Holcomb*, 391.

Facts Agreed—See Controversy Without Action.

Facts, Findings of—See Findings of Facts.

False Swearing—Attack of judgment for, *Carpenter v. Carpenter*, 286.

Fares—Intra-urban bus fares, *Utilities Commission v. Greensboro*, 247.

Felony—Attempt to commit robbery is infamous crime, *S. v. McNeely*, 737.

Findings of Fact—Review of findings or judgment on findings, *Rubber Co. v. Shaw*, 170; *Rich v. R. R.*, 175; conclusive when supported by evidence, *Bradshaw v. Board of Education*, 393; *Conner v. Rubber Co.*, 516; *Williams v. Board of Education*, 599; made under misapprehension of applicable law will not be disturbed when errors do not affect result of case, *Lowe v. Dept. of Motor Vehicles*, 353; findings of referee are conclusive when supported by evidence, *Mimidis v. Papaulias*, 479; of Industrial Commission conclusive when supported by evidence, *Blalock v. Durham*, 208; preservation of exceptions to findings of fact, *Conner v. Rubber Co.*, 516; *Travis v. Johnston*, 713.

Fixtures—Whether personalty was affixed to and became part of realty, *Fleishel v. Jessup*, 451.

Fog—Stopping automobile on highway because visibility obscured by fog and smoke, *Royal v. McClure*, 186.

Foreclosure—Of tax lien, *Cherry v. Woolard*, 603.

Foreign Corporation—Service on by service on Secretary of State, *Housing Authority v. Brown*, 592; *Harrington v. Steel Products, Inc.*, 675.

Foreseeability—See Negligence; Automobiles.

Former Jeopardy—Plea not available for continuing offense, *S. v. Coppedge*, 590.

Fragmentary Appeal — *Rogers v. Brantley*, 744.

Fraud—Election between rescission for fraud or damages, *Surratt v. Insurance Agency*, 121; *Davis v. Hargett*, 157; attack of judgment for fraud, *Carpenter v. Carpenter*, 286; past or subsisting fact, *Vincent v. Corbett*, 469.

Frauds, Statute of—Statutory requirement that contract limiting right to do business must be in writing, *Electronics Co. v. Radio Corp.*, 114; sufficiency of writing, *Millikan v. Simmons*, 196; *Elliott v. Owen*, 684; burden of proof, *Elliott v. Owen*, 684; contracts affecting realty, *Rankin v. Helms*, 532.

Games and Exhibitions—Injury to stock car racer, *Blevins v. France*, 334.

General Appearance—*Waters v. McBee*, 540.

General County Courts—Exclusive or concurrent jurisdiction of Superior Courts and inferior courts, *S. v. McCullough*, 11; *S. v. Baucom*, 61; jurisdiction of, *Waters v. McBee*, 540.

General Reputation—Competency of testimony of general reputation, *Nance v. Fike*, 368.

Gifts—Deed of gift not registered within two years is void, *Harris v. Briley*, 526.

Grand Jury—*S. v. Stevens*, 40.

Gravel—Taking sand and gravel from land of another, see Larceny.

Guardian Ad Litem—Appointment of, *Cherry v. Woolard*, 603; duty to ward, *Travis v. Johnston*, 713; acceptance of service of process by, *Travis v. Johnston*, 713.

Habeas Corpus—To obtain freedom from unlawful restraint, *S. v. Cannon*, 399.

Harmless and Prejudicial Error—Appellant has burden of showing prejudicial error, *S. v. Stevens*, 40; *In re Gamble*, 149; error relating to one count only, *S. v. Riddler*, 78; *S. v. Thomas*, 212; remark of court provoked by appellant will not be held prejudicial, *Brittain v. Blankenship*, 518; in the admission or exclusion of evidence, *S. v. Conner*, 109; *In re Gamble*, 149; *S. v. Cauley*, 701; in instructions, *S. v. Hairr*, 506; *S. v. Sutton*, 679; *S. v. Cauley*, 701.

Hearsay Evidence — Declaration of agent incompetent to prove fact of agency, *Brothers v. Jernigan*, 441.

Heirs—Of the blood of the ancestor, *Peel v. Moore*, 512.

Highway Patrolman—Negligent shooting of person arrested, *Lowe v. Dept. of Motor Vehicles*, 353; action for wrongful death for killing of prisoner by patrolman, *Jenkins v. Department of Motor Vehicles*, 560.

Highway Workmen—Injury to workman from vehicle, *Kellogg v. Thomas*, 722.

Highways—State Tort Claims Act does not cover injury from defective condition of highway, *Flynn v. Highway Commission*, 617; law of the road, see Automobiles.

Homicide—Murder in second degree, *S. v. Crisp*, 407; presumptions and burden of proof, *S. v. Simpson*, 325; *S. v. Crisp*, 407; sufficiency of evidence and nonsuit, *S. v. Simpson*, 325; *S. v. Stephens*, 380; *S. v. Duncan*, 374; *S. v. Crisp*, 407; instructions, *S. v. Crisp*, 407; appeal and review, *S. v. Stephens*, 380.

Husband and Wife—May maintain joint action for trespass, *Hall v. Mica Corp.*, 182; right to sue wife without joinder of husband, *Etheridge v. Wescott*, 637; liability of wife for crime committed in presence of husband, *S. v. Cauley*, 701; estates by entireties, *Woolard v. Smith*, 489; divorce and alimony, see Divorce and Alimony; no objection or exception necessary to admission of incriminating statement made by wife of defendant, *S. v. Dillahunt*, 524.

Hypothetical Question—Assuming existence of fact not supported by evidence is incompetent, *S. v. Simpson*, 325.

Illegitimate Children—See Bastards.

Income Tax—Computation of loss carry-over for income tax, *Rubber Co. v. Shaw*, 170.

Independent Contractor—Is not covered by Compensation Act, *Hart v. Motors*, 84.

Indictment and Warrant—Charge of crime, *S. v. Cox*, 57; *S. v. Merritt*, 687; bill of particulars, *S. v. Cox*, 57; *S. v. Flowers*, 77; for aiding and abetting in prostitution, *S. v. Cox*, 57; *S. v. Powell*, 121; for subornation of perjury, *S. v. Lucas*, 53; qualification and selection of grand jury, see Grand Jury; defendant may be tried on original warrant on appeal from conviction in inferior court, *S. v. Underwood*, 68; issuance of warrant tolls running of statute in prosecution for misdemeanor, *S. v. Underwood*, 68; statute providing for removal to Superior Court upon demand for

jury trial in recorder's court is valid, *S. v. Register*, 480.

Industrial Commission—See Master and Servant; jurisdiction in hearings under State Tort Claims Act, see State.

Infamous Misdemeanor—Attempt to commit robbery is infamous crime, *S. v. McNeely*, 737.

Infants—Supreme Court will protect interests of infants *ex mero motu*, *Edwards v. Butler*, 205; assault on minor child by step-father and mother, *S. v. Cauley*, 701; service of process and appointment of guardian, *Cherry v. Woolard*, 604; *Travis v. Johnston*, 713; validity and attack of judgments against infants, *Travis v. Johnston*, 713.

Injunctions—Enjoining nuisance or trespass, *Hall v. Mica Corp.*, 182; *Causby v. Oil Co.*, 235; enjoining implementation of statute, *Fox v. Comrs. of Durham*, 497; temporary orders, *Causby v. Oil Co.*, 235; *Hyder v. McBride*, 485; *Willcox v. Di Capadarso*, 741.

Innocent Purchaser—At tax foreclosure sale, *Travis v. Johnston*, 713.

Insanity—Defense of insanity, *S. v. Duncan*, 374.

Inspection of Writings—See Bill of Discovery.

Instructions—Requisite and sufficiency of instructions, *S. v. Hairr*, 506; charge *held* not to impinge jury's right to recommend mercy, *S. v. Conner*, 109; charge on burden of proof, *Paul v. Neece*, 565; as to permissible verdicts, *S. v. Cauley*, 701; *S. v. McNeely*, 737; peremptory instruction, *Millikan v. Simmons*, 195; party desiring elaboration on particular point should tender request for instructions, *Millikan v. Simmons*, 195; court need not charge jury to scrutinize testimony of accomplices in absence of request, *S. v. Stevens*, 40; court need not charge on circumstantial evidence in absence of request, *S. v. Stevens*, 40; fact that statement of State's contentions is longer than that of defendant not ground for objection, *S. v. Sparrow*, 81; instructions in automobile cases, see Automobiles; in homicide prosecutions, see Homicide; in prosecution for perjury, *S. v. Arthur*, 582; broadside exception and assignment of error to charge, *S. v. Stevens*, 40; *Tillman v. Talbert*, 270; *S. v. Thomas*, 212; inadvertence in statement must be brought to trial court's attention in apt time, *Millikan v. Simmons*, 195; not in record deemed correct, *Harris v. Davis*, 579; harmless and prejudicial error in instructions, *S. v. Hairr*, 506; *S. v. Sutton*, 679; *S. v. Cauley*, 701.

Insurance—Accident and health insurance, *Scarborough v. Ins. Co.*, 502; auto collision and upset, *Griffin v. Ins. Co.*, 484; *Jarvis v. Ins. Co.*, 691; actions on auto policies, *Wright v. Ins. Co.*, 361.

Integration — Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Intent to Kill—Within meaning of prosecution for assault with deadly weapon with intent to kill, *S. v. Cauley*, 701.

Interlocutory Order—Appeal lies from interlocutory order affecting substantial right, *Jenkins v. Trantham*, 422.

Intersections—See Automobiles.

Inter Vivos Trusts—*Ridge v. Bright*, 345.

Intoxicating Liquor—Construction and operation of statutes, *S. v. Daniels*, 671; possession of implements of manufacture, *S. v. Edmundson*, 693; sufficiency of evidence and nonsuit, *S. v. McCullough*, 11; *S. v. Ryals*, 75.

Intoxication—Driving while intoxicated, *S. v. Garner*, 79; *S. v. Barham*, 80; *S. v. Hairr*, 506.

Invited Error—Remark of court provoked by appellant will not be held prejudicial, *Brittain v. Blankenship*, 518.

Issues—Form and sufficiency of, *Millikan v. Simmons*, 195; question of contributory negligence may be sub-

mitted on issue of plaintiff's negligence in cross-action, *Atkins v. Daniel*, 218; evidence of contributory negligence of cyclist *held* sufficient for jury, *Harris v. Davis*, 579; sufficiency of evidence to require submission of issue of last clear chance, *Lambert v. Bland*, 283; must arise upon pleadings, *Jenkins v. Trantham*, 422.

"J. P."—Use of abbreviations in court records disapproved, *S. v. Edmundson*, 693.

Jailer—May use record of arrest to refresh memory in testifying as to time of release of defendant, *S. v. Merritt*, 687.

Jeopardy—Plea of former jeopardy not available for continuing offense, *S. v. Coppedge*, 590.

Joint Tort-Feasors—Joinder of, see Torts; release of one joint tort-feasor releases all, *MacFarlane v. Wildlife Resources Com.*, 385.

Judges—Interrogation of witness by court *held* to constitute expression of opinion on testimony, *In re Will of Holcomb*, 391; correction of record to speak the truth, *S. v. Cannon*, 399; *S. v. Arthur*, 582; *S. v. Arthur*, 586; *Trust Co. v. Toms*, 645; one Superior Court judge is bound by order of another allowing amendment to pleadings, *Burrell v. Transfer Co.*, 662.

Judgments—By default, *Rich v. R. R.*, 175; conformity to pleading, proof and verdict, *Travis v. Johnston*, 713; service and jurisdiction, *Harris v. Upham*, 477; *Cherry v. Woolard*, 602; correction in trial court, *S. v. Cannon*, 399; *Trust Co. v. Toms*, 645; *S. v. Arthur*, 586; attack, *Carpenter v. Carpenter*, 286; *Shaver v. Shaver*, 309; *Hart v. Motors*, 84; *Rich v. R. R.*, 175; *Travis v. Johnston*, 713; parties concluded, *Peel v. Moore*, 512; *res judicata*, *Surratt v. Ins. Agency*, 212; motion for judgment on the pleadings, see Pleadings; arrest of judgment, *S. v. Lucas*, 53; *S. v. Cox*, 57; *S. v. Baucom*, 61; appeal will not lie where prayer for judgment is continued, *S. v. Kay*, 117; motion in arrest of judgment may be made in Supreme Court, *S. v. Lucas*, 53; suspended judgments and executions, *S. v. Thompson*, 282; *S. v. Davis*, 621; evidence *held* to support finding of breach of condition of suspension, *S. v. Davis*, 621; execution on judgment, see Executions; payment of judgment lien out of proceeds of foreclosure sale, *Military Academy v. Dockery*, 427; appealable, *S. v. Kay*, 117; *Jenkins v. Trantham*, 422; *Harris v. Upham*, 477; *Wilks, Inc., v. Dillingham*, 522; *Clements v. Simmons*, 523; *Willcox v. Di Capadarso*, 741; appeal will lie from overruling of demurrer for misjoinder of parties and causes, *Hall v. Mica Corp.*, 182; exception to judgment or signing of judgment, *Surratt v. Insurance Agency*, 121; *Travis v. Johnston*, 713.

Judicial Notice—Of matters within common knowledge, *Scarborough v. Veneer Company*, 1; that person does not become intoxicated immediately upon drinking is matter of common knowledge, *S. v. Hairr*, 506.

Judicial Sales—Title and rights of purchaser, *Cherry v. Woolard*, 603.

Junk Dealers—*Mandamus held* not to lie to compel issuance of license for junk yard, *Hinshaw v. McIver*, 256.

Jurisdiction—Exclusive or concurrent jurisdiction of Superior Courts and inferior courts, *S. v. McCullough*, 11; of general county courts, see Courts; judgment rendered without jurisdiction is void, *Carpenter v. Carpenter*, 286.

Jury—Charge *held* not to impinge jury's right to recommend mercy, *S. v. Conner*, 109; court may not determine issue of fact raised by pleadings, *Hayes v. Ricard*, 313.

Laborer's Lien—*Eason v. Dew*, 571.

Laches—Appeal from recorder's court dismissed for laches for failure to have record properly docketed, *Clements v. Booth*, 474; in failing to object to failure of trustee to file bond, *Trust Co. v. Toms*, 645.

Lake—Maintenance of unenclosed lake on land is not negligence, *Burns v. Gardner*, 602.

Landlord and Tenant—Landlord's lien for rent, *Eason v. Dew*, 571; liability to tenant for defective condition of premises, *Robinson v. Thomas*, 732; liability of tenant for injury to third persons, *Hedrick v. Akers*, 274.

Larceny—*S. v. Neill*, 252; *S. v. Everett*, 596.

Last Clear Chance—Sufficiency of evidence to require submission of issue of last clear chance, *Lambert v. Bland*, 283.

Latent Defects—Liability of landlord for injury to tenant for defective condition of premises, *Robinson v. Thomas*, 732.

Law of the Case—*Hinson v. Dawson*, 23.

Leases—Liability of landlord for injury to tenant for defective condition of premises, *Robinson v. Thomas*, 732.

Leather Belt—May be deadly weapon, *S. v. Cauley*, 701.

Legislature—Supreme Court must construe an Act as written, *Jenkins v. Department of Motor Vehicles*, 560.

Less Degree of Crime—Duty to instruct on, *S. v. McNeely*, 737.

Licenses—*Mandamus held* not to lie to compel issuance of license for junk yard, *Hinshaw v. McIver*, 256.

Liens—Laborer's lien, *Eason v. Dew*, 571; landlord's lien, *Eason v. Dew*, 571.

Life Estates and Remainders—*Griffin v. Springer*, 95; *Blanchard v. Ward*, 142; *Stanley v. Foster*, 201; *Edwards v. Butler*, 205.

Life Imprisonment—Charge *held* not to impinge jury's right to recommend mercy, *S. v. Conner*, 109.

Limb—Striking of limb by cab of truck is collision within meaning of insurance policy, *Griffin v. Insurance Co.*, 484.

Limitation of Actions—Limitation on prosecution for misdemeanor, *S. v. Underwood*, 68; limitation for claim under Workmen's Compensation Act, see Master and Servant; accrual of right of action on contract to convey, *Etheridge v. Wescott*, 637.

Liquor—See Intoxicating Liquor.

Logs and Logging—Timber deed, *Scarborough v. Veneer Company*, 1.

Loss Carry-Over—Computation of loss carry-over for income tax, *Rubber Co. v. Shaw*, 170.

Malpractice—General county court has jurisdiction to hear action for malpractice, *Waters v. McBee*, 540.

Mandamus—*Hinshaw v. McIver*, 256; *Bryan v. Sanford*, 30.

Manslaughter—See Homicide and Automobiles.

Married Women—See Husband and Wife.

Master and Servant—Liability of owner for negligence of employee driver, see Automobiles; contracts of employment, *Long v. Gilliam*, 548; employer's liability for injury to third persons, *MacFarlane v. Wildlife Resources Com.*, 385; Workmen's Compensation Act—Independent contractors, *Hart v. Motors*, 84; "accident," *Blalock v. Durham*, 208; "arising out of employment," *Butler v. Heating Co.*, 525; *Zimmerman v. Freezer Locker*, 628; notice and filing of claim, *Coats v. Wilson*, 76; jurisdiction of Commission, *Hart v. Motors*, 84; change of condition and review of award, *Paris v. Builders Corp.*, 35; *Hart v. Motors*, 84; amount of recovery, *Liles v. Electric Co.*, 653; appeal and review of award, *Hart v. Motors*, 84; *Blalock v. Durham*, 208; *Conner v. Rubber Co.*, 516; *Liles v. Electric Co.*, 653; costs and attorneys' fees, *Liles v. Electric Co.*, 653; jurisdiction of Industrial Commission in hearings under State Tort Claims Act, see State.

Memorandum—Sufficiency of within Statute of Frauds, *Elliott v. Owen*, 684.

Mental Capacity—Defense of insanity, *S. v. Duncan*, 374.

Merger of Estates—*Blanchard v. Ward*, 142.

Mining—Liability for damages resulting from silt washed into stream, *Phillips v. Mining Co.*, 17; enjoining discharge of dust into air incident to mica mining, *Hall v. Mica Corp.*, 182.

Minutes—Power of trial court to amend and correct its records, *S. v. Cannon*, 399; *S. v. Arthur*, 582; *S. v. Arthur*, 586; *Trust Co. v. Toms*, 645.

Misdemeanor—Exclusive or concurrent jurisdiction of Superior Courts and inferior courts, *S. v. McCullough*, 11; *S. v. Baucom*, 61; attempt to commit robbery is infamous crime, *S. v. McNeely*, 737; limitation on prosecution for misdemeanor, *S. v. Underwood*, 68.

Misjoinder of Causes—Appeal will not lie from overruling of demurrer for misjoinder of causes or failure of complaint to state cause of action, *Wilks, Inc., v. Dillingham*, 522; *Clements v. Simmons*, 523.

Misrepresentation — Promissory misrepresentation as basis of fraud, *Vincent v. Corbett*, 469.

Monopolies—*Electronics Co. v. Radio Corp.*, 114.

Mortgages—Sufficiency of cancellation, *Monteith v. Welch*, 415; deficiency and personal liability, *Fleishel v. Jessup*, 451; disposition of proceeds and surplus, *Military Academy v. Dockery*, 427; title of purchaser, *Ibid.*

Motions—Motion for judgment on the pleadings, see Pleadings; motion in arrest of judgment, *S. v. Lucas*, 53; *S. v. Cox*, 57; *S. v. Baucom*, 61; motion in arrest of judgment may be made in Supreme Court, *S. v. Lucas*, 53; to suppress evidence, *S. v. White*, 73; motion for continuance, *S. v. Stevens*, 40; *S. v. Flowers*, 77; motion for bill of particulars is addressed to the discretion of the court, *S. v. Flowers*, 77; motion for new trial for newly discovered evidence, *S. v. Williams*, 459; *Jeffries v. Garage, Inc.*, 745; *S. v. Sparrow*, 623.

Municipal Corporations—Defects in sidewalk, *Hedrick v. Akers*, 274; assessments for improvements, *Sanford v. Oil Co.*, 388; zoning, *Bryan v. Sanford*, 30; junk yards, *Hinshaw v. McIver*, 256.

Municipal Police Officers—Fact that arrest by municipal officers was outside corporate limits does not preclude prosecution for offense for which arrest was made, *S. v. Sutton*, 679.

Murder—See Homicide.

Negligence—Joinder of joint tortfeasors, see Torts; in the operation of automobiles, see Automobiles; of railroad companies causing injury to persons other than passengers, see Railroads; waiver of sovereign immunity under State Tort Claims Act, see State; liability of landlord for injury to tenant for defective condition of premises, *Robinson v. Thomas*, 732; intentional act cannot be negligent act, *Jenkins v. Department of Motor Vehicles*, 560; sudden emergency, *Blevins v. France*, 334; injury to children from condition of premises, *Jessup v. R. R.*, 242; *Burns v. Gardner*, 602; willful negligence, *Blevins v. France*, 334; proximate cause, *McNair v. Richardson*, 65; foreseeability, *McNair v. Richardson*, 65; contributory negligence, *Alford v. Washington*, 132; *Blevins v. France*, 334; *Hedrick v. Akers*, 274; presumptions and burden of proof, *Harris v. Davis*, 579; *Fleming v. Twiggs*, 666; *Merrell v. Kindley*, 118; nonsuit, *Fleming v. Twiggs*, 666; *Robinson v. Thomas*, 732; *Wright v. Pegram*, 45; *Hedrick v. Akers*, 274; *Blevins v. France*, 334; issues, *Atkins v. Daniel*, 218; *Harris v. Davis*, 579.

Negroes—Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Newly Discovered Evidence—Motion for new trial for newly discovered evidence, *S. v. Williams*, 459; *Jeffries v. Garage, Inc.*, 745; *S. v. Sparrow*, 623.

Nonresident—May be served by publication in order to enforce contract to convey, *Harris v. Upham*, 477.

Nonsuit—Sufficiency of evidence to overrule, *Fleming v. Twiggs*, 666; *Robinson v. Thomas*, 732; sufficiency of evidence in particular actions and prosecutions, see particular titles of actions and crimes; sufficiency of circumstantial evidence to overrule nonsuit in general, *S. v. Stephens*, 380; *S. v. Simpson*, 325; consideration of evidence on motion to nonsuit, *Scarborough v. Veneer Company*, 1; *S. v. Simpson*, 325; defendant's evidence not considered, *Long v. Gilliam*, 548; on affirmative defense, *Blevins v. France*, 334; on ground that State's evidence proved defense, *S. v. Mooring*, 624; is not proper procedure to test sufficiency of evidence of guilt of higher degree of crime, *S. v. Crisp*, 407; may not be entered before plaintiff has rested case, *Warren v. Winfrey*, 521; may not be allowed if plaintiff is entitled to nominal damages, *Lieb v. Mayer*, 613; nonsuit for contributory negligence, *Wright v. Pegram*, 45; *Hedrick v. Akers*, 274; *Blevins v. France*, 334; review of judgment on motion to nonsuit, *Poindexter v. Bank*, 191.

Nontaxpaid Liquor—See Intoxicating Liquor.

N. C. Compensation Act—See Master and Servant.

Noxious Odors—*Causby v. Oil Co.*, 235.

Nuisance—Attractive nuisance, see Negligence; pollution of air, *Causby v. Oil Co.*, 235; trespass from discharge of dust, see Trespass.

Objections—No objection or exception necessary to admission of incriminating statement made by wife of defendant, *S. v. Dillahunt*, 524.

Oil Refinery—Pollution of air by operation of oil refinery may be nuisance *per accidens*, *Causby v. Oil Co.*, 235.

Opinion—Expression of opinion by court on evidence, *S. v. Stevens*, 40; *S. v. Sparrow*, 81; *Brittain v. Blankenship*, 518; interrogation of witness by court *held* to constitute expression of opinion by court on testimony, *In re Will of Holcomb*, 391; court may ask witness questions of clarifying nature, *S. v. Stevens*, 40; opinion testimony as to speed, *Fleming v. Twiggs*, 666; witness may not give mere estimate or opinion as to amount of damages, *Rankin v. Helms*, 532.

Options—Oral renewal during term is sufficient when written memorandum is later executed, *Millikan v. Simmons*, 195.

"Or"—Use of disjunctive in indictment or warrant, *S. v. Merritt*, 687.

Oral Contract—Limiting right to do business is void, *Electronics Co. v. Radio Corp.*, 114; see, also, Frauds, Statute of.

Order of Proof—*S. v. Thomas*, 212.

"P.N.G."—Use of abbreviations in court records disapproved, *S. v. Edmundson*, 693.

Parent and Child—Willful refusal to support illegitimate child, see Bastards; duty to support, *Pace v. Pace*, 698.

Parol Evidence—Competency of evidence affecting writings, *Rankin v. Helms*, 532; inadmissibility of parol evidence under Statute of Frauds, *Elliott v. Owen*, 684; where record is used not to prove contents but to refresh witness' memory, best and secondary evidence rule does not apply, *S. v. Merritt*, 687.

Parol Trust—*Vincent v. Corbett*, 469; *Paul v. Neece*, 565.

Part-Time Employee—Computation of amount of award under Workmen's Compensation Act, *Liles v. Electric Co.*, 653.

Partial New Trial—*Lieb v. Mayer*, 613.

Parties—Parties plaintiff, *Hall v. Mica Co.*, 182; additional parties plaintiff, *Veasey v. King*, 216; who may attack divorce decree, *Carpenter v. Carpenter*, 286; joinder of joint tortfeasors, see Torts; necessity of joinder of husband in action against wife, *Etheridge v. Wescott*, 637; in action on chattel mortgage note, defendant may set up that chattel was

damaged by risk covered by policy and have insurer joined as party defendant, *Trust Co. v. Currin*, 102; person not a party may not move to vacate judgment, *Shaver v. Shaver*, 309; who are bound by estoppel, *Hayes v. Ricard*, 313; cause remanded for necessary parties, *Peel v. Moore*, 512.

Partition—*McLamb v. Weaver*, 432.

Partnership—Liability of member for torts, *Hardy & Newsome v. Whedbee*, 682.

Passive Trusts—Trust property as subject to execution, *Cornelius v. Albertson*, 265.

Patent Defects—Liability of landlord for injury to tenant for defective condition of premises, *Robinson v. Thomas*, 732.

Patrolman—Negligent shooting of person arrested, *Lowe v. Dept. of Motor Vehicles*, 353; action for wrongful death for killing of prisoner by patrolman, *Jenkins v. Department of Motor Vehicles*, 560.

Payment—Tender of payment not necessary when other party breaches contract, *Millikan v. Simmons*, 195; tender of payment not necessary when adverse party refuses performance, *Furlough v. Owens*, 483; payment by check, *Paris v. Builders Corp.*, 35; payment to collecting agent, *Monteith v. Welch*, 415.

Pedestrian—Injury to pedestrian by auto, *Merrell v. Kindley*, 118; *Fleming v. Twiggs*, 666; *Kellogg v. Thomas*, 722; injury to person lying on highway, *Shinault v. Creed*, 217.

Pendency of Prior Action—Plea in abatement for, *Hill v. Spinning Co.*, 554.

Peremptory Instruction—*Millikan v. Simmons*, 195.

Perjury—*S. v. Arthur*, 582; *S. v. Lucas*, 53.

Perpetuities—*Griffin v. Springer*, 95.

Personal Property—Remainder in personalty, *Ridge v. Bright*, 345; whether personalty was affixed to and became part of realty, *Fleishel v. Jessup*, 451.

Physicians and Surgeons—General county court has jurisdiction to hear action for malpractice, *Waters v. McBee*, 540.

Pistol—Intentional pointing of pistol, *Lowe v. Dept. of Motor Vehicles*, 353.

Plea—Failure of record to show plea and verdict may be corrected, *S. v. Cannon*, 399.

Plea in Abatement—*Hill v. Spinning Co.*, 554.

Pleadings—Filing of complaint, *Veasey v. King*, 216; statement of cause of action, *Hill v. Spinning Co.*, 554; counterclaims, *Etheridge v. Wescott*, 637; verification, *Rich v. R. R.*, 175; reply, *Phillips v. Mining Co.*, 17; demurrer, *Phillips v. Mining Co.*, 17; *Royal v. McClure*, 186; *Trust Co. v. Currin*, 102; *Joyner v. Board of Education*, 164; *Hall v. Mica Co.*, 182; *Hill v. Spinning Co.*, 554; amendment, *Surratt v. Ins. Agency*, 121; *Rich v. R. R.*, 175; *Paul v. Neece*, 565; *Burrell v. Transfer Co.*, 662; variance, *Robinson v. Thomas*, 732; issues raised, *Phillips v. Mining Co.*, 17; bill of particulars, *Hill v. Spinning Co.*, 554; judgment on pleadings, *Phillips v. Mining Co.*, 17; motions to strike, *Hinson v. Dawson*, 23; *Trust Co. v. Currin*, 102; *Hill v. Spinning Co.*, 554; no appeal lies from overruling of demurrer for failure of complaint to state cause of action, *Willcox v. Di Capadarso*, 741; waiver or estoppel affecting substantial rights must be pleaded, *Wright v. Insurance Co.*, 361; admission in answer of employee *held* incompetent against employer, *Brothers v. Jernigan*, 441; pleadings are necessary part of record proper, *Pace v. Pace*, 698.

Police Officers—Fact that arrest by municipal officers was outside corporate limits does not preclude prosecution for offense for which arrest was made, *S. v. Sutton*, 679.

Police Power—See Municipal Corporations.

Pollution—Of air by operation of oil refinery may be nuisance *per accidens*, *Causby v. Oil Co.*, 235.

Pond — Maintenance of unenclosed pond on land is not negligence, *Burns v. Gardner*, 602.

Porch—Injury to tenant from falling in of porch, *Robinson v. Thomas*, 732.

Potatoes—Conversion and sale of cargo of potatoes by truck driver, *Peed v. Burleson's, Inc.*, 437.

Premature Appeal—*Rogers v. Brantley*, 744.

Presumptions—From recent possession of stolen goods, *S. v. Neill*, 252; from killing with deadly weapon, *S. v. Crisp*, 407; no presumption of negligence from fact of injury, *Fleming v. Twiggs*, 666; *Merrell v. Kindley*, 118.

Pre-Trial—Examination of witness in regard to transaction with decedent waives G.S. 8-51, *Hayes v. Ricard*, 313.

Principal and Agent—Trustee is not agent for collection of notes secured by deed of trust, *Monteith v. Welch*, 415; liability of owner for negligence of employee driver, *Brothers v. Jernigan*, 441; estoppel and ratification, *Monteith v. Welch*, 415; evidence of agency, *Brothers v. Jernigan*, 441.

Probata—Evidence in support of allegations which have been stricken, is properly excluded, *Robinson v. Thomas*, 732.

Process—Waiver of process by general appearance, *Waters v. McBee*, 540; *Hardy & Newsome, Inc., v. Whedbee*, 682; acceptance of service of process by guardian *ad litem*, *Travis v. Johnston*, 713; *alias* and *pluries* summons, *Cherry v. Woolard*, 603; service by publication, *Harris v. Upham*, 477; service on foreign corporations, *Housing Authority v. Brown*, 592; *Harrington v. Steel Products*, 675.

Prohibition—See Intoxicating Liquor.

Promissory Misrepresentation—As basis of fraud, *Vincent v. Corbett*, 469.

Prostitution—Indictment and warrant, *S. v. Cox*, 57; *S. v. Powell*, 121.

Proximate Cause—In automobile cases, see Automobiles.

Public Schools—See Schools.

Public Utilities — Intra-urban bus fares, *Utilities Commission v. Greensboro*, 247.

Publication — Nonresident may be served by publication to enforce contract to convey, *Harris v. Upham*, 477.

Punitive Damages—*Hinson v. Dawson*, 23.

Quasi-Contracts—*Tillman v. Talbert*, 270.

Quiet Enjoyment—Breach of warranty of, *Shimer v. Traub*, 466.

Quieting Title—*Hayes v. Ricard*, 313; *Etheridge v. Wescott*, 637.

Races—Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Racing—Liability of promoters of stock car race for injury to participant, *Blevins v. France*, 334.

Railroads—Injury to persons on or near track, *Jessup v. R. R.*, 242.

Ratification—Acceptance of benefits by principal is not ratification when principal would be entitled thereto irrespective of unauthorized act, *Monteith v. Welch*, 415.

Realty—Whether personalty was affixed to and became part of realty, *Fleishel v. Jessup*, 451.

Receiving Stolen Goods—*S. v. Neill*, 252.

Recent Possession—Presumption from recent possession of stolen goods, *S. v. Neill*, 252.

Reckless Driving—Harmless and prejudicial error in instructions, *S. v. Sutton*, 679.

Recommendation of Life Imprisonment—Charge *held* not to impinge jury's right to recommend mercy, *S. v. Conner*, 109.

Recorder's Courts—Appeal from recorder's court dismissed for laches for failure to have record properly docketed, *Clements v. Booth*, 474;

statute providing for removal to Superior Court upon demand for jury trial in recorder's court is valid, *S. v. Register*, 480.

Records—Power of trial court to amend and correct its records, *S. v. Cannon*, 399; *S. v. Arthur*, 582; *S. v. Arthur*, 586; *Trust Co. v. Toms*, 645; appeal from recorder's court dismissed for laches for failure to have record properly docketed, *Clements v. Booth*, 474; pleadings are necessary part of record proper, *Pace v. Pace*, 698.

Reference—Findings of referee are conclusive when supported by evidence, *Mimidis v. Papoulias*, 479.

Refinery—Pollution of air by operation of oil refinery may be nuisance *per accidens*, *Causby v. Oil Co.*, 235.

Registration—Cancellation of record of mortgage by trustee *held* not notice, *Monteith v. Welch*, 415; deed of gift not registered within two years is void, *Harris v. Briley*, 526.

Release—Estoppel of child by release of any claim for distributive share in parent's estate, *Price v. Davis*, 229; of one joint tort-feasor releases all, *MacFarlane v. Wildlife Resources Com.*, 385.

Remainder—*Griffin v. Springer*, 95; *Blanchard v. Ward*, 142; *Stanley v. Foster*, 201; *Edwards v. Butler*, 205; in personalty, *Ridge v. Bright*, 345.

Remand—Cause remanded for necessary parties, *Peel v. Moore*, 512; for judgment, *S. v. Sutton*, 679.

Rent—Landlord's lien for rent, *Eason v. Dew*, 571.

Repeal—By implication or substitution, *S. v. Lance*, 455.

Reply—See Pleadings.

Request for Instructions—Court need not charge on circumstantial evidence in absence of request, *S. v. Stevens*, 40; court need not charge jury to scrutinize testimony of accomplices in absence of request, *S. v. Stevens*, 40; party desiring elaboration on particular point should tender request for instructions, *Millikan v. Simmons*, 195.

Rescue — Doctrine of, *Blevins v. France*, 334; *Alford v. Washington*, 132.

Respondeat Superior—Admission or proof of ownership of vehicle takes case to jury on issue, *Brothers v. Jernigan*, 441; *Hardy & Newsome, Inc., v. Whedbee*, 682; *Kellogg v. Thomas*, 722.

Restraining Order—See Injunctions.

Retroactive Statute — State Tort Claims Act is retroactive, *MacFarlane v. Wildlife Resources Com.*, 385.

Revaluation—Order enjoining commissioners from making payments under contract for appraising tax values, *Hyder v. McBride*, 485.

Revocable Trusts—*Ridge v. Bright*, 345.

Robbery—*S. v. McNeely*, 737.

Rule Against Perpetuities—*Griffin v. Springer*, 95.

Rule in Shelley's Case—*Hammer v. Brantley*, 71; *Griffin v. Springer*, 95.

Sales—Transfer of title, *Peed v. Burleson's, Inc.*, 437.

Sand and Gravel—Taking from land of another, see Larceny.

Schools—Conveyance of land so long as used for school purposes, *Board of Education v. Edgerton*, 576; evidence *held* sufficient to support finding that death of child was caused by negligence of school bus driver, *Williams v. Board of Education*, 599; segregation, *Constantian v. Anson County*, 221; *Joyner v. Board of Education*, 164.

Searches and Seizures—*S. v. White*, 73.

Secretary of State—Change of location of principal office of domesticated corporation, *Noland Co. v. Construction Co.*, 50; service on foreign corporation by service on Secretary of State, *Housing Authority v. Brown*, 592; *Harrington v. Steel Products, Inc.*, 675.

Segregation—Assignment of school children, *Joyner v. Board of Education*, 164; integration does not affect validity of bonds, *Constantian v. Anson County*, 221.

Service—Nonresident may be served by publication to enforce contract to convey, *Harris v. Upham*, 477; general appearance waives service, *Brittain v. Blankenship*, 518; *Waters v. McBee*, 540; *Hardy & Newsome v. Whedbee*, 682; of process on foreign corporation by service on Secretary of State, *Housing Authority v. Brown*, 592; *Harrington v. Steel Products, Inc.*, 675.

Shelley's Case—*Hammer v. Brantley*, 71; *Griffin v. Springer*, 95.

Sidewalk—Liability for fall of pedestrian over drain pipe across sidewalk, *Hedrick v. Akers*, 274.

Silence—As implied admission of guilt, *S. v. Cauley*, 701.

Smoke—Stopping automobile on highway because visibility obscured by smoke and fog, *Royal v. McClure*, 186.

Solicitor—Scope of cross-examination, *S. v. Conner*, 109; argument to jury, *S. v. Conner*, 109.

Sovereign Immunity—Waiver of immunity under Tort Claims Act, see State.

Speed—Opinion testimony as to speed, *Fleming v. Twiggs*, 666; duty to reduce in view of special hazards, *Kellogg v. Thomas*, 722.

Speeding—Prosecution for speeding, *S. v. Sutton*, 679.

State—Tort Claims Act, *MacFarlane v. Wildlife Resources Com.*, 385; *Jenkins v. Department of Motor Vehicles*, 560; *Flynn v. Highway Com.*, 617; *Lowe v. Department of Motor Vehicles*, 353; *Bradshaw v. Board of Education*, 393; *Stephens v. Board of Education*, 481; *Williams v. Board of Education*, 599.

Static Electricity—Evidence *held* sufficient to sustain finding that employee was electrocuted by, *Blalock v. Durham*, 208.

Statute of Frauds—See Frauds, Statute of.

Statute of Limitation—See Limitation of Actions.

Statutes—Constitutionality of statute will not be determined unless question is presently presented, *Fox v. Commissioners of Durham*, 497; Supreme Court must construe an Act as written, *Jenkins v. Department of Motor Vehicles*, 560; caption as aid in construction, *S. v. Lance*, 455; correction of clerical errors, *S. v. Daniels*, 671; construction in regard to constitutionality, *Fox v. Comrs. of Durham*, 497; repeal by implication, *S. v. Lance*, 455.

Step-Father—Assault by on minor, *S. v. Cauley*, 701.

Stock Car Racing—Liability of promoters for injury to participants, *Blevins v. France*, 334.

Stopping—See Automobiles.

Streams—Liability of operator of mica mine for damages resulting from silt washed into stream, *Phillips v. Mining Co.*, 17.

Street Improvements—Appeal from assessment for street improvements, *Sanford v. Oil Co.*, 388.

Subornation of Perjury—*S. v. Lucas*, 53.

Sudden Emergency — Doctrine of, *Blevins v. France*, 334.

Summons—See Process.

Superior Courts—See Courts.

Supreme Court—See Appeal and Error; must construe an Act as written, *Jenkins v. Department of Motor Vehicles*, 560; Supreme Court may decide case on merits in public interest notwithstanding appeal has become academic, *Joyner v. Board of Education*, 164; Supreme Court will protect interests of infants *ex mero motu*, *Edwards v. Butler*, 205.

Suspended Judgments and Executions —*S. v. Davis*, 621; *S. v. Thompson*, 282.

Taxation—Validity of school bonds not affected by federal decisions against enforced segregation, *Constantian v. Anson County*, 221; enjoining commissioners from making payments under contract for appraising tax values, *Hyder v. McBride*, 485; construction of taxing statutes, *Rubber Co. v. Shaw*, 170; income taxes, *Ibid.*; foreclosure, *Travis v. Johnston*, 713; tax titles,

Cherry v. Woolard, 603; *Travis v. Johnston*, 713.

Temporary Restraining Order—See Injunctions.

Tenant—Liability of landlord for injury to tenant for defective condition of premises, *Robinson v. Thomas*, 732.

Tenants in Common—Joinder of tenant in commissioners' deed to herself and husband does not create estate by entirety, *McLamb v. Weaver*, 432; deed to persons not married creates tenancy in common, *Grant v. Toatley*, 463.

Tender—Not necessary when other party breaches contract, *Millikan v. Simmons*, 195; tender of payment not necessary when adverse party refuses performance, *Furlough v. Owens*, 483.

Theory of Trial—Appeal must follow, *Paul v. Neese*, 565.

Timber Deed—*Scarborough v. Veneer Company*, 1.

Tort Claims Act—See State.

Torts—Liability of partnership for, *Hardy & Newsome, Inc., v. Whedbee*, 682; joint torts and joinder of parties, *Phillips v. Mining Co.*, 17; releases, *Blevins v. France*, 334; *MacFarlane v. Wildlife Resources Com.*, 385.

Traffic Lights—See Automobiles.

Transactions With Decedent—Examination of witness in regard to transactions with decedent entitles opposing party to cross-examine witness in regard thereto, *Hayes v. Ricard*, 313.

Tree—Striking of limb of tree by cab of truck is collision within meaning of insurance policy, *Griffin v. Insurance Co.*, 484.

Trespass—Pollution of air, *Hall v. Mica Corp.*, 182.

Trespass to Try Title—Sale of land pending action *held* not to abate it, *Willcox v. Di Capadarso*, 741; parties, *Veasey v. King*, 216.

Trial—Conduct and acts of Court, *In re Will of Holcomb*, 391; admission of evidence, *Brothers v. Jernigan*, 441; nonsuit, *Warren v. Winfrey*, 521; *Lieb v. Mayer*, 613; *Scarborough v. Veneer Co.*, 1; *Long v. Gilliam*, 548; *Rankin v. Helms*, 532; *Fleming v. Twiggs*, 666; *Blevins v. France*, 335; directed verdict and peremptory instructions, *Millikan v. Simmons*, 195; instructions, *Paul v. Neece*, 565; *Millikan v. Simmons*, 195; issues, *Millikan v. Simmons*, 195; *Jenkins v. Trantham*, 422; newly discovered evidence, *Jeffries v. Garage, Inc.*, 745.

Trover and Conversion, *Peed v. Burleson's, Inc.*, 437.

Trustee—Is not agent for collection of notes secured by deed of trust, *Monteith v. Welch*, 415; proper application of proceeds of foreclosure sale, *Military Academy v. Dockery*, 427.

Trusts—Trust property as subject to execution, *Cornelius v. Albertson*, 265; parol trust, *Paul v. Neece*, 565; written trust *inter vivos*, *Ridge v. Bright*, 345; resulting trust, *Vincent v. Corbett*, 469; *Grant v. Toatley*, 463; appointment of successor trustee, *Trust Co. v. Toms*, 645.

Turlington Act — See Intoxicating Liquor.

Utilities Commission — Jurisdiction, *Utilities Com. v. Greensboro*, 247.

Valuation—Enjoining commissioners from making payments under contract for appraising tax values, *Hyder v. McBride*, 485.

Variance—Evidence in support of allegations which have been stricken, is properly excluded, *Robinson v. Thomas*, 732.

Vendor and Purchaser — Purchaser may join as party plaintiff in action of trespass to try title, *Veasey v. King*, 216; nonresident may be served by publication in action to enforce contract to convey, *Harris v. Upham*, 477; memorandum of contract to sell must specify purchaser, *Elliott v. Owen*, 684; extension of time, *Millikan v. Simmons*, 195; tender, *Millikan v. Simmons*, 195; *Furlough v. Owens*, 483; remedies of purchaser, *Etheridge v. Wescott*, 637.

Venue—Residence of corporation, *Noland & Co. v. Construction Co.*, 50.

Verdict—Directed verdict, *Millikan v. Simmons*, 195; will be interpreted in light of charge and theory of trial, *S. v. McNeely*, 737; failure of record to show plea and verdict may be corrected, *S. v. Cannon*, 399; of guilt of manslaughter even though evidence of manslaughter is lacking will not be disturbed when the verdict is favorable to defendant, *S. v. Stephens*, 380.

Verification—Of pleadings, *Rich v. R. R.*, 175.

Waiver—Affecting substantial merits must be pleaded, *Wright v. Insurance Co.*, 361.

Wanton and Willful Negligence—*Blevins v. France*, 334.

Warrant—See Indictment and Warrant.

Warranty—Breach of warranty of title of quiet enjoyment, *Shimer v. Traub*, 466.

Water and Watercourses — *Phillips v. Mining Co.*, 17.

Wayne County Court—Jurisdiction of, *S. v. Daniels*, 671.

Weapon—Intentional pointing of pistol, *Lowe v. Dept. of Motor Vehicles*, 353; deadly weapon, *S. v. Cauley*, 701; *S. v. Crisp*, 407.

Whiskey—See Intoxicating Liquor.

Wills—Rule in *Shelley's case*, *Hammer v. Brantley*, 71; vested and contingent interests and defeasible fees, *Stanley v. Foster*, 201.

Wire—Wire dislodged by collision electrocuting person attempting rescue, *Alford v. Washington*, 132.

Witnesses—Court may ask questions of clarifying nature, *S. v. Stevens*, 40; *In re Will of Holcomb*, 391; court need not charge jury to scrutinize testimony of accomplices in absence of request, *S. v. Stevens*, 40; examination of witness in regard to transactions with decedent entitles opposing party to cross-examine witness in regard thereto, *Hayes v. Ricard*, 313; hypothetical question assuming existence of fact not supported by evidence is incompetent, *S. v. Simpson*, 325; witness may testify from own knowledge as to whether land is included in description, *Etheridge v. Wescott*, 637; witness may not give mere estimate or opinion as to amount of damages, *Rankin v. Helms*, 532; opinion testimony as to speed, *Fleming v. Twiggs*, 666; where record is used not to prove contents, but to refresh witness' memory, best and secondary evidence rule does not apply, *S. v. Merritt*, 687; scope of cross-examination, *S. v. Conner*, 109; *S. v. Rowell*, 280; cross-examiner not concluded by answers to collateral matters tending to show bias, *In re Gamble*, 149; State may show facts otherwise than as testified by its witness, *S. v. Mooring*, 624; in order for inconsistent statement to be competent for impeachment, it must be shown that the witness made the statement, *S. v. Crisp*, 407.

Workmen's Compensation Act — See Master and Servant.

Zoning Ordinances — See Municipal Corporations.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 8. Pendency of Prior Action—Identity of Actions.

In order to support a plea in abatement it is not sufficient that the subject matter of the second action may be litigated in the first, but it is also required that judgment in the prior action would operate as a bar to the second. *Hill v. Spinning Co.*, 554.

The pendency of a prior action by a corporation to recover monies allegedly wrongfully misappropriated by its president, without allegation that any of the alleged withdrawals were or purported to be salary payments or funds to which the president was entitled to receive as salary, will not support a plea in bar to a subsequent action instituted by the executors of the deceased president to recover salary allegedly due but not paid, since the issues and judgment in the prior action would not determine whether the corporation was indebted on account of unpaid salary. *Ibid.*

§ 14½. Transfer of Title or Interest.

Where plaintiff sells land pending action, cause does not abate as to right to damages for trespass, but temporary restraining order relating to use of land must be vacated. *Willcox v. Di Capadarso*, 741.

ACTIONS.

§ 6. Distinction Between Forms of Action.

The nature of an action is determined by the issues arising on the pleadings and by the relief sought, and not its denomination by either party. *Hayes v. Ricard*, 313.

ADMINISTRATIVE LAW.

§ 4. Appeal, Certiorari and Review of Orders of Administrative Agencies.

Where a statute provides procedure for an appeal from an administrative agency or court inferior to the Superior Court, the procedure must be followed, and *certiorari* cannot be used as a substitute for an appeal either before or after the time for appeal has expired, but will lie only in proper cases when it is impossible for the aggrieved party to perfect his appeal during the time allowed by the statute. *Sanford v. Oil Co.*, 388.

Certiorari will lie when the aggrieved party, through no fault of his own, is unable to perfect his appeal within the time allowed by statute, and there is merit in his exceptions to the action of the administrative agency or inferior court. *Ibid.*

A writ of *certiorari* may be used as an ancillary writ to require a lower court or administrative agency to send up to the Superior Court records, papers, documents, and other matter necessary to dispose of the appeal. *Ibid.*

AGRICULTURE.

§ 1. Landlord's Lien for Rent.

The landlord's lien for rent and advancements and expenses incurred in making and saving the crop is a preferred lien on the entire crop. G.S. 42-15. *Eason v. Dew*, 571.

AGRICULTURE—*Continued.*

A person who deals with a tenant is charged with notice of the landlord's rights under G.S. 42-15. *Ibid.*

§ 3. Lien for Labor.

An agricultural worker's lien for labor done is incident to and security for a debt, and there can be no lien in the absence of an underlying debt. *Eason v. Dew*, 571.

§ 4. Priorities Between Agricultural Liens.

Landlord's lien for rent and advancements *held* superior to subtenant's lien for labor under separate contract with tenant. *Eason v. Dew*, 571.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction.

Constitutionality of statute will not be determined unless question is presently presented to protect constitutional rights. *Fox v. Comrs. of Durham*, 497.

Theory of trial in the lower court must prevail in considering exceptions and assignments of error. *Paul v. Neece*, 565.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Even though an appeal is subject to dismissal on the ground that the questions presented have become academic, the Supreme Court may nevertheless consider the appeal on its merits when matters of grave public importance are involved. *Joyner v. Board of Education*, 164.

Even though an appeal is not taken in behalf of a minor, the Supreme Court in its supervisory power and *ex mero motu* will correct error in the judgment adversely affecting interest of the minor. *Edwards v. Butler*, 205.

Where it appears upon the face of the record that the party moving to vacate a judgment was neither a party nor a privy to the action, the Supreme Court will take notice of the fatal defect *ex mero motu* and order the motion dismissed. *Shaver v. Shaver*, 309.

§ 3. Judgments Appealable.

An appeal lies from the overruling of demurrer for misjoinder of parties and causes of action. Rule of Practice in the Supreme Court 4(a). *Hall v. Mica Corp.*, 182.

An appeal will not lie from an interlocutory order unless such order affects some substantial right and the ruling will work injury to appellant if not corrected before an appeal from final judgment. *Jenkins v. Trantham*, 422.

An order requiring petitioners in a proceeding to establish a disputed boundary to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition, affects a substantial right and is appealable. *Ibid.*

A defendant may appeal from a denial of his motion to dismiss on the ground that the court had no jurisdiction over the person or property of the defendant. G.S. 1-134.1. *Harris v. Upham*, 477.

An appeal will not lie from the overruling of a demurrer for misjoinder of causes or failure of the complaint to state facts sufficient to constitute causes of action, and an attempted appeal therefrom will be dismissed. Rule of Prac-

APPEAL AND ERROR—*Continued.*

tice in the Supreme Court No. 4(a). *Clements v. Simmons*, 523; *Wilks, Inc., v. Dillingham*, 522.

An appeal will not lie from the overruling of a demurrer for failure of the complaint to state a cause of action. Rule of Practice in the Supreme Court No. 4(a). *Willcox v. Di Capadarso*, 741.

An appeal from orders allowing attorneys of record to withdraw from the case and as commissioners to sell the lands in controversy, and for allowance of reasonable attorney's fees, will be dismissed *ex mero motu* as fragmentary and premature, the proceeding for the sale of the land being pending in the Superior Court. *Rogers v. Brantley*, 744.

§ 7. Motions in Supreme Court.

The Supreme Court may allow a party to amend his pleadings under the provisions of G.S. 7-13. *Surratt v. Ins. Agency*, 121.

§ 12. Jurisdiction and Powers of Lower Court After Appeal.

Where appeal is taken from the refusal to dismiss a motion in the cause to set aside a judgment, the lower court is without jurisdiction, pending the appeal, to order a hearing on the motion. *Shaver v. Shaver*, 311.

Pending appeal, the lower court has no jurisdiction to hear a motion for correction of the minutes. *S. v. Arthur*, 586.

Pending appeal from an order for alimony *pendente lite* the trial court has no jurisdiction to hear a motion to attach defendant for contempt for willful failure to comply with the order. *Lawson v. Lawson*, 689.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error not supported by an exception is ineffectual and presents no question of law for the determination of the Supreme Court. Rules of Practice in the Supreme Court Nos. 19(3) and 21. *Tynes v. Davis*, 528; *Ausband v. Pack*, 694; *S. v. Crumlin*, 695; *Watson v. Assurance Corp.*, 696.

The Rules of Court governing appeals are mandatory and will be enforced, even *ex mero motu*. *Tillis v. Cotton Mills*, 587.

The assignments of error must clearly and distinctly set out the asserted errors so that the Court is not compelled to go beyond the assignments themselves to ascertain the precise questions involved. Rule of Practice in the Supreme Court No. 19(3). *Tillis v. Cotton Mills*, 587; *Armstrong v. Howard*, 598.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents the sole question whether the facts found are adequate to support the judgment. *Surratt v. Ins. Agency*, 121; *Travis v. Johnston*, 713.

§ 21a. Exceptions and Assignments of Error to Rulings on Motions to Nonsuit.

An assignment of error to the court's ruling on motions to nonsuit is sufficient if it refers to the motion, the ruling thereon, the number of the exception and the page of the record where found, and an attempt to summarize the evidence in the assignment of error is not advised. *Allen v. Allen*, 446.

APPEAL AND ERROR—*Continued.*

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

Unnumbered exceptions to the findings of fact which do not point out the particular findings challenged or the particular findings which the court failed to make as requested, and equally general assignments of error thereon, are insufficient and will not be considered. Rules of Practice in the Supreme Court Nos. 21 and 19(3). *Travis v. Johnston*, 713.

§ 23. Objections, Exceptions and Assignments of Error to Evidence.

An assignment of error that the court erred in admitting testimony as shown by the numbered exception, with reference to the page of the record on which the exception is noted, is insufficient, since the assignment of error should clearly point out the error relied on and not compel the Court to go beyond the assignment itself to learn what the question is. *Allen v. Allen*, 446; *S. v. Mills*, 487.

§ 24. Exceptions and Assignments of Error to Charge.

Ordinarily, objection to the trial court's review of the evidence or its statement of contentions must be called to the court's attention in apt time. *Millikan v. Simmons*, 195.

Exception to charge on ground that it failed to comply with G.S. 1-180 is insufficient. *S. v. Stevens*, 40; *S. v. Thomas*, 212; *Tillman v. Talbert*, 270.

§ 27. Objections and Exceptions to Proceedings in Superior Court Upon Appeal From Inferior Courts or Administrative Boards.

Where no exceptions to the findings of fact are preserved on the appeal from the Industrial Commission to the Superior Court, the sufficiency of the evidence to support the findings is not presented on further appeal to the Supreme Court, and it will be presumed that the findings are supported by the evidence, and the sole question is whether the findings are sufficient to support the judgment. *Conner v. Rubber Co.*, 510.

§ 33. Necessary Parts of Record Proper.

The pleadings are a necessary part of the record proper and may not be dispensed with by consent of the parties or by stipulation as to their contents. *Pace v. Pace*, 698.

§ 35. Matters Not Included in Record Presumed Correct.

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence. *Harris v. Davis*, 579.

§ 38. Abandonment of Exceptions and Assignments of Error by Failure to Discuss Same in the Brief.

Assignments of error not set out in appellant's brief and not supported by reason or argument are deemed abandoned. *Paul v. Neece*, 565; *Lieb v. Mayer*, 613; *Watson v. Assurance Corp.*, 696; *Robinson v. Thomas*, 732.

§ 39. Presumptions and Burden of Showing Error.

The burden is upon appellant to show prejudicial error. *In re Gamble*, 149.

When the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent. *Schoenith v. Realty Co.*, 601.

APPEAL AND ERROR—*Continued.*

§ 40. Harmless and Prejudicial Error in General.

Where appellant fails to show prejudicial error on his exceptions to the admission of evidence and the court's charge to the jury, the judgment will be affirmed. *Browning v. Weissinger*, 471.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Ordinarily appellant fails to show that the exclusion of evidence was prejudicial when he fails to make it appear of record what the excluded evidence would have been. *In re Gamble*, 149.

Where appellant is precluded by the lower court from disclosing the contents of a sealed envelope or introducing the instrument in evidence, but the record nevertheless makes it appear that the instrument was competent to show prejudice of petitioner as a witness and for the purpose of cross-examination, the rule that the exclusion of evidence cannot be held prejudicial unless the record shows what the excluded evidence would have been does not apply upon the particular facts. *Ibid.*

§ 42. Harmless and Prejudicial Error in Instructions.

Assignments of error to designated portions of the charge will not be sustained when the charge read contextually is free of prejudicial error. *Allen v. Allen*, 446.

§ 44. Harmless and Prejudicial Error—Invited Error.

A remark of the court made in reply to, or provoked by, argument of counsel is invited error of which appellant may not complain. *Brittain v. Blankenship*, 518.

§ 49. Review of Findings of Judgments on Findings.

Findings of fact by the trial court under agreement of the parties are conclusive when supported by any competent evidence. *Rubber Co. v. Shaw*, 170.

The findings of fact of the referee in a consent reference, approved by the trial court, are conclusive when supported by evidence. *Mimidis v. Papoulias*, 479.

If the findings of fact made by the trial court are not challenged and are sufficient to support the order, the order must be affirmed. *Rich v. R. R.*, 175.

Even if the findings are made under a misapprehension of the applicable law, the judgment thereon will not be disturbed when it is apparent that the errors did not affect the result. *Lowe v. Department of Motor Vehicles*, 353.

§ 51. Review of Judgments on Motions to Nonsuit.

Upon appeal from judgment as of nonsuit, plaintiffs' evidence is to be considered as true and interpreted in the light most favorable to plaintiffs, resolving all conflicts in plaintiffs' favor, and the Supreme Court will not attempt to pass on the credibility of the witnesses. *Poindexter v. Bank*, 191.

§ 54. Partial New Trial.

Where error relates solely to the issue of damages without affecting the other issues, the Supreme Court in its discretion may award a partial new trial limited solely to the issue of damages, the issues being separable and there being no danger of complication. *Lieb v. Mayer*, 613.

APPEAL AND ERROR—*Continued.*

§ 55. Remand.

Cause remanded for necessary parties. *Peel v. Moore*, 512.

§ 59. Interpretation of Decisions of the Supreme Court.

A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case. *Carpenter v. Carpenter*, 286.

§ 60. Law of the Case and Subsequent Proceedings.

Where adjudication that intestate's death was not proximately caused by injuries received in the collision in suit is affirmed on appeal, allegations in a subsequent pleading inferring that intestate's death was caused by the collision are properly stricken on motion. *Hinson v. Dawson*, 23.

APPEARANCE.

§ 1. What Constitutes General or Special Appearance.

The filing of motions for change of venue, as a matter of right and for the convenience of witnesses, constitutes a general appearance. *Waters v. McBee*, 540.

An appearance for the purpose of requesting continuances is a general appearance. *Hardy & Newsome v. Whedbee*, 682.

§ 2. Effect of General Appearance.

A voluntary general appearance is equivalent to personal service and waives all defects and irregularities in, or even want of, service. *Brittain v. Blankenship*, 518.

A general appearance is equivalent to personal service and gives the court the same power over a defendant that it would have by due service of summons. *Waters v. McBee*, 540; *Hardy & Newsome v. Whedbee*, 682.

The general appearance of one partner gives the court jurisdiction to render judgment against the appearing partner individually and against the partnership property. *Hardy & Newsome v. Whedbee*, 682.

ARCHITECTS.

§ 2. Licensing and Regulation.

Person not licensed architect may contract to provide plans for residence costing less than $20,000. *Tillman v. Talbert*, 270.

§ 3. Actions for Compensation.

Where owners change plans so that house costs more than $20,000, person not licensed architect may recover on *quantum meruit* for work done up to time changes increased value of house over $20,000, and owners may not assert counterclaim on ground that they would have built two houses simultaneously if cost had not been excessive. *Tillman v. Talbert*, 270.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

A highway patrolman has the right to arrest without a warrant a person whom he sees driving at a high and unlawful rate of speed. *Lowe v. Department of Motor Vehicles*, 353.

ARREST AND BAIL—*Continued.*

§ 5. Method of Making Arrest and Force Permissible.

An officer, in making a lawful arrest, is not justified in pointing a loaded weapon at the person to be arrested except in good faith upon necessity, real or apparent. *Lowe v. Department of Motor Vehicles*, 353.

ASSAULT AND BATTERY.

§ 3. Actions for Civil Assault.

Evidence of general reputation of alleged assailant is competent on self-defense only in regard to reputation as violent and dangerous fighting man of which defendant had knowledge. *Nance v. Fike*, 368.

The evidence in this action for civil assault *is held* sufficient to warrant the submission of the case to the jury. *Ibid.*

§ 4. Criminal Assault in General.

The provisions of G.S. 14-34 that the intentional pointing of a pistol at any person constitutes an assault are subject to the qualification that such intentional pointing of a pistol must be done without legal justification. *Lowe v. Department of Motor Vehicles*, 353.

§ 5. Assault With a Deadly Weapon.

In order to be a deadly weapon it is not required that the instrument be a deadly weapon *per se*, but it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used, in which instance whether it is a deadly weapon becomes a question for the jury under proper instructions from the court. *S. v. Cauley*, 701.

Intent to kill is a mental attitude which ordinarily must be proven by circumstantial evidence, and such intent may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *Ibid.*

§ 13. Criminal Prosecutions—Competency of Evidence.

Evidence of general reputation of alleged assailant is competent on self-defense only in regard to reputation as violent and dangerous fighting man of which defendant had knowledge. *Nance v. Fike*, 368.

Testimony of a witness that she heard one of defendants beating the child in question is competent when the witness testifies that she knew the voices of defendants, and that she recognized their voices and heard them use vile and profane language to the child and heard the blows and the cries of the child, and motion to strike such testimony is properly denied. *S. v. Cauley*, 701.

Testimony that while a three-year-old child was in the hospital, the child, in the presence of her mother, said in reference to a bruised area, "They hit me," referring to the child's mother and stepfather, *is held* competent against the mother as an implied admission of guilt, since the accusation was made under circumstances calling for a reply from her. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence *held* amply sufficient for jury on charge of felonious assault on three-year-old child by step-father and aiding and abetting therein by mother. *S. v. Cauley*, 701.

ATTACHMENT.

§ 3. Attachment of Property of Nonresident.

Where the action involves land in the county in which the land lies, attachment against the nonresident owner is not necessary to service of summons by publication. *Harris v. Upham*, 477.

AUTOMOBILES.

§ 6. Safety Statutes and Ordinances in General.

The violation of a safety statute must nevertheless be a proximate cause of the injury to make defendant liable in damages. *McNair v. Richardson*, 65.

§ 7. Attention to Road, Lookout and Due Care in General.

Negligence is not to be presumed from the mere fact that an accident has occurred. *Merrell v. Kindley*, 118; *Fleming v. Twiggs*, 666.

A motorist is required to keep a lookout in the direction of travel, and is charged with seeing what he ought to see. *Kellogg v. Thomas*, 722.

§ 9. Stopping and Parking.

The stopping of a car behind another car, which had stopped on the highway because heavy smoke and fog impaired or destroyed vision, is a temporary stop because of exigencies of travel, and G.S. 20-161 has no application thereto. *Royal v. McClure*, 186.

Where a line of cars traveling in the same direction stop successively one behind the other because smoke and fog had obscured visibility, the drivers so stopping are not under duty to anticipate that the drivers of other cars overtaking them would so operate their cars that they could not stop. *Ibid.*

§ 14. Following Vehicles.

The statutory proscription against following too closely a vehicle traveling in the same direction has no application to the distance between vehicles stopping one behind the other on the highway. *Royal v. McClure*, 186.

§ 17. Right of Way at Intersections.

While a motorist entering an intersection with the traffic control light is nevertheless under duty to maintain a proper lookout, keep his vehicle under reasonable control, and avoid hitting persons or vehicles which he sees, or should see, in time to avoid collision, such duty does not require him to anticipate that a motorist along the intersecting street will approach the intersection at an unlawful speed or fail to observe the traffic signal governing the traffic in his direction of travel. *Wright v. Pegram*, 45.

§ 32. Bicycles.

Bicycles are vehicles and every rider of a bicycle upon a highway is subject to the provisions of the Motor Vehicles Act, except those which by their nature can have no application. *Harris v. Davis*, 579.

§ 33. Pedestrians.

Evidence *held* not to show negligence in hitting pedestrian. *Merrell v. Kindley*, 118.

Evidence *held* not to show negligence in hitting person lying prone on highway. *Shinault v. Creed*, 217.

AUTOMOBILES—*Continued.*

A motorist has the right to assume that a pedestrian attempting to cross a highway at a place where there is no road intersection or crosswalk, will yield the right of way to the vehicle and not attempt to cross until such movement can be made in safety. *Fleming v. Twiggs*, 666.

A workman crossing a highway in an area marked by signs reading "Men Working" is in a place where he has a lawful right to be and is entitled, when apparently oblivious of danger, to warning by horn of an approaching motorist. *Kellogg v. Thomas*, 722.

He is not held to the same degree of vigilance to traffic as an ordinary pedestrian, and is entitled to assume that motorists will see the warning signs and exercise due care. *Ibid.*

§ 35. Pleadings in Auto Accident Cases.

The complaint alleged that seven automobiles were traveling in the same direction upon the highway, that the first five cars stopped one behind the other because smoke and fog had obscured visibility, that the sixth car, in which plaintiff's intestate was a passenger, collided with the rear of the fifth car and that the seventh car immediately thereafter collided with the rear of the sixth car. *Held:* Demurrers of the drivers of the fourth and fifth cars were properly allowed, since upon the facts alleged, they had operated their cars in a lawful manner, kept them under control, and had stopped them on the highway in accordance with the exigencies of travel. *Royal v. McClure*, 186.

§ 36. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of an accident and injury. *Fleming v. Twiggs*, 666; *Merrell v. Kindley*, 118.

§ 38. Opinion Evidence as to Speed.

A witness' testimony that she was sitting in an automobile and did not look back until she heard tires as brakes were applied, that she then saw a car approaching from the rear as it was some seven or nine feet from a pedestrian in the rear of her automobile, and then looked away before the impact, discloses lack of opportunity on her part to form an opinion as to the car's speed, and her testimony as to its speed is without probative force. *Fleming v. Twiggs*, 666.

§ 41b. Sufficiency of Evidence of Speed.

Evidence to the effect that defendant's car was being driven on the open highway, without evidence of circumstances requiring a reduction of speed from the statutory maximum, that defendant's car struck a pedestrian attempting to cross the highway from the rear of a stationary car, that the brakes were applied before defendant's car hit the pedestrian, and that tire marks on the highway were 40 to 50 feet in length, with evidence that the car was traveling at a lawful speed shortly before the accident and without evidence of probative force that the car was traveling at an excessive speed at the time of the accident, is insufficient to present the question of excessive speed. *Fleming v. Twiggs*, 666.

§ 41c. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Failing to Keep Vehicle to Right in Passing Car Traveling in Opposite Direction.

Conflicting evidence as to which vehicle was to the left of the center of highway when the vehicles, traveling in opposite directions, collided, requires the

AUTOMOBILES—*Continued.*

denial of defendant's motions for judgment of nonsuit. *McNair v. Richardson*, 65.

§ 41g. Sufficiency of Evidence of Negligence Causing Accident at Intersection.

Evidence tending to show that the driver along the servient street failed to stop before entering an intersection with the dominant highway in disregard of the stop sign erected on the servient street, and collided in the center of the intersection with a car traveling along the dominant highway, and that one of the cars, as a result of the collision, struck a pole, dislodging a high voltage wire so that it fell across the cars, *is held* sufficient to overrule nonsuit in an action to recover for the death of intestate, electrocuted when he touched one of the cars in attempting to aid the occupants. *Alford v. Washington*, 132.

§ 41i. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Hitting Pedestrians.

Evidence disclosing only that plaintiff, in the act of crossing a street inside a block, had taken two steps into the street and, while in the act of taking a third, heard a horn, turned around and was hit by plaintiff's car, *is held* insufficient to show actionable negligence and nonsuit was proper. *Merrell v. Kindley*, 118.

Nonsuit was properly entered upon evidence tending to show that intestate was lying prostrate on the highway very early on a foggy morning, and that defendant's car ran over intestate and killed him about the time it passed another car traveling in the opposite direction, with further evidence that defendant was driving at a lawful speed and stopped his car a distance of about a car's length after running over intestate, since the evidence fails to disclose any negligence on defendant's part or that by the exercise of reasonable care he should have discovered intestate's perilous plight and incapacity before striking him. *Shinault v. Creed*, 217.

Evidence tending to show that an automobile, traveling along a straight and level highway, hit a pedestrian attempting to cross the highway from the rear of a car parked on the motorist's right side of the highway, without evidence that the automobile was traveling at excessive speed and with no evidence to indicate that the motorist was put on notice that the pedestrian would attempt to cross in the path of his oncoming vehicle, or that the motorist could have avoided the injury after ascertaining the pedestrian had exposed himself, is insufficient to overrule defendants' motion for nonsuit. *Fleming v. Twiggs*, 666.

Evidence tended to show that a motorist on a clear morning on a level, straight road, drove into an area protected by warning signs, with workmen and machinery clearly visible, at a rate of speed of 30 to 35 miles per hour, and, without blowing the horn or slackening speed, struck a workman crossing the highway, is sufficient to carry the case to the jury on the ground of negligence and proximate cause. *Kellogg v. Thomas*, 722.

§ 42f. Nonsuit for Contributory Negligence in Failing to Keep Vehicle to Right in Passing Car Traveling in Opposite Direction.

Conflicting evidence as to which vehicle was over center line of highway takes issue to jury. *McNair v. Richardson*, 65.

AUTOMOBILES—*Continued.*

§ 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 in failing to avoid collision at intersection. *Wright v. Pegram*, 45.

§ 42j. Contributory Negligence in Attempting Rescue.

The evidence tended to show that intestate, an electric welder, came to the scene of the collision immediately after the impact, that a high tension wire had fallen on the tops of the two cars involved in the collision, and was emitting sparks, that children in one of the cars were crying and screaming, and that intestate, in attempting to render aid, touched one of the cars and was electrocuted. *Held:* Intestate's action in attempting the rescue is not contributory negligence on his part as a matter of law. *Alford v. Washington*, 132.

§ 42k. Contributory Negligence of Pedestrian.

Whether plaintiff workman was guilty of contributory negligence in attempting to cross the highway in front of defendant's car without seeing the car until it was approximately 20 feet from him, *held* a question for the jury upon evidence tending to show that he first looked in both directions before attempting to cross, that defendant's car was traveling at excessive speed under the plainly visible conditions and failed to give warning of its approach, and that plaintiff was in the performance of his duties at the time and had a right to be on the highway, and the granting of nonsuit on the ground of contributory negligence was error. *Kellogg v. Thomas*, 722.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to the Jury.

Evidence of contributory negligence of cyclist *held* sufficient for submission of issue to jury. *Harris v. Davis*, 579.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Plaintiff's evidence, considered in the light most favorable to her, *is held* sufficient to justify the submission of the issue of last clear chance in this action involving a collision occurring when defendant's car hit the rear of another car standing on the highway at nighttime without lights. *Lambert v. Bland*, 283.

§ 46. Instructions in Auto Accident Cases.

An instruction to the effect that the violation by defendant of certain statutes regulating the driving of motor vehicles upon the highway, and designed for the protection of life and limb, would render defendant liable for any consequences that might flow therefrom as a proximate cause regardless of whether defendant could have foreseen or anticipated injury, must be *held* for prejudicial error, since foreseeability is an essential element of proximate cause even when the act complained of is the violation of safety statutes. *McNair v. Richardson*, 65.

§ 46½. Punitive Damages.

Allegations that defendant driver without warning turned at an intersection directly across the path of the car in which intestate was riding, that he had defective vision and was incapable of seeing and apprehending the dangers inherent in the operation of a motor vehicle, and that defendant owner had

full knowledge of this defect of vision but nevertheless permitted such defendant to drive, *held* sufficient to support prayer for punitive damages. *Hinson v. Dawson*, 23.

§ 54e. Competency of Evidence on Issue of Respondeat Superior.

Admission in answer of employee that he was driving with general knowledge of employer *held* incompetent, as is also testimony of statement by employee that he was making trip for employer. *Brothers v. Jernigan*, 441.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Admission by the employer of the ownership of the truck involved in the collision is sufficient to take the case to the jury on the issue of *respondeat superior* by virtue of G.S. 20-71.1, but the statute does not compel an affirmative finding, and the burden remains on plaintiffs to show that the driver was negligent and that he was the agent or employee of the owner and at the time acting within the scope of his employment. *Brothers v. Jernigan*, 441.

An admission that the driver of a tractor was employed by a partnership precludes nonsuit on the issue of *respondeat superior*. *Hardy & Newsome v. Whedbee*, 682.

Admission of the male defendant that he was the owner of the automobile being operated by his wife and that she was operating it with his consent at the time, takes the issue of *respondeat superior* to the jury under the provisions of G.S. 20-71.1. *Kellogg v. Thomas*, 722.

§ 58. Homicide—Competency and Relevancy of Evidence.

In this prosecution for manslaughter in the death of a passenger in defendant's truck, killed in a collision with another truck, the driver of the other truck testified for the State, and defendant was precluded from eliciting testimony from the witness on cross-examination to the effect that he was then being sued by the estate of the deceased for wrongful death. *Held:* The exclusion of the testimony tending to show the bias or interest of the witness is prejudicial error. *S. v. Rowell*, 280.

§ 63. Prosecutions for Speeding.

The fact that the arrest of defendant was illegal because municipal police officers pursued defendant and arrested him outside the corporate limits of the municipality does not affect the jurisdiction of the court over the offense for which defendant was arrested, and the court may try defendant on a valid warrant charging him with driving at a speed in excess of 80 miles per hour. *S. v. Sutton*, 679.

§ 65. Prosecutions for Reckless Driving.

An instruction that a person is guilty of reckless driving if he intentionally violates a traffic law must be held for prejudicial error, even though in other parts of the charge the court correctly defines reckless driving. *S. v. Sutton*, 679.

§ 66. Definition of "Under the Influence of Intoxicating Liquor or Narcotic Drugs."

A person is intoxicated within the purview of G.S. 20-138 when he has drunk a sufficient quantity of intoxicating liquor to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciа-

AUTOMOBILES—*Continued.*

ble impairment of either or both of these faculties, and not such as to affect them however slightly. *S. v. Hairr*, 506.

§ 70. Warrant for Driving Drunk.

Where a defendant goes to trial without moving to quash a warrant charging that he operated a motor vehicle while under the influence of "intoxicating liquor, opiates or narcotic drugs," he waives any duplicity resulting from the use of the disjunctive "or." *S. v. Merritt*, 687.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Evidence in this case *held* sufficient to support defendant's conviction of driving an automobile on the highways of the State while under the influence of intoxicants. *S. v. Garner*, 79; *S. v. Barham*, 80; *S. v. Hairr*, 506.

§ 74. Instructions in Prosecutions Under G.S. 20-138.

Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about mid-afternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact. *S. v. Hairr*, 506.

BASTARDS.

§ 1. Elements of Offense of Willful Failure to Support.

The offense proscribed by G.S. 49-2 is the willful refusal of a parent to support his or her illegitimate child, and neither the begetting of the child nor the failure of the father to pay expenses of the mother incident to the birth of the child, is an offense under the statute. *S. v. Coppedge*, 590.

Since the willful failure to support an illegitimate child is a continuing offense, arrest of judgment on an invalid warrant will not preclude a subsequent prosecution. *Ibid.*

§ 4. Warrant and Indictment for Willful Failure to Support.

Where a warrant under G.S. 49-2 fails to allege that defendant's failure to support his illegitimate child was willful, the warrant is fatally defective and motion in arrest of judgment must be allowed. *S. v. Coppedge*, 590.

BILL OF DISCOVERY.

§ 6. Right to Introduce Examination at Trial.

A pre-trial examination of a witness under G.S. 1-568.1, *et seq.*, in regard to a transaction or communication with a decedent is a waiver of the protection afforded by G.S. 8-51 to the extent that either party may use it upon the trial. *Hayes v. Ricard*, 313.

BILL OF DISCOVERY—*Continued.*

§ 7. Inspection of Writings—Nature and Scope of Remedy.

G.S. 8-89 is a remedial statute which should be liberally construed. *Construction Co. v. Housing Authority*, 261.

Plaintiff *held* entitled to inspect only those records which relate to the subject of the particular action. *Cates v. Finance Co.*, 277.

Contentions that the individual defendants would refuse to testify on the ground of self-incrimination cannot be made the basis for an order for inspection of writings, since the constitutional question of self-incrimination does not arise until the individuals themselves assert it, and is not presented upon the application for inspection of writings. *Ibid.*

§ 8. Inspection of Writings—Affidavits and Proceedings to Secure.

The issue raised by the pleadings in this action by a contractor against a housing authority was whether the settling of floor slabs, which plaintiff was required to rectify, was due to the fault of plaintiff. Plaintiff made verified motion for inspection of reports made between specified dates by the architect's officers or employees to defendant builder, like reports mailed to or delivered to the Housing Administration, report of a named employee of the Housing Administration, and reports of tests made by defendant, all relative to the cause of the settling of the slabs. Plaintiff further averred that the information was not available to plaintiff from any other source. *Held:* The affidavits disclosed that the documents and papers sought to be inspected are material to the controversy and sufficiently identified them within the requirements of G.S. 8-89. *Construction Co. v. Housing Authority*, 261.

Where plaintiff's verified motion for inspection of writings is sufficient to justify order therefor, the issuance of the order is within the discretion of the court, and its order granting the motion in part and denying it in part will not be disturbed in the absence of a showing of abuse. *Ibid.*

The requirements of G.S. 8-89 are satisfied by a verified motion sufficiently designating the books, papers and documents sought to be inspected. *Tillis v. Cotton Mills*, 587.

§ 9. Hearing and Order.

A motion for inspection of writings, upon proper verified motion, is addressed to the discretion of the trial court. *Tillis v. Cotton Mills*, 587.

Where the motion is for inspection of writings in the possession of the corporate defendant, and the order allows inspection of writings in the possession of both the corporate and individual defendant, but both defendants are represented by the same counsel and it appears that the individual defendant was the president of the corporate defendant and that the writings referred to in the order all relate to business of the corporate defendant, abuse of discretion in granting the order is not shown. *Ibid.*

BILLS AND NOTES.

§ 29. Actions on Notes—Defenses.

Where a chattel mortgage note is protected by insurance procured by holder, maker may set up loss covered by policy as defense. *Trust Co. v. Currin*, 102.

BOUNDARIES.

§ 6. Nature and Grounds of Processioning Proceeding.

What constitutes the boundary lines is a matter of law for the court; where those lines are actually located on the premises is an issue of fact for the jury. *Jenkins v. Trantham*, 422.

§ 8. Pleadings in Processioning Proceedings.

Plaintiff may allege boundary as set out in partition and also, by amendment, assert another line and claim to same by adverse possession. *Jenkins v. Tranthem*, 422.

§ 9. Burden of Proof in Processioning Proceedings.

In a proceeding to establish a disputed boundary under G.S. Chapter 38, the burden is upon petitioners to show the true location of their boundary lines. *Jenkins v. Trantham*, 422.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 9. Presumptions and Burden of Proof.

Where the evidence shows that a store had been broken and entered and goods stolen therefrom, the recent possession of the stolen goods raises a presumption of fact that the possessor is guilty of the breaking and entering and the larceny, but such recent possession, nothing else appearing, raises no presumption that the possessor is guilty of receiving the goods with knowledge that they had been stolen. *S. v. Neill*, 252.

CARRIERS.

§ 16. Carriage of Passengers—Fares.

The public utility corporation in question provided public bus transportation and also electricity in a municipality. Its franchise provided that forfeiture by the company of one or more powers granted should result in the forfeiture of the whole. *Held:* The purpose of the provision is to prevent the utility from discontinuing any one of its operations and has no relation to the rates to be charged for the different classes of service, and therefore, in determining the fare to be charged for bus service, the Utilities Commission properly disregards the value of the utility's electrical properties. *Utilities Com. v. Greensboro*, 247.

COMPROMISE AND SETTLEMENT.

§ 3. Conclusiveness and Effect of Settlement.

Plaintiff electing to affirm settlement may not recover of third persons for alleged fraud in inducing settlement. *Davis v. Hargett*, 157.

CONSPIRACY.

§ 3. Nature and Elements of the Offense.

A conspiracy is the unlawful combination or agreement of two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. *S. v. McCullough*, 11.

§ 5. Competency and Relevancy of Evidence.

The order of proof is a rule of practice resting in the sound discretion of the trial court, and while in a conspiracy prosecution the existence of the con-

CONSPIRACY—*Continued.*

spiracy should ordinarily be proven first and then defendant's connection with it, if at the close of all the evidence every constituent element of the offense is proved, exception on the ground that corroborative evidence was introduced prior to the substantive evidence cannot be sustained. *S. v. Thomas*, 212.

§ 6. Sufficiency of Evidence and Nonsuit.

While a conspiracy must usually be proven by circumstantial evidence, such evidence must point unerringly to the existence of the conspiracy, and the evidence in this case *is held* insufficient to do so. *S. v. McCullough*, 11.

§ 9. Conviction of Substantive Offense Pursuant to Conspiracy.

Where an indictment charges a conspiracy to do an unlawful act, and with the commission of such act pursuant to the conspiracy, a defendant may be convicted of the substantive offense, notwithstanding the absence of sufficient evidence to take the conspiracy count to the jury, since the establishment of the conspiracy is not a prerequisite to the conviction of the substantive offense, and the charge that the offense was committed pursuant to the conspiracy will be treated as surplusage. *S. v. McCullough*, 11.

CONSTITUTIONAL LAW.

§ 4. Conflict of State and Federal Provisions.

When a portion of a section of the State Constitution is invalid as violative of the Constitution of the United States, and the remaining portion is independent, complete in itself, and capable of enforcement, the invalid part will be rejected and the valid portion stand. *Constantian v. Anson County*, 221.

The Constitution of the United States takes precedence over the Constitution of North Carolina, and in the interpretation of the Federal Constitution, the Supreme Court of the United States is the final arbiter. Constitution of North Carolina, Article 1, sections 3 and 5. Constitution of the United States, Article VI. *Ibid.*

§ 6½. Persons Entitled to Raise Question of Constitutionality of Statute and Waiver.

Constitutionality of statute will not be determined unless presently necessary to protect rights. *Fox v. Comrs. of Durham*, 497.

§ 10c. Power and Duty of Court in Construing Statutes.

The Supreme Court must construe an Act as written, the power to change the law being the exclusive province of the General Assembly. *Jenkins v. Department of Motor Vehicles*, 560.

§ 18. Equal Protection, Application and Enforcement of Laws.

The provision of the Federal Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws," is a limitation upon the exercise of governmental power by a state or state agency. *Constantian v. Anson County*, 221.

The Federal decision does not require that children of different races be taught in the same schools, but declares only that if a child be excluded from attending the school of his choice, solely on the basis of race, by a state or state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

CONSTITUTIONAL LAW—*Continued*

§ 21. Due Process.

The statutory provision for service of process on foreign corporations by service on the Secretary of State is constitutional. *Harrington v. Steel Products*, 675.

§ 32. Constitutional Guarantees of Person Accused of Crime—Necessity for Indictment.

In all misdemeanor cases where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal the defendant may be tried in the Superior Court upon the original warrant. Constitution of North Carolina, Article I, Section 12. *S. v. Underwood*, 68.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Pending appeal from an order for alimony *pendente lite* the trial court has no jurisdiction to hear a motion to attach defendant for contempt for wilful failure to comply with the order. *Lawson v. Lawson*, 689.

CONTRACTS.

§ 6. Form and Requisites in General.

A written agreement to pay a contractor a stipulated fee to supervise the erection of a residence does not preclude parol evidence of a contemporaneous verbal agreement that the entire cost of the construction of the dwelling, including the builder's fee, should not exceed a stipulated sum, since the parol agreement supplements the written so that the written and parol agreements together constitute one entire contract. *Rankin v. Helms*, 532.

§ 7. Contracts Against Public Policy.

If a contract is illegal, either at common law or by reason of statutory provisions relating to monopolies and trusts, plaintiff cannot recover damages for the breach thereof. G.S. 75-1. *Electronics Co. v. Radio Corp.*, 114.

Plaintiff declared upon an oral contract under which plaintiff was constituted the sole and exclusive distributor in North Carolina in the sale of a particular product manufactured by defendant. *Held:* The contract substantially limits defendant's right to do business in this State, within the purview of G.S. 75-4 declaring such contracts to be void unless the party so limited agrees thereto in writing. Therefore, demurrer was properly allowed upon the declaration on the oral agreement. *Ibid.*

Where agreement to draw plans for house to cost less than $20,000 is made and work done thereunder, subsequent changes in plans directed by owner does not avoid the lawful contract, and the person drawing the plans is entitled to recover for the work done up to the time the changes resulted in a house costing more than $20,000. *Tillman v. Talbert*, 270.

§ 16. Performance or Breach in General.

Allegations of plaintiff contractor that flooring slabs constructed by it in accordance with the plans and specifications, settled through no fault of plaintiff, and that plaintiff was required to rectify the settling at large expense, *held* sufficient to state a cause of action in plaintiff's favor against defendant housing authority. *Construction Co. v. Housing Authority*, 261.

CONTRACTS—*Continued.*

§ 23. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence to the effect that defendant agreed to supervise the construction of a dwelling for a fee and stipulated that the entire cost of construction should not exceed a stated sum, that the house was not completed according to the plans and specifications, and that the cost of construction largely exceeded the contract price, *is held* sufficient to overrule defendant's motion for nonsuit in an action for damages for breach of contract. *Rankin v. Helms*, 532.

CONTROVERSY WITHOUT ACTION.

§ 1. Subject Matter.

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250. *Griffin v. Springer*, 95.

The sufficiency of a deed to convey title can be adjudicated by the submission of a controversy without action under G.S. 1-250. *Peel v. Moore*, 512.

§ 2. Affidavit and Statement of Facts.

Where, after filing of pleadings, the parties submit the cause to the court on facts agreed, and such facts negative rather than support plaintiff's allegations as to the existence of a contract between plaintiff and defendant, there is a variance between the allegations and proof, and the facts agreed control. *Eason v. Dew*, 571.

When litigants submit a cause on agreed facts, the agreed facts constitute the sole basis for decision. *Ibid.*

CORPORATIONS.

§ 3. Location of Principal Office.

Domesticated corporations may sue and be sued under the laws which apply to domestic corporations, subject to the limitation that domestication does not deprive the Federal courts of their jurisdiction in respect to foreign corporations. *Noland Co. v. Construction Co.*, 50.

The location of the principal office and place of business of a corporation is a question of fact, and the instrument a foreign domesticated corporation is required to file in the office of the Secretary of State is merely notice of that fact. G.S. 55-118. Therefore, when a domesticated corporation declares in writing that it had moved its principal office from one county to another county on a particular date, it will not be permitted to take advantage of its own neglect for more than 18 days to so inform the Secretary of State as required by the statute. *Ibid.*

§ 25b. Liability of Officers and Agents for Torts of Corporation.

In the absence of conspiracy, an officer of a corporation cannot be held individually liable for the tortious conversion of property by the corporation when such officer had nothing to do with the transaction and does not learn of it until some time after it had been consummated. *Peed v. Burleson's, Inc.*, 437.

COURTS.

§ 2. Jurisdiction in General.

Where its want of jurisdiction is made to appear to a court, it cannot enter a judgment in favor of either party, but may only set aside such orders as may

have been improperly entered before want of jurisdiction was discovered, and dismiss the proceeding. *Hart v. Motors*, 84.

A court has no power or authority to hear and determine matters in controversy beyond its territorial limits, but a limitation on its territorial jurisdiction has no reference to the kind or character of action of which the court may take jurisdiction or of the parties who may be subject to its jurisdiction. *Waters v. McBee*, 540.

The jurisdiction of a court is the measure of its power to hear the matter in controversy and, by its judgment, bind those affected by the controversy. *Ibid.*

While a defendant cannot by consent confer jurisdiction on a court, he may waive the issuance of process necessary to compel his attendance at the hearing of an action within the court's jurisdiction. *Ibid.*

§ 4b. Appeals to Superior Court From Inferior Courts.

Appeal from recorder's court *held* correctly dismissed for laches of appellant in failing to see that record was properly docketed. *Clements v. Booth*, 474.

§ 4c. Jurisdiction of Superior Court on Appeal from Clerk.

Statutory authority of the clerk to enter judgments by default and by default and inquiry cannot deprive the Superior Court of its statutory and inherent powers to extend the time for, or allow an amendment to, a pleading, which powers the judge of the Superior Court may exercise when the cause reaches him by appeal. *Rich v. R. R.*, 175.

§ 5. Jurisdiction of Superior Court Judge After Orders or Judgment of Another Superior Court Judge.

Where a judge of the Superior Court sustains demurrer to the complaint and grants plaintiff time to file amended complaint, the order is in effect a ruling that the complaint contains a defective statement of a good cause of action and is subject to amendment, and therefore another Superior Court judge is bound by such ruling even if the ruling be erroneous, since it could not be set aside by another Superior Court judge for error of law, nor could it be reviewed on appeal in the absence of exception thereto. *Burrell v. Transfer Co.*, 662.

§ 11. Jurisdiction of County, Municipal and Recorders' Courts.

The provisions of section 1, chapter 216, Public Laws of 1923 (G.S. 7-265), that courts created under the act should have jurisdiction "over the entire county in which the said court may be established" give such courts jurisdiction within the boundaries of its county notwithstanding that other courts may have been created with jurisdiction covering the same matters in other parts of the county, and do not limit such courts to causes of action arising within the county. *Waters v. McBee*, 540.

A general county court has jurisdiction to hear a case of asserted malpractice when the court has jurisdiction of the parties. G.S. 7-279(3). *Ibid.*

Where an action within the jurisdiction of a county court is instituted by a resident of the county against a nonresident, the general appearance of the defendant subjects him to the jurisdiction of the court, and the court has jurisdiction to hear the controversy. *Ibid.*

Whether the judge of a recorder's court may return a special verdict if the statute under which the court is established does not so provide, *quaere? S. v. Everett*, 596.

COURTS—*Continued.*

Wayne County Court has jurisdiction of statutory as well as common law misdemeanors. *S. v. Daniels*, 671.

CRIME AGAINST NATURE.

§ 1. Elements and Essentials of the Offense.

G.S. 14-202.1 does not repeal G.S. 14-177, since the two acts are complementary rather than repugnant or inconsistent. *S. v. Lance*, 455.

CRIMINAL LAW.

§ 2. Attempts.

An attempt to commit an offense is composed of an intent to commit the crime, together with a direct ineffectual act done towards its commission. *S. v. McNeely*, 737.

§ 3. Felonies, Misdemeanors and Penalties.

An attempt to commit the crime of robbery is an infamous crime punishable as provided in G.S. 14-3. *S. v. McNeely*, 737.

§ 5. Mental Capacity.

Evidence of defendant's mental condition before and after the commission of the offense, as well as at the time thereof, is competent upon his defense of insanity provided the inquiry bears such relation to his condition at the time the offense was committed as to be worthy of consideration in respect thereto. *S. v. Duncan*, 374.

An adjudication, pursuant to G.S. 122-84, that defendant was without sufficient mental capacity to undertake his defense, entered about a month after the time of the commission of the offense, although not conclusive, is competent in evidence for the consideration of the jury on defendant's defense of insanity. *Ibid.*

§ 7. Limitations.

In prosecutions for misdemeanors not requiring an indictment, the issuance of a warrant tolls the running of G.S. 15-1, and upon appeal from conviction in an inferior court, defendant is not entitled to quashal upon trial in the Superior Court upon the original warrant, even though the appeal is not called until more than two years after the commission of the offense. *S. v. Underwood*, 68.

§ 8b. Aiders and Abettors.

The charge of the court as to what constitutes aiding and abetting *held* without error. *S. v. Cauley*, 701.

§ 12a. Jurisdiction in General.

The fact that defendant's arrest was unlawful does not affect the jurisdiction of the court of the crime for which the arrest was made. *S. v. Sutton*, 679.

§ 12c. Jurisdiction—Degree of Crime.

The County Court of Wayne County has jurisdiction of statutory as well as of common law misdemeanors, Ch. 697, Public-Local Laws of 1913, as amended by Ch. 346, Public-Local Laws of 1937, it being apparent that the amendatory

CRIMINAL LAW—*Continued.*

Act intended to add the words "or by statute" in line 26 of the original Act rather than in line 6 as specified in the amendment. *S. v. Daniels*, 671.

§ 12f. Exclusive or Concurrent Jurisdiction of Superior Courts and Inferior Courts.

Where G.S. 7-64 applies, motion to quash indictment for misdemeanor on ground of want of jurisdiction in Superior Court is properly denied. *S. v. McCullough*, 11. But when G.S. 7-64 does not apply local statute may deprive Superior Court of original jurisdiction. *S. v. Baucom*, 61.

§ 12g. Jurisdiction—Transfer of Cause to Superior Court.

Chapter 115, Public Laws of 1929, 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. Register*, 480.

§ 12f. Jurisdiction Where Two Courts Have Concurrent Jurisdiction.

Where a county court and a Superior Court have concurrent jurisdiction, the pendency of a prosecution in the county court for the identical criminal offense will support a plea in abatement and motion in arrest of judgment in the Superior Court. *S. v. Daniels*, 671.

The pendency in a county court of a prosecution on a warrant charging unlawful possession of non-taxpaid whiskey for the purpose of sale, G.S. 18-50, will not support a plea in abatement and motion in arrest of judgment in the Superior Court in a prosecution for unlawful possession of non-taxpaid whiskey, G.S. 18-48, since the two offenses are not identical but are separate and distinct. *Ibid.*

§ 24½. Former Jeopardy—Continuing Offense.

Willful failure to support illegitimate child is a continuing offense, and therefore prosecution will not bar subsequent proceedings. *S. v. Coppedge*, 590.

§ 27. Judicial Notice.

It is a matter of common knowledge that a person does not become drunk or materially under the influence of intoxicating liquor immediately after drinking an immoderate quantity of it. *S. v. Hairr*, 506.

§ 30½. Competency of Evidence in General.

Testimony of a witness that she heard one of defendants beating the child in question is competent when the witness testifies that she knew the voices of defendants, and that she recognized their voices and heard them use vile and profane language to the child and heard the blows and the cries of the child, and motion to strike such testimony is properly denied. *S. v. Cauley*, 701.

§ 31d. Examination of Experts.

The assumption in a hypothetical question of the existence of a vital fact not supported by evidence, is ground for a new trial. *S. v. Simpson*, 325.

§ 34e. Silence as Implied Admission.

Testimony that while a three-year-old child was in the hospital, the child, in the presence of her mother, said in reference to a bruised area, "They hit me," referring to the child's mother and stepfather, *is held* competent against

the mother as an implied admission of guilt, since the accusation was made under circumstances calling for a reply from her. *S. v. Cauley*, 701.

§ 37. Best and Secondary Evidence.

Where State is not trying to prove contents of record, but witness is merely using record to refresh his memory, best and secondary evidence rule does not apply. *S. v. Merritt*, 687.

§ 41d. Competency of Husband or Wife to Testify.

The admission of testimony of an incriminating statement made by the wife not in his presence must be held for prejudicial error, even in the absence of objection. *S. v. Dillahunt*, 524.

§ 42c. Cross-Examination.

Questions asked by the solicitor on cross-examination of the defendant as to defendant's participation in other specific crimes of a kindred nature, most of which were admitted by defendant, will not be held for prejudicial error when the questions appear to have been based upon information and to have been asked in good faith. *S. v. Conner*, 109.

In this prosecution for manslaughter in the death of a passenger in defendant's truck, killed in a collision with another truck, the driver of the other truck testified for the State, and defendant was precluded from eliciting testimony from the witness on cross-examination to the effect that he was then being sued by the estate of the deceased for wrongful death. *Held:* The exclusion of the testimony tending to show the bias or interest of the witness is prejudicial error. *S. v. Rowell*, 280.

§ 42e. Evidence Competent to Impeach or Discredit Witness.

The exclusion of testimony of a statement inconsistent with the testimony of a witness, offered for the purpose of impeaching the credibility of the witness, will not be held for prejudicial error when it is not made to appear whether the witness or another made the inconsistent statement, and defendant does not again proffer the impeaching testimony after such other person had testified for the State. *S. v. Crisp*, 407.

§ 43. Evidence Obtained by Unlawful Means.

Where a search warrant is issued without the signed affidavit under oath of the complainant, the warrant is fatally defective, notwithstanding testimony of complainant that he was sworn by the justice of the peace in whose name the warrant was issued and stated to him under oath his information and the location of the premises. Motion to suppress evidence obtained by such defective warrant should have been allowed. *S. v. White*, 73.

§ 44. Time of Trial and Continuance.

Where motion for continuance is based solely on absence of witnesses and not lack of time to prepare the defense, and defendant fails to show any effort to have the witnesses in court and fails to show what testimony material to the defense they could give if present, there is no showing of abuse of discretion by the trial court in denying the motion. *S. v. Stevens*, 40; *S. v. Flowers*, 77.

§ 48a. Order of Proof.

The order of proof is a rule of practice resting in the sound discretion of the trial court. *S. v. Thomas*, 212.

CRIMINAL LAW—*Continued*

§ 50d. Expression of Opinion on Evidence by Court During Trial.

The court may ask a witness questions of a clarifying nature. *S. v. Stevens*, 40.

§ 50f. Argument to Jury.

The argument of the solicitor as to the manner in which the offense was committed *held* to have a legitimate basis in the evidence, and defendant's assignment of error thereto cannot be sustained. *S. v. Conner*, 109.

While counsel are entitled to argue to the jury the whole case as well of law as of fact, and are to be given wide latitude in making their arguments to the jury, the court properly restrains counsel from arguing to the jury a point of law which, by admission of counsel, is entirely irrelevant to the case. *S. v. Crisp*, 407.

§ 52a(1). Consideration of Evidence on Motion to Nonsuit and Office and Effect of Motion.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and contradictions and discrepancies in testimony of the State's witnesses are for the jury to resolve. *S. v. Simpson*, 325.

Where defendant contends that though the evidence may be sufficient to be submitted to the jury as to the offense of manslaughter, it is insufficient to support a verdict of guilty of murder in the second degree, defendant should request instructions that the jury could not return a verdict for any higher offense than manslaughter, and motion for judgment of nonsuit is not the proper way to present this contention. *S. v. Crisp*, 407.

§ 52a(2). Sufficiency of Evidence to Overrule Nonsuit in General.

The State is not precluded from showing the facts to be otherwise than as stated by one of its witnesses, and where in no aspect does the State's evidence establish a complete defense, defendant's motion to nonsuit on that ground is properly denied. *S. v. Mooring*, 624.

§ 52a(3). Sufficiency of Circumstantial Evidence to Be Submitted to Jury.

Under the same rule applicable when the State relies upon direct evidence or a combination of direct and circumstantial evidence, motion to nonsuit upon circumstantial evidence should be denied if there is any substantial evidence tending to prove each essential element of the offense charged. *S. v. Stephens*, 380.

Whether there is substantial evidence, direct or circumstantial, of each essential element of the offense, is a question of law for the court; whether circumstantial evidence points unerringly to defendant's guilt and excludes every other reasonable hypothesis, is a question of fact for the jury. *Ibid.*

§ 53a. Form and Sufficiency of Instructions in General.

The judge must charge the essential elements of the offense. *S. v. Hairr*, 506.

The failure of the court to define "an attempt" to commit the offense will not be held for prejudicial error when the term is used in accordance with its ordinary meaning and is clearly understandable. *S. v. McNeely*, 737.

CRIMINAL LAW—*Continued*

§ 53e. Charge on Circumstantial Evidence.

Where the State relies largely on direct evidence, the failure of the court to charge with respect to the nature of incidental and corroborative circumstantial evidence will not be held for error in the absence of a special request. *S. v. Stevens*, 40.

§ 53f. Instructions—Expression of Opinion by Court on Evidence.

The fact that the court necessarily takes more time in stating the contentions of the State than in stating those of defendant is not ground for objection. G.S. 1-180. *S. v. Sparrow*, 81.

§ 53g. Instructions of Permissible Verdicts.

The male defendant was charged with assault on his three-year-old stepdaughter with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, and the *femme* defendant was charged with aiding and abetting in the felonious assault. *Held:* The court's charge correctly defining the permissible verdicts that might be returned against each defendant respectively, and instructing the jury that if it acquitted the male defendant, it should also acquit the female defendant, *is held* sufficient on this aspect, and not objectionable on the ground that the court did not instruct the jury that it could return a verdict of guilty as to the male defendant and not guilty as to the female defendant. *S. v. Cauley*, 701.

The court is not required to charge the jury as to a less degree of the crime when there is no evidence of guilt of a less degree. *S. v. McNeely*, 737.

§ 53j. Charge on Credibility of Witnesses.

In the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of accomplices will not be held for error, the matter being a subordinate and not a substantive feature of the case. *S. v. Stevens*, 40.

§ 53n. Charge on Right to Recommend Life Imprisonment.

A charge to the effect that the jury should not base its verdict on sympathy will not be held prejudicial when such statement relates to the portion of the charge that the verdict should speak the truth and not be based on prejudice or sympathy, and is entirely disconnected from the later portion of the charge wherein the court correctly instructed the jury as to its right to recommend life imprisonment if they should find defendant guilty of the capital offense. *S. v. Conner*, 109.

§ 54b. Form and Sufficiency of Verdict.

In this prosecution on indictments charging robbery, the case was submitted to the jury solely on the question of defendant's guilt of an attempt to commit the offenses. *Held:* A verdict of guilty as charged will be interpreted in the light of the facts in evidence and the charge of the court, and is sufficient to support the judgment. *S. v. McNeely*, 737.

§ 56. Arrest of Judgment.

Where the warrant or indictment is fatally defective, the Supreme Court will arrest the judgment either on motion or *ex mero motu*, and the arrest of judgment vacates the verdict and sentence, but does not preclude the State from instituting a subsequent prosecution upon a new and sufficient bill, if it so desires. *S. v. Lucas*, 53; *S. v. Cox*, 57; *S. v. Coppedge*, 590.

CRIMINAL LAW—*Continued*

Arrest of judgment for want of jurisdiction in the Superior Court vacates the verdict and judgment, but does not preclude the State from thereafter proceeding against defendant in the tribunal having jurisdiction of the offense. *S. v. Baucom*, 61.

Arrest of judgment will be allowed when it appears upon face of indictment that court was without jurisdiction. *Ibid.*

§ 57b. Motions for New Trial for Newly Discovered Evidence.

New trial for newly discovered evidence will not lie for evidence that could have been procured by due diligence at original hearing. *S. v. Williams*, 459.

§ 62a. Severity of Punishment.

An attempt to commit the crime of robbery is an infamous crime punishable as provided in G.S. 14-3. *S. v. McNeely*, 737.

§ 62f. Suspended Judgments and Executions.

On appeal from an order of an inferior court putting into effect a suspended sentence, the hearing in the Superior Court must be *de novo*, and where the Superior Court merely finds that there was evidence to support the findings and order of the inferior court, and affirms the order, the cause must be remanded. *S. v. Thompson*, 282.

Evidence *held* to support findings by the court that the defendant allowed people to congregate and remain in her home at nighttime with such frequency and in such numbers as to raise an inference that she was engaged in fortune telling or aiding in prostitution contrary to the terms of a suspended judgment against her, so as to justify the order putting into effect the sentence. *S. v. Davis*, 621.

§ 67a. Supervisory Jurisdiction—Matters Cognizable Ex Mero Motu.

Where the warrant on which defendant was tried does not charge a criminal offense, the judgment of not guilty upon a special verdict is void, and the State's appeal therefrom will be dismissed. *S. v. Everett*, 596.

§ 72. Effect of Appeal.

Pending appeal, the trial court has no jurisdiction to hear a motion for correction of the minutes. *S. v. Arthur*, 586.

§ 78c. Form and Requisites of Exceptions and Assignments of Error in General.

Assignments of error to the court's rulings on the admissibility of evidence and to parts of the charge which do nothing more than refer to the page of the record where the alleged errors may be discovered, are insufficient, since the Court should not be compelled to go beyond the assignment itself to learn what the question is. Rule of Practice in the Supreme Court, No. 19(3). *S. v. Mills*, 487.

Where no exceptions to the charge are taken and set out in the record, exceptions appearing only in connection with the assignments of error are insufficient and will not be considered. *S. v. Crumlin*, 695.

§ 78d(1). Objections and Exceptions to Admission or Exclusion of Evidence.

The admission of testimony of an incriminating statement made by defendant's wife not in his presence must be held for prejudicial error even in the

absence of objection, since such testimony is made incompetent by statute. *S. v. Dillahunt*, 524.

§ 78e(1). Exceptions and Assignments of Error to Charge.

An exception to a long portion of the charge which does not point out the matter complained of is insufficient. *S. v. Stevens*, 40; *S. v. Thomas*, 212.

Assignment of error to charge should present precise question without necessity of going beyond the assignment itself to learn what the question is. *S. v. Mills*, 487.

Assignments of error to the charge not set out in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28. *S. v. Cauley*, 701.

§ 79. The Brief.

An assignment of error not supported by reason or argument or authority in the brief is deemed abandoned. *S. v. Garner*, 79; *S. v. Thomas*, 212; *S. v. Hairr*, 506; *S. v. Cauley*, 701; *S. v. McNeely*, 737.

§ 81a. Nature and Grounds of Appellate Jurisdiction.

The Supreme Court can review decisions of the lower courts only on matters of law or legal inference. *S. v. Neill*, 252.

A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the denial of the motion is not appealable and is not reviewable in the absence of abuse of discretion. *S. v. Williams*, 459.

No appeal lies from the discretionary determination of application for new trial for newly discovered evidence. *S. v. Sparrow*, 623.

Where the record fails to show final judgment, but only prayer for judgment continued upon condition, and recites that defendant excepts to the judgment, the cause must be remanded for judgment or for correction of the record. *S. v. Kay*, 117.

§ 81b. Presumptions and Burden of Showing Error.

Appellant must show prejudice in order to be entitled to a new trial. *S. v. Stevens*, 40.

§ 81c(2). Harmless and Prejudicial Error in Instructions.

It is prejudicial error for the court, in undertaking to define the law, to state it incorrectly. *S. v. Hairr*, 506.

Where the charge contains an incorrect instruction on a material aspect of the case, such error cannot be held harmless because in another part of the charge the court gives a correct instruction thereon, since the jury may have acted upon the incorrect portion. *Ibid.*

§ 81c(3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Defendant's confession and testimony at the trial were to the effect that he fired his pistol, fatally wounding deceased, while robbing deceased's store. *Held:* The admission in evidence of a bullet of the same caliber found in the store more than a month after the commission of the offense and testimony as to abrasion on the wall near where the bullet was found, with photographs of the abrasion for the purpose of illustrating the testimony, is not prejudicial. *S. v. Conner*, 109.

CRIMINAL LAW—*Continued*

An exception to the admission of testimony over objection cannot be sustained when testimony to the same effect is theretofore and thereafter admitted without objection. *S. v. Cauley*, 701.

The admission of testimony against the *femme* defendant that the male defendant upon being arrested told her, the *femme* defendant, "don't tell anything," *is held* harmless. *Ibid.*

§ 81c(4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where concurrent sentences are imposed upon conviction on two counts, any error relating to one count only would be harmless. *S. v. Riddler*, 78; *S. v. Thomas*, 212.

Where the jury makes no reference to one count, it is equivalent to a verdict of not guilty thereon, and the charge of the court to the jury in regard thereto cannot be prejudicial, even if erroneous. *S. v. Cauley*, 701.

§ 81d. Questions Presented for Review.

Upon appeal from refusal of motion to grant a new trial for newly discovered evidence, the Supreme Court will not review questions assigned as error in a former appeal dismissed for failure to comply with the Rules of Court. *S. v. Williams*, 459.

§ 81f. Review of Judgments on Motions to Nonsuit.

An appeal from refusal of defendant's motion to nonsuit in a case in which the State relies upon circumstantial evidence presents the question whether the record, considered in the light most favorable to the State, discloses substantial evidence of all material elements constituting the offense for which the accused was tried. *S. v. Stephens*, 380.

§ 82. Motions in Supreme Court.

A motion in arrest of judgment may be made in the Supreme Court upon the hearing of the appeal. *S. v. Lucas*, 53.

§ 83. Remand.

Where there is no error in the trial on one count, but the sentence thereon is made to begin at the expiration of the sentence on another count upon which a new trial is awarded, the judgment on the count upheld must be set aside and the cause remanded for judgment. *S. v. Sutton*, 679.

§ 85a. Proceeding in Lower Court After Remand.

After the granting of a new trial, defendant may move in the lower court for correction of the minutes, without prejudice to his right to be heard on the question of former jeopardy if no verdict had been returned. *S. v. Arthur*, 582.

DAMAGES.

§ 7. Grounds for Recovery of Punitive Damages.

Punitive damages are not recoverable as a matter of right, but only in the discretion of the jury upon a separate issue in those cases in which the pleadings and evidence warrant the submission of the issue. *Hinson v. Dawson*, 23.

Punitive damages may be recovered when the injury is inflicted maliciously or willfully, and may be recovered for negligent injury only when such injury

DAMAGES—*Continued.*

is the result of wanton negligence, and conduct is wanton when it is in conscious and intentional disregard of and indifference to the rights and safety of others. *Ibid.*

§ 8. Pleadings Relative to Punitive Damages.

Where the facts alleged form a sufficient basis for the conclusion that defendants were guilty of wanton negligence so as to support the submission of the issue of punitive damages, allegations in the complaint stating that the acts of defendant were in reckless and wanton disregard of and indifference to the rights and safety of intestate are improperly stricken, and the fact that they are stated in a paragraph subsequent to the one in which the acts of negligence are particularized, is unobjectionable. *Hinson v. Dawson*, 23.

Allegations that defendant driver, upon reaching an intersection, suddenly and without warning made a left turn directly across the path of the car in which intestate was riding, and, upon information and belief, that defendant driver had defective vision and was incapable of seeing and apprehending the dangers inherent in the operation of a motor vehicle, and that defendant owner had full knowledge of this defect of vision, but nevertheless permitted such defendant to drive, *are held* sufficient to support plaintiff's allegation that defendants' conduct was wanton and to support plaintiff's prayer for the recovery of punitive damages. *Ibid.*

Even though the allegations of the complaint are sufficient to support plaintiff's prayer for punitive damages, allegations in the complaint as to the financial worth of a defendant should be stricken on motion as being an allegation of evidence rather than of an ultimate fact, and as being prejudicial if plaintiff's evidence turns out to be insufficient to warrant submission of an issue as to punitive damages. *Ibid.*

§ 11. Relevancy and Competency of Evidence.

Plaintiff may not testify as to amount of damages for breach of contract when such amount is mere estimate or opinion without any factual predicate therefor. *Rankin v. Helms*, 532.

§ 12. Burden of Proving Damage and Sufficiency of Evidence.

Damages are never presumed, but the burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule, and when compensatory damages are susceptible of proof with approximate accuracy, they must be so proven even in actions of tort. *Lieb v. Mayer*, 613.

Damages to a car resulting from a collision are susceptible of proof with approximate accuracy, and when plaintiff's evidence is confined solely to general statements as to where the car was hit and mashed in, without evidence as to the value of the car before or after the collision or the cost of repair, such evidence will not justify a verdict for substantial damages. *Ibid.*

§ 13a. Instructions on Issue of Damages.

Where plaintiff seeks to recover for personal injuries and damage to her car resulting from a collision, but offers no evidence as to damages to the car which would justify a verdict for substantial damages, an instruction on the issue of damages that the jury should ascertain the damage to plaintiff's automobile and damage to her person, and add the two sums together, must be

DAMAGES—*Continued.*

held for prejudicial error, it being impossible to tell the amount of damages, if any, the jury awarded for injury to plaintiff's car. *Lieb v. Mayer*, 613.

DEDICATION.

§ 4. Acceptance of Dedication.

Where a street is dedicated to the public by a registered map and the sale of lots as bounded on a proposed street shown on the map, the city accepts the dedication by its acceptance of the map as official and its incorporation in a subsequently enacted zoning ordinance. *Bryan v. Sanford*, 30.

DEEDS.

§ 1a. Nature and Requisites in General.

The right to contract and to convey property ought not to be limited or circumscribed unless prohibited by sound public policy or valid statute. *Woolard v. Smith*, 489.

§ 1c. Formal Requisites—Words of Conveyance.

While the grantor in a deed need not use technical operative words of conveyance, he must use words that, upon liberal construction, are sufficient to operate presently as a transfer of the grantor's interest to the grantee, and the mere expression of an intention is insufficient to constitute a conveyance. *McLamb v. Weaver*, 432.

§ 4. Consideration.

Consideration sufficient to support a conveyance is not confined exclusively to the payment of money, and a conveyance executed to discharge a debt or obligation acknowledged by grantor, and accepted by the grantee in satisfaction of such debt or obligation, is supported by a sufficient consideration. *Hayes v. Ricard*, 313.

§ 5. Execution.

The date recited in a deed is at least *prima facie* evidence that it was executed and delivered on that date. *Monteith v. Welch*, 415.

§ 6. Registration of Deeds of Gift.

Judgment that deed of gift delivered by grantors in escrow, and therefore not registered by the grantees within two years after its execution, is void, G.S. 47-26, affirmed on authority of *Allen v. Allen*, 209 N.C. 744. *Harris v. Briley*, 526.

§ 11. General Rules of Construction.

The intention of grantor as expressed in the entire instrument must be given effect in construing the deed unless such intention is in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant, and to this end all parts of the deed should be given force if this can be done by any reasonable interpretation. *Griffin v. Springer*, 95.

The granting clause is the heart of a deed, and in the event of repugnancy between it and preceding or succeeding recitals, the granting clause will prevail. *Ibid.*

DEEDS—*Continued.*

§ 13a. Estates and Interests Created by Construction of the Instrument.
(Estates by entireties, see Husband and Wife.)

The introductory recitals in the deed in question stated that the instrument was between grantor, party of the first part, his nephew, party of the second part, the nephew's two children, parties of the third part; the granting clause was to the party of the second part for life, at his death to be divided to the parties of the third part equally, and "at their death" to the children of the named grandnieces, with *habendum* "to hold the estate as set out to the parties above named." *Held:* The named grandnieces took only a life estate after the life estate of their father, with limitation over upon their respective deaths to their respective children, G.S. 39-1 not being applicable, since the granting clause plainly discloses the intent of grantor to grant the grandnieces merely a life estate. *Griffin v. Springer*, 95.

Where there is a conveyance to A for life and then to his children, with limitation over in the event A has no children, *held* the remainder to A's children is contingent until they are *in esse*, but upon the birth of a child the remainder vests in such child subject to be opened up for any child or children of A who may thereafter be born. The distinction is noted where the conveyance is to the surviving children of the life tenant. *Blanchard v. Ward*, 142.

The deed conveyed to A a life estate, with remainder to his children, with limitation over in the event A had no children. A's only son died during childhood. *Held:* Upon the birth of the son, the remainder vested in him and the limitation over was defeated, and upon the death of the son, A and his wife took the vested remainder under G.S. 29-1, Rule 6, as tenants in common. *Ibid.*

A grant of land directly to the children of a living person conveys the title only to those children who are living at the time of the execution of the deed, including a child then *en ventra sa mere;* but where there is a limitation over to the children at the death of the life tenant, all children who are alive at the termination of the life estate, whether born before or after the execution of the deed, take thereunder. *Edwards v. Butler*, 205.

Grantor conveyed the land in question to his wife for life and then to his children. After the death of the wife, the grantor remarried, and left children surviving of both the first and second marriages. *Held:* Upon the death of the wife named in the deed, her children, including a child *en ventra sa mere* at the time of the execution of the deed, took the fee to the exclusion of the children of the second marriage. *Ibid.*

Where a deed is made to a man "and wife," designating a person not the male grantee's wife, without evidence or contention that the conveyance was not intended to be to the *femme* designated and no sufficient evidence of mistake, nothing else appearing, the grantees take as tenants in common, and further upon the jury's finding that the *femme* had furnished at least one-half of the purchase price, a resulting trust in her favor would arise even though she were not designated as a grantee. *Grant v. Toatley*, 463.

§ 13b. Estates and Interests Created—Rule in Shelley's Case.

A conveyance to grantor's grandnieces for life and to the children of the named grandnieces respectively at their death does not convey a fee simple to the grandnieces by application of the rule in *Shelley's case*, since that rule does not apply unless it manifestly appears that the word "children" is used in the sense of heirs general. *Griffin v. Springer*, 95.

DEEDS—*Continued.*

§ 13d. Construction—Rule Against Perpetuities.

Where a deed conveys land for life to persons *in esse* with remainder upon their respective deaths to their respective children, and one of the life tenants has children and the other none, the rule against perpetuities is not applicable, since the remainder vests immediately in the children of one life tenant, subject to be opened up to include after-born children, and as to the other life tenant, the remainder must vest, if at all, during her life. *Griffin v. Springer*, 95.

§ 14b. Conditions Concurrent and Subsequent.

A deed "upon condition that the same shall be held and possessed by the party of the second part only so long as the property shall be used for school purposes," without provision for termination or right of re-entry for condition broken, *is held* not to disclose an intent to impose rigid restrictions upon the title or to create a condition subsequent, but only to indicate the purpose and motive of the transfer of title, it being apparent from the record that the proceeds of sale were to be used to build other and more suitable school buildings on another and more appropriate site. *Board of Education v. Edgerton*, 576.

The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested, and where the language in the deed merely expresses the motive and purpose which prompted the conveyance, without reservation of power of termination or right of re-entry for condition broken, an unqualified fee will pass. *Ibid.*

§ 15. Reservations and Exceptions.

Where the granting clause, the *habendum*, and the warranty are clear and unambiguous and sufficient to pass immediately a fee simple title to the land described therein, a statement inserted following the description to the effect that the grantor excepted a life estate to himself is ineffectual as repugnant to the fee. *Edwards v. Butler*, 205.

§ 17. Warranties.

An action will not lie for breach of warranty of title to real estate, nor on a general warranty or covenant of quiet enjoyment until there has been an ouster under a superior title. Nor will an action lie for fraudulent misrepresentations on the ground of the grantor's knowledge of claim of title by a third person and failure to disclose such claim, since an action for fraud for misrepresentations in the sale of real estate must be collateral to the title. *Shimer v. Traub*, 466.

§ 22. Construction and Operation of Timber Deeds.

Where deed provides that timber should be cut over only once, second cutting of distinct portion constitutes trespass. *Scarborough v. Veneer Co.*, 1.

It is matter of common knowledge that new timber growth begins immediately after land is cut over, and that second cutting over injures such new growth. *Ibid.*

Where deed conveys all merchantable timber of a specified size, together with the laps, tops and slabs of the timber cut, with right to cut and remove within a specified time, the grantee has the right to remove such laps, tops and slabs within the designated period, irrespective of a provision in the deed

DEEDS—*Continued.*

that the grantee should have the right to cut over the land only once, since such provision does not protect grantors against removal of timber cut, but only against a second cutting. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 13. Advancements Pro Tanto and In Toto and Release of Right to Share.

Intestate died survived by four sons and four daughters. Prior to his death each of the daughters executed a release of any right to share in their father's estate for a specified consideration paid them by their father. There was no contention that the consideration failed to represent a fair division of the entire estate or that there was any bad faith, fraud or overreaching on the part of the ancestor. *Held:* The contracts are binding, and each daughter is estopped thereby to claim any part of the estate. *Price v. Davis*, 229.

A parent may give to one or more of his children his respective share of the estate without making a division of all his property for distribution among all his children or those who represent them, but if the release executed by a child is for a grossly inadequate consideration or is procured by fraud or undue influence, the consideration for the release should be treated as an advancement and not an estoppel. *Ibid.*

DIVORCE AND ALIMONY.

§ 3. Affidavits and Jurisdiction.

In an action for divorce, the truth of the jurisdictional averments required by statute to be set forth in the affidavit is for the determination of the court, even though the judge, in his discretion, may submit such questions of fact to a jury and adopt the jury's findings; but averments referring to the grounds or cause of action for divorce set forth in the complaint, relate to issues of fact for the jury alone. *Carpenter v. Carpenter*, 286.

§§ 5d, 8d. Pleadings and Evidence in Actions for Alimony Without Divorce.

The allegations and evidence in this case *held* sufficient to make out a cause of action for alimony without divorce on the ground that defendant offered such indignities to the person of plaintiff as to make her life burdensome, and to sufficiently establish want of provocation on the part of plaintiff. *Allen v. Allen*, 446.

The State and society and the children of the marriage have an interest in the marriage *status*, and the requirement that the complaining party allege and prove lack of provocation is salutary and will be enforced in order that the Court have opportunity to see that the assistance of the law in breaking up the family is used for the benefit of the injured party only. *Ibid.*

The complaint in this action for alimony without divorce and for custody of the minor child of the marriage *is held* sufficient as against demurrer. *Lawson v. Lawson*, 689.

§ 12. Alimony Pendente Lite.

The burden is upon the husband to establish his plea of adultery of the wife as a bar to her right to subsistence and counsel fees *pendente lite*, and even the failure of the court to make affirmative finding in favor of the husband on

DIVORCE AND ALIMONY—*Continued*

this defense is a sufficient denial thereof to support its order for alimony *pendente lite*. *Lawson v. Lawson*, 689.

§ 16. Enforcing Payment of Alimony.

Pending appeal, the lower court has no jurisdiction to hold defendant in contempt for willful refusal to pay alimony *pendente lite* as ordered. *Lawson v. Lawson*, 689.

§ 22. Validity and Attack of Domestic Decrees.

If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, it is voidable but not void, and may be set aside upon motion in the cause by a party to the end that the cause may be retried. *Carpenter v. Carpenter*, 286.

Where, in an action for divorce on the ground of two years separation, defendant appears and files answer admitting the allegations as to the ground for divorce, neither party to the action may thereafter attack the decree for false swearing in regard to the cause or ground for divorce. *Ibid.*

A stranger to a divorce decree whose pre-existing rights are adversely affected thereby may attack same on the ground of false swearing in regard to the ground for divorce, but this right of a stranger to attack the decree does not obtain when his interests arise entirely subsequent to the rendition of the decree. *Ibid.*

In plaintiff's action to have his marriage declared void on the ground that his spouse's prior decree of divorce from her first husband was void, the plaintiff may not attack the validity of the divorce decree by alleging false swearing or fraud in regard to the ground or cause for divorce upon which the decree was based. *Ibid.*

A person who is neither a party nor a privy to an action has no standing to vacate the judgment by a motion in the cause. *Shaver v. Shaver*, 309.

EJECTMENT.

§ 10. Nature and Essentials of Right of Action.

Where title to land is in controversy and plaintiff seeks to recover possession from defendant and for an accounting of rents and profits, the action is one in ejectment and not merely to remove cloud upon title. *Hayes v. Ricard*, 313.

§ 15. Pleadings and Burden of Proof.

In an action in ejectment plaintiffs must recover on the strength of their own title. *Hayes v. Ricard*, 313.

§ 16. Competency and Relevancy of Evidence.

It is competent for a witness to state whether or not a deed or a series of deeds cover the lands in dispute when he is stating facts within his own knowledge. *Etheridge v. Wescott*, 637.

§ 17. Sufficiency of Evidence and Nonsuit.

In an action in ejectment in which the pleadings raise the issue of title, it is error for the court to discharge the jury and enter judgment declaring plaintiffs to be the owners and ousting defendant from possession. *Hayes v. Ricard*, 313.

ELECTION OF REMEDIES.

§ 1. When Election Is Required in General.

Where a party has inconsistent rights or remedies, his choice of one is an election not to pursue the other. *Surratt v. Ins. Agency*, 121.

In a proceeding to establish a disputed boundary, petitioners may assert the true boundary as pointed out in their petition and at the same time assert by amendment another line marked by a fence, and claim title to the land on one side of the fence by adverse possession, leaving it to the court and jury to say upon the issues arising on the pleadings, which line, if either, they have carried the burden of establishing, the remedies not being inconsistent or repugnant to each other, and the principle of election does not apply. *Jenkins v. Trantham*, 422.

§ 2. Between Rescission for Fraud and Action for Damages.

A party may sue to rescind what has been done as a result of fraud, or affirm what has been done and sue for damages caused by such fraud, but he may not pursue both remedies. *Surratt v. Ins. Agency*, 121.

A motion by a party to set aside a judgment on the ground of alleged fraud bars such party from thereafter maintaining an action to recover damages for the same fraud. *Ibid.*

Plaintiff electing to affirm settlement may not recover of third persons for alleged fraud and duress inducing settlement. *Davis v. Hargett*, 157.

ELECTRICITY.

§ 10. Contributory Negligence of Person Injured.

A person is under duty to avoid coming in contact with an electric wire which he sees and knows to be dangerous. *Alford v. Washington*, 132.

But he may not be contributorily negligent as a matter of law in coming in contact with wire in attempting rescue. *Ibid.*

ESTATES.

§ 4. Merger of Estates.

In order for a lesser estate to be merged in a greater estate, both estates must be held by the same person in the same right without an intermediate estate. *Blanchard v. Ward*, 142.

Where the owner of a life estate acquires a one-half interest in the remainder as tenant in common, his life estate merges with the remainder *pro tanto*, but the other tenant in common holds his interest in the remainder subject to the first tenant's life estate. *Ibid.*

§ 9a. Life Estates and Remainders.

Where a deed conveys land for life to persons *in esse* with remainder upon their respective deaths to their respective children, and one of the life tenants has children and the other none, the rule against perpetuities is not applicable, since the remainder vests immediately in the children of one life tenant, subject to be opened up to include after-born children, and as to the other life tenant, the remainder must vest, if at all, during her life. *Griffin v. Springer*, 95.

In contemplation of law, the possibility of issue is commensurate with life. *Ibid.*; *Stanley v. Foster*, 201.

ESTATES—*Continued.*

A conveyance to a person for life with remainder to her children is valid even though the life tenant have no children at the time of the execution of the deed, since the life estate is sufficient to uphold the contingent remainder, and such contingent remainder will vest *eo instanti* a child is born to the life tenant. *Griffin v. Springer*, 95.

Land was conveyed to A for life, remainder to his children. A's only child died during childhood, and A and his wife inherited the vested remainder as tenants in common. *Held:* The wife's interest in remainder was subject to the husband's life estate, which life estate is sufficient to support the contingent remainder to any child or children of A who may thereafter be born, and A and wife cannot convey the indefeasible fee. *Blanchard v. Ward*, 142.

§ 17. Life Estates and Remainders in Personalty.

A remainder in personal property after a life estate may be created by deed or other proper written instrument. *Ridge v. Bright*, 345.

ESTOPPEL.

§ 10. Persons Estopped.

Plaintiffs claiming as devisees under a will are bound by an estoppel which could have been asserted against their testator, and evidence tending to show an estoppel *in pais* against the testator is competent against plaintiffs. *Hayes v. Ricard*, 313.

§ 11a. Pleading Estoppel.

If plaintiff seeks to rely upon a waiver or an estoppel *in pais* or an equitable estoppel affecting the real and substantial merits of the matter in controversy and has an opportunity to plead it, and the facts constituting a waiver or estoppel do not appear in the pleadings of the parties, he must specially plead it, and if he does not do so, evidence to prove it is not admissible over objection. *Wright v. Ins. Co.*, 361.

EVIDENCE.

§ 5. Judicial Notice—Matters Within Common Knowledge.

It is a matter of common knowledge that new timber growth begins immediately after land is cut over, and that a second entry with incidental roadways and placing of locations for a sawmill would seriously interfere with the growth of new timber. *Scarborough v. Veneer Co.*, 1.

§ 8. Burden of Proof—Defenses.

Burden is upon defendants to prove affirmative defense of a release executed by plaintiff. *Blevins v. France*, 335.

§ 13. Privileged Communications—Attorney and Client.

Where a party examines an attorney in regard to a transaction with the attorney's deceased client, such party waives the privilege and the adverse party may cross-examine the attorney as to that particular transaction. *Hayes v. Ricard*, 313.

§ 19. Evidence Competent to Impeach or Discredit Witness.

The exclusion of evidence which would clearly show bias, interest, prejudice, etc., on the part of a witness is erroneous and may be ground for a new trial. *In re Gamble*, 149.

EVIDENCE—*Continued.*

In proceeding to have respondent declared incompetent, it is competent for respondent to show that petitioner was interested because petitioner was beneficiary under respondent's will. *Ibid.*

Where a party testifies as a witness in his own behalf, it is competent for the opposing party to show his general reputation as bearing on his credibility as a witness. *Vance v. Fike*, 368.

§ 22. Cross-Examination.

Ordinarily, the answers of a witness to questions relating to collateral matters, asked on cross-examination for the purpose of impeachment, are conclusive, and may not be contradicted by other evidence, but this rule does not obtain when the questions tend to impeach the impartiality of a witness by showing bias, interest, prejudice, etc., since such questions are not irrelevant to the issue in the sense that the cross-examiner is concluded by the answer. *In re Gamble*, 149.

A party is entitled to cross-examine a witness for the purpose of showing bias of the witness. *S. v. Rowell*, 280.

§ 32. Transactions or Communications With Decedent or Lunatic.

A party examining a witness in regard to a transaction with a decedent waives the privilege, and the adverse party may cross-examine the witness in regard to that particular transaction. *Hayes v. Ricard*, 313. A pre-trial examination comes within this rule, and the waiver continues throughout the proceedings, including a second trial of the same cause. *Ibid.*

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Where a contract is not required to be in writing it may be partly written and partly verbal, in which event the verbal part may be shown by parol, provided the parol evidence does not vary or contradict the written terms, but supplements the written part so as to establish one entire contract. *Rankin v. Helms*, 532.

§ 42f. Admissions in Pleadings.

Admission in the answer of the employee that at the time of the collision he was driving the employer's truck with the general knowledge and consent of the employer is improperly admitted over the employer's objection, since the admission is not against the interest of the employee but is an affirmative declaration tending only to contradict the defense of the employer. *Brothers v. Jernigan*, 441.

§ 46d. Opinion Evidence as to Value or Damages.

Plaintiff may not testify as to amount of damages resulting from breach of contract when such amount is mere estimate or opinion without evidence of facts as predicate. *Rankin v. Helms*, 536.

EXECUTION.

§ 2. Property Subject to Execution—Trust Estates.

The common law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, G.S. 1-315(4), G.S. 1-316, but even so, the trustee must be brought in by supplemental proceeding under G.S. 1-360 *et seq.* *Cornelius v. Albertson*, 265.

EXECUTION—*Continued.*

§ 6. Issuance and Levy of Execution.

Since an execution must conform to the judgment, it may not be issued against a stranger to the judgment, and therefore the writ cannot command the sheriff to satisfy the judgment out of property held in trust for the judgment debtor by a person not a party to the suit, either individually or as executor or trustee. *Cornelius v. Albertson*, 265.

§ 11. Stay, Quashing and Relief Against Execution.

An injunction against levy or execution under a judgment will lie only when the judgment debtor has no adequate remedy at law, and where the judgment debtor may move in the cause to recall or withdraw the execution, or stay an execution by *supersedeas*, injunction will not lie. *Cornelius v. Albertson*, 265.

§ 24. Supplementary Proceedings.

Where the judgment creditor seeks to have property held in trust for the benefit of the judgment debtor sold in satisfaction of the judgment, the judgment creditor should have execution issued to satisfy the judgment out of the property of the judgment debtor, and after return of such execution unsatisfied, have the trustee brought in and made subject to the jurisdiction of the court by supplemental proceedings under G.S. 1, Article 31. Upon the hearing in such proceeding the question of whether the property is held in an active trust, and therefore not subject to sale, or held in a passive trust, and therefore subject to sale, may be determined. *Cornelius v. Albertson*, 265.

EXECUTORS AND ADMINISTRATORS.

§ 10. Control and Management of Estate in General.

An administrator is not an insurer of the assets of the estate, but is required, in the ordinary course of administration, to act in good faith and with such care, foresight and diligence as an ordinarily prudent and sensible person would act with his own property under like circumstances. *Poindexter v. Bank*, 191.

§ 12a. Operation of Business of Deceased.

In the absence of statutory provision, a personal representative may carry on the business of the decedent only where a binding contractual obligation made by the decedent so requires, where a temporary operation is necessary to prepare the assets for sale as a going concern or for liquidation, or when authorized by the court, and he is responsible for loss to the estate which proximately results from an unauthorized operation of decedent's business. *Poindexter v. Bank*, 191.

Evidence that the personal representative continued the operation of intestate's manufacturing business in the ordinary course of trade, installing its own management, purchasing machinery, etc., for a period of 21 months until the business became insolvent, and that at the time the personal representative took over the business it was worth a large sum over and above its liabilities, *is held* sufficient to overrule nonsuit in an action by the beneficiaries of the estate to recover for loss to the estate proximately resulting from the unauthorized operation of the business by the personal representative. *Ibid.*

FRAUD.

§ 3. Past or Subsisting Fact.

While a promissory misrepresentation may be the basis of fraud, it is required that such misrepresentation be made with intent not to comply and that it be relied upon by the promisee and induce him to act to his disadvantage. *Vincent v. Corbett*, 469.

FRAUDS, STATUTE OF.

§ 2. Sufficiency of Writing.

The Statute of Frauds does not require that the agreement shall be in writing but only that some memorandum of the agreement be in writing and signed by the party to be charged. *Millikan v. Simmons*, 196.

Where, during the term of an option, the parties verbally agree to an extension at the request of vendor, and thereafter a memorandum of the extension is executed and signed by vendor, and such memorandum refers to the original option and stipulates that its terms should remain in effect for the period of the extension, the memoranda will be construed together, and the extension is sufficiently definite and certain when made so by reference to the original option. *Ibid.*

Where the memorandum of a contract to convey realty fails to identify the buyer in any manner, the memorandum is insufficient under the Statute of Frauds, and the identity of the buyer may not be shown by parol. *Elliott v. Owen*, 684.

§ 3. Pleading and Burden of Proof.

The burden is on the party declaring on a contract required by the Statute of Frauds to be in writing to show that the memorandum of the contract was executed in compliance with the Statute. *Elliott v. Owen*, 684.

§ 9. Contracts Affecting Realty.

A contract for the construction of a house is not required to be in writing. *Rankin v. Helms*, 532.

GAMES AND EXHIBITIONS.

§ 4. Liability for Injury to Participants.

Evidence to the effect that defendants were engaged in the business of promoting, arranging and conducting automobile stock car racing, that the race in question was started while intestate's car was stalled on the track, and that the starting officials knew, or should have known, of the perilous and helpless condition of intestate, *is held* sufficient to be submitted to the jury on the question of defendants' concurrent negligence. *Blevins v. France*, 334.

Evidence that officials of a stock car race started a race inadvertent to the fact that intestate's car was stalled on the track is insufficient to establish willful or wanton injury so as to preclude the defense of contributory negligence. *Ibid.*

Doctrines of sudden emergency and rescue *held* inapplicable upon the evidence. *Ibid.*

Contributory negligence of participant in stock car race *held* to bar recovery for his death in collision. *Ibid.*

Stock car race *held* in conformity with Ch. 177, Session Laws of 1949, is a lawful contest. *Ibid.*

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

A party litigant has no right to select a grand juror but may object only to his selection on the ground that he does not possess the qualifications or that the manner of his selection was illegal. *S. v. Stevens*, 40.

The authority conferred on the presiding judge by local law applicable to the county to discharge the whole grand jury includes the right to discharge any one of the grand jurors and to fill the vacancy thus occasioned with another possessing the requisite qualifications. *Ibid.*

Statutory provisions which relate to the number and qualifications of grand jurors and which are designed to secure impartiality and freedom from unfair influences are deemed to be mandatory; those which prescribe more details as to the manner of selecting or drawing them are usually regarded as directory only. *Ibid.*

The burden is on the objecting party to show disqualification of a grand juror. *Ibid.*

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

In *habeas corpus* proceedings, the court has jurisdiction to discharge defendant only when the records disclose that the court did not have jurisdiction of the offense or of the person of defendant, or that the judgment imposed was not authorized by law, but the writ is not available as a substitute for appeal to correct errors of law, nor may defendant be discharged for irregularities in the record which may be corrected by amendment and which do not render the proceeding void. *S. v. Cannon*, 399.

Where the records disclose that a judgment regular in all respects was imposed by a court having jurisdiction of the offense and the person of defendant, such judgment is not void, and the omissions from the record of defendant's plea and the return of the verdict of the jury can be supplied by amendment. Therefore, decree in the *habeas corpus* proceeding that the judgment was void is beyond the jurisdiction of the court in such proceeding, and the decree is not binding upon the State. *Ibid.*

HIGHWAYS.

§ 6. Maintenance.

Recovery cannot be had under the State Tort Claims Act for injuries in a wreck resulting from the negligent failure or omission of the responsible employees of the Highway Commission to repair a hole in a State highway. *Flynn v. Highway Com.*, 617.

HOMICIDE.

§ 5. Murder in the Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Crisp*, 407.

§ 16. Presumptions and Burden of Proof.

In a prosecution for homicide arising out of a shooting, the State must prove that the shot fired by defendant was a proximate cause or a concurring or an accelerating cause of the deceased's death. *S. v. Simpson*, 325.

An intentional killing with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice. *S. v. Crisp*, 407.

HOMICIDE—*Continued.*

§ 25. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence *held* insufficient to be submitted to the jury in this prosecution for murder. *S. v. Simpson*, 325; *S. v. Stephens*, 380.

Evidence that deceased died as a result of injuries inflicted by defendant *held* sufficient for jury. *S. v. Duncan*, 374.

Where the State's evidence tends to show an intentional killing with a deadly weapon, it is sufficient to be submitted to the jury on the charge of murder in the second degree, notwithstanding defendant's evidence in conflict tending to show that the shooting was by accident or misadventure. *S. v. Crisp*, 407.

Where defendant contends that though the evidence may be sufficient to be submitted to the jury as to the offense of manslaughter, it is insufficient to support a verdict of guilty of murder in the second degree, defendant should request instructions that the jury could not return a verdict for any higher offense than manslaughter, and motion for judgment of nonsuit is not the proper way to present this contention. *S. v. Crisp*, 407.

§ 27b. Instructions on Presumptions and Burden of Proof.

Where the State offers evidence of an intentional killing with a deadly weapon, an instruction that the burden is on defendant to establish matters in mitigation or excuse to the satisfaction of the jury unless they arise out of the evidence against him, *is held* without error, defendant being entitled to show matters in mitigation or excuse from the State's evidence, if he can, as well as from that offered by himself. *S. v. Crisp*, 407.

§ 27e. Instructions on Question of Manslaughter.

The court's instruction as to the legal provocation which will reduce murder in the second degree, established by proof of an intentional killing with a deadly weapon, to manslaughter, *held* sufficiently full. *S. v. Crisp*, 407.

The court's definition of the terms unlawful act, culpable negligence and proximate cause as they relate to the crime of manslaughter *held* without error in the case, the charge not being objectionable on the ground that the jury were left free to consider ordinary rather than culpable negligence in determining defendant's defense of killing by accident or misadventure. *Ibid.*

§ 30. Appeal and Review.

Where the evidence tends to show defendant's guilt of murder, the jury's verdict of guilty of manslaughter, even though evidence of manslaughter is lacking, will not be disturbed on appeal, the verdict being favorable to defendant. *S. v. Stephens*, 380.

HUSBAND AND WIFE.

§ 4a. Right to Sue or Be Sued Without Joinder of Spouse.

Since C.S. 454 has not been brought forward in our General Statutes, the husband is not a necessary or proper party to an action to cancel a contract to convey executed to the wife alone, in which the wife sets up a counterclaim for specific performance or return of the purchase price paid. *Etheridge v. Wescott*, 637.

§ 8. Liability for Crime.

If a wife, in the presence of her husband, commits a felony, there is a *prima facie* presumption, in the absence of evidence to the contrary, that she com-

mitted the offense under constraint by him, but the presumption is rebuttable, and if the wife acts of her own free will and without any constraint on the part of her husband, she is held to the same responsibility as any other person, and her coverture is no defense. *S. v. Cauley*, 701.

Evidence that the male defendant mercilessly beat his three-year-old stepdaughter in the presence of the child's mother, that during the hours the offense was committed the wife was heard cursing and laughing, and that she thereafter said the wounds inflicted on the child were the result of the child's falling from an automobile, *is held* sufficient to take the case to the jury upon the theory that the wife was present, aiding and abetting her husband of her own free will and volition in the commission of the felonious assault. *Ibid.*

In a prosecution of the wife for aiding and abetting her husband in the commission of a felonious assault in her presence, the failure of the court to charge as to the rebuttable presumption that she acted under his constraint must be held for prejudicial error. *Ibid.*

§ 14. Creation and Existence of Estates by Entireties.

Conveyance made to two persons who are not married cannot create estate by entireties. *Grant v. Toatley*, 463. Wife's joinder in commissioner's deed in partition to herself and husband does not create estate by entireties. *McLamb v. Weaver*, 432. Husband's deed to himself and wife creates estate by entireties. *Woolard v. Smith*, 489.

§ 15. Nature and Incidents of Estates by Entireties.

An estate by entirety is based on the fiction of the unity of persons resulting from marriage, so that the husband and wife constitute a legal entity separate and distinct from them as individuals, with the result that together they own the whole, with right of survivorship by virtue of the original conveyance. *Woolard v. Smith*, 489.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

An indictment must charge the offense with sufficient certainty to apprise defendant of the specific accusation against him and to protect him from a subsequent prosecution for the same crime. *S. v. Cox*, 57.

While ordinarily a warrant or indictment for a statutory offense is sufficient if it follows the language of the statute, where the words of the statute do not in themselves inform the accused of the specific offense of which he is charged so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, the words of the statute must be supplemented by other allegations so as to charge the particular offense. *Ibid.*

A bill of particulars cannot supply a fatal deficiency in the warrant. *Ibid.*

Where a defendant goes to trial without moving to quash a warrant charging that he operated a motor vehicle while under the influence of "intoxicating liquor, opiates or narcotic drugs," he waives any duplicity resulting from the use of the disjunctive "or." *S. v. Merritt*, 687.

INDICTMENT AND WARRANT—*Continued.*

§ 17. Bill of Particulars.

A bill of particulars may not be used to supply a fatal deficiency in a warrant or indictment. *S. v. Cox*, 57.

Motion for bill of particulars is addressed to the discretion of the trial court. *S. v. Flowers*, 77.

INFANTS.

§ 13. Actions Against Infants—Service of Process and Appointment of Guardian Ad Litem.

A guardian *ad litem* was appointed for infants on the same day they were made parties and served with summons. The guardian so appointed refused to serve. The court thereafter appointed another guardian who accepted the appointment and filed answer. *Held:* The appointment of the substitute guardian and the filing of answer by him after the date the infants were served cures any irregularity in the appointment of the original guardian before service on the infants. *Cherry v. Woolard*, 604.

No impropriety can be implied from the fact that the guardian *ad litem* accepts service of summons instead of requiring service by the sheriff. *Travis v. Johnston*, 713.

§ 15½. Validity and Attack of Judgments Against Infants.

A judgment against an infant on the answer filed by his guardian *ad litem* is not voidable unless and until it is established that the guardian *ad litem* did not in good faith act in the representation of his ward. *Travis v. Johnston*, 713.

INJUNCTIONS.

§ 4c. Enjoining Nuisance or Trespass.

Husband and wife may maintain joint action for trespass to realty by discharge of dust and to abate same as nuisance. *Hall v. Mica Corp.*, 182.

While mere apprehension of a nuisance is insufficient to warrant equitable relief, it is not required that plaintiff wait until some harm has been experienced or show with absolute certainty that it will occur, but injunction will lie upon proof that apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate. *Causby v. Oil Co.*, 235.

Plaintiffs' evidence tending to show that the operation of a lawful business by defendant caused the emission of noxious and nauseating odors into the air, polluting the air within a radius of about two miles, and resulting in annoyance and inconvenience and a hazard to health, thus depriving plaintiffs of the healthful enjoyment of their homes, is sufficient to show an abatable private nuisance *per accidens*, regardless of the degree of care or skill exercised by defendant to avoid such injury. *Ibid.*

§ 4g. Enjoining Enforcement or Implementation of Statute.

When public officials act in accordance with and under color of an act of the General Assembly, the constitutionality of such statute may not be tested in an action to enjoin enforcement thereof unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury. *Fox v. Comrs. of Durham*, 497.

INJUNCTIONS—*Continued.*

Residents and taxpayers of a county may not, solely on the basis of their *status*, restrain a county and its officials from appropriating and expending funds in implementing a zoning ordinance authorized by act of the General Assembly, since the constitutionality of the statute and ordinance may not be tested by injunction, and plaintiffs would have an adequate remedy at law if an unauthorized or illegal tax should be levied against any of them. *Ibid.*

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

While the judge, upon the hearing of motion for a temporary restraining order, may not decide the cause on the merits, the court must consider and weigh the affidavits and other evidence of the opposing parties for the purpose of ascertaining whether plaintiff has made out an apparent case. *Causby v. Oil Co.*, 235.

Where plaintiff has made out an apparent case for injunctive relief, the court will ordinarily issue a temporary restraining order when the injury which defendant would suffer from its issuance is slight as compared with the damage which plaintiff would sustain from its refusal if the plaintiff should finally prevail. *Ibid.*

Evidence *held* sufficient to support order restraining to final hearing operation of business in such manner as to constitute nuisance *per accidens*. *Ibid.*

An order enjoining county commissioners from making further payments under the contract attacked until the final hearing, upon conflicting allegations in the verified pleadings, is upheld. *Hyder v. McBride*, 485.

Where, after the institution of the action, plaintiffs convey the property, the temporary order issued at their instance in connection with their use of the land must be vacated and the costs of appeal taxed against them, since they no longer have any property rights to be protected by the injunction. *Willcox v. Di Capadarso*, 741.

INSURANCE.

§ 38. Accident and Health Insurance.

Evidence tending to show that insured was the aggressor and demonstrated an attempt to do violence to the person of the witness, causing the witness to push him away to protect himself and home, that insured fell back and struck his head against a water meter, causing death, does not disclose death from bodily injury sustained through purely accidental means within the coverage of the insurance policy sued on, and nonsuit should have been entered. *Scarborough v. Ins. Co.*, 502.

§ 43½. Auto Collision and Upset.

Insured was riding on the rear of a truck. The cab of the truck struck an overhanging limb, breaking the windshield. The limb was bent far enough back for the cab to pass, and when the pressure on the limb was released by the passing of the cab, it flew back, striking plaintiff in the eye, causing the loss of the sight of that eye. *Held:* The striking of the limb by the cab was a collision within the meaning of that term as used in the policy in suit, and that the limb should strike plaintiff on the rebound was an accident within the coverage of the policy. *Griffin v. Ins. Co.*, 484.

In an action on a policy providing payments for injury by accident "while in or upon, entering or alighting from" a truck, the burden is upon plaintiff to show injury within the coverage of the policy, and evidence merely tending to

INSURANCE—*Continued.*

show that the injured person was on the highway approaching the truck from the rear when he was run down and killed by a car, and that the doors to the truck remained closed and undamaged, is insufficient to overrule insurer's motion for nonsuit. *Jarvis v. Ins. Co.*, 691.

§ 50. Actions on Auto Policies.

Where insured declares on the policy as written and defendant insurer files answer giving notice that it would rely upon transfer of an interest in the insured vehicle to another without endorsement on the policy as required by its terms, and use of the vehicle beyond a 50-mile radius of the stated place of principal garaging in violation of provisions in the policy, insured, in the absence of a reply setting up waiver or estoppel by insurer of such provisions, is not entitled to introduce evidence thereof, and, plaintiff's own evidence showing a violation of these provisions, nonsuit is proper. *Wright v. Ins. Co.*, 361.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Statutes.

The unlawful possession of non-taxpaid whiskey for the purpose of sale, a violation of G.S. 18-50, and the unlawful possession of non-taxpaid whiskey, a violation of G.S. 18-48, are separate and distinct offenses of equal degree, and a violation of the one is not a lesser degree of the offense defined in the other. *S. v. Daniels*, 671.

§ 5b. Possession of Implements Designed for Manufacture of Intoxicating Liquor.

Evidence of defendants' guilt of possession of material and equipment designed and intended for the purpose of manufacturing whiskey *held* sufficient. G.S. 18-4. The use of abbreviations in court pleadings, minutes, judgments and records is not approved. *S. v. Edmundson*, 693.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence of conspiracy between defendants to transport beer in truck not registered for this purpose *held* insufficient, but evidence was sufficient as to one defendant on question of guilt of illegal transportation in such truck. *S. v. McCullock*, 11.

Evidence tending to show that a quantity of nontaxpaid liquor was found on defendant's premises near his house and at places under his control is sufficient to be submitted to the jury in a prosecution for unlawful possession of intoxicating liquor. *S. v. Ryals*, 75.

JUDGMENTS.

§ 9. Judgments by Default in General.

Where answer is not verified it must be stricken on motion after notice and hearing before rendition of default judgment. *Rich v. R. R.*, 175.

The jurisdiction of the Clerk of Superior Court to enter judgment by default final and by default and inquiry is both conferred and limited by statute, and the statutes do not deprive the Superior Court in term of its jurisdiction in regard thereto. *Ibid.*

JUDGMENTS—*Continued*

§ 11. Judgments by Default and Inquiry.

A judgment by default and inquiry is an interlocutory judgment which transfers the cause by operation of law to the Superior Court for further hearing in term. *Rich v. R. R.*, 175.

§ 17b. Conformity to Pleading, Proof and Verdict.

Upon motion in the original cause presenting solely the question of the validity of the order of sale and decree of confirmation in the foreclosure of a tax sale certificate, the court is not called upon to adjudicate the title of a subsequent purchaser, and such adjudication will be stricken on appeal. *Travis v. Johnston*, 713.

§ 18. Process, Service and Jurisdiction.

Action for specific performance of a contract to convey a described tract of land was instituted against a nonresident in the county in which the land is situate. Process was served by publication under G.S. 1-98(3) and personally by a United States Marshal under G.S. 1-104. *Held:* Levy on the land under a writ of attachment was not required, since the bringing of the action in the jurisdiction where the land lies is sufficient to enable the court to exercise dominion over it, and the court acquired jurisdiction over the *res* sufficient to support a judgment *in rem* decreeing specific performance of the contract. *Harris v. Upham*, 477.

Where the judgment roll discloses sheriff's return of service by delivery to named defendants "also, copies to all minor defendants," a person examining the record will not be charged with the duty of minutely examining the record to ascertain whether the words quoted were in fact a part of the return as made by the sheriff, and in the absence of actual knowledge, a purchaser at a judicial sale under the judgment acquires title unaffected by any contention of defect of service. *Cherry v. Woolard*, 602.

§ 20. Modification and Correction of Records in Trial Court.

A court has the inherent power and duty to correct the mistakes of its clerk or other officers, or supply defects or omissions in its records in order to make its records speak the truth, and no lapse of time will debar the court of the power to discharge this duty. Thus it may be performed by another presiding judge at a subsequent term. *S. v. Cannon*, 399.

The power of a court of record to amend or supply omissions in its minutes should be exercised with care and caution, and proof of the omission or defect should be clear and satisfactory, but parol evidence is competent in this jurisdiction upon motion to amend, though such evidence is not admissible to correct a court record when such record is collaterally attacked. *Ibid.*

In the exercise of its power to amend and correct its records, the court is authorized only to make the record correspond to the actual facts, and cannot, under the guise of amendment, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred. *Ibid.*

Where, upon motion of the solicitor to correct and amend the minutes of the court, the court finds upon supporting evidence that defendant's plea and the return of a verdict of guilty by the jury were omitted from the minutes through inadvertence and oversight and that the proceedings were in all respects regular, such findings are conclusive. *Ibid.*

Where court corrects the minutes of the court to make them speak the truth, the records stand as though the correct entries had been made at the time. *Ibid.; Trust Co. v. Toms*, 645.

After the granting of a new trial the defendant may move in the lower court for correction of the minutes. *S. v. Arthur*, 582. But pending the appeal the trial court has no jurisdiction to hear such motion. *S. v. Arthur*, 586.

Where the judgment roll in a proceeding for the appointment of a successor trustee fails to show the judge's approval of the clerk's order appointing the successor trustee as required by G.S. 36-12, the court may, upon motion in the cause, hear evidence, and upon its finding therefrom that the presiding judge did in fact approve the order and that the order of approval was lost without having been spread upon the minutes as required by G.S. 2-42(9), order that the minutes be corrected to speak the truth. *Trust Co. v. Toms*, 645.

Upon the hearing of a motion in the cause to correct the minutes of the court to make them speak the truth, the loss and contents of missing records may be established by affidavits. *Ibid.*

§ 24. Parties Who May Attack Judgment.

A stranger to a divorce decree whose pre-existing rights are adversely affected thereby may attack same on the ground of false swearing in regard to the ground for divorce, but this right of a stranger to attack the decree does not obtain when his interests arise entirely subsequent to the rendition of the decree. *Carpenter v. Carpenter*, 286.

In plaintiff's action to have his marriage declared void on the ground that his spouse's prior decree of divorce from her first husband was void, the plaintiff may not attack the validity of the divorce decree by alleging false swearing or fraud in regard to the ground or cause for divorce upon which the decree was based. *Ibid.*

A person who is neither a party nor a privy to an action has no standing to vacate the judgment by a motion in the cause. *Shaver v. Shaver*, 309.

§ 25. Procedure to Attack Judgments.

A challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is a void judgment without legal effect and may be treated as a nullity at any time. *Hart v. Motors*, 84.

Motion to set aside judgment by default for irregularity may be made before judge at term. *Rich v. R. R.*, 175.

Where it appears on the face of the record that the court rendering a judgment was without jurisdiction of the parties or the subject matter, the judgment is a nullity and it may be attacked by any person adversely affected thereby at any time, collaterally, or otherwise. *Carpenter v. Carpenter*, 286.

§ 27b. Attack of Judgments as Void.

A judgment is not void if it is rendered by a court which has authority to hear the cause and jurisdiction of the parties or their interest in the property affected. *Travis v. Johnston*, 713.

§ 27e. Attack of Judgments for Fraud.

If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, it is voidable but not void, and may be set

JUDGMENTS—*Continued*

aside upon motion in the cause by a party to the end that the cause may be retried. *Carpenter v. Carpenter*, 286.

Where, in an action for divorce on the ground of two years separation, defendant appears and files answer admitting the allegations as to the ground for divorce, neither party to the action may thereafter attack the decree for false swearing in regard to the cause or ground for divorce. *Ibid.*

§ 29. Parties Concluded by Judgment.

A judgment cannot be binding upon persons who are strangers to the action and who are given no opportunity to be heard. *Peel v. Moore*, 512.

§ 32. Operation of Judgment as Bar to Subsequent Action.

Estoppel by judgment ordinarily depends upon the identity of the parties, subject matter and issues. *Surratt v. Ins. Agency*, 121.

Adjudication that judgment was not procured by fraud *held* to bar subsequent action for damages upon substantially identical allegations of fraud. *Ibid.*

JUDICIAL SALES.

§ 7. Title and Rights of Purchaser.

Purchaser at judicial sales takes good title when record is in all respects valid; and purchaser is not required to see to proper application of proceeds of sale. *Cherry v. Woolard*, 603.

LANDLORD AND TENANT.

§ 10. Liability of Landlord for Injuries to Tenant from Defective Condition of Premises.

In an action by a tenant against a landlord for injuries received as a result of defective condition of the premises, evidence as to other properties owned by the landlord and as to repairs of the premises made after the injury, is properly excluded. *Robinson v. Thomas*, 732.

The landlord is liable to the tenant for injuries received as a result of defective condition of the premises only if the defect is latent and the landlord has actual or constructive knowledge of such dangerous defect and fails to give warning thereof, and the tenant is not aware of the danger and could not by the exercise of ordinary diligence discover it. *Ibid.*

Evidence *held* insufficient to show liability of landlord or rental agent for injury from latent defect in premises. *Ibid.*

§ 11. Liability of Tenant for Injury to Third Persons.

A lessee of a part of a building, nothing else appearing, is not under duty to install, maintain or remove a drain pipe across the sidewalk in front of the building, and may not be held liable by a pedestrian for injuries received in a fall over such pipe. *Hedrick v. Akers*, 274.

LARCENY.

§ 1. Nature and Elements of the Crime.

Larceny and receiving stolen goods are separate offenses and not degrees of the same offense. *S. v. Neill*, 252.

LARCENY—*Continued.*

§ 4. Indictment and Warrant.

A warrant charging that defendant unlawfully and willfully authorized and directed his employee to enter upon the lands of another and carry off sand and gravel therefrom, without alleging what, if anything, the employee did pursuant to such authorization, does not charge a criminal offense. G.S. 14-80. *S. v. Everett*, 596.

§ 5. Presumptions and Burden of Proof.

Recent possession of stolen goods raises a presumption of fact that the possessor is guilty of the larceny, and, when the larceny is by breaking and entering, that the possessor is guilty of the breaking; but recent possession raises no presumption of receiving. *S. v. Neill*, 252.

LIMITATION OF ACTIONS.

§ 6d. Accrual of Right of Action—Contracts to Convey.

Where a contract to convey stipulates that the vendor should execute deed to the purchaser as soon as the land is clear of encumbrance and the vendor is in position to make warranty deed, the statute of limitations does not begin to run in favor of the vendor until the removal of the encumbrance or encumbrances. *Etheridge v. Wescott*, 637.

MANDAMUS.

§ 1. Nature and Grounds of the Writ.

Mandamus lies to compel the performance of a purely ministerial duty, imposed by law, at the instance of a party having a clear legal right to demand performance, and the remedy is not available to establish a legal right, or to compel the performance of an illegal or unauthorized act, nor will it issue where the rights of those not parties to the action would be injuriously affected. *Hinshaw v. McIver*, 256.

Therefore *mandamus* will not lie to compel a city tax collector to issue license for a junk yard on the ground that the ordinance under which plaintiff's license had been revoked was void. *Ibid.*

§ 2a. Ministerial or Legal Duty.

Mandamus will lie to compel a municipality to zone one of four corners at an intersection in the same manner as it had zoned two other corners at the intersection, such action being a ministerial duty of the city under G.S. 160-173. *Bryan v. Sanford*, 30.

MASTER AND SERVANT.

§ 2. Contracts of Employment.

The written contract in this case, purporting to reduce to writing the prior verbal contract of employment between the parties, without payment to the employee of the compensation due her up to the time of the execution of the writing and without providing in express terms either for cancellation or continuance of the employment, together with provision for the continuance of the use of the employee's given name as the trade name for the business, *is held* not a cancellation or termination of the pre-existing contract of employment or a contract fixing a new rate of pay for subsequent employment. *Long v. Gilliam*, 548.

MASTER AND SERVANT—*Continued.*

A verbal contract of employment under which the employee's compensation was fixed at a stipulated sum per week, plus a yearly share of the net profits, was reduced to writing which did not stipulate a fixed term of employment, and the employee continued to work in the same manner after the execution of the writing. *Held:* Under the allegations and evidence, whether the employee was to continue to receive a share of the profits in addition to the compensation to be paid weekly was a question of fact for the jury. *Ibid.*

§ 6. Term of Employment.

Where a contract of employment does not fix a definite term, it is terminable at the will of either party, but as long as it is not terminated by either party, the employee is entitled to compensation at the contract rate for the period worked. *Long v. Gilliam*, 548.

§ 22a. Nature and Scope of Employer's Liability for Injuries to Third Person by Servant.

When the injured person sues the servant and recovers, he may not thereafter recover against the master a sum greater than the verdict against the servant. *MacFarlane v. Wildlife Resources Com.*, 385.

§ 39b. Workmen's Compensation Act—Independent Contractors.

Only employees are covered by the Workmen's Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to an independent contractor. *Hart v. Motors*, 84.

§ 40b. Compensation Act—Whether Injury Resulted from Accident.

Evidence tending to show that the employee, in normal health so far as appeared, was working near a high tension wire from which all current had been cut off but which could have been charged with static electricity, that as he came near to or in contact with the wire, he staggered back and fell to the ground unconscious 4 to 10 feet from the wire, and died, together with testimony, competent as part of the *res gestae*, that the employee exclaimed "that line is hot," *is held* sufficient to sustain the finding of the Industrial Commission that the employee died as a result of an accident arising out of and in the course of his employment, notwithstanding that other employees, in dry clothing, came in contact with the wire without injury. Whether the death certificate of the coroner was competent as to the cause of death is not decided. *Blalock v. Durham*, 208.

§ 40c. Compensation Act—Whether Accident Arises Out of Employment.

Evidence to the effect that the employee was injured while working under the supervision of his superior in attempting to make repairs on a drum belonging to another contractor working in the same building and on the same job, with evidence that the two contractors had on prior occasions assisted each other without charge, supports the conclusion that the injury arose out of and in the course of the employment. *Butler v. Heating Co.*, 525.

Evidence that bickerings and altercations arising in connection with the employment were the cause of mentally disturbed employee's act in shooting fellow employees *held* sufficient to sustain finding that the shootings arose out of the employment. *Zimmerman v. Freezer Locker*, 628.

MASTER AND SERVANT—*Continued.*

§ 40d. Compensation Act—Whether Accident Arises in Course of the Employment.

An accident arises "in the course of" the employment if at the time the employee is at his place of work performing the duties of his employment. *Zimmerman v. Freezer Locker*, 628.

§ 43. Compensation Act—Notice and Filing of Claim.

Finding that claimant employee did not file claim for compensation within twelve months from the date of the accident causing the injury, as required by G.S. 97-24(a), supports the conclusion that the claim is barred. *Coats v. Wilson*, 76.

§ 45. Jurisdiction of Industrial Commission.

The jurisdiction of the Industrial Commission as a court is limited to that prescribed by statute and its jurisdiction in this sense may not be enlarged by consent of the parties, waiver or estoppel, or by procedural rules of the Commission itself. *Hart v. Motors*, 84.

Where a party who has received compensation under the Workmen's Compensation Act upon agreements of the parties, approved by the Commission, attacks the jurisdiction of the Commission at the first hearing before the Hearing Commissioner, and counsel for the employer and insurance carrier states thereat that defendants do not object to the attack upon the jurisdiction, the question of estoppel does not arise. *Ibid.*

The limitation for review of an award for change of condition has no application to an attack of an award for want of jurisdiction. *Ibid.*

The Commission has no jurisdiction to apply the Act to an independent contractor. *Ibid.*

Where a party who had been receiving compensation under agreements approved by the Industrial Commission thereafter attacks the jurisdiction of the Commission on the ground that he was an independent contractor and not an employee, the Commission upon its findings, supported by evidence, that such party was an independent contractor should strike out its approval of the agreements and dismiss the action, but it has no jurisdiction to order such party to return amounts theretofore received under the agreements. *Ibid.*

§ 53b. Compensation Act—Amount of Recovery.

The amount of an award of compensation under the Workmen's Compensation Act is prescribed by statute, and under the statute, as distinguished from a common law action for tort or a statutory action for wrongful death, recovery is based upon the injured employee's earnings rather than his earning capacity. G.S. 97-2(e). *Liles v. Electric Co.*, 653.

Therefore, when fatally injured part-time worker was making as much as part-time worker of same grade and character employed in same class of employment, Commission may not find that his average weekly wage would not give fair result, but must compute compensation on basis of his average weekly wage. *Ibid.*

§ 53c. Change of Condition and Review of Award.

Where request for review of an award for changed conditions is not made until more than twelve months after delivery and acceptance of check in final payment, review of the award is barred, G.S. 97-47, notwithstanding that the

check is negotiated to and actually paid by the drawee bank less than twelve months prior to the request. *Paris v. Builders Corp.*, 35.

Where an employee accepts payment for permanent partial disability in a lump sum, the twelve month period within which request for review of the award for change of conditions must be made is to be calculated from the date of such payment and not the date on which the last payment of compensation would have been due had the employee not elected to accept a lump sum payment. *Ibid.*

G.S. 97-47 does not apply where a party challenges the jurisdiction of the Industrial Commission after receiving compensation under agreement of the parties approved by the Commission, the statute being applicable only when the Industrial Commission has jurisdiction. *Hart v. Motors*, 84.

§ 55d. Appeal and Review of Award.

Jurisdictional findings of the Industrial Commission are not conclusive upon appeal to the Superior Court, but the Superior Court may review the evidence and make its own findings upon questions of jurisdiction. *Hart v. Motors*, 84.

Where a party who had been receiving compensation under agreements approved by the Industrial Commission thereafter attacks the jurisdiction of the Commission, and upon the appeal of defendants from order dismissing the proceeding, the Superior Court finds that claimant was an independent contractor and not an employee and that therefore the Idustrial Commission had no jurisdiction, the Superior Court should remand the proceeding to the Commission with direction that it enter an order setting aside its approval of the agreements and dismiss the proceeding, but it is error for the Superior Court to hold that the agreements entered into by the parties should be set aside and in overruling exception to the action of the Commission in setting aside the agreements. *Ibid.*

Where there is sufficient competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive, notwithstanding that the evidence might warrant a contrary finding and notwithstanding that incompetent evidence might also have been admitted. *Blalock v. Durham*, 208; *Conner v. Rubber Co.*, 516.

Where exceptions to the findings of the hearing commissioner are not preserved and no exception is entered either to the findings of fact or conclusions of law made by the Industrial Commission, the sufficiency of the evidence to support the findings is not presented for review in the Superior Court, and the review therein is limited to the single question whether the findings are sufficient to support the award. *Conner v. Rubber Co.*, 516.

Whether the computation of the average weekly wage of the injured employee would not be fair and just to both parties upon the particular facts of the case, is a question of fact, but the Commission's findings in this regard are not conclusive if not supported by competent evidence or if predicated on an erroneous construction of the statute. *Liles v. Electric Co.*, 653.

§ 55h. Compensation Act—Costs and Attorneys' Fees.

Where the Supreme Court finds error in the Commission's decision in respect of the sole controversy presented by the appeal, G.S. 97-88 does not apply, and provision in the judgment appealed from that the insurer should pay costs, including attorney fee, will be stricken. *Liles v. Electric Co.*, 653.

MINES AND MINERALS.

§ 4b. Liability for Injuries to Lands Incident to Mining Operations.

Mining companies whose operations contribute to deposit of silt in stream, resulting in damage to lands of lower proprietor, are liable as joint tort-feasors for such damage, and statutes do not relieve them of liability for such damage. *Phillips v. Mining Co.*, 17.

MONOPOLIES.

§ 2. Combinations and Agreements Unlawful.

If a contract is illegal, either at common law or by reason of statutory provisions relating to monopolies and trusts, plaintiff cannot recover damages for the breach thereof. *Electronics Co. v. Radio Corp.*, 114.

MORTGAGES.

§ 27. Payment and Satisfaction of Debt.

The trustee in a deed of trust is not, by reason of his position, the implied agent of the holder of the notes to receive payment, and where he has no actual or apparent authority to collect the debt, payment to him of the unmatured notes secured by the instrument does not discharge the debt. *Monteith v. Welch*, 415.

§ 28. Form, Methods and Sufficiency of Cancellation.

Where deed to purchasers is dated prior to an unauthorized cancellation of a deed of trust by the trustee, or even if the deed to the purchasers and the unauthorized cancellation be made the same day, the purchasers are not protected by the cancellation unless the cancellation is made prior to the execution of the deed, and in fact relied on, with the burden upon the purchasers to show that in fact they relied upon the cancellation. G.S. 45-37. *Monteith v. Welch*, 415.

A registered deed of trust is notice as to its contents, and therefore, where the trustee, without possession of the notes, makes an unauthorized cancellation prior to the maturity of the notes, purchasers, even though they purchase at the same time the unauthorized cancellation is made, upon the mistaken belief that the trustee was authorized to receive payment and cancel the deed of trust, are not protected by the cancellation, since they have notice that the notes had not matured and of want of authority of the trustee, and where loss must fall on one of two innocent persons, it should be borne by the person who occasions it. *Ibid.*

The acceptance by the holder of notes secured by deed of trust of payments from the trustee subsequent to the unauthorized cancellation of the instrument by the trustee is no sufficient evidence of an intent on the part of the holder of the notes to ratify the unauthorized cancellation, since the holder of the notes is entitled to payment, notwithstanding the unauthorized act of the trustee. *Ibid.*

§ 36. Deficiency and Personal Liability.

In an action to recover deficiency judgment after foreclosure of a deed of trust on certain realty and stipulated "items of machinery and equipment and other personal property," defendant mortgagors are entitled to introduce evidence bearing upon and have the jury determine the question whether the enumerated structures, or any of them, were actually affixed to and became a part of the freehold, and the value thereof, since plaintiffs are precluded by

MORTGAGES—*Continued*

G.S. 45-21.38 from recovering deficiency judgment as to any portion which was realty. *Fleishel v. Jessup*, 451.

§ 37. Disposition of Proceeds and Surplus.

Where the trustee in a junior deed of trust forecloses the instrument, it is his duty, nothing else appearing, to pay the surplus after the discharge of the debt secured by the instrument foreclosed to satisfy junior liens, if any, and then to owners of the equity of redemption, or he may pay the surplus to the clerk of the Superior Court. G.S. 45-21.31b(4). If he elects to make payment in discharge of the debts secured by prior deeds of trust on the property he does so at his own risk. *Military Academy v. Dockery*, 427.

§ 38. Wrongful Application of Proceeds of Sale.

The complaint alleged that the trustee in a junior deed of trust foreclosed the instrument, and notwithstanding notice of plaintiff's claim of lien as a subsequent judgment creditor of the trustor, failed to discharge the judgment lien, and, by inference at least, paid the surplus to the *cestui que trust* in prior encumbrances. *Held:* The complaint states a cause of action in favor of the judgment creditor against the trustee, the *cestui* in the prior encumbrances and the trustor, the liability of the *cestui* being predicated on the ground that he received and had money belonging to the judgment creditor. Nor is the complaint demurrable for misjoinder of parties and causes of action. *Military Academy v. Dockery*, 427.

§ 42. Title of Purchaser.

Where the trustee in a junior deed of trust forecloses the instrument he can convey no better title than he acquired, and, nothing else appearing, title vests in the purchaser subject to the prior liens. *Military Academy v. Dockery*, 427.

MUNICIPAL CORPORATIONS.

§ 14a. Defects and Obstructions in Streets or Sidewalks.

Lessee, nothing else appearing, is not under duty to keep sidewalk in safe condition. *Hedrick v. Akers*, 274. And contributory negligence of pedestrian *held* to prevent recovery against lessor. *Ibid.*

§ 33. Validity, Objection and Appeal from Assessments.

Where notice of appeal from assessment for street improvement is not given until more than ten days after the assessment roll had been made final, the appeal is properly dismissed, G.S. 160-89, and *certiorari* is not available. *Sanford v. Oil Co.*, 388.

§ 37. Zoning Ordinances and Building Permits.

Where a municipality incorporates in its zoning regulations a registered map which shows an intersection of streets, the intersection has four corners within the purview of G.S. 160-173, notwithstanding that one of the streets is not actually opened or used for public purposes beyond its intersection with the other. Therefore, where two of the corners are zoned for business purposes, the owner of another corner at the intersection is entitled to have his lot also zoned for business purposes. *Bryan v. Sanford*, 30.

MUNICIPAL CORPORATIONS—*Continued.*

§ 39. Regulations Relating to Public Safety, Health and Welfare.

A municipality has statutory power to regulate the operation of junk yards within its borders in the exercise of its police powers. *Hinshaw v. McIver*, 256.

§ 40. Violation and Enforcement of Police Regulations.

One obtaining license under a city ordinance is ordinarily bound by the provisions of the ordinance as to revocation. *Hinshaw v. McIver*, 256.

The power of a municipality to enact regulatory ordinances for the protection of the public and to prevent nuisances is not to be forestalled or foreclosed by writ of *mandamus*. *Ibid.*

A municipality, after notice and hearing, revoked plaintiff's license to operate a junk yard for violations of its regulations governing the operation of such business. Plaintiff thereafter instituted this action for *mandamus* against the city tax collector, the city not being a party, to compel the tax collector to issue license. *Held:* Plaintiff may not test the validity of the municipal ordinance in this action, and the court correctly denied plaintiff's application for writ of *mandamus*. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

An intentional act of violence is not a negligent act. *Jenkins v. Department of Motor Vehicles*, 560.

§ 2. Sudden Peril and Emergencies.

Sudden emergency is not available to party whose own negligence contributes to causing emergency. *Blevins v. France*, 334.

§ 4½. Willful and Wanton Negligence.

Act constitutes willful negligence if it involves deliberate purpose not to discharge duty necessary to safety of others and is wanton when done in heedless indifference to safety of others. *Blevins v. France*, 334.

§ 4b. Attractive Nuisance and Injury to Children.

Where children enter upon lands without invitation or inducement equivalent to an invitation, they are trespassers, and the lawnowner owes them only the duty not to injure them willfully or wantonly. *Jessup v. R. R.*, 242.

Evidence that boys on infrequent occasions boarded and rode moving freight cars within city limits, without evidence of acquiescence therein by defendant's employees, is insufficient to show implied invitation. *Ibid.*

A railroad company is not under duty to guard every approach to its tracks from children. *Ibid.*

The maintenance of an unenclosed pond or pool on one's premises is not negligence, and where there is no evidence that the owners of the land permitted children to play on or around the pond, either expressly or impliedly, the owners may not be held liable on the ground of negligence for the drowning of a small child in the pond or lake. *Burns v. Gardner*, 602.

§ 5. Proximate Cause in General.

The only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation. *McNair v. Richardson*, 65.

NEGLIGENCE—*Continued.*

§ 9. Anticipation or Foreseeability of Injury.

Foreseeability of injury is a requisite of proximate cause, even though the act complained of be a violation of statute. *McNair v. Richardson*, 65.

§ 11. Contributory Negligence of Persons Injured in General.

Ordinarily, a person *sui juris* is under obligation to use ordinary care for his own protection, the degree of care required being commensurate with the danger to be avoided. *Alford v. Washington*, 132; *Blevins v. France*, 334.

A bystander who sees others in imminent and serious peril through the negligence of another cannot be charged with contributory negligence as a matter of law in risking death or serious injury in attempting to effect a rescue, unless such attempt is recklessly or rashly made. *Alford v. Washington*, 132.

Doctrine of rescue *held* not applicable to evidence in this case. *Blevins v. France*, 334.

A person is under duty to discover and avoid defects and obstructions which he should see in the exercise of due diligence for his own safety, and increase in the hazard because of dirt and rain calls for a corresponding increase in vigilance. *Hedrick v. Akers*, 274.

Contributory negligence need not be the sole proximate cause of injury or death in order to bar recovery, but suffices for this purpose if it be a proximate cause or one of them. *Blevins v. France*, 334.

Evidence *held* not to show willful or wanton injury so as to preclude defense of contributory negligence. *Ibid.*

§ 17. Presumptions and Burden of Proof.

The burden of proof on the issue of contributory negligence is on defendant. *Harris v. Davis*, 579.

Negligence is not presumed from the mere fact of accident and injury. *Fleming v. Twiggs*, 666.

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in performance of some legal duty which defendant owed plaintiff under the circumstances and that such negligent breach of duty was the proximate cause of the injury. *Ibid.*

§ 19a. Questions of Law and of Fact.

Where the facts are admitted or established, the existence of negligence and proximate cause are questions of law for the court. *Hedrick v. Akers*, 274.

§ 19b(1). Sufficiency of Evidence of Negligence.

If the evidence fails to establish either negligence or proximate cause, nonsuit is proper, and whether there is enough evidence to support a material issue is a matter of law. *Fleming v. Twiggs*, 666; *Robinson v. Thomas*, 732.

§ 19c. Nonsuit for Contributory Negligence.

In order to warrant nonsuit on the ground of contributory negligence, plaintiff's evidence must establish his contributory negligence so clearly that no other conclusion may be reasonably drawn from that evidence. *Wright v. Pegram*, 45.

Defendant landlord installed a 10-inch drain pipe in such manner as to leave it exposed across the entire width of the sidewalk and elevated above the sidewalk from 2 to 3 inches at one end, to 5 inches at the other. Plaintiff fell to

NEGLIGENCE—*Continued.*

her injury over the pipe, and testified that although her eyesight was good, she did not see the hazard because of dirt and rain. *Held:* Nonsuit on the ground of contributory negligence was properly allowed. *Hedrick v. Akers*, 274.

Nonsuit is proper when plaintiff's own evidence establishes contributory negligence as sole logical deduction. *Blevins v. France*, 334.

§ 21. Issues in Actions for Negligence.

Where defendant files a cross action upon his contention that the collision was the result of plaintiff's negligence, the court, after submitting the issue of defendant's negligence, may submit the question of plaintiff's contributory negligence to the jury upon the issue of whether defendant was injured by the negligence of plaintiff. *Atkins v. Daniel*, 218.

Defendant is entitled to have the evidence considered in the light most favorable to him in determining whether there is sufficient evidence of contributory negligence to be submitted to the jury. *Harris v. Davis*, 579.

NUISANCE.

§ 3c. Pollution of Air.

Operation of oil refinery so as to discharge noxious odors into air, resulting in annoyance and inconvenience in use of adjoining property as well as threat to health, may constitute nuisance *per accidens*. *Causby v. Oil Co.*, 235.

Trespass from discharge of dust, see "Trespass."

PARENT AND CHILD.

§ 5. Duty to Support.

It is a public policy of this State that a father shall provide necessary support for his minor children, which duty he may not contract away or transfer to another. *Pace v. Pace*, 698.

PARTIES.

§ 2. Parties Plaintiff.

All persons having interest in realty may maintain action for trespass and to enjoin future trespasses, and allegation that plaintiffs, husband and wife, owned their home *held* sufficient to show joint interest. *Hall v. Mica Co.*, 182.

§ 10b. Additional Parties Plaintiff.

Pending an action by the owners of land to recover permanent damages for the wrongful entry and construction of a road on the land by defendant, the land was sold. *Held:* While the purchasers of the land cannot participate in any award of permanent damages, they are entitled to participate in the defense of the title and their right to possession of the land, and upon being made additional parties by order of the clerk, the trial judge has the discretionary power to extend the time for them to file complaint. *Veasey v. King*, 216.

PARTITION.

§ 4f. Operation and Effect of Actual Partition.

No title vests in commissioners, and upon confirmation of their report they have no further authority. Therefore their deeds to tenants in common convey nothing, and where one tenant in common joins in the deed to herself, she not

PARTITION—*Continued.*

being a grantee, the deed does not create estate by entireties to herself and husband notwithstanding its expressions of desire to do so. *McLamb v. Weaver*, 432.

PARTNERSHIP.

§ 6d. Liability of Members for Torts.

The liability of partners for the torts of the partnership is joint and several. *Hardy & Newsome v. Whedbee*, 682.

PAYMENT.

§ 2. Payment by Check.

In the absence of agreement to the contrary, delivery and acceptance of a check is only conditional payment until the check is paid, but if the check is paid on presentation, such payment ordinarily relates back to the time the check is delivered to the payee or his duly authorized agent. *Paris v. Builders Corp.*, 35.

§ 3. Payment to Collecting Agent.

Trustee in deed of trust is not ordinarily agent for *cestui* to receive payment of notes secured by the instrument. *Monteith v. Welch*, 415.

PERJURY.

§ 1. Nature and Elements of the Offense.

Perjury is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. *S. v. Arthur*, 582.

§ 4. Subornation of Perjury.

Subornation of perjury consists in procuring another to commit the crime of perjury. *S. v. Lucas*, 53.

§ 5. Indictment.

Since the commission of perjury by another is the basic element in the crime of subornation of perjury, the statutes, G.S. 15-145 and G.S. 15-146, must be read together. Therefore, an indictment for subornation of perjury which fails to set out the matter alleged to have been falsely sworn by the person suborned and fails to allege that the suborner knew such to be false or that he was ignorant whether or not it was true, is fatally defective. *S. v. Lucas*, 53.

§ 8. Instructions.

In a prosecution for perjury, it is prejudicial error for the court to fail to instruct the jury that in order to convict they must find guilt beyond a reasonable doubt from the evidence of at least two witnesses, or from the evidence of one witness together with other evidence of corroborating circumstances. *S. v. Arthur*, 582.

PLEADINGS.

§ 1. Filing of Complaint.

The trial judge, in his discretion, is authorized to enlarge the time for filing complaint and the exercise of his discretion is not subject to review. *Veasey v. King*, 216.

PLEADINGS—*Continued.*

§ 3a. Statement of Cause of Action.

A party may not by reference incorporate in a pleading allegations made by him in a separate and independent action. *Hill v. Spinning Co.*, 554.

§ 10. Counterclaims.

The owner of lands executed a deed to one person and a contract to convey to another. The grantee joined as a party plaintiff in an action to cancel the contract as a cloud on title, and defendant set up a counterclaim for specific performance or return of the purchase price paid, with interest. *Held:* The contract to convey was the sole basis of plaintiffs' action and defendant's counterclaim, and therefore, the counterclaim could be set up in the action, G.S. 1-137, even though recovery of the purchase price was not sought and could not be had as against plaintiff grantee in any event. *Etheridge v. Wescott*, 637.

§ 12. Answer—Verification.

Where the complaint is verified, the answer also must be verified. *Rich v. R. R.*, 175.

Where defendant corporation verifies its answer but does not verify answer in behalf of individual defendants, there is no verification as to them. *Ibid.*

§ 13. Office and Necessity of Reply.

The function of a reply is to deny such new matter alleged in the answer or affirmative defenses as the plaintiff does not admit, and to answer any cross action asserted by defendant, but a reply cannot state a cause of action, this being the function of the complaint. *Phillips v. Mining Co.*, 17.

§ 15. Office and Effect of Demurrer.

Parties joined for contribution by original defendant may not move to dismiss plaintiffs' action against original defendant. *Phillips v. Mining Co.*, 17.

A demurrer does not admit the conclusions of law of the pleader. *Royal v. McClure*, 186.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

In action by holder on note, maker may set up defense that holder loaned money on chattel mortgage note and required chattel to be insured, that chattel was damaged by risk covered by the policy, and that holder refused to demand payment from insurer. Therefore, insurer's demurrer for misjoinder of parties and causes should have been overruled. *Trust Co. v. Currin*, 102.

Where there is a misjoinder of both parties and causes of action, the court is not authorized to direct a severance, but must dismiss the action upon demurrer. *Joyner v. Board of Education*, 164.

Action for damages for trespass resulting from discharge of dust into air and to restrain future trespasses *held* not demurrable, allegations as to increased cost of cleaning house and danger to health being related to damages and grounds for injunctive relief. *Hall v. Mica Corp.*, 182.

§ 19c. Demurrer for Failure of Pleading to State Cause of Action or Defense.

Where a further answer and defense rests wholly on allegations made by the pleader in a prior action, ineffectually sought to be incorporated in the pleading by reference, the facts properly alleged cannot constitute a cause of

PLEADINGS—*Continued.*

action, and therefore plaintiff's demurrer and motion to strike such further answer and defense are proper. *Hill v. Spinning Co.*, 554.

§ 22. Amendment.

The Supreme Court may allow a party to amend his pleadings under the provisions of G.S. 7-13. *Surratt v. Ins. Agency*, 121.

On appeal from clerk, Superior Court may allow party to verify pleading *nunc pro tunc*. *Rich v. R. R.*, 175.

The amendment allowed by the trial court in this case *is held* not to supply a fatal deficiency in the complaint, but was addressed to the discretion of the court and not appealable. *Paul v. Neece*, 565.

If a complaint is subject to amendment, the allowance of such amendment is addressed to the discretion of the trial judge, G.S. 1-131, G.S. 1-161, G.S. 1-163, and where motion for leave to amend is made at term, the statutory provision as to notice of such motion does not apply. G.S. 1-131. *Burrell v. Transfer Co.*, 662.

Order allowing amendment includes adjudication that pleading is subject to amendment, and another Superior Court judge is bound thereby. *Ibid.*

§ 24. Variance.

Evidence in support of allegations in the complaint which have been stricken on motion is properly excluded. *Robinson v. Thomas*, 732.

§ 25. Issues Raised by Pleadings.

Where affirmative defense alleged in answer is not admitted, the issue is raised for the jury, and judgment on pleadings in defendant's favor is error. *Phillips v. Mining Co.*, 17.

§ 27. Bill of Particulars.

Where plaintiff files a bill of particulars the case is confined to the items specified therein. *Hill v. Spinning Co.*, 554.

§ 28. Motion for Judgment on Pleadings.

Ordinarily, a motion for judgment on the pleadings is in essence a demurrer by plaintiff to the answer of defendant, challenging the sufficiency of new matter alleged by defendant to constitute a defense. *Phillips v. Mining Co.*, 17.

Parties joined for contribution by original defendant may not move for judgment on pleadings in favor of original defendant against plaintiff. *Ibid.*

In this action by a lower proprietor to recover for damages resulting from the deposit of silt into a stream incident to mining operations, defendants alleged that they were the owners of leasehold estates acquired by *mesne* conveyances from the grantee in a deed executed by plaintiffs, conveying mining rights, with full rights to woods and waters upon plaintiffs' land. *Held:* The plea of the covenant of the deed is an affirmative defense, and in the absence of admission by plaintiffs that defendants possess a leasehold estate in the land of plaintiffs, defendants are not entitled to dismissal of plaintiffs' action upon demurrer or motion for judgment on the pleadings. *Ibid.*

§ 31. Motions to Strike.

In passing upon a motion to strike, facts alleged in the pleading, but not the conclusions of the pleader, are deemed admitted. *Hinson v. Dawson*, 23; *Trust Co. v. Currin*, 102.

PLEADINGS—*Continued.*

Where the allegations are sufficient to warrant submission of issue of punitive damages, allegations that the acts of defendant were in reckless and wanton disregard of safety and rights of intestate are improperly stricken, but allegations of financial worth of defendant should nevertheless be stricken. *Hinson v. Dawson*, 23.

Motion to strike further answer and defense *held* properly allowed when facts properly alleged fail to state defense. *Hill v. Spinning Co.*, 554.

PRINCIPAL AND AGENT.

§ 7d. Estoppel and Ratification.

Where one of two innocent parties must suffer loss occasioned by the wrongful act of a third person, the party whose act occasions the loss should suffer it, even in the absence of any moral wrong or positive fault on his part. *Monteith v. Welch*, 415.

The principal will not be held to have ratified the acts of his agent unless the act of the principal relied on as a ratification is accompanied by an intent to ratify the unauthorized transaction, and therefore ratification cannot be inferred from acceptance by the principal of benefits to which he is entitled irrespective of the unauthorized act of the agent. *Ibid.*

§ 13c. Relevancy and Competency of Evidence of Agency.

Testimony of a statement by the driver that he made the trip in question for the employer-owner is incompetent as to the employer as a hearsay declaration of the agent to prove the fact of agency. *Brothers v. Jernigan*, 441.

PROCESS.

§ 4. Alias and Pluries Summons.

G.S. 1-95 relates solely to the maintenance of chain of process against an original defendant not properly served, and has no application to the service of process upon an additional party after service has been had on the original defendant. *Cherry v. Woolard*, 603.

An *alias* summons issues only when the original summons has not been served upon the party named therein, and the denomination of process "*alias* summons" does not make it so. *Ibid.*

§ 6. Service by Publication.

Nonresident may be served by publication in action to enforce contract to convey land situate here. *Harris v. Upham*, 477.

§ 8d. Service of Foreign Corporations.

Findings of fact of the trial court *held* sufficient to support its conclusion that defendant corporation was doing business in this State within the meaning of G.S. 55-38 so as to warrant service of process on the Secretary of State. *Housing Authority v. Brown*, 592.

G.S. 55-38, providing that process on a foreign corporation may be served on the Secretary of State when the corporation is doing business in this State and has failed to name an officer or agent upon whom process may be served, is constitutional. *Harrington v. Steel Products*, 675.

A foreign corporation is "doing business in this State" within the purview of G.S. 55-38 if it exercises in this State some of the functions for which it was created. *Ibid.*

PROCESS—*Continued.*

A foreign corporation which merely takes orders in this State to be transmitted to its home office for acceptance and shipment of its goods into this State by common carrier is not doing business here within the meaning of G.S. 55-38, but if it transports its goods to this State in its own trucks and thus completes the transaction by making deliveries here, it performs here one of its essential purposes and is doing business here within the purview of the statute. *Ibid.*

PROSTITUTION.

§ 5a. Indictment and Warrant.

A warrant charging that defendant "did unlawfully and wilfully aid and abet in prostitution and assignation contrary to the form of the statute," without stating wherein defendant aided and abetted, is insufficient, and defendant's motion in arrest of judgment is allowed in the Supreme Court. *S. v. Cox*, 57; *S. v. Powell*, 121.

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Relief.

Where a person who is not a licensed architect contracts to furnish plans and specifications for a residence costing less than $20,000, and, after he had made preliminary studies, defendant owners direct changes resulting in the designing of a residence of a value exceeding $20,000, *held*, the person so drawing the plans is entitled to recover on a *quantum meruit* for the work performed up to the time that the changes increased the value of the house above $20,000, the subsequent illegal agreement being regarded as a nullity not affecting the previous lawful contract. *Tillman v. Talbert*, 270.

§ 2. Actions.

In an action to recover on a special contract and also upon a *quantum meruit*, plaintiff can abandon the special contract and recover on *quantum meruit* for the reasonable value of his services. *Tillman v. Talbert*, 270.

QUIETING TITLE.

§ 1. Nature and Grounds of the Remedy.

Where title to land is in controversy and plaintiff seeks to recover possession from defendant and for an accounting of rents and profits, the action is one in ejectment and not merely to remove cloud upon title. *Hayes v. Ricard*, 313.

In an action to quiet title it is required only that plaintiff have such an interest in the land as to make the claim of defendant adverse to him. *Etheridge v. Wescott*, 637.

§ 2. Proceedings.

It is competent for a witness to state whether or not a deed or a series of deeds covers the lands in dispute when he is stating facts within his own knowledge. *Etheridge v. Wescott*, 637.

The owner of lands executed deed to one person and a contract to convey to another. Upon his death his executors, with the joinder of the grantee, instituted action to cancel the contract to convey as a cloud on title, and introduced evidence of a perfect paper title in the deceased. *Held:* Plaintiffs could maintain the action even without the joinder of the grantee, and it was not necessary to submit an issue as to the grantee's title in order to determine whether

or not the contract to convey constituted a cloud on the title warranted to the grantee in his deed. *Ibid.*

Where, in an action to cancel a registered contract to convey as a cloud on title, it appears that the contract was under seal and was not void on its face, a peremptory instruction that if the jury believed the evidence they should find that the contract conveyed no interest in the real property described therein, is error, it not being established that the contract had been abandoned or was barred by the statute of limitations. *Ibid.*

RAILROADS.

§ 5. Injury to Persons on or Near Tracks.

A railroad company is not under duty to guard every approach to its tracks and trains so as to make its premises child-proof, and may not be held liable for the death of a child who, without express or implied invitation, attempted to board a moving freight car and is killed. *Jessup v. R. R.*, 242.

A railroad company cannot be held liable for the death of a child killed in attempting to board a moving car on the ground that its employee, who was standing nearby, was negligent in failing to restrain the child, when the evidence discloses that prior to the accident the boy was in a place of safety where he had a lawful right to be and suddenly lunged at the train in such manner and with such speed that the employee had no opportunity to prevent the injury. *Ibid.*

Evidence that on infrequent occasions boys boarded and rode moving cars in defendant's yard within a city, without evidence of acquiescence therein by defendant's employees, is insufficient to show an implied invitation to children to do so, there being a distinction between a temptation on the part of a trespasser to enter upon another's property and an invitation on the part of the owner for him to do so. *Ibid.*

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements of the Offense.

Larceny and receiving stolen goods with knowledge that they had been stolen are separate and distinct offenses, and not degrees of the same offense. *S. v. Neill*, 252.

The offense of receiving stolen goods with knowledge that they had been stolen presupposes that the goods had been stolen by someone other than the person charged with the offense of receiving, and the person guilty of the larceny cannot be guilty of receiving. *Ibid.*

§ 4. Presumptions and Burden of Proof.

Where the evidence shows that a store had been broken and entered and goods stolen therefrom, the recent possession of the stolen goods raises a presumption of fact that the possessor is guilty of the breaking and entering and the larceny, but such recent possession, nothing else appearing, raises no presumption that the possessor is guilty of receiving the goods with knowledge that they had been stolen. *S. v. Neill*, 252.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence that a store was broken and entered and goods stolen therefrom, and that defendants soon thereafter attempted to sell the stolen goods to

RECEIVING STOLEN GOODS—*Continued.*

another, with other evidence tending to show defendants' guilt of the breaking and larceny, is insufficient to support a conviction of defendants of receiving the goods with the knowledge that they had been stolen, and their motions to nonsuit on this count should have been allowed. *S. v. Neill*, 252.

ROBBERY.

§ 1a. Nature and Elements of the Offense.

Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or by putting him in fear, and is an infamous crime. *S. v. McNeely*, 737.

§ 3. Prosecution.

Where, upon indictments charging robbery, the court submits the case to the jury on the less degree of an attempt to commit the offenses, the failure of the court to submit the question of defendant's guilt of assault will not be held for error when defendant makes no contention and introduces no evidence and fails to request instructions in regard to guilt of assault. *S. v. McNeely*, 737.

In this prosecution on indictments charging robbery, the case was submitted to the jury solely on the question of defendant's guilt of an attempt to commit the offenses. *Held:* A verdict of guilty as charged will be interpreted in the light of the facts in evidence and the charge of the court, and is sufficient to support the judgment. *Ibid.*

§ 4. Punishment.

An attempt to commit the crime of robbery is an infamous crime punishable as provided by G.S. 14-3. *S. v. McNeely*, 737.

SALES.

§ 11. Transfer of Title.

As a general rule, under a contract of sale which provides for a sale f.o.b. the point of shipment, the carrier is the agent of the purchaser, and title passes upon delivery to the carrier, but where the evidence is sufficient to show that the contract by the seller was to deliver the goods at the purchaser's plant at a designated price per unit, plus a designated sum per unit for freight, the evidence brings the case within the exception to the general rule, and, the seller being required to make delivery, the carrier is the seller's agent to perform this duty, so that delivery to the carrier is not delivery to the buyer, and the seller assumes the risk in carriage. *Peed v. Burleson's, Inc.*, 437.

SCHOOLS.

§ 1. Establishment and Operation in General.

No provision of the Federal Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary, this being exclusively a matter of state policy. *Constantian v. Anson County*, 221.

Proscription against enforced segregation does not nullify State constitutional mandate for maintenance of schools. *Ibid.*

§ 3d. Assignment of Children.

Application for enrollment of children in particular school must be made on individual basis and not *en masse*. *Joyner v. Board of Education*, 164.

SCHOOLS—*Continued.*

Judicial notice will be taken of the fact that boards of education must of necessity employ teachers in advance of the opening of school. Therefore, it would seem that applications for admissions to schools other than those theretofore designated by the board of education or city administrative unit, should be made reasonably in advance of the opening of school. *Ibid.*

Pupils residing in one administrative unit may be assigned to a school in another administrative unit pursuant to the provision of G.S. 115-163. *Ibid.*

County boards have no responsibility for administration of school affairs, including assignment of pupils, this being the function of the school authority of each administrative unit. *Constantian v. Anson County*, 221.

Federal decision does not require integration, but declares only that if child be excluded from attending school of his choice solely because of race, he may assert his rights under the equal protection clause. *Ibid.*

§ 4b. County Boards of Education and County Commissioners.

Under our Constitution it is the duty of the board of county commissioners of each county to provide funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for the constitutional term, and such boards have no authority or responsibility in the administration of school affairs, including the assignment of pupils to particular schools, this being the function of the school authority of each administrative unit. *Constantian v. Anson County*, 221.

The mandates of Article IX, sections 2 and 3, of the State Constitution remain in full force and effect after striking, as violative of the Fourteenth Amendment to the Federal Constitution, that portion of the 1875 amendment to section 2 which purports to make mandatory the enforced separation of the races in the public schools of the State. *Ibid.*

§ 10b. Requisites and Validity of School Bonds.

Proscription against enforced segregation in public schools does not affect validity of bonds to provide funds for school facilities. *Constantian v. Anson County*, 221.

SEARCHES AND SEIZURES.

§ 2. Requisites and Validity of Search Warrant.

Where a search warrant is issued without the signed affidavit under oath of the complainant, the warrant is fatally defective, notwithstanding testimony of complainant that he was sworn by the justice of the peace in whose name the warrant was issued and stated to him under oath his information and the location of the premises. *S. v. White*, 73.

STATE.

§ 3a. Nature and Scope of State Tort Claims Act in General.

While ordinarily a statute has prospective effect only, the State Tort Claims Act, by express provision, is retroactive as to those claims listed therein. Ch. 1059, sec. 1, Session Laws of 1951. *MacFarlane v. Wildlife Resources Com.*, 385.

Under the State Tort Claims Act, a claim for damages for injuries proximately caused by negligence of a State employee while engaged in the discharge of his duties as such shall be tried under the common law rules in tort actions

STATE—*Continued.*

founded on negligence as any other claim of like nature between private individuals would be tried, subject to the limitation prescribed in the Act. G.S. 143, Art. 31. *Ibid.*

Where a person injured by the alleged negligence of a State employee while engaged in the discharge of his duties as such, recovers from the employee an amount in excess of the maximum recovery under the State Tort Claims Act, and releases the employee from any and all other or future liability, his subsequent action against the State under the State Tort Claims Act is properly dismissed. *Ibid.*

The State Tort Claims Act does not permit recovery for a wrongful and intentional injury, but by the terms of the Act waives the State's immunity only for injuries negligently inflicted. *Jenkins v. Department of Motor Vehicles*, 560.

Findings *held* to support conclusion that highway patrolman intentionally shot prisoner under arrest, and therefore no recovery could be had for wrongful death under the Tort Claims Act. *Ibid.*

Under the State Tort Claims Act recovery is permitted for injuries resulting from a negligent act, but not those resulting from a negligent omission on the part of State employees. *Flynn v. Highway Com.*, 617.

Therefore recovery cannot be had under the Act for injuries resulting from alleged negligent failure of the Highway Commission to repair a hole in a State highway. *Ibid.*

§ 3b. Tort Claims Act—Negligence of State Employee.

Evidence *held* to sustain finding that shooting of plaintiff by highway patrolman was result of negligence. *Lowe v. Department of Motor Vehicles*, 353.

§ 3d. State Tort Claims Act—Findings and Judgment.

Where there is competent evidence tending to support the finding and conclusion of the Industrial Commission that there was no negligence on the part of the State employee in question, order of the Commission denying relief under the State Tort Claims Act is properly affirmed. *Bradshaw v. Board of Education*, 393.

Where, in a proceeding under the State Tort Claims Act, the findings of fact of the Industrial Commission, supported by competent evidence, support the conclusions as modified on appeal to the Superior Court, the decision of the Commission, as sustained by the Superior Court, must be upheld. *Stephens v. Board of Education*, 481.

Evidence *held* sufficient to support the findings of fact sustaining the conclusions that school bus driver was guilty of negligence proximately causing death of child who had alighted from the bus and that the child was not guilty of contributory negligence. *Williams v. Board of Education*, 599.

§ 3e. Tort Claims Act—Appeals.

The judgment of the Commission upon a hearing under the State Tort Claims Act will not be set aside on the ground that the findings were made under a misapprehension of the applicable law when it is apparent that such errors did not affect the result. *Lowe v. Department of Motor Vehicles*, 353.

STATUTES.

§ 5c. Rules of Construction—Captions.

The court has the right to look to the title of an ambiguous statute for the purpose of determining the meaning thereof and the legislative intent. *S. v. Lance*, 455.

§ 5g. Correction of Clerical Errors.

Where the reference in an amendatory Act to line 6 rather than line 26 of a section of the original Act is obviously a clerical error, the error may be corrected in order to carry out the clear legislative intent. *S. v. Daniels*, 671.

§ 6. Construction in Regard to Constitutionality.

A statute or an ordinance may be valid in part and invalid in part, and therefore a party should not be allowed to challenge the constitutionality of an entire statute and ordinance in bulk, but should be required to present only those particular provisions which they contend impinge in some way their constitutional rights. *Fox v. Comrs. of Durham*, 497.

§ 13. Repeal by Implication and Construction.

Whether a later statute repeals a former one by implication or substitution is a question of legislative intent to be ascertained by application of the rules for ascertaining their intent. *S. v. Lance*, 455.

Repeals by implication are not favored, and where a later act by any reasonable construction can be declared to be operative without obvious or necessary repugnancy to a former act, it is the duty of the court to give effect to both. *Ibid.*

A later penal statute will not be held to repeal a former act by substitution unless the later statute covers the whole ground and the intention of the legislature that the later act should be in substitution of the former is clear and manifest. *Ibid.*

TAXATION.

§ 23½. Construction of Taxing Statutes in General.

While an administrative interpretation of a taxing statute is not controlling, and such interpretation which is in direct conflict with the clear intent and purpose of the statute may not stand, nevertheless an administrative construction will be given consideration in interpreting the statute and is *prima facie* correct. *Rubber Co. v. Shaw*, 170.

§ 29. Income Taxes.

Statutory provision for the carry-over of loss from a prior year or years as a deduction from taxable income in a profitable year is a matter of grace, the General Assembly being under no constitutional or other legal compulsion to allow any carry-over. *Rubber Co. v. Shaw*, 170.

Plaintiff is a foreign corporation doing business in this State. In computing its income taxable in this State during the year in question, royalty income received by it during the prior year from its non-unitary business, not connected with its operations in this State and not taxable as income here, and such royalty income for the year in question, were deducted from the net loss before computing the amount of the loss carry-over to be allocated to its operations within this State. *Held:* The administrative procedure is supported by the second and third paragraphs, subsection (d) of G.S. 105-147(6), and is upheld. *Ibid.*

TAXATION—*Continued.*

§ 40. Foreclosure of Tax Liens or Certificates.

A judgment in a tax foreclosure suit is not void if it is rendered by a court which has authority to hear and determine questions in dispute and jurisdiction over the parties to the controversy or their interest in the property. *Travis v. Johnston*, 713.

The clerk of the Superior Court has authority to order sale of land in tax foreclosure proceedings where the answer filed raises no issue of fact. G.S. 1-209. *Ibid.*

Where land is listed in the name of one of the life tenants, but in an action to foreclose a tax sale certificate (C.S. 8037) the minor remaindermen are served, personally or by publication, and a guardian *ad litem* duly appointed, who files answer, the court has jurisdiction of the parties, and the contention that the court lacked jurisdiction because the land was not properly listed for taxation is untenable. *Ibid.*

§ 42. Tax Deeds and Titles.

Where the judgment roll in a tax foreclosure on lands in the county discloses proceedings in conformity with the statutes then in effect, service on all persons having an interest in the land, including minors, the appointment of guardian *ad litem* for the minors and the filing of answers by such guardian, the purchaser acquires good title. *Cherry v. Woolard*, 603.

An innocent purchaser at the foreclosure of a tax sale certificate, or an innocent purchaser from such purchaser, is protected from attacks on the order of sale and decree of confirmation when there is no defect appearing on the record. *Travis v. Johnston*, 713.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Several.

Concert of action is not a requisite of joint tortfeasorship, but if independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue any one or all of them, as he may elect. *Phillips v. Mining Co.*, 17.

§ 6. Joinder of Joint Tort-Feasors.

Where the injured party elects to sue only one or less than all joint tortfeasors, the original defendant or defendants may have the others made additional defendants under G.S. 1-240 for the purpose of enforcing contribution in the event the plaintiff recovers. *Phillips v. Mining Co.*, 17.

Mining company sued for damages resulting from deposit of silt in stream incident to mining operations may join as joint tort-feasors other mining companies whose operations contributed to deposit of silt. *Ibid.*

§ 9a. Release from Liability.

Whether a release from liability in consideration of permission to enter an automobile stock car race and in consideration of benefits for injury or death under the plan provided by the promoters of the race, bars recovery for the death of a participant killed in a collision during the race, is a matter of affirmative defense, upon which defendant promoters have the burden of proof, and nonsuit may not be entered on such affirmative defense when it is not established by plaintiff's evidence. *Blevins v. France*, 334.

TORTS—*Continued.*

The release of one joint tort-feasor releases them all. *MacFarlane v. Wildlife Resources Com.*, 385.

TRESPASS.

§ 1f. Pollution of Air.

Persons having interest in realty may maintain joint action for trespass from discharge of dust into air. *Hall v. Mica Corp.*, 182.

TRESPASS TO TRY TITLE.

§ 3. Parties.

Pending an action by the owners of land to recover permanent damages for the wrongful entry and construction of a road on the land by defendant, the land was sold. *Held:* While the purchasers of the land cannot participate in any award of permanent damages, they are entitled to participate in the defense of the title and their right to possession of the land, and upon being made additional parties by order of the clerk, the trial judge has the discretionary power to extend the time for them to file complaint. *Veasey v. King*, 216.

TRIAL.

§ 6. Conduct and Acts of Court.

The court may ask a witness questions of a clarifying nature. *S. v. Stevens*, 40.

G.S. 1-180 denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts. *In re Will of Holcomb*, 391.

The court, after interrogating a witness in regard to his knowledge of the signature of the decedent, at issue in the case, stated that as far as the court was concerned the witness knew decedent's signature. *Held:* The endorsement of the veracity of the witness by the court constitutes prejudicial error. *Ibid.*

§ 17. Admission of Evidence Competent for Restricted Purpose.

While ordinarily the admission of evidence competent against one defendant and not another will not be held for error in the absence of a request at the time that its admission be restricted, such request is not necessary when prior to the admission of the evidence the court has stated that he was admitting the evidence as against both parties. *Brothers v. Jernigan*, 441.

§ 21. Office and Effect of Motion to Nonsuit.

The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accordance with the statute. Therefore, the court has no power to enter judgment as of nonsuit before the plaintiff has rested his case. *Warren v. Winfrey*, 521.

Where plaintiff's evidence is sufficient to establish a tort and to show that plaintiff is entitled to recover nominal damages at least, nonsuit is not the proper procedure to present the contention that there is not a scintilla of evidence upon which the jury could base their verdict as to the amount of damage, since nonsuit cannot be properly allowed if plaintiff is entitled to a recovery in any view of the facts which the evidence reasonably tends to establish. *Lieb v. Mayer*, 613.

TRIAL—*Continued.*

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence in behalf of plaintiffs must be taken as true and plaintiffs given the benefit of every fair inference reasonably deducible therefrom. *Scarborough v. Veneer Co.*, 1.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Defendant's evidence in conflict with that offered by plaintiff is not to be considered in passing upon motion to nonsuit. *Long v. Gilliam*, 548.

§ 23a. Sufficiency of Evidence in General.

A jury verdict cannot be based upon a mere guess. *Rankin v. Helms*, 532.

There must be legal evidence of every material fact necessary to support the verdict and evidence which raises a mere guess or speculation is insufficient. *Fleming v. Twiggs*, 666.

§ 24a. Nonsuit on Affirmative Defense.

Nonsuit may not be entered on an affirmative defense unless it is established by plaintiff's own evidence. *Blevins v. France*, 335.

§ 29. Directed Verdict and Peremptory Instructions.

Where defendant admits the execution and delivery of the instrument in question, a peremptory instruction to answer the issue in the affirmative is justified. *Millikan v. Simmons*, 195.

§ 31d. Charge on Burden of Proof.

Where the *quantum* of proof necessary to establish the cause of action is not stated in one paragraph of the charge relating to the elements necessary to constitute such cause of action, but the following paragraphs repeatedly and correctly state the *quantum* of proof, the charge read contextually is not prejudicial. *Paul v. Neece*, 565.

§ 32. Requests for Instructions.

A party desiring more specific instructions as to the law applicable to the case should aptly tender prayer therefor. *Millikan v. Simmons*, 195.

§ 36. Form and Sufficiency of Issues.

Where an issue embraces all the essential matters in dispute, in view of the admissions in the pleadings and the testimony of the parties, it is sufficient. *Millikan v. Simmons*, 195.

Issues of fact to be submitted to the jury must arise upon the pleadings. *Jenkins v. Trantham*, 422.

§ 47. Motions for New Trial for Newly Discovered Evidence.

The lower court has no jurisdiction to hear a motion for new trial for newly discovered evidence after the appeal from its judgment has been withdrawn by consent. *Jeffries v. Garage, Inc.*, 745.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Right of Action.

Where the employee-driver of a truck sells the cargo en route to a stranger who uses the property in his own business, such third person acquires no title and is liable to the true owner on the basis of conversion, with the measure

of damages ordinarily being the value of the property at the time and place of conversion, with interest. *Peed v. Burlesons, Inc.*, 437.

§ 2. Actions for Conversion.

Where, in an action for conversion of goods bought from the carrier's driver, the evidence, considered in the light most favorable to plaintiffs, does not show that plaintiff owner had been fully reimbursed for the loss by plaintiff carrier, nonsuit as to plaintiff owner on the ground that he had no interest in the subject matter should be denied. *Peed v. Burleson's, Inc.*, 437.

TRUSTS.

§ 2a. Parol Trust.

The pleadings and evidence in this action to establish a parol trust *held* sufficient to be submitted to the jury under the principle that where the person buys land under a parol agreement to do so and to hold it for another until he pays the purchase price, the purchaser becomes a trustee for the party for whom he purchases the land, and equity will enforce such an agreement. *Paul v. Neece*, 565.

If an agreement to purchase and hold land for another is made at or before the time the legal estate passes, the agreement creates a parol trust, and it is not required that there be consideration to support it. *Ibid.*

§ 2b. Action to Establish Parol Trust.

While in an action to establish a parol trust the burden is on plaintiff to show by clear, strong and convincing proof an agreement with defendant constituting the basis of the action, on the subsequent issue as to the amount defendant paid for the lots, the burden of proof on plaintiff is only to show the amount by the preponderance of evidence. *Paul v. Neece*, 565.

The charge of the court in this case on the issue of a parol trust *is held* without error. *Ibid.*

§ 3a. Written Trusts Inter Vivos.

The creator and trustee of an *inter vivos* trust may be one and the same person. *Ridge v. Bright*, 345.

It is not required that a completely executed voluntary trust *inter vivos* be supported by consideration. *Ibid.*

The settlor-trustee of an *inter vivos* trust in personalty may retain possession of the personalty. *Ibid.*

An *inter vivos* trust in personalty under which the settlor-trustee retains the power to revoke the trust, reserves a life interest therein, and also reserves the power to sell any part of the *res* for her own benefit during her lifetime, with further provision that the legal title should pass to the beneficiary upon the death of the settlor, is not an attempted testamentary disposition of the *res* but is a valid trust, since the instrument transfers an immediate nonpossessory interest to the beneficiary, subject to divestment by the settlor. *Ibid.*

The creator of a revocable *inter vivos* trust in personalty does not revoke the trust by a will which devises or bequeaths property to the beneficiary of the trust, since, in the absence of provision in the instrument to the contrary, the right of revocation must be exercised before the death of the settlor. *Ibid.*

TRUSTS—*Continued.*

§ 4b. Creation of Resulting Trust.

A grantor may not engraft a parol trust on his deed conveying the fee simple title except in cases of fraud, mistake or undue influence. *Vincent v. Corbett*, 469.

Misrepresentation which does not induce grantor to act to his disadvantage will not support parol trust for fraud. *Ibid.*

Where a person furnishes one-half the consideration for a deed made solely to another, the person so furnishing the consideration is entitled to a resulting trust in one-half the property. *Grant v. Toatley*, 463.

§ 9. Appointment of Successor Trustees.

Where a trustee of an active trust resigns and a successor is appointed by the clerk and approved by the judge, the fact that the successor trustee failed to give the bond specified in G.S. 36-17 does not render the appointment void. *Trust Co. v. Toms*, 645.

Where a successor trustee is duly appointed, the beneficiaries of the trust may not wait 16 years, during which time they joined in a proceeding to authorize the successor trustee to sell assets for reinvestment and during which time the income of the trust was paid to the life beneficiary, and then, upon discovering that the successor trustee had embezzled the assets thus realized, seek to hold the original trustee liable on the ground that the successor trustee failed to file bonds as required by G.S. 36-17. *Ibid.*

UTILITIES COMMISSION.

§ 2. Jurisdiction.

The Utilities Commission has been given specific authority to fix fares to be charged by intra-urban bus companies. *Utilities Com. v. Greensboro*, 247.

§ 3. Hearings and Decrees.

The Utilities Commission should fix such rate for a public utility corporation as will yield a just and reasonable return upon the value of the property of such utility which is used in connection with the particular service for which the rate is to be fixed. *Utilities Com. v. Greensboro*, 247.

§ 5. Appeals.

A protestant to an order of the Utilities Commission granting an increase in rates may not assert on appeal that the Commission could not grant such increase without a specific finding that petitioner's service was inadequate or inefficient when protestant does not base this contention on any exception or assignment of error (Rule of Practice in the Supreme Court No. 19(3)), offers no evidence before the Commission in support of such contention, and gives no notice of such contention as required by G.S. 62-74. *Utilities Com. v. Greensboro*, 247.

VENDOR AND PURCHASER.

§ 17b. Extension of Time.

Verbal agreement for extension of option made within term is sufficient even though memorandum of agreement is not executed until after term. *Millikan v. Simmons*, 195.

VENDOR AND PURCHASER—*Continued.*

§ 18. Tender or Payment of Purchase Price.

Notice by the vendor that she would not carry out the terms of the option makes tender of payment by the purchaser unnecessary. *Millikan v. Simmons*, 195.

The vendors' refusal to comply with their contract after tender of cashier's check for the initial payment and demand of deed, relieves the purchaser of the necessity of making further tender or tendering cash. *Furlough v. Owens*, 483.

§§ 23, 24. Remedies of Purchaser.

Where the owner has conveyed the property to a third person, the purchaser in a registered contract to convey theretofore executed may sue for specific performance or abandon the contract and insist only upon a refund of the purchase price paid, with interest, if such right has been preserved and is not barred by the statute of limitations. *Etheridge v. Wescott*, 637.

Where the action lays proper predicate for the recovery of the purchase price paid, evidence of the amount of consideration paid is competent. *Ibid.*

VENUE.

§ 1e. Residence of Parties—Corporations.

Where a domesticated corporation some days prior to its institution of an action on contract, moves its principal office from the county in which the action is instituted, defendants, residents of another county, are entitled as a matter of right to the removal of the action to the county of their residence upon motion aptly made. *Noland Co. v. Construction Co.*, 50.

WATERS AND WATERCOURSES.

§ 3. Pollution or Deposit of Foreign Matter Into Streams.

The provisions of G.S. 143-212(3)(d) and G.S. 74-31 afford no defense to an action by a lower proprietor to recover for injuries to his land resulting from the deposit of silt in a stream incident to mining operations. *Phillips v. Mining Co.*, 17.

Where silt from several mining operations unites in causing injury, each mining company is a joint tort-feasor. *Ibid.*

WILLS.

§ 33b. Estates and Interests Created Under Rule in Shelley's Case.

Where a will devises lands to the beneficiary "for the term of her natural life and at her death to her heirs," the Rule in *Shelley's case* obtains as a rule of property without regard to the intent of devisor. *Hammer v. Brantley*, 71.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

The will devised lands to testator's son with provision that if the son died leaving no children, the land should go to testator's named grandchildren, with further provision that if any named grandchild should die without leaving children, her part should go to the survivors. The son died without issue. *Held:* The named grandchildren each take a fee, defeasible upon her death without issue, and during the lives of the named grandchildren, testator's great-grandchildren cannot assert any interest in the property. *Stanley v. Foster*, 201.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-68. Husband and wife may maintain joint action for trespass. *Hall v. Mica Co.*, 182.

1-95. Has no application to service of process on additional party. *Cherry v. Woolard*, 603.

1-103. General appearance waives process. *Waters v. McBee*, 540.

1-104. Nonresident may be served with process by publication in action to enforce contract to convey land situate here. *Harris v. Upham*, 477.

1-127(3). Judgment in prior action must be such as to operate as bar to second action in order for second action to abate. *Hill v. Spinning Co.*, 554.

1-131; 1-161–1-163. Where one judge sustains demurrer and grants time to file amended complaint, another judge may not dismiss action. *Burrell v. Transfer Co.*, 662.

1-132. Where there is a misjoinder of both parties and causes the action must be dismissed upon demurrer. *Joyner v. Board of Education*, 164.

1-134.1. Appeal will lie from denial of motion to dismiss for want of jurisdiction. *Harris v. Upham*, 477. Lower court is without jurisdiction pending appeal. *Shaver v. Shaver*, 311.

1-144. Where complaint is verified answer also must be verified. *Rich v. R. R.*, 175.

1-145. Where answer is not verified, answer must be stricken on motion after notice before default judgment may be entered. *Rich v. R. R.*, 175.

1-180. Court may not express opinion on evidence at any time during trial. *In re Will of Holcomb*, 391. Fact that court necessarily takes more time in stating contentions of State than those of defendant is not ground for objection. *S. v. Sparrow*, 81. Assignments of error must point out specific objection. *S. v. Thomas*, 212; *Tillman v. Talbert*, 270.

1-183. Nonsuit may not be entered before plaintiff has rested. *Warren v. Winfrey*, 521.

1-196; 1-198. Issues must arise on pleadings. *Jenkins v. Trantham*, 422.

1-209. Clerk may order sale of land in tax foreclosure where answer raises no issues of fact. *Travis v. Johnston*, 713.

1-240. Where silt from several mining operations unites in causing injury to lands, each mining company is joint tort-feasor. *Phillips v. Mining Co.*, 17.

1-250. Sufficiency of deed to convey title can be adjudicated in controversy without action. *Griffin v. Springer*, 95; *Peel v. Moore*, 512.

1-277. Order requiring petitioners to elect between line described in petition and line claimed by adverse possession in amendment *held* erroneous. *Jenkins v. Trantham*, 422.

1-299; 1-300. Appeal from recorder's court *held* correctly dismissed for laches in failing to see that record was properly docketed. *Clements v. Booth*, 474.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

1-315(4), 1-316. Property held for judgment debtor in passive trust is subject to execution, but even so, trustee must be brought in by supplemental proceedings. *Cornelius v. Albertson*, 265.

7-11. Supreme Court, *ex mero motu*, will correct error in judgment affecting title to realty. *Edwards v. Butler*, 205.

7-13. Supreme Court may allow party to amend pleadings. *Surratt v. Insurance Agency*, 122.

7-64. Superior Court has concurrent original jurisdiction with general county court of misdemeanors. *S. v. McCullough*, 11. Is not applicable to Union County. *S. v. Baucom*, 61.

7-265. Does not limit jurisdiction of general county court to causes arising within the county. *Waters v. McBee*, 540.

7-279(3). General county court has jurisdiction of action for malpractice. *Waters v. McBee*, 540.

8-51. Examination of witness under G.S. 1-568.1 in regard to transaction with decedent is a waiver of the protection of the statute to the extent that either party may use it upon the trial. *Hayes v. Ricard*, 313.

8-57. Testimony of incriminating statement made by defendant's wife not in his presence *held* prejudicial even in absence of objection. *S. v. Dillahunt*, 524.

8-89. Verified motion sufficiently designating writings is sufficient. *Tillis v. Cotton Mills*, 587. Affidavit for inspection of writings *held* sufficient. *Construction Co. v. Housing Authority*, 261. The statute should be liberally construed. *Ibid.*

8-89; 31-11. Party is entitled to have his will deposited with clerk brought into court for purpose of attacking credibility of witness by showing personal motive. *In re Gamble*, 149.

14-3. Attempt to commit crime of robbery is infamous crime. *S. v. McNeely*, 738.

14-34. Does not apply when pistol is pointed with legal justification. *Lowe v. Department of Motor Vehicles*, 353. Officer making arrest is not justified in pointing pistol except in good faith upon real or apparent necessity. *Ibid.*

14-71. Where evidence tends to show larceny, defendant cannot be found guilty of receiving. *S. v. Neill*, 252.

14-80. Warrant charging defendant with authorizing another to carry sand and gravel from land of third person *held* insufficient. *S. v. Everett*, 596.

14-202.1. Does not repeal G.S. 14-177. *S. v. Lance*, 455.

14-209. Guilt must be proven by testimony of two witnesses or testimony of one witness and adminicular circumstances. *S. v. Arthur*, 582.

15-1. Issuance of warrant tolls running of statute. *S. v. Underwood*, 68.

15-27. Search warrant issued without signed affidavit under oath is fatally defective. *S. v. White*, 73.

15-143. Bill of particulars cannot supply fatal deficiency in warrant or indictment. *S. v. Cox*, 57.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

15-145; 15-146. Indictment for subornation of perjury must set forth matter alleged to have been falsely sworn. *S. v. Lucas*, 53.

15-200.1. Hearing in Superior Court on appeal from order executing suspended sentence must be *de novo*. *S. v. Thompson*, 282.

18-4. Evidence of guilt of possession of equipment designed and intended for manufacture of liquor *held* sufficient. *S. v. Edmundson*, 693.

18-50; 18-48; 7-64. Unlawful possession of liquor for purpose of sale and unlawful possession of liquor are separate offenses, and pendency of prosecution for the one will not abate the other. *S. v. Daniels*, 671.

18-66. Evidence *held* sufficient to sustain conviction of driving truck loaded with beer without license. *S. v. McCullough*, 11.

20-71.1. Admission of ownership of vehicle takes issue of *respondeat superior* to jury. *Kellogg v. Thomas*, 723; *Brothers v. Jenkins*, 441. Statute does not compel affirmative finding. *Brothers v. Jenkins*, 441.

20-138. Evidence of drunken driving *held* sufficient. *S. v. Hairr*, 506.

20-140; 20-141. Motorist is required to reduce speed when entering area of special hazard. *Kellogg v. Thomas*, 722.

20-141; 20-183. Highway patrolman has right to arrest without a warrant a person whom he sees driving at unlawful speed. *Lowe v. Department of Motor Vehicles*, 353.

20-149(b). Evidence of contributory negligence of cyclist *held* sufficient for submission of issue to jury. *Harris v. Davis*, 579.

20-152. Has no application to vehicles stopping one behind the other on highway because of fog. *Royal v. McClure*, 186.

20-161. Stopping on highway because of impaired visibility from smoke and fog is temporary stop because of exigencies of travel, and statute does not apply. *Royal v. McClure*, 186.

20-174(e). Highway workman is entitled to warning by horn of approaching car. *Kellogg v. Thomas*, 722.

20-1. Verbal agreement to extend option, with written memorandum thereof executed within life of option, meets requirements of statute of frauds. *Millikan v. Simmons*, 196.

22-1. Contract for construction of house is not required to be in writing. *Rankin v. Helms*, 532.

28-73; 28-190. Ordinarily, personal representative carries on business of decedent at his personal risk. *Poindexter v. Bank*, 191.

29-1(6). Life estate to A with remainder to children, with remainder over in event A has no children, vests remainder immediately upon birth of son. *Blanchard v. Ward*, 142.

36-12; 2-42(9). Where judgment roll fails to disclose that judge approved clerk's order appointing successor trustee, minutes may be corrected. *Trust Co. v. Toms*, 645.

36-17. Original trustee cannot be held liable for failure of successor trustee to file bond. *Trust Co. v. Toms*, 645.

39-6.2. Remainder in personalty after life estate may be created by deed. *Ridge v. Bright*, 345.

42-15; 44-1; 44-41. Landlord's lien for rent *held* superior to subtenant's lien for labor. *Eason v. Dew*, 571.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

45-21.31b(4). It is duty of trustee to pay surplus to satisfy junior liens and then to owners of equity, or pay surplus to clerk's office. *Military Academy v. Dockery*, 427.

45-21.38. Whether personalty mortgaged was affixed to realty must be determined before judgment for deficiency may be rendered. *Fleishel v. Jessup*, 451.

45-37. Trustee has no authority to cancel deed of trust prior to maturity of notes merely by reason of status. *Monteith v. Welch*, 415.

46-10; 46-17. After confirmation of report commissioners have no further duty, and deeds executed by them to effectuate partition are nullities. *McLamb v. Weaver*, 432.

47-26. Deed of gift delivered in escrow void for want of registration within one year. *Harris v. Briley*, 526.

49-2. Warrant failing to charge that failure to support was willful is fatally defective. *S. v. Coppedge*, 590.

50-8. Truth of jurisdiction averments is for court. *Carpenter v. Carpenter*, 286.

55-38. Findings *held* sufficient to support conclusion that foreign corporation was doing business in this State. *Housing Authority v. Brown*, 592; *Harrington v. Steel Products Co.*, 675.

55-118. Instrument foreign corporation is required to file in office of Secretary of State is merely notice of change of address. *Noland Co. v. Construction Co.*, 50.

62-74. Protestant to rate order should give notice of contention that rate could not be granted without finding that petitioner's service was inadequate. *Utilities Com. v. Greensboro*, 247.

62-121.47, 62-122.1. Utilities Commission has been given specific authority to fix fares for intra-urban bus companies. *Utilities Com. v. Greensboro*, 247.

62-124. Rate for bus fares should be fixed separate and apart from rates of same company for electrical service. *Utilities Com. v. Greensboro*, 247.

75-1; 75-4. Contract constituting plaintiff sole distributor of goods manufactured by defendant void if not in writing. *Electronics Co. v. Radio Corp.*, 114.

83-12. Person not licensed architect may make valid contract to provide plans for residence not to exceed value of $20,000. *Tillman v. Talbert*, 270.

97-2(e). Compensation of part-time employee may not be based upon wages he would have earned as full-time employee. *Liles v. Electric Co.*, 653.

97-24(a). Claim for compensation must be filed within 12 months of date of accident. *Coats v. Wilson, Inc.*, 76.

97-47. Motion for review of award for changed condition must be made within twelve months after acceptance of check in final payment. *Paris v. Builders Corp.*, 35. Does not apply where party challenges jurisdiction of Industrial Commission. *Hart v. Motors*, 84.

105-147(6). Method of computing income tax of foreign corporation *held* valid. *Rubber Co. v. Shaw*, 170.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

105-264. Administrative interpretation is not controlling but will be given consideration. *Rubber Co. v. Shaw*, 170.

105-406. Taxpayers may not restrain county from expending funds in implementing statute. *Fox v. Comrs. of Durham*, 497.

115-163; 115-178; 115-179. Application for enrollment of children in particular school must be made on individual basis; pupils residing in one administrative unit may be assigned to a school in another. *Joyner v. Board of Education*, 164.

122-84. Adjudication of mental incapacity entered month after time of commission of offense is not conclusive but is competent in evidence. *S. v. Duncan*, 374.

130-79; 130-102. Whether death certificate of coroner is competent as proof of cause of death, *quaere? Blalock v. Durham*, 208.

143-1, *et seq.* Where injured person collects from negligent State employee more than maximum amount recoverable under Tort Claims Act, he may not also recover against the State. *MacFarlane v. Wildlife Resources Com.*, 385.

143-212(3)(d), 74-31. Afford no defense to action for injuries to land from silt dumped into stream. *Phillips v. Mining Co.*, 17.

143-291. Does not permit recovery for negligent omission of duty. *Flynn v. Highway Commission*, 617. Tort Claims Act does not cover injuries intentionally inflicted. *Jenkins v. Department of Motor Vehicles*, 560.

143-291; 143-292. Evidence *held* to support finding that there was no negligence of State employee causing accident. *Bradshaw v. Board of Education*, 393.

160-89. Notice of appeal from assessment must be given within ten days after roll has been made final. *Sanford v. Oil Co.*, 388.

160-173. *Mandamus* will lie to compel municipality to zone one of four corners of intersection in same manner as two other corners. *Bryan v. Sanford*, 30.

160-200. Municipality has power to regulate operation of junk yards. *Hinshaw v. McIver*, 256.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
ART.

I, secs. 3, 5. Constitution of United States takes precedence over Constitution of North Carolina. *Constantian v. Anson County*, 221.

I, sec. 12. Upon appeal from conviction in inferior court, defendant may be tried in Superior Court on original warrant. *S. v. Underwood*, 68.

IV, sec. 8. Supreme Court can review decisions of lower court only on matters of law or legal inference. *S. v. Neill*, 252. Supreme Court, *ex mero motu*, will correct error in judgment affecting title to realty. *Edwards v. Butler*, 205.

IX, secs. 2, 3. Remain in full force and effect after striking that portion which purports to make mandatory the segregation of the races. Provision of bond order that two of projects are for school facilities for colored children does not render order void for discrimination. *Constantian v. Anson County*, 221.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

U. S. Art. VI. Constitution of the United States takes precedence over the Constitution of North Carolina. *Constantian v. Anson County*, 221.

Fourteenth Amendment. Does not require that children of different races be taught in the same schools, but only that child not be excluded from a school on account of race. *Constantian v. Anson County*, 221.