NORTH CAROLINA REPORTS

VOL. 246

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1957

FALL TERM, 1957

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1957

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

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

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

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i.e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1957—FALL TERM, 1957

CHIEF JUSTICE

J. WALLACE WINBORNE.

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICES:

W. A. DEVIN,
M. V. BARNHILL

ATTORNEY-GENERAL:

GEORGE B. PATTON.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
RALPH MOODY,
CLAUDE L. LOVE,
PEYTON B. ABBOTT,
HARRY W. McGALLIARD,
JOHN HILL PAYLOR,
SAMUEL BEHRENDS, JR.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE

BERT M. MONTAGUE.

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 B. MALLARD	Thirteenth	Tabor City.
C. 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.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
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.	Morganton.

EMERGENCY JUDGES.

HENRY A. GRADY	New Bern.
H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Smithfield.
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.
GRADY B. STOTT	Fourteenth	Gastonia.
ZEB A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

FIRST DIVISION

FIRST DISTRICT

Judge Moore

Camden—Sept. 23; Nov. 4†.
Chowan—Sept. 9; Nov. 25.
Currituck—Sept. 2; Oct. 7†.
Dare—Oct. 21.
Gates—Oct. 14 (A).
Pasquotank—Sept. 16†; Oct. 14†; Nov. 11*; Dec. 2† (2).
Perquimans—Oct. 28.

SECOND DISTRICT

Judge Parker

Beaufort—Sept. 2†; Sept. 16*; Oct. 14†; Nov. 4*; Dec. 2†.
Hyde—Oct. 7; Oct. 28†.
Martin—Aug. 5†; Sept 23*; Nov. 18† (2); Dec. 9.
Tyrrell—Aug. 26†; Sept. 30.
Washington—Sept. 9*; Nov. 11†.

THIRD DISTRICT

Judge Bone

Carteret—Oct. 14†; Nov. 4.
Craven—Sept. 2 (2); Sept. 30† (2); Oct. 28† (A); Nov. 11; Nov. 25† (2).
Pamlico—Aug. 5 (2).
Pitt—Aug. 19 (2); Sept. 16† (2); Oct. 7 (A); Oct. 21†; Oct. 28; Nov. 18; Dec. 9.

FOURTH DISTRICT

Judge Frizzelle

Duplin—Aug. 26; Sept. 2†; Oct. 7*; Nov. 4*; Dec. 2† (2).
Jones—Sept. 23; Oct. 28†; Nov. 25.
Onslow—July 15‡ (A); Sept. 30; Nov. 11† (2).
Sampson—Aug. 5 (2); Sept. 9† (2); Oct. 14*; Oct. 21†; Nov. 18* (A).

FIFTH DISTRICT

Judge Morris

New Hanover—July 29*; Aug. 5†; Aug. 19*; Sept. 9† (2); Sept. 30*; Oct. 7† (2); Oct. 28* (2); Nov. 18† (2); Dec. 2* (2).
Pender—Sept. 2†; Sept. 23; Oct. 21†; Nov. 11.

SIXTH DISTRICT

Judge Paul

Bertie—Aug. 26; Sept. 2†; Nov. 18 (2).
Halifax—Aug. 12 (2); Sept. 30† (2); Oct. 21*; Dec. 2 (2).
Hertford—July 22 (A); Sept. 9; Sept. 16†; Oct. 14.
Northampton—Aug. 5; Oct. 28 (2).

SEVENTH DISTRICT

Judge Bundy

Edgecombe—Sept. 16*; Oct. 7* (2); Nov. 4† (2).
Nash—Aug. 19*; Sept. 9†; Sept. 23†; Sept. 30*; Oct. 21† (2); Nov. 18* (2); Dec. 2† (A).
Wilson—July 15*; Aug. 26* (2); Sept. 23† (A) (2); Oct. 21* (A) (2); Dec. 2† (2).

EIGHTH DISTRICT

Judge Stevens

Greene—Oct. 7† (A); Oct. 14* (A); Dec. 2.
Lenoir—Aug. 19*; Sept. 9† (2); Oct. 7† (2); Oct. 21* (2); Nov. 18† (2); Dec. 9.
Wayne—Aug. 12*; Aug. 26† (2); Sept. 23† (2); Nov. 4 (2); Dec. 2† (A).

SECOND DIVISION

NINTH DISTRICT

Judge Mallard

Franklin—Sept. 16† (2); Oct. 14*; Nov. 25† (2).
Granville—July 22; Oct. 7†; Nov. 11 (2).
Person—Sept. 9; Sept. 30† (A) (2); Oct. 28.
Vance—Sept. 30*; Nov. 4†.
Warren—Sept. 2*; Oct. 21†.

TENTH DISTRICT

Judge Hall

Wake—July 8* (A) (2); July 22† (A); Aug. 5†; Aug. 12* (2); Aug. 26†; Sept. 2* (2); Sept. 2† (A) (2); Sept. 16† (2); Sept. 30* (A) (2); Oct. 7† (2); Oct. 21† (2); Oct. 28* (A) (2); Nov. 4† (2); Nov. 18* (2); Nov. 18† (A) (2).

ELEVENTH DISTRICT

Judge Carr

Harnett—Aug. 12†; Aug. 26* (A); Sept. 9† (A) (2); Oct. 7† (2); Nov. 11* (A) (2).
Johnston—Aug. 19; Sept. 23† (2); Oct. 21; Nov. 4† (2); Dec. 2 (2).
Lee—July 29*; Aug. 5†; Sept. 9*; Sept. 16†; Oct. 28*; Nov. 18†.

TWELFTH DISTRICT

Judge Seawell

Cumberland—Aug. 5†; Aug. 12*; Aug. 26* (2); Sept. 9†; Sept. 23* (2); Oct. 7† (2); Oct. 21† (2); Nov. 4* (2); Nov. 25† (2); Dec. 9*.
Hoke—Aug. 19; Nov. 18.

THIRTEENTH DISTRICT

Judge Hobgood

Bladen—Oct. 21*; Nov. 11†.
Brunswick—Sept. 16; Oct. 14†.
Columbus—Sept. 2* (2); Sept. 23† (2); Oct. 7*; Oct. 28† (2); Nov. 18* (2).

FOURTEENTH DISTRICT

Judge Bickett

Durham—July 8* (A) (2); July 29 (2); Aug. 26*; Sept. 2†; Sept. 9* (2); Sept. 30* (2); Oct. 14† (2); Oct. 28* (2); Nov. 11† (2); Nov. 25 (2); Dec. 9*.

FIFTEENTH DISTRICT

Judge Williams

Alamance—July 15† (A); July 29†; Aug. 12* (2); Sept. 9† (2); Oct. 14* (2); Nov. 11† (2); Dec. 2*.
Chatham—Aug. 26†; Oct. 7; Oct. 28†; Nov. 4; Nov. 25.
Orange—Aug. 5*; Sept. 23† (2); Dec. 9.

SIXTEENTH DISTRICT

Judge Nimocks

Robeson—July 8† (A); Aug. 12*; Aug. 26†; Sept. 2* (2); Sept. 16† (2); Oct. 7† (2); Oct. 21* (2); Nov. 11† (2); Nov. 25*.
Scotland—July 22†; Aug. 19; Sept. 30†; Nov. 4†; Dec. 2 (2).

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Phillips

Caswell—Nov. 11* (A); Dec. 2†.
Rockingham—Sept. 2* (2); Sept. 23† (A) (2); Oct. 14†; Oct. 21* (2); Nov. 18† (2); Dec. 9*.
Stokes—Sept. 30*; Oct. 7†.
Surry—July 8† (2); Sept. 16* (2); Nov. 4† (2); Dec. 2 (A).

EIGHTEENTH DISTRICT
Schedule A—Judge Johnston

Guilford, Gr.—July 8*; July 22*; Aug. 26*; Sept. 2†; Sept. 9* (2); Sept. 30*; Oct. 7* (2); Oct. 21*; Nov. 4*; Nov. 11† (2); Nov. 25*; Dec. 2*.
Guilford, H. P.—July 15*; Sept. 23*; Oct. 28*; Dec. 9*.

Schedule B—Judge Olive

Guilford, Gr.—Sept. 9† (2); Sept. 23† (2); Oct. 7† (2); Oct. 21† (2); Nov. 18† (2).
Guilford, H. P.—Sept. 9† (A); Oct. 14† (A); Nov. 4† (2).

NINETEENTH DISTRICT
Judge Rousseau

Carbarrus—Aug. 19*; Aug. 26†; Oct. 7 (2); Nov. 4† (A) (2).
Montgomery—July 8 (A); Sept. 23†; Sept. 30; Oct. 28 (A).
Randolph—July 15† (A) (2); Sept. 2*; Nov. 4† (2); Nov. 25†; Dec. 2* (2).
Rowan—Sept. 9 (2); Oct. 21† (2); Nov. 18*.

TWENTIETH DISTRICT
Judge Gwyn

Anson—Sept. 16*; Sept. 23†; Nov. 18†.
Moore—Aug. 12* (A); Sept. 2† (2); Nov. 11.
Richmond—July 15*; July 22†; Sept. 30*; Oct. 7†; Dec. 2† (2).
Stanly—July 8; Oct. 14† (2); Nov. 25.
Union—Aug. 19† (A); Aug. 26; Oct. 28 (2).

TWENTY-FIRST DISTRICT
Judge Preyer

Forsyth—July 8† (2); July 22 (2); Aug. 26†◆; Sept. 2 (2); Sept. 9† (A) (2); Sept. 23† (2); Oct. 7 (2); Oct. 21† (2); Nov. 4 (2); Nov. 18† (2); Dec. 2 (2); Dec. 2† (A) (2).

TWENTY-SECOND DISTRICT
Judge Crissman

Alexander—Sept. 23.
Davidson—Aug. 19; Sept. 9† (2); Oct. 7†; Nov. 11 (2); Dec. 9†.
Davie—July 29; Sept. 30†; Nov. 4.
Iredell—Aug. 26; Sept. 2†; Oct. 14†; Oct. 21 (2); Nov. 25† (2).

TWENTY-THIRD DISTRICT
Judge Armstrong

Alleghany—Aug. 26; Sept. 30.
Ashe—Sept. 9†; Oct. 21*.
Wilkes—July 22; Aug. 12 (2); Sept. 16† (2); Oct. 7; Oct. 28† (2); Nov. 11 (A); Dec. 2.
Yadkin—Sept. 2*; Nov. 11† (2); Nov. 25.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Froneberger

Avery—July 8 (A) (2); Oct. 14 (2).
Madison—July 22*; Aug 26† (2); Sept. 30*; Oct. 28†; Dec. 2*; Dec. 9†.
Mitchell—July 29† (A); Sept. 9 (2).
Watauga—Sept. 23*; Nov. 4† (2).
Yancey—Aug. 5; Aug. 12† (2); Nov. 18 (2).

TWENTY-FIFTH DISTRICT
Judge Nettles

Burke—Aug. 12; Sept. 30 (2); Nov. 18.
Caldwell—Aug. 26; Sept. 16† (2); Dec. 2 (2).
Catawba—July 29 (2); Sept. 2† (2); Nov. 4 (2); Nov. 25†.

TWENTY-SIXTH DISTRICT
Schedule A—Judge Pless

Mecklenburg—July 8* (A) (2); July 29* (2); Aug. 12† (A) (2); Aug. 26† (2); Sept. 9†; Sept. 16† (2); Sept. 30* (2); Oct. 14†; Oct. 21† (2); Nov. 4†; Nov. 11† (2); Nov. 25†; Dec. 2* (2).

Schedule B—Judge Moore

Mecklenburg—Aug. 12† (3); Sept. 2* (2); Sept. 16† (2); Sept. 30† (2); Oct. 14† (2); Oct. 28* (2); Nov. 11† (2); Nov. 25†; Dec. 2† (2).

TWENTY-SEVENTH DISTRICT
Judge Huskins

Cleveland—July 8 (2); Sept. 23† (2); Oct. 21*; Nov. 25† (A) (2).
Gaston—July 22*; Aug. 5† (A) (2); Sept. 16*; Oct. 7† (2); Nov. 11* (2); Dec. 2† (2).
Lincoln—Sept. 2 (2).

TWENTY-EIGHTH DISTRICT
Judge Farthing

Buncombe—July 8* (A) (2); July 22† (A); July 29† (3); Aug. 19† (A); Aug. 19*; Aug. 26† (3); Sept. 16† (A); Sept. 16*; Sept. 23† (3); Oct. 14* (2); Oct. 21† (A); Oct. 28† (3); Nov. 18* (A) (2); Nov. 18†; Nov. 25† (3).

TWENTY-NINTH DISTRICT
Judge Campbell

Henderson—Oct. 14; Nov. 18† (2).
McDowell—Sept. 2 (2); Sept. 30† (2).
Polk—Aug. 26.
Rutherford—Sept. 16†* (2); Nov. 4*† (2).
Transylvania—Oct. 21 (2); Dec. 2† (2).

THIRTIETH DISTRICT
Judge Clarkson

Cherokee—July 22; Nov. 4 (2).
Clay—Sept. 30.
Graham—Sept. 2.
Haywood—July 8; Sept. 16† (2); Nov. 18 (2).
Jackson—Oct. 7 (2).
Macon—July 29; Dec. 2 (2).
Swain—July 15; Oct. 21.

* Indicates criminal term.
† Indicates civil term.
No designation indicates mixed term.
(A) Indicates judge to be assigned.
‡ Indicates jail and civil term.
(2) Indicates number of weeks of term; no number indicates one week term.
◆ Indicates non-jury 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. RUTH R. MITCHELL, Deputy Clerk; MRS. RUTH STARR, 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

JAMES E. HOLSHOUSER, United States District Attorney, Greensboro.
LAFAYETTE WILLIAMS, Assistant U. S. District Attorney, Yadkinville.
JOHN HALL, Assistant U. S. District Attorney, Greensboro.
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 J. WAGGONER, 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 10th day of August, 1957:

ALEXANDER, ABNER.....Winston-Salem
ALLEN, CARY WALTER.....Asheville
ALSPAUGH, JAMES ANDREW.....Chapel Hill
BAIN, EDGAR REEL.....Lillington
BARRIER, JOSEPH LENTZ.....Charlotte
BARTON, GRANDON DILLARD, JR.....Chapel Hill
BATTS, JEFFERSON DAVIS.....Wilson
BEBER, ROBERT H.....Durham
BERNHARDT, RICHMOND GILBERT, JR.....Lenoir
BERNSTEIN, MARK RICHARD.....Charlotte
BERRY, LISBON CEASOR, JR.....Wilmington
BIGGS, MAURICE ALEXANDER, JR.....Winston-Salem
BOYAN, CLARENCE CALVIN.....Winston-Salem
BRADSHAW, ROBERT WALLACE, JR.....Wilson
BRENDLE, WAYNE MONROE.....Valdese
BRIEAN, LEROY SPANGLER.....Winston-Salem
BROCK, JAMES MOSES.....Mocksville
BROOKS, EUGENE CLYDE, III.....Durham
BROWN, GEORGE EUGENE.....Raleigh
BUMPASS, GEORGE LOUIS.....Durham
CAMERON, BRADLEY JAMES.....Winston-Salem
CAMPBELL, JERRY AUSTIN.....Taylorsville
CLARK, DAVID MCKENZIE.....Greenville
COCKMAN, DAVID REECE.....Thomasville
CONNELLY, HENRY WILSON.....Winston-Salem
COUTRAS, ANGELO ANEST.....Charlotte
COWARD, JAMES KENT.....Sylva
CRAIG, BILLY RAY.....Lenoir
CREWS, JAMES PHILLIP.....Winston-Salem
CRUCIANI, JOSEPH RUSSELL.....Chapel Hill
CRUMPLER, FRED GUTHRIE, JR.....Germanton
CURRIN, BEVERLY HART.....Olivia
DARLINGTON, FRED, III.....Burlington
DAWES, REDMOND BLANFORD, JR.....Roxboro
DEBERRY, ARTHUR ST. CLAIR, JR.....Tarboro
DOBSON, TYSON YATES, JR.....Beulaville
DOWNING, DANIEL LAURENCE.....Fayetteville
DUKE, JOHN EDWIN.....Goldsboro
ELLER, JOHN DEWALDEN, JR.....Winston-Salem

EULISS, WADE COLUMBUS.....Greensboro
FERREE, HAROLD CONRAD.....Winston-Salem
FOWLER, HENRY LEE, JR.....Mount Holly
FOX, JAMES CARROLL.....Chapel Hill
FRASSINETI, JORDAN JOSEPH.....Southern Pines
GILLIAM, JOSEPH DUANE.....Thomasville
GLAZE, RICHARD EDWARD.....Durham
GREENE, GEORGE ROYSTER.....Raleigh
HAMILTON, JACK TUNNEY.....Smithfield
HARRILL, JULIUS SCRUGGS, JR.....Asheville
HELLMER, RALPH GEORGE.....Rowland
HENDREN, JOHNIE RAY.....Statesville
HOLT, HARRIET DOUW.....Carrboro
HOLT, WILLIAM PAUL, JR.....Greensboro
HOOTS, JOHN HENRY.....Winston-Salem
JAMES, HENRY, JR.....Matthews
JOHNSON, JAMES MCDANIEL.....Dunn
JOHNSON, JOHN SAMUEL, JR.....Shiloh
JOHNSTON, THOMAS DAVID.....Fayetteville
KING, MITCHELL THOMPSON.....Asheville
KIRK, CLARENCE MILLARD.....Knightdale
KUHN, WILLIAM ORVILLE.....Wilmington
LACKEY, NORRIS DIXON, JR.....Shelby
LASSITER, EDWARD ALLEN.....Sunbury
LEE, JAMES GROVER, JR.....Chapel Hill
LEGGIO, ANTHONY JOSEPH.....Durham
LIMER, JAMES HARRY.....Warrenton
LYNCH, ARCHIBALD EDGAR, JR.....Buie's Creek
MCDANIEL, ANDREW HOLMES.....Forest City
MCDONALD, JOHN ERLE, JR.....Charlotte
MEEK, RICHARD TERRELL.....Charlotte
MIDGETTE, ROBERT BRYANT.....Chapel Hill
MILLER, GEORGE WASHINGTON, JR.....Spencer
MITCHELL, HERBERT THOMAS, JR.....Asheville
MOORE, FRANKLIN MCIVER.....Kinston
MORRIS, JOHN CHARLES.....Raleigh
MORRIS, WILLIAM LEROY.....Lincolnton
MOTSINGER, GRADY RAY, JR.....Dobson
MURDOCK, THOMAS EDWARD.....Chapel Hill
MURPHREY, WILLIS EVERETTE, III.....Roanoke Rapids
NEWTON, LOUIS KNOX.....Southport
OGBURN, JOHN NELSON, JR.....Greensboro
OWEN, HUGH RONALD.....Harris
PALMER, WILLIAM CORNELIUS.....Lenoir
PARHAM, LEWIS HILLSMAN, JR.....Charlotte

PARK, CHARLES BENJAMIN, III.....Raleigh
PARKER, GERALD CORBETT.....Hubert
PEARSON, WILLIAM GASTON, II.....Durham
PIZER, EDWARD PAUL.....Raleigh
PULLEN, EDWIN TILMON, III.....Winston-Salem
RABIL, LOUIS.....Weldon
REDDEN, ROBERT MCDUFFIE.....Hendersonville
REVELLE, JAMES GUY, JR.....Conway
RHODES, WILLIAM KENDRICK, III.....Wilmington
RICH, DEAN ARTHUR.....Chapel Hill
RIDENOUR, JOHN LAWSON, III.....Greensboro
SAPP, ARMSTEAD WRIGHT, JR.....Greensboro
SAPP, ARMISTEAD WRIGHT, JR.....Winston-Salem
SCHWEIDLER, JOSEPH FREDERICK.....Winston-Salem
SHARPE, KEITH YOUNT.....Pfafftown
SHAW, CHARLES COLLINS, JR.....Henderson
SMAW, OWEN MEREDITH.....New Bern
STACKHOUSE, FRANK LEE.....Winston-Salem
SWIGGETT, ROBERT HORACE, JR.....Durham
TART, JERRY GORDON.....New Grove
TARTER, STANLEY MARVIN.....Asheville
THOMAS, ROBERT EIRWIN.....Asheville
THOMPSON, WILLIAM LEONARD.....Raleigh
TICE, DOUGLAS OSCAR, JR.....Greensboro
TOXEY, ANDREW FLORA.....Elizabeth City
TWIGGS, HOWARD FABING.....Raleigh
VICKORY, CHARLES BRANSON, JR.....Pleasant Garden
WADE, HAMLIN.....Chapel Hill
WALKER, THOMAS PHILIP.....Bostic
WARREN, JESSE LANIER.....Greensboro
WATTS, LEWIS POINDEXTER, JR.....Charlotte
WEST, TED GRADON.....Lenoir
WHITE, CHARLES MAYFIELD, III.....Manson
WHITESIDES, HENRY MONROE.....Chapel Hill
WILLSON, ROBERT BRIGGS.....Asheville

BY COMITY:

CAVENDER, HARVEY LESTER.....Brevard from Illinois
NOEL, CHARLES E.....Fayetteville from Georgia
DE QUEVEDO, RAFAEL GARCIA.....Raleigh from District of Columbia

Given over my hand and the seal of the Board of Law Examiners this 13th day of December, 1957.

EDWARD L. CANNON, *Secretary,*
Board of Law Examiners
State of North Carolina

CASES REPORTED

A PAGE

Accounts Supervision Co. v. Thomas 281
Alford v. Chevrolet Co. 214
Allen, Boyd v. 150
Amazon Cotton Mills Co. v. Duplan Corp. 88
American Trust Co., Matheson v. 710
Anders v. Anderson 53
Anderson, Anders v. 53
Andrews, S. v. 561
Archer v. Cline 545
Archives & History, In re Department of 392
Arthur, S. v. 690
Artis, Riddle v. 629
Asheville Citizens Times Co., Evans v. 669
Ashley v. Jones 442
Atlantic Coast Line Railroad Co., Goldsboro v. 101
Avery County Board of Education, Mica Co. v. 714

B

Bailey, Jones v. 599
Bakeries, Morgan v. 429
Bank v. Bloomfield 492
Bank, Gurganus v. 655
Bank, Sides v. 672
Bank v. Taliaferro 121
Barbee v. Perry 538
Barbour v. Scheidt, Comr. of Motor Vehicles 169
Baucom, Fuller v. 510
Baucom, Kirkman v. 510
Beal, Keener v. 247
Beeson v. Beeson 330
Bell v. Maxwell 257
Bell Bakeries, Morgan v. 429
Bell, S. v. 646
Berrier, Raper v. 193
Bingham, Harris v. 77
Bird Coal Co., Penland v. 26
Blackwell, S. v. 642
Bloomfield, Bank v. 492
Board of Education, Mica Co. v. 714
Board of Elections, Walker v. 196
Boles, S. v. 83
Bolin v. Bolin 666

PAGE

Boyd v. Allen 150
Brendle v. Stafford 218
Bridges v. Graham 371
Brinkley v. Minerals Corp. 17
Brooks v. Burlington Mills 143
Brown, S. v. 686
Bryan, Lane v. 108
Buchanan v. Smawley 592
Builders Supply v. Dixon 136
Bullard v. Phillips 87
Bumgarner v. Corpening 40
Burleson v. Francis 619
Burlington Mills, Brooks v. 143
Burlington Mills, Freight Lines v. 143
Burns v. Oil Corporation 266
Burr v. Everhart 327

C

Calloway v. Wyatt 129
Canady, S. v. 613
Carolina Power & Light Co., Lea v. 287
Carter v. Davis 191
Carter, Stephens v. 318
Catlett, Johnson v. 341
Champion v. Tractor Co. 691
Champion Motor Co., Worley v. 677
Chappel, Jordan v. 620
Chevrolet Co., Alford v. 214
Church Conference v. Locklear ..349
Citizens National Bank, Sides v. 672
City of Gastonia, Jackson v. 404
City of Goldsboro v. R. R. 101
City of Kinston, Philyaw v. 534
City of Raleigh, Glenn v. 469
City of Reidsville v. Turner 338
Clark, Jackson v. 622
Cleveland, Comrs. of, Ramsey v. 647
Cline, Archer v. 545
Coach Co. v. Fultz 523
Coach Co., Hood v. 684
Coal Co., Penland v. 26
Coffield v. Peele 661
Cogdill, In re Estate of 602
Coggins-McIntosh Lumber Co., McBryde v. 415
Collins v. Covert 303
Collins v. Gas Co. 544
Comrs. of Cleveland, Ramsey v. ..647
Comr. of Motor Vehicles, Barbour v. 169

PAGE

Comr. of Motor Vehicles, Johnson v. 452
Comr. of Motor Vehicles, Snyder v. 81
Construction Co. v. Electrical Workers Union 481
Construction Co., Linthicum & Sons v. 203
Cooke, S. v. 518
Cooperative, Hensley v. 274
Corpening, Bumgarner v. 40
Cotton Mills Co. v. Duplan Corp. 88
Covert, Collins v. 303
Cox v. Cox 528
Cox v. Cox 532
Crawford, In re Will of 322
Crawford, Robbins v. 622
Crotts v. Transportation Co. 420

D

Davis, Carter v. 191
Davis v. Davis 307
Davis, S. v. 73
Davis v. Walker 340
Dean v. Insurance Co. 704
Denning v. Gas Co. 541
Department of Archives & History, In re 392
Dillingham, Lowry v. 618
Dixon, Builders Supply v. 136
Dow, S. v. 644
Duncan v. Renfrow 197
Dunn, S. v. 89
Duplan Corp., Cotton Mills Co. v. 88
Dutch, S. v. 438

E

Edmondson v. Henderson 634
Edwards v. Hunter 46
Electrical Workers Union, Construction Co. v. 481
Elmore, Reed v. 221
English Mica Co. v. Board of Education 714
Evans v. Times Co. 669
Everhart, Burr v. 327

F

Fairchild Realty Co. v. Spiegel, Inc. 458

PAGE

Faison, S. v. 121
Farmers Federation Cooperative, Hensley v. 274
Fidelity Bank v. Bloomfield 492
Finch v. Honeycutt 91
Floyd, S. v. 434
Francis, Burleson v. 619
Freight Lines v. Burlington Mills 143
Fuller v. Baucom 510
Fultz, Coach Co. v. 523
Fultz, Little v. 523

G

Gable, Manufacturing Co. v. 1
Garner v. Newport 449
Garris v. Scott 568
Gas Co., Collins v. 544
Gas Co., Denning v. 541
Gastonia, Jackson v. 404
Gaulden v. Insurance Co. 378
Gillyard, S. v. 217
Glenn v. Raleigh 469
Goldsboro v. R. R. 101
Goldsboro Gas Co., Collins v. 544
Goldsboro Gas Co., Denning v. 541
Gordon Co., Porter v. 398
Graham, Bridges v. 371
Grantham v. Myers 204
Gray, Price v. 162
Green, S. v. 90
Green, S. v. 717
Greene, Walston v. 617
Gregg v. Williamson 356
Greyhound Lines, Neece v. 547
Griffin, S. v. 680
Guaranty Bank & Trust Co., Gurganus v. 655
Gulf Oil Corporation, Burns v. 266
Gurganus v. Trust Co. 655

H

Halifax County Bd. of Elections, Walker v. 196
Hanson, S. v. 686
Hardin-Dixon Tractor Co., Champion v. 691
Hardy v. Small 581
Harris v. Bingham 77
Helms v. Wehunt 693

PAGE

Henderson, Edmondson v. 634
Hennis Freight Lines v. Burlington Mills 143
Hensley v. Cooperative 274
Herring, S. v. 518
Highway Com. v. Privett.....501
Holmes v. Sanders 200
Home Beneficial Life Insurance Co., Dean v. 704
Honeycutt, Finch v. 91
Hood v. Coach Co. 684
Hughes, S. v. 219
Huie v. Templeton 86
Hunt, S. v. 454
Hunter, Edwards v. 46

I

In re Department of Archives & History 392
In re Estate of Cogdill 602
In re Will of Crawford 322
Insurance Co., Dean v. 704
Insurance Co., Gaulden v. 378
Insurance Co., Marshall v. 447
Insurance Co. v. Sutton.....339
Irby v. R. R. 384

J

Jackson v. Clark 622
Jackson v. Gastonia 404
Johnson v. Catlett 341
Johnson v. Meyer's Co. 310
Johnson, Norris v. 179
Johnson v. Scheidt, Comr. of Motor Vehicles 452
Jones, Ashley v. 442
Jones v. Bailey 599
Jones Construction Co. v. Electrical Workers Union 481
Jordan v. Chappel 620

K

Keener v. Beal 247
Keith v. Lee 188
Kelly Construction Co., Linthicum & Sons v. 203
Kelly v. Kelly 174
Kerley, S. v. 157
Kilgore, S. v. 455
Kinston, Philyaw v. 534

PAGE

Kirkman v. Baucom 510
Kirkman, Williams v. 510

L

Lane v. Bryan 108
Lassiter, Thompson v. 34
Lea v. Light Co. 287
Lee, Keith v. 188
Lee, Lewis v. 68
Leggett, Tyer v. 638
Lewis v. Lee 68
Lewis, Scott v. 298
Light Co., Lea v. 287
Linthicum & Sons v. Construction Co. 203
Little v. Fultz 523
Lloyd, Shearin v. 363
Locklear, Church Conference v. 349
Locklear, Ransom v. 456
Love v. Snellings 674
Lowry v. Dillingham 618
Lumbee River Conference v. Locklear 349
Lumber Co., McBryde v. 415
Lynn, S. v. 80

Mc

McBryde v. Lumber Co. 415
McCormick v. Smith 425

M

Manufacturing Co. v. Gable 1
Marshall v. Insurance Co. 447
Matheson v. Trust Co. 710
Maxwell, Bell v. 257
Meshaw, S. v. 205
Methodist Church, Conference of, v. Locklear 349
Meyer's Co., Johnson v. 310
Mica Co. v. Board of Education ..714
Midkiff, NASCAR, Inc. v. 409
Miller, S. v. 608
Mills, S. v. 237
Minerals Corp., Brinkley v..... 17
Moran, S. v. 686
Morgan v. Bell Bakeries, Inc. 429
Morgan, S. v. 596
Morris v. Morris 314
Moss, Walker v. 196
Motor Co., Worley v. 677

PAGE

Murray, S. v. 518
Myers, Grantham v. 204

N

NASCAR, Inc. v. Midkiff 409
National Bank, Sides v. 672
Neece v. Greyhound Lines 547
Newport, Garner v. 449
Norris v. Johnson 179
N. C. Dept of Motor Vehicles, Snyder v. 81
N. C. Highway and Public Works Com. v. Privett 501

O

Oil Corporation, Burns v. 266
Overnite Transportation Co., Crotts v. 420
Oxendine, S. v. 457

P

Pate, Smith v. 63
Peele, Coffield v. 661
Penland v. Coal Co. 26
Perry, Barbee v. 538
Phillips, Bullard v. 87
Philyaw v. Kinston 534
Pilkington v. West 575
Pilot Life Insurance Co., Gaulden v. 378
Porter v. Yoder & Gordon Co. 398
Powell v. Roberson 606
Power Co., Lea v. 287
Price v. Gray 162
Privett, Highway Com. v. 501

Q

Quality Chevrolet Co., Alford v. 214
Queen City Coach Co. v. Fultz 523
Queen City Coach Co., Hood v. 684

R

R. R., Goldsboro v. 101
R. R., Irby v. 384
Raleigh, Glenn v. 469
Ramsey v. Comrs. of Cleveland 647
Ransom v. Locklear 456
Raper v. Berrier 193
Realty Co. v. Spiegel, Inc. 458

PAGE

Redfern, S. v. 293
Reed v. Elmore 221
Reidsville v. Turner 338
Renfrow, Duncan v. 197
Richmond Greyhound Lines, Neece v. 547
Rickman Manufacturing Co. v. Gable 1
Riddle v. Artis 629
Robbins v. Crawford 622
Robbins, S. v. 332
Roberson, Powell v. 606
Rogers, S. v. 611
Rollins, Ramsey v. 647

S

St. Clair, S. v. 183
Sanders, Holmes v. 200
Scheidt, Comr. of Motor Vehicles, Barbour v. 169
Scheidt, Comr. of Motor Vehicles, Johnson v. 452
Scheidt, Comr. of Motor Vehicles, Snyder v. 81
Scott, Garris v. 568
Scott v. Lewis 298
Shearin v. Lloyd 363
Sides v. Bank 672
Simkins, S. v. 518
Small, Hardy v. 581
Smawley, Buchanan v. 592
Smith Builders Supply v. Dixon 136
Smith, McCormick v. 425
Smith v. Pate 63
Smith, S. v. 118
Smith, Stokes v. 694
Snellings, Love v. 674
Snyder v. Scheidt, Comr. of Motor Vehicles 81
Southern Railway Co., Irby v. 384
Spiegel, Inc., Realty Co. v. 458
Stafford, Brendle v. 218
S. v. Andrews 561
S. v. Arthur 690
S. v. Bell 646
S. v. Blackwell 642
S. v. Boles 83
S. v. Brown 686
S. v. Canady 613
S. v. Cooke 518

PAGE

S. v. Davis 73
S. v. Dow 644
S. v. Dunn 89
S. v. Dutch 438
S. v. Faison 121
S. v. Floyd 434
S. v. Gillyard 217
S. v. Green 90
S. v. Green 717
S. v. Griffin 680
S. v. Hanson 686
S. v. Herring 518
S. v. Hughes 219
S. v. Hunt 454
S. v. Kerley 157
S. v. Kilgore 455
S. v. Lynn 80
S. v. Meshaw 205
S. v. Miller 608
S. v. Mills 237
S. v. Moran 686
S. v. Morgan 596
S. v. Murray 518
S. v. Oxendine 457
S. v. Redfern 293
S. v. Robbins 332
S. v. Rogers 611
S. v. St. Clair 183
S. v. Simkins 518
S. v. Smith 118
S. v. Stocks 89
S. v. Strickland 120
S. v. Sturdivent 518
S. v. Tessnear 615
S. v Wallace 445
S. v. White 587
S. v. Williams 614
S. v. Williams 688
S. v. Wolfe 518
S. v. Worley 202
S. v. Wynne 686
State Highway Com. v. Privett 501
Stephens v. Carter 318
Stocks, S. v. 89
Stokes v. Smith 694
Strickland, S. v. 120
Sturdivent, S. v. 518
Sudan Temple v. Umphlett 555
Supervision Co. v. Thomas 281
Sutton, Insurance Co. v. 339

PAGE

T

Taliaferro, Trust Co. v. 121
Temple v. Temple 334
Templeton, Huie v. 86
Tessnear, S. v. 615
Thomas, Supervision Co. v. 281
Thompson v. Lassiter 34
Thrush v. Thrush 114
Times Co., Evans v. 669
Todd v. White 59
Town of Newport, Garner v. 449
Tractor Co., Champion v. 691
Transportation Co., Crotts v. 420
Trust Co., Gurganus v. 655
Trust Co., Matheson v. 710
Trust Co v. Taliaferro 121
Turner, Reidsville v. 338
Tyer v. Leggett 638

U

Umphlett, Sudan Temple v. 555
Union, Construction Co. v. 481
United Feldspar & Minerals Corp., Brinkley v. 17
Utica Fire Insurance Co. v. Sutton 339

W

Wachovia Bank & Trust Co. v. Taliaferro 121
Waggoner v. Waggoner 210
Walker, Davis v. 340
Walker v. Moss 196
Wallace, S. v. 445
Walston v. Greene 617
Washington National Insurance Co., Marshall v. 447
Weddle v. Weddle 336
Wehunt, Helms v. 693
West, Pilkington v. 575
White, S. v. 587
White, Todd v. 59
Widows Fund of Sudan Temple v. Umphlett 555
Williams v. Kirkman 510
Williams, S. v. 614
Williams, S. v. 688
Williamson, Gregg v. 356
Wolfe, S. v. 518

PAGE

Worley v. Motor Co. 677
Worley, S. v. 202
Wyatt, Calloway v. 129
Wynne, S. v. 686

Y

Yoder & Gordon Co., Porter v. 398

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

Brown v. Doby, 244 NC 746. Petition for *certiorari* denied June 3, 1957.
Futrelle v. R. R., 245 NC 36. Petition for *certiorari* granted April 1, 1957.
Bennett v. R. R., 245 NC 261. Petition for *certiorari* denied May 13, 1957.
Kovacs v. Brewer, 245 NC 630. Petition for *certiorari* pending.
S. v. Strickland, 246 NC 120. Petition for *certiorari* denied October 14, 1957.

CASES CITED

A

Absher v. Raleigh ..... 211 N.C. 567 168
Adrian v. Shaw ..... 82 N.C. 474 ..... 701, 703
Aiken v. Sanderford ..... 236 N.C. 760 133
Albritton v. Hill ..... 190 N.C. 429 263
Alexander v. Harkins ..... 120 N.C. 452 498
Alford v. Chevrolet Co. ..... 246 N.C. 214 584
Alford v. Washington ..... 238 N.C. 694 ..... 292, 537
Allen v. Allen ..... 213 N.C. 264 324
Allen v. Cameron ..... 181 N.C. 120 ..... 316, 317
Allen v. McDowell ..... 236 N.C. 373 ..... 395, 595
Allen v. Taylor ..... 96 N.C. 37 467
Alley v. Long ..... 209 N.C. 245 641
Allman v. Register ..... 233 N.C. 531 465
Anderson v. Heating Co. ..... 238 N.C. 138 ..... 33, 87
Anderson v. Moore ..... 233 N.C. 299 ..... 359, 621
Anderson v. Office Supplies ..... 236 N.C. 519 526
Anderson v. Rainey ..... 100 N.C. 321 133
Andrews v. Masons ..... 189 N.C. 697 559
Andrews v. Oil Co. ..... 204 N.C. 268 595
Applebaum v. Commercial Travelers ..... 171 N.C. 435 559
Archbell v. Archbell ..... 158 N.C. 408 668
Armstrong v. Armstrong ..... 230 N.C. 201 520
Armstrong v. Armstrong ..... 235 N.C. 733 193
Artis v. Artis ..... 228 N.C. 754 608
Assurance Society v. Basnight ..... 234 N.C. 347 636
Assurance Society v. Russos ..... 210 N.C. 121 703
Atkins v. Durham ..... 210 N.C. 295 477
Atkins v. Transportation Co. ..... 224 N.C. 688 ..... 377, 477, 628
Atkinson v. Downing ..... 175 N.C. 244 201
Austin v. Dare County ..... 240 N.C. 662 546
Austin v. Overton ..... 222 N.C. 89 424
Austin v. R. R. ..... 197 N.C. 319 291
Austin v. Staten ..... 126 N.C. 783 237
Aycock v. Cooper ..... 202 N.C. 500 30
Aydlett v. Keim ..... 232 N.C. 367 391
Aydlett v. Major & Loomis Co. ..... 211 N.C. 548 367

B

Bag Co. v. Grocery Co. ..... 171 N.C. 764 324
Bailey v. Bailey ..... 243 N.C. 412 ..... 107, 171
Bailey v. Insurance Co. ..... 222 N.C. 716 384
Bailey v. Jackson ..... 191 N.C. 61 ..... 234, 237
Bailey v. McPherson ..... 233 N.C. 231 532
Bailey v. R. R. ..... 223 N.C. 244 ..... 390, 391
Bailey v. Raleigh ..... 130 N.C. 209 153
Baker v. Brown ..... 151 N.C. 12 256
Baker v. Lumberton ..... 239 N.C. 401 479
Baker v R. R. ..... 232 N.C. 523 329
Baker v. Varser ..... 240 N.C. 260 34

Baldwin v. Hinton ..... 243 N.C. 113 179
Baldwin v. Smitherman ..... 171 N.C. 772 290
Ball v. Hendersonville ..... 205 N.C. 414 489
Ballard v. Kilpatrick ..... 71 N.C. 281 309
Ballinger v. Thomas ..... 195 N.C. 517 ..... 70, 595
Bangle v. Webb ..... 220 N.C. 423 117
Bank v. Bloomfield ..... 246 N.C. 492 468
Bank v. Coral ..... 225 N.C. 96 316
Bank v. Fries ..... 162 N.C. 516 87
Bank v. Jones ..... 211 N.C. 317 359
Bank v. Lumber Co. ..... 193 N.C. 757 359
Bank v. McCullers ..... 201 N.C. 440 ..... 336, 668
Bank v. Motor Co. ..... 216 N.C. 432 195
Bank v. Sauls ..... 183 N.C. 165 359
Bank v. Seagroves ..... 166 N.C. 608 133
Bank v. Stack ..... 179 N.C. 514 659
Bank v. Sternberger ..... 207 N.C. 811 ..... 99, 578
Bank v. Taylor ..... 122 N.C. 569 307
Bank v. Thompson ..... 174 N.C. 349 674
Bank v. Weaver ..... 213 N.C. 767 674
Bank v. Winder ..... 198 N.C. 18 214
Banks v. Shepard ..... 230 N.C. 86 525
Barbee v. Bumpass ..... 191 N.C. 521 668
Barbee v. Edwards ..... 238 N.C. 215 359
Barbee v. Green ..... 92 N.C. 471 428
Barco v. Owens ..... 212 N.C. 30 56
Bargeon v. Transportation Co. ..... 196 N.C. 776 181
Barlow v. Bus Lines ..... 229 N.C. 382 ..... 252, 253, 261, 262, 377
Barnes v. Caulbourne ..... 240 N.C. 721 327
Barneycastle v. Walker ..... 92 N.C. 198 17
Barrett v. Richardson ..... 76 N.C. 429 703
Barwick v. Rouse ..... 245 N.C. 391 87
Basnight v. Small ..... 163 N.C. 15 321
Bass v. Ingold ..... 232 N.C. 295 ..... 345, 347
Batchelor v R. R. ..... 196 N.C. 84 313
Batson v. Laundry ..... 202 N.C. 560 335
Batten v. Aycock ..... 224 N.C. 225 659
Beaver v. Paint Co. ..... 240 N.C. 328 ..... 107, 280
Beck v. Voncannon ..... 237 N.C. 707 395
Beck v. Wilkins ..... 179 N.C. 231 555
Belcher v. Grimsley ..... 88 N.C. 88 190
Bell v. Cunningham ..... 81 N.C. 83 336
Bell v Machine Co. ..... 150 N.C. 111 271
Bell v. Thurston ..... 214 N.C. 231 316
Bennett v. Stephenson ..... 237 N.C. 377 164
Benton v. Alexander ..... 224 N.C. 800 468
Bernhardt v. R. R. ..... 135 N.C. 258 307
Berry v. Coppersmith ..... 212 N.C. 50 ..... 45, 302
Bickley v. Green ..... 187 N.C. 772 310
Biddix v. Rex Mills ..... 237 N.C. 660 195
Billings v. Renegar ..... 241 N.C. 17 169
Bird v. Bradburn ..... 131 N.C. 488 617
Blackburn v. Bowman ..... 46 N.C. 441 67

Blackmore v. Winders....144 N.C. 212.... 595
Blacknall v. Hancock....182 N.C. 369.... 237
Blair, In re....230 N.C. 753.... 617
Blake v. Broughton....107 N.C. 220.... 359
Blalock v. Durham....244 N.C. 208.... 717
Blalock, In re....233 N.C. 493.... 171
Blevins v. France....244 N.C. 334.... 252, 261, 415
Bloss v. ————....3 N.C. 223.... 578
Blower Company v. MacKenzie....197 N.C. 152.... 213
Board of Education v. Commissioners....113 N.C. 379.... 651
Board of Trustees v. Webb....155 N.C. 379.... 651
Boddie v. Bond....154 N.C. 359.... 214
Bogen v. Bogen....220 N.C. 648.... 264
Bolich v. Insurance Co....206 N.C. 144.... 531
Bond v. Bond....235 N.C. 754.... 107
Bond v. Coke....71 N.C. 97.... 321
Boney v. Bank....190 N.C. 863.... 674
Boney v. Parker....227 N.C. 350.... 595
Boomer v. Gibbs....114 N.C. 76.... 45
Boone v. Matheny....224 N.C. 250.... 290
Boone v. R. R....240 N.C. 152.... 390
Borders v. Yarbrough....237 N.C. 540.... 230
Bost v. Metcalfe....219 N.C. 607.... 633, 685
Bradham v. Trucking Co....243 N.C. 708.... 525
Bradley v. Bradley....245 N.C. 483.... 87
Brafford v. Cook....232 N.C. 699.... 513
Brame v. Clark....148 N.C. 364.... 520
Bray v. Weatherly & Co....203 N.C. 160.... 585
Brenizer v. Stephens....220 N.C. 395.... 234
Brewer v. Brewer....238 N.C. 607.... 434
Brick v. R. R....145 N.C. 203.... 555
Bridges v. Graham....246 N.C. 371.... 514
Brigman v. Contruction Co....192 N.C. 791.... 473
Brink v Black....74 NC. 329.... 617
Brinn v. Brinn....213 N.C. 282.... 56, 318
Brinson v. McCotter....181 N.C. 482.... 637
Brittingham v. Stadiem....151 N.C. 299.... 39
Broom v. Bottling Co....200 N.C. 55.... 601
Broome v Charlotte....208 N.C. 729.... 476
Brown v. Brown....168 N.C. 4.... 224
Brown v. Commissioners....100 N.C. 92.... 653
Brown v. Harding....171 N.C. 686.... 701
Brown v. Hodges....230 N.C. 746.... 43
Brown v. Hurley....243 N.C. 138.... 179
Brown v. Kinsey....81 N.C. 245.... 112
Brown v. McKee....108 N.C. 387.... 324
Brown v. Montgomery Ward & Co....217 N.C. 368.... 313
Brown v. R. R....202 N.C. 256.... 348
Brummitt v. McGuire....107 N.C. 351.... 307
Bruton v. Light Co....217 N.C. 1.... 67
Bryan v. Lawrence....50 N.C. 337.... 321

Bryan v. Spruill..... 57 N.C. 27..... 133
Bryan v. T. A. Loving Co.....222 N.C. 724..... 585
Bryant v. Construction Co.....197 N.C. 639..... 31
Bryant v. Shields.....220 N.C. 628..... 608
Buchanan v. Clark.....164 N.C. 56..... 107
Buchanan v.
Highway Commission.....217 N.C. 173..... 279
Buckner v. Hawkins.....230 N.C. 99..... 665
Buckner v Maynard.....198 N.C. 802..... 714
Buckner v. Wheeldon.....225 N.C. 62..... 366
Building & Loan Asso. v. Jones..214 N.C. 30..... 361
Bulis, In re Estate of.....240 N.C. 529..... 56, 318
Bullard v. Ross.....205 N.C. 495..... 167, 168
Bullock v. Crouch.....243 N.C. 40..... 38
Bumgardner v. R. R.....132 N.C. 438..... 313
Bunch v. Edenton..... 90 N.C. 431..... 479
Bundy v. Powell.....229 N.C. 707..... 164, 252, 261, 264, 377
Bunn v. Todd.....107 N.C. 266..... 306
Burcham v. Burcham.....219 N.C. 357..... 98
Burgess v. Trevathan.....236 N.C. 157..... 67, 68
Burnett v. R. R. .....120 N.C. 517..... 374
Burney v. Holloway.....225 N.C. 633..... 98
Burnsville v. Boone.....231 N.C. 577..... 107
Burton v. Cahill.....192 N.C. 505..... 359
Butler v. Bell.....181 N.C. 85..... 371
Butler v. Butler.....169 N.C. 584..... 668
Butler v. Fertilzer Works.....195 N.C. 409..... 575
Butler v. Winston.....223 N.C. 421..... 37
Bynum v. Powe..... 97 N.C. 374..... 531
Byrd v. Express Co.....139 N.C. 273..... 112
Byrd v. Patterson.....229 N.C. 156..... 713

C

Cab Co. v. Sanders.....223 N.C. 626..... 255
Caldwell v. Caldwell.....189 N.C. 805..... 531
Callaham v. Arenson.....239 N.C. 619..... 224, 233
Campbell v. Casualty Co.....212 N.C. 65..... 40
Cameron v. Hicks.....141 N.C. 21..... 579
Cannon v. Blair.....229 N.C. 606..... 107
Carlton v. Bernhardt-Seagle Co...210 N.C. 655..... 31
Carr v. Jimmerson.....210 N.C. 570..... 224
Carswell v. Morganton.....236 N.C. 375..... 302
Cartwright v. Coppersmith.....222 N.C. 573..... 306
Cash Register Co. v. Townsend....137 N.C. 652..... 134
Causey v. Plaid Mills.....119 N.C. 180..... 321
Cawfield v. Owens.....129 N.C. 286..... 359
Cecil v. Henderson.....212 N.C. 244..... 67
Cecil v. Lumber Co.....197 N.C. 81..... 202, 374
Chaffin v. Brame.....233 N.C. 377..... 253, 254
Chambers v. North River Line....179 N.C. 199..... 16
Chandler v. Jones.....173 N.C. 427..... 601, 658
Cheek v. Brokerage Co.....209 N.C. 569..... 601
Cheek v. Walden.....195 N.C. 652..... 701, 703

Chemical Co. v. Walston....187 N.C. 817.... 212
Cherry v. Andrews....231 N.C. 261.... 500
Cherry v. Warehouse Co....237 N.C. 362.... 178
Chestnut v. Sutton....207 N.C. 256.... 150
Childress v. Motor Lines....235 N.C. 522.... 680
Childs v Theatres, Inc....200 N.C. 333.... 468
Chinnis v. Cobb....210 N.C. 104.... 99, 578
Chisman, In re Will of....175 N.C. 420.... 324
Churchwell v. Trust Co....181 N.C. 21.... 674
Clapp v. Clapp....241 N.C. 281.... 355
Clark v. Dill....208 N.C. 421.... 43
Clark v. Guano Co....144 N.C. 64.... 181
Clark v. Sweaney....176 N.C. 529.... 39
Clements v. R. R....179 N.C. 225.... 531
Cleve v. Adams....222 N.C. 211.... 701, 703
Clinard v. Lambeth....234 N.C. 410.... 49, 50, 51, 52
Clinard v. Winston-Salem....173 N.C. 356.... 543
Clodfelter v. Wells....212 N.C. 823.... 291
Clothing Store v. Ellis Stone & Co....233 N.C. 126.... 420
Coach Co. v. Burrell....241 N.C. 432.... 38, 39, 40
Coach Co. v. Coach Co....237 N.C. 697.... 465
Coach Co. v. Motor Lines....229 N.C. 650.... 507
Coddington v. Stone....217 N.C. 714.... 100
Coffield v. Peele....246 N.C. 661.... 703
Cofield v. Griffin....238 N.C. 377.... 133
Cole v. Koonce....214 N.C. 188.... 255
Cole v. Seawell....152 N.C. 349.... 43
Collier v. Mills....245 N.C. 200.... 34, 59
Collier v Poe.... 16 N.C. 55.... 659
Collins v. Bass....198 N.C. 99.... 360
Collins v. Lamb....215 N.C. 719.... 169
Colt v. Kimball....190 N.C. 169.... 133
Combs v. Porter....231 N.C. 585.... 359
Commissioners v. Commissioners 75 N.C. 240.... 307
Commissioners v. Commissioners....157 N.C. 514.... 651
Comrs. of Beaufort v. Rowland....220 N.C. 24.... 178
Connor v. Schenck....240 N.C. 794.... 368, 370
Conrad v. Foundry Company....198 N.C. 723.... 278, 584
Construction Co. v. Holding Corporation....207 N.C. 1.... 676
Construction Co. v. Ice Co....190 N.C. 580.... 270
Construction Co. v. R. R....184 N.C. 179.... 168
Cook v. Cook....159 N.C. 46.... 395
Cook v. Hobbs....237 N.C. 490.... 680
Cooper v. Wyman....122 N.C. 784.... 117
Coppedge v. Coppedge....234 N.C. 173.... 316, 665
Corbett v. Clute....137 N.C. 546.... 679
Cornelison v. Hammond....225 N.C. 535.... 43
Cornelius v. Brawley....109 N.C. 542.... 325
Council v. Land Bank....213 N.C. 329.... 360
Cox v. Freight Lines....236 N.C. 72.... 112, 132, 143, 183, 292

Cozart v. Hudson....239 N.C. 279....424, 709
Craddock v. Brankley....177 N.C. 125....395
Cranford, In re....231 N.C. 91....395
Craig, In re....192 N.C. 565....601
Craven County v. Trust Co....237 N.C. 502....226, 233, 234
Creighton v. Snipes....227 N.C. 90....717
Crews v. Crews....192 N.C. 679....621
Crompton v. Baker....220 N.C. 52....550
Crouch v. Crouch....160 N.C. 447....701
Crudup v. Holding....118 N.C. 222....317, 318
Culbreth v. Hall....159 N.C. 588....360
Cullens v. Cullens....161 N.C. 344....714
Cummings v. R. R....217 N.C. 127....390, 391
Cummins v. Bruit Co....225 N.C. 625....254
Cunningham v. R. R....139 N.C. 427....67, 68
Curtis v. Cash....84 N.C. 41....190

D

Dail v. Kellex Corp....233 N.C. 446....671
Dail v. Taylor....151 N.C. 284....290
Dalrymple v. Cole....170 N.C. 102....703
Darden v. Timberlake....139 N.C. 181....714
Dare County v. Currituck County....95 N.C. 189....651
Daughtry v. Daughtry....225 N.C. 358....668, 669
Davenport v. Fleming....154 N.C. 291....699, 704
Davis v. Alexander....202 N.C. 130....50
Davis v. Bass....188 N.C. 200....668
Davis v. Fremont....135 N.C. 538....652
Davis v. Hargett....244 N.C. 157....414
Davis v. Keen....142 N.C. 496....325
Davis v. Land Bank....219 N.C. 248....302
Davis v. Light Co....238 N.C. 106....314, 537, 538
Davis v. Mecklenburg County....214 N.C. 469....585
Davis v. Robinson....189 N.C. 589....226. 227, 230, 233, 235
Davis v. Vaughn....243 N.C. 486....668
Davis v. Whitehurst....229 N.C. 226....133, 310
Day v. Commissioners....191 N.C. 780....651
Day v. Stevens....88 N.C. 83....190, 191
Deal v. Sanitary District....245 N.C. 74....51
Deans v. Deans....241 N.C. 1....179
Deaton v. Elon College....226 N.C. 433....444
DeBruhl v. Highway Com....245 N.C. 139....660
Deese v. Light Co....234 N.C. 558....292
DeFebio, In re....237 N.C. 269....87
DeLaney v. Hart....198 N.C. 96....234
Dellinger v. Bollinger....242 N.C. 696....107, 171
Denton v. Vassiliades....212 N.C. 513....336
Dependents of Phifer v. Dairy....200 N.C. 65....585
Development Co. v. Bearden....227 N.C. 124....133
Devereux v. Insurance Co....98 N.C. 6....307
Dix v. Pruitt....194 N.C. 64....354

Dobias v. White....240 N.C. 680....143, 658
Dobson v. Simonton....93 N.C. 268....309
Doles v. R. R....160 N.C. 318....181
Donlop v. Snyder....234 N.C. 627....164
Donnel v. Cox....240 N.C. 259....107
Dosher v. Hunt....243 N.C. 247....263
Dougherty v. Stepp....18 N.C. 371....520
Dowdy v. R. R....237 N.C. 519....147, 390
Drum v. Miller....135 N.C. 204....168
Duckett v. Lyda....223 N.C. 356....178
Dull v. Dull....232 N.C. 482....608
Duncan v. Capenter....233 N.C. 422....23
Dunn v. Dunn....242 N.C. 234....68
Duplin County v. Harrell....195 N.C. 445....703
Dwiggins v. Bus Co....230 N.C. 234....595
Dyer v. Dyer....212 N.C. 620....401, 402

E

Early v. Eley....243 N.C. 695....133
Eason v. Buffaloe....198 N.C. 520....226
Edens v. Williams....7 N.C. 27....316, 665
Edgerton v. Harrison....230 N.C. 158....580
Edwards v. Cobb....95 N.C. 5....604
Edwards v. Cross....233 N.C. 354....290, 291, 514
Edwards v. Faulkner....215 N.C. 586....608
Edwards, In re Estate of....234 N.C. 202....195
Edwards, In re Petition of....206 N.C. 549....49
Edwards v. Loving Co....203 N.C. 189....585
Edwards v. McLawhorn....218 N.C. 543....604
Edwards v. Publishing Co....227 N.C. 184....275, 279
Efird v. Efird....234 N.C. 607....98, 316
Elder v. Johnston....227 N.C. 592....665
Eledge v. Light Co....230 N.C. 584....348
Ellington v. Bradford....242 N.C. 159....38
Ellis v. Power Co....193 N.C. 357....292, 537
Ellis v. R. R....241 N.C. 747....374
Ellis v. Wellons....224 N.C. 269....325
Elmore v. R. R....189 N.C. 658....640
Emerson v. Munford....242 N.C. 241....164
Enloe v. R. R....179 N.C. 83....290
Essick v. Lexington....232 N.C. 200....345, 347
Etheridge v. Etheridge....222 N.C. 616....113, 291, 377
Etheridge, In re Will of....231 N.C. 502....324
Evans, In re Will of....223 N.C. 206....326
Everett v. Smith....44 N.C. 303....67
Ewing v. Kates....196 N.C. 354....143
Ewing v. Thompson....233 N.C. 564....39
Ezzell v Merritt....224 N.C. 602....419

F

Farr v. Asheville....205 N.C. 82....407, 408
Farr v. Lumber Co....182 N.C. 725....348

Farrar v. Alston ..... 12 N.C. 69 133
Fawcett v. Mt. Airy ..... 134 N.C. 125 ..... 479, 652
Fawley v. Bobo ..... 231 N.C. 203 424
Feimster v. Johnson ..... 64 N.C. 259 320
Ferguson v. Ferguson ..... 225 N.C. 375 98
Ferguson v. Wright ..... 113 N.C. 537 699
Ferrell v. Trust Co ..... 221 N.C. 432 87
Finch v. Honeycutt ..... 246 N.C. 91 ..... 318, 578
Finch v. Slater ..... 152 N.C. 155 117
Finley v. Sapp ..... 238 N.C. 114 201
Fisher v. Brown ..... 135 N.C. 198 324
Fisher v. Fisher ..... 217 N.C. 70 ..... 578, 668
Fisher v. Fisher ..... 218 N.C. 42 ..... 99, 578, 668, 669
Fisher v. New Bern ..... 140 N.C. 506 ..... 168, 473, 475
Fisher v. Trust Co ..... 138 N.C. 90 309
Fleishel v. Jessup ..... 244 N.C. 451 321
Fleming v. Graham ..... 110 N.C. 374 702
Fleming v. Land Bank ..... 215 N.C. 414 359
Flynn v. Highway Commission ..... 244 N.C. 617 480
Foil v. Drainage Comrs ..... 192 N.C. 652 15
Foote v. Gooch ..... 96 N.C. 265 321
Foster v. Atwater ..... 226 N.C. 472 63
Fowler v. Wester ..... 173 N.C. 442 578
Fox v. Mills, Inc ..... 225 N.C. 580 717
Fox v. Scheidt, Comr. of Motor Vehicles ..... 241 N.C. 31 159
Franklin v. Realty Co ..... 202 N.C. 212 234
Fraser v. Bean ..... 96 N.C. 327 ..... 359, 360
Freeman v. Lide ..... 176 N.C. 434 579
Freeman v. Preddy ..... 237 N.C. 734 164
Frey v. Lumber Co ..... 144 N.C. 759 134
Fuller v. Wadsworth ..... 24 N.C. 263 359
Fulp v. Brown ..... 153 N.C. 531 ..... 700, 701

G

Gabriel v. Newton ..... 227 N.C. 314 ..... 279, 717
Gaither Corp v. Skinner ..... 238 N.C. 254 636
Gaither Corp v. Skinner ..... 241 N.C. 532 67
Gallimore v. Grubb ..... 156 N.C. 575 500
Gant v Gant ..... 197 N.C. 164 314
Gardner v. Batts ..... 114 N.C. 496 701
Garland v. Gatewood ..... 241 N.C. 606 112
Garmon v. Thomas ..... 241 N.C. 412 541
Garner v. Horner ..... 191 N.C. 539 668
Garrenton v. Maryland ..... 243 N.C. 614 261
Garrett v. Kendrick ..... 201 N.C. 388 271
Garrett v. Rose ..... 236 N.C. 299 637
Gas Co. v. Montgomery Ward & Co ..... 231 N.C. 270 444
Gaskins v. Kelly ..... 228 N.C. 697 254
Gatewood v. Leak ..... 99 N.C. 363 531
Gatling v. Gatling ..... 239 N.C. 215 127
Gault v. Lake Waccamaw ..... 200 N.C. 593 51

Gay v. Baker ..... 58 N.C. 344 714
Geddie v. Williams ..... 189 N.C. 333 43
Gentile v. Wilson ..... 242 N.C. 704 166
Gheen v. Summey ..... 80 N.C. 187 700
Gibbons, In re ..... 245 N.C. 24 ..... 194, 195
Gibson v. Insurance Co. ..... 232 N.C. 712 ..... 107, 171
Gilreath v. Silverman ..... 245 N.C. 51 ..... 253, 262, 265
Glace v. Throwing Co. ..... 239 N.C. 668 34
Godfrey v. Power Co. ..... 223 N.C. 647 347
Godwin v. Cotton Co. ..... 238 N.C. 627 ..... 167, 168
Godwin v. R. R. ..... 220 N.C. 281 ..... 168, 390
Gold Mining Co. v. Lumber Co. ..... 170 N.C. 273 714
Goldsboro v. R. R. ..... 246 N.C. 101 ..... 171, 338, 366, 412, 532, 651, 672
Goodman v. Goodman ..... 201 N.C. 808 ..... 617, 618
Goodson v. Williams ..... 237 N.C. 291 329
Goodwin v. Greene ..... 237 N.C. 244 43
Gore v. Townsend ..... 105 N.C. 228 213
Grady v. Grady ..... 209 N.C. 749 49
Graham v. Gas Co. ..... 231 N.C. 680 444
Graham v. R. R. ..... 240 N.C. 338 166
Grant v. McGraw ..... 228 N.C. 745 182
Graves v. Howard ..... 159 N.C. 594 361
Gray v. Coleman ..... 171 N.C. 344 44
Green v Bowers ..... 230 N.C. 651 169
Green v. Casualty Co. ..... 203 N.C. 767 561
Green v. Kitchin ..... 229 N.C. 450 652
Green v. Miller ..... 161 N.C. 24 63
Greene v. Carroll ..... 205 N.C. 459 601
Greensboro v. Scott ..... 138 N.C. 181 652
Greensboro v. Smith ..... 239 N.C. 138 ..... 396, 477
Greensboro v. Smith ..... 241 N.C. 363 477
Gregg v. Mallett ..... 111 N.C. 74 374
Griffin v. Baker ..... 192 N.C. 297 595
Griffin v. Insurance Co. ..... 225 N.C. 684 561
Griffin v. Springer ..... 244 N.C. 95 608
Griggs v. Griggs ..... 213 N.C. 624 133
Grissom v. Pickett ..... 98 N.C. 54 190
Groce v. Groce ..... 214 N.C. 398 336
Grocery Co. v. Hoyle ..... 204 N.C. 109 361
Groome v. Davis ..... 215 N.C. 510 263
Guerry v. Trust Co. ..... 234 N.C. 644 306
Guest v. Iron & Metal Co. ..... 241 N.C. 448 ..... 584, 585
Guilford College v. Guilford County ..... 219 N.C. 347 704
Gurley v. Wiggs ..... 192 N.C. 726 713

H

Haith v. Roper ..... 242 N.C. 489 179
Hall v. Dixon ..... 174 N.C. 319 703
Hall v. Hall ..... 235 N.C. 711 674
Hamilton v. Hamlet ..... 238 N.C. 741 473
Hamilton v. Rocky Mount ..... 199 N.C. 504 479

Hammer v. Brantley....244 N.C. 71.... 608
Hampton v. Hardin.... 88 N.C. 592.... 325
Hancammon v. Carr....229 N.C. 52.... 309
Hancock v. Wilson....211 N.C. 129.... 255
Hanks v. Utilities Co....204 N.C. 155.... 489
Harding v. Insurance Co....218 N.C. 129.... 134
Hardware Co. v. Banking Co....169 N.C. 744.... 676
Harrell v. Scheidt, Comr. of Motor Vehicles....243 N.C. 735.... 83, 172
Harrington v. Wadesboro....153 N.C. 437.... 477
Harris v. Montgomery Ward & Co....230 N.C. 485.... 166
Harrison v. Brown....222 N.C. 610.... 366
Harrison v. Kapp....241 N.C. 408.... 164
Harrison v. R. R. ....229 N.C. 92.... 79
Hartley v. Smith....239 N.C. 170.... 444
Harton v. Telephone Co....141 N.C. 455.... 168
Harward v. General Motors Corp....235 N.C. 88.... 329
Hatcher v. Clayton....242 N.C. 450.... 505
Hatcher v. Williams....225 N.C. 112.... 360
Hawes v. Accident Association....243 N.C. 62.... 717
Hawes v. Haynes....219 N.C. 535.... 39
Hawkins v. Finance Corp....238 N.C. 174.... 214, 287
Hawkins v. Simpson....237 N.C. 155.... 478
Hayes v. Ricard....244 N.C. 313.... 67
Hayes v. Wilmington....243 N.C. 525.... 644
Hazelwood v. Adams....245 N.C. 398.... 366
Heath v. Kirkman....240 N.C. 303.... 271
Hedgecock v. Insurance Co....212 N.C. 638.... 707
Hedgepeth v. Coleman....183 N.C. 309.... 641
Hege v. Sellers....241 N.C. 240.... 230, 236
Hegler v. Mills Co....224 N.C. 669.... 717
Helms v. Austin....116 N.C. 751.... 714
Helms v. Power Co....192 N.C. 784.... 291
Hemphill v. Ross.... 66 N.C. 477.... 359
Henderson v. Henderson....239 N.C. 487.... 71, 72, 526
Henderson v. Powell....221 N.C. 239.... 166
Henderson v. Power Co....200 N.C. 443.... 317
Henderson v. Wilmington....191 N.C. 269.... 478
Hendrix v. Motors, Inc....241 N.C. 644.... 140
Henry v. Leather Co....231 N.C. 477.... 276, 585
Hensley v. Helvenston....189 N.C. 636.... 377
Herndon v. R. R....162 N.C. 317.... 143
Herring v. Lumber Co....159 N.C. 382.... 287
Hetfield v. Baum.... 35 N.C. 394.... 66
Heyer v. Bulluck....210 N.C. 321.... 127, 316
Hickerson, In re....235 N.C. 716.... 402
Hicks v. Kearney....189 N.C. 316.... 361
Hicks v. Wooten....175 N.C. 597.... 699, 704
Higdon v. Jaffa....231 N.C. 242.... 226, 234, 237
Highway Commission v. Black....239 N.C. 198.... 507
Hildebrand v. Furniture Co....212 N.C. 100.... 217

Hill v. DuBose....234 N.C. 446....671
Hill v. Insurance Co....200 N.C. 502....575
Hill v. Lopez....228 N.C. 433....264
Hill v. Snider....217 N.C. 437....133
Hine v. Blumenthal....239 N.C. 537....224, 637
Hinkle v. Lexington....239 N.C. 105....585
Hinnant v. Power Co....187 N.C. 288....167
Hinsdale v. Williams....75 N.C. 430....700
Hinson v. Hinson....176 N.C. 613....316
Hinton v. West....207 N.C. 708....575
Hinton v. Williams....170 N.C. 115....237
Hobbs v. Coach Co....225 N.C. 323....255
Hobbs v. Goodman....240 N.C. 192....347, 419
Hocutt v. R. R....124 N.C. 214....367
Hodge v. Powell....96 N.C. 64....213
Hodges v. Charlotte....214 N.C. 737....473, 479
Hodges v. Malone & Co....235 N.C. 512....559
Hodges v. Stewart....218 N.C. 290....178
Hoft v. Mohn....215 N.C. 397....182
Hoke v. Greyhound Corp....227 N.C. 412....73
Holcomb v. Holcomb....192 N.C. 504....488
Holland v. Smith....224 N.C. 255....665
Hollifield v. Everhart....237 N.C. 313....70
Holloman v. Davis....238 N.C. 386....179
Holmes v Sanders....243 N.C. 171....200
Holmes v. Sanders....246 N.C. 200....194
Holmes v. Wharton....194 N.C. 470....313
Holt v. Holt....232 N.C. 497....272
Holton v. Commissioners of Mecklenburg County....93 N.C. 430....653
Homes Co. v. Falls....184 N.C. 426....234
Honeycutt v. Asbestos Co....235 N.C. 471....24
Hooper v. Lumber Co....215 N.C. 308....367
Hoover v. Indemnity Co....202 N.C. 655....348
Hopkins v. Barnhardt....223 N.C. 617....336
Hopkins v. Colonial Stores....224 N.C. 137....602
Hopkins v. Comer....240 N.C. 143....112
Horn v. Funiture Co....245 N.C. 173....584
Horne v. Smith....105 N.C. 322....321
Horton v. Hensley....23 N.C. 163....419
Horton v. Perry....229 N.C. 319....181
House v. House....231 N.C. 218....127
Housing Authority, In re....233 N.C. 649....395, 488
Houston v. Smith....88 N.C. 312....213
Howard v. Carman....235 N.C. 289....191
Howell v. Ferguson....87 N.C. 113....181
Howland v. Stitzer....236 N.C. 230....669
Hughes v. Enterprises....245 N.C. 131....165
Hughes v. Oliver....228 N.C. 680....621
Humphrey v. Beall....215 N.C. 15....233, 234
Humphrey v. Stephens....191 N.C. 101....361
Hunsucker v. Chair Co....237 N.C. 559....347, 348
Hunt v. Bradshaw....242 N.C. 517....366

Hunt v. High Point ..... 226 N.C. 74 ..... 478, 479
Hunt v. State ..... 201 N.C. 707 585
Hunter v West ..... 172 N.C. 160 51
Huskins v. Feldspar Corp ..... 241 N.C. 128 ..... 23, 24, 26
Huskins v. Hospital ..... 238 N.C. 357 ..... 51, 52, 491
Hutchins v. Davis ..... 230 N.C. 67 468

I

Ice Cream Co. v. Ice Cream Co ..... 238 N.C. 317 89
Improvement Co. v. Andrews ..... 176 N.C. 280 658
Ingle v. Cassady ..... 208 N.C. 497 ..... 66, 291
Ingle v. Stubbins ..... 240 N.C. 382 ..... 225, 226
Ingold v. Assurance Co ..... 230 N.C. 142 321
Ingram v. Colson ..... 14 N.C. 520 45
Ingram v. Easley ..... 227 N.C. 442 ..... 578, 698
Ingram v. Smoky Mountain Stages, Inc ..... 225 N.C. 444 ..... 71, 73, 391
In re Blair ..... 230 N.C. 753 617
In re Blalock ..... 233 N.C. 493 171
In re Craig ..... 192 N.C. 656 601
In re Cranford ..... 231 N.C. 91 395
In re DeFebio ..... 237 N.C. 269 87
In re Estate of Bulis ..... 240 N.C. 529 ..... 56, 318
In re Estate of Edwards ..... 234 N.C. 202 195
In re Gibbons ..... 245 N.C. 24 ..... 194, 195
In re Hickerson ..... 235 N.C. 716 402
In re Housing Authority ..... 233 N.C. 649 ..... 395, 488
In re Palmer's Will ..... 117 N.C. 134 604
In re Petition of Edwards ..... 206 N.C. 549 49
In re Powell ..... 241 N.C. 288 ..... 207, 208, 210
In re Sams ..... 236 N.C. 228 605
In re Saville ..... 156 N.C. 172 604
In re S. v. Gordon ..... 225 N.C. 241 195
In re Venable's Will ..... 127 N.C. 344 326
In re Walters ..... 229 N.C. 111 ..... 244, 245
In re Westfeldt ..... 188 N.C. 702 325
In re Will of Chisman ..... 175 N.C. 420 324
In re Will of Etheridge ..... 231 N.C. 502 324
In re Will of Evans ..... 223 N.C. 206 326
In re Will of Williams ..... 215 N.C. 259 324
In re Wolfe ..... 185 N.C. 563 326
Insurance Co. v. Carolina Beach ..... 216 N.C. 778 ..... 63, 107, 366
Insurance Co. v. McCraw ..... 215 N.C. 105 71
Insurance Co. v. Motor Lines, Inc ..... 225 N.C. 588 68
Insurance Co. v. Motors, Inc ..... 241 N.C. 67 622
Insurance Co. v. R. R ..... 179 N.C. 255 67
Investment Co. v. Chemicals Laboratory ..... 233 N.C. 294 202
Irvin v. R. R ..... 164 N.C. 5 680
Irwin v. Charlotte ..... 193 N.C. 109 63
Ivey v. Blythe ..... 193 N.C. 705 234

J

James v. Charlotte....183 N.C. 630.... 477
James v. Coach Co....207 N.C. 742.... 423
James v. Pretlow....242 N.C. 102.... 107, 201
Jamison v. Charlotte....239 N.C. 423.... 396
Jamison v. Charlotte....239 N.C. 682.... 654
Jarrell v. Dyer....170 N.C. 177.... 318
Jenette v. Hovey....182 N.C. 30.... 117
Jenkins v. Trantham....244 N.C. 422.... 414
Johnson v. Asheville....196 N.C. 550.... 420
Johnson v. Cotton Mills....232 N.C. 321.... 280
Johnson v. Gill....235 N.C. 40.... 191
Johnson v. Hardy....216 N.C. 558.... 309
Johnson v. Heath....240 N.C. 255.... 169, 257
Johnson v. Hosiery Co....199 N.C. 38.... 585
Johnson v. Insurance Co....215 N.C. 120.... 531
Johnson v. R R....191 N.C. 75.... 348
Johnson v. Scarborough....242 N.C. 681.... 309
Johnston v. Garrett....190 N.C. 835.... 234
Johnston County v. Ellis....226 N.C. 268.... 37
Johnston County v. Stewart....217 N.C. 334.... 179
Jones v. Assurance Society....147 N.C. 540.... 307
Jones v. Bagwell....207 N.C. 378.... 255, 433
Jones v. Commissioners....143 N.C. 59.... 651
Jones v. Furniture Co....222 N.C. 439.... 132, 133
Jones v. Jones....227 N.C. 424.... 98
Jones v Percy....237 N.C. 239.... 45
Joyner v. Sugg....131 N.C. 324.... 702, 704
Joyner v. Sugg....132 N.C. 580.... 699
Junior Order American Mechanics v. Tate....212 N.C. 305.... 559, 560

K

Kearns v. Furniture Co....222 N.C. 438.... 717
Keaton v. Taxi Co....241 N.C. 589.... 377, 513
Keener v. Beal....246 N.C. 247.... 693
Keith v. Wilder....241 N.C. 672.... 134
Kellogg v. Thomas....244 N.C. 722.... 526
Kelly v. Kelly....241 N.C. 146.... 174, 175
Kelly v. Willis....238 N.C. 637.... 112, 377
Kennerly v. Dallas....215 N.C. 532.... 489
Killebrew v. Hines....104 N.C. 182.... 359
Killian v. Harshaw.... 29 N.C. 497.... 224
Kindley v. R. R....151 N.C. 207.... 555
King v. Bynum....137 N.C. 491.... 601, 659
King v. Coley....229 N.C. 258.... 143
King v. Pope....202 N.C. 554.... 263
King v. Stokes....125 N.C. 514.... 714
Kirby v. Board of Education....230 N.C. 619.... 488
Kirby v. Boyette....116 N.C. 165.... 578
Kirkman v. Holland....139 N.C. 185.... 578
Kirkpatrick v. Crutchfield....178 N.C. 348.... 67

Kirkwood v. Peden ..... 173 N.C. 460 ..... 699, 700, 704
Kistler v. Development Co. ..... 205 N.C. 755 360
Klassette v. Drug Co. ..... 227 N.C. 353 479
Knight v. Body Co. ..... 214 N.C. 7 717
Knight v. Bridge Co. ..... 172 N.C. 393 575
Knight v. Coach Co. ..... 201 N.C. 261 553
Knights of Honor v. Selby ..... 153 N.C. 203 559
Krites v. Plott ..... 222 N.C. 679 224

L

Lamb v. Boyles ..... 192 N.C. 542 290
Lambert v. Kinnery ..... 74 N.C. 348 700
Lamm v. Crumpler ..... 240 N.C. 35 133
Lancaster v. Greyhound Corp. ..... 219 N.C. 679 166
Lance v. Cogdill ..... 236 N.C. 134 44
Lance v. Cogdill ..... 238 N.C. 500 ..... 51, 52
Land Bank v. Bland ..... 231 N.C. 26 703
Lane v. Bryan ..... 246 N.C. 108 ..... 377, 631, 634
Lassiter v. Telephone Co. ..... 215 N.C. 227 585
Latham v. Blakely ..... 70 N.C. 368 321
Laughinghouse v. Ins. Co. ..... 239 N.C. 678 ..... 87, 683
Lawrence v. Weeks ..... 107 N.C. 119 190
Laws v. Christmas ..... 178 N.C. 359 57
Lea v. Utilities Co. ..... 175 N.C. 459 168
Leach v. Page ..... 211 N.C. 622 309
Leary v. Land Bank ..... 215 N.C. 501 ..... 38, 595
Ledwell v. Proctor ..... 221 N.C. 161 451
Lee v. Construction Co. ..... 200 N.C. 319 348
Lee v. R. R. ..... 237 N.C. 357 ..... 313, 391
Lee v. Stewart ..... 218 N.C. 287 520
Lee v. Walker ..... 234 N.C. 687 51
Leggett v. College ..... 234 N.C. 595 34
Leonard v. Power Co. ..... 155 N.C. 10 575
Lewis v. Fountain ..... 168 N.C. 277 256
Lewis v. Shaver ..... 236 N.C. 510 ..... 367, 368, 370, 630
Lewis v. Watson ..... 229 N.C. 20 478
Lewis v. Wilkins ..... 62 N.C. 303 190
Lewter v. Enterprises, Inc. ..... 240 N.C. 399 ..... 34, 280
Light Co. v. Insurance Co. ..... 238 N.C. 679 39
Lincoln v. R. R. ..... 207 N.C. 787 ..... 252, 262
Linder v. Horne ..... 237 N.C. 129 178
Lindley v. Yeatman ..... 242 N.C. 145 72
Lindsay v. Carswell ..... 240 N.C. 45 302
Lindsay v. Smith ..... 78 N.C. 328 680
Lipscomb v. Cox ..... 195 N.C. 502 646
Lister v. Lister ..... 222 N.C. 555 658
Lloyd v. Insurance Co. ..... 200 N.C. 722 ..... 448, 449
Locklear v. Oxendine ..... 233 N.C. 710 302
Locklear v. Paul ..... 163 N.C. 338 417
Logan v. Johnson ..... 218 N.C. 200 30
Long v. Melton ..... 218 N.C. 94 50
Long v. Trantham ..... 226 N.C. 510 214

Loubz v. Hafner ..... 12 N.C. 185 66
Lovette v. Lloyd ..... 236 N.C. 663 348
Lovin v. Hamlet ..... 243 N.C. 399 ..... 473, 475
Lowe v. Gastonia ..... 211 N.C. 564 ..... 473, 475, 478
Lumber Co. v. Elizabeth City ..... 181 N.C. 442 324
Lumber Co. v. Hotel Co. ..... 109 N.C. 658 203
Lumber Co. v. Motor Co. ..... 192 N.C. 377 676
Lumber Co. v. Wilson ..... 222 N.C. 87 271
Lummus v. Davidson ..... 160 N.C. 484 578
Lunsford v. Manufacturing Co. ..... 196 N.C. 510 168
Luther v Luther ..... 234 N.C. 429 213
Lutz Industries, Inc. v. Dixie Home Stores ..... 242 N.C. 332 ..... 68, 423
Lyda v. Marion ..... 239 N.C. 265 34
Lyerly v. Griffin ..... 237 N.C. 686 424
Lyon & Sons v. Board of Education ..... 238 N.C. 24 67

Mc

MacFarlane v. Wildlife Resources Com. ..... 244 N.C. 385 38
McAllister v. Pryor ..... 187 N.C. 832 291
McCanless v. Ballard ..... 222 N.C. 701 43
McClamrock v. Packing Co. ..... 238 N.C. 648 255
McCorkle v. Beatty ..... 226 N.C. 338 324
McCracken v. Adler ..... 98 N.C. 400 699
McCraw v. Mills, Inc. ..... 233 N.C. 524 ..... 584, 716
McCrimmon v. Powell ..... 221 N.C. 216 390
McCullen v. Durham ..... 229 N.C. 418 ..... 67, 578, 698
McDowell v. Blythe Brothers Co. ..... 236 N.C. 396 ..... 489, 595
McDowell v. Kent ..... 153 N.C. 555 373
McGowan v. Beach ..... 242 N.C. 73 500
McGuinn v. McLain ..... 225 N.C. 750 467
McIlhenney v. Wilmington ..... 127 N.C. 146 543
McKay v. Bullard ..... 219 N.C. 589 427
McKay v. Cameron ..... 231 N.C. 658 224
McKee v. Lineberger ..... 69 N.C. 217 132
McKeel v. Latham ..... 202 N.C. 318 641
McKenzie v. Gastonia ..... 222 N.C. 328 585
McKinley v. Hinnant ..... 242 N.C. 245 79
McKinney v. High Point ..... 237 N.C. 66 652
McKinny v. Sutphin ..... 196 N.C. 318 360
McLane v. Manning ..... 60 N.C. 608 133
McLaney v. Motor Freight, Inc. ..... 236 N.C. 714 ..... 70, 71
McLaurin v. Cronly ..... 90 N.C. 50 143
McNair v Richardson ..... 244 N.C. 65 ..... 112, 314
McNeely v. Walters ..... 211 N.C. 112 ..... 214, 676
McPherson v. McPherson ..... 33 N.C. 391 309
McQueen v. Bank ..... 111 N.C. 509 674
McQueen v. Trust Co. ..... 234 N.C. 737 100

M

Machine Co. v. Owings....140 N.C. 503.... 414
Machinery Co. v. Sellers....197 N.C. 30.... 402
Maddox v. Brown....232 N.C. 542.... 680
Mallette v. Cleaners, Inc....245 N.C. 652.... 252, 261
Mangum v. Trust Co....195 N.C. 469.... 666
Manley v. News Co....241 N.C. 455.... 271
Manfacturing Co. v. Building Co....177 N.C. 103.... 466, 467
Manufacturing Co. v. Charlotte....242 N.C. 189.... 409
Manufacturing Co. v. Malloy....217 N.C. 666.... 359
Manufacturing Co. v. R. R....233 N.C. 661.... 147, 391
Maples v. Horton....239 N.C. 394.... 234
Markham v. Hicks.... 90 N.C. 204.... 700
Marsh v. Bennett College....212 N.C. 662.... 584
Marshall v. Telephone Co....181 N.C. 292.... 601
Marshburn v. Patterson....241 N.C. 441.... 183
Martin v. Bundy....212 N.C. 437.... 214
Martin v. Hanes Co....189 N.C. 644.... 31
Martin v Knowles....195 N.C. 427.... 607, 608
Massey v. Board of Education....204 N.C. 193.... 585
Mast v. Sapp....140 N.C. 533.... 367, 368, 371
May v. Loomis....140 N.C. 350.... 134
Mayberry v. Grimsley....208 N.C. 64.... 607, 608
Mebane v. Layton.... 89 N.C. 396.... 699, 700
Mebane v. Mebane.... 39 N.C. 131.... 580
Mercer v. Powell....218 N.C. 642.... 112, 390, 391
Merrell v. Jenkins....242 N.C. 636.... 338
Metzger Bros. v. Whitehurst....147 N.C. 171.... 677
Mewborn v. Mewborn....239 N.C. 284.... 127
Mewborn v. Smith....200 N.C. 532.... 335
Meyer v. Fenner....196 N.C. 476.... 595
Midkiff v. Auto Racing, Inc....240 N.C. 470.... 411
Millar v. Wilson....222 N.C. 340.... 473
Miller v. Greenwood....218 N.C. 146.... 140
Miller v. Little....212 N.C. 612.... 701
Miller v. Lumber Co.... 66 N.C. 503.... 677
Miller v. R.R....205 N.C. 17.... 391
Milliken v. Denny....141 N.C. 224.... 227
Mills v. Building & Loan Assn. 216 N.C. 664.... 359, 360
Mills v. Hansel....168 N.C. 651.... 117
Mills v. Moore....219 N.C. 25.... 291
Mintz v. Murphy....235 N.C. 304.... 329, 537
Mitchell v. Melts....220 N.C. 793.... 329, 628
Mitchell v. Saunders....219 N.C. 178.... 366
Mobley v. Griffin....104 N.C. 112.... 302, 699
Moffitt v. Asheville....103 N.C. 237.... 473
Mohn v. Cressey....193 N.C. 568.... 117
Monger v. Lutterloh....195 N.C. 274.... 501
Monk v. Kornegay....224 N.C. 194.... 224
Monteith v. Welch....244 N.C. 415.... 360
Montgomery v. Blades....222 N.C. 463.... 292

Moore v. Bezalla ..... 241 N.C. 190 434
Moore v. Boone ..... 231 N.C. 494 424
Moore v. Crosswell ..... 240 N.C. 473 107
Moore v. Deal ..... 239 N.C. 224 465
Moore v. Edminston ..... 70 N.C. 471 256
Moore v. Gwyn ..... 26 N.C. 275 659
Moore v. Miller ..... 179 N.C. 396 302
Moore v. Moore ..... 224 N.C. 552 595
Moore v. Sales Co. ..... 214 N.C. 424 ..... 278, 279
Moore v. Stone Co. ..... 242 N.C. 647 ..... 716, 717
Moore v. Vallentine ..... 77 N.C. 188 321
Morgan v. Brooks ..... 241 N.C. 527 182
Morgan v. Coach Co. ..... 225 N.C. 668 423
Morgan v. Oil Co. ..... 238 N.C. 185 169
Morris v. Morris ..... 246 N.C. 314 ..... 664, 665
Morrison v. McLeod ..... 37 N.C. 108 359
Morrison v. Watson ..... 101 N.C. 332 699
Mortgage Corp. v. Barco ..... 218 N.C. 154 302
Moss v. Hicks ..... 240 N.C. 788 191
Mosteller v. R. R. ..... 220 N.C. 275 50
Motley v. Whitemore ..... 19 N.C. 537 713
Muilenburg v. Blevins ..... 242 N.C. 271 338
Munick v. Durham ..... 181 N.C. 188 ..... 477, 478
Murphy v. Coach Co. ..... 200 N.C. 92 433
Murray v. Hazell ..... 99 N.C. 168 703
Murray v. Knitting Co. ..... 214 N.C. 437 671
Murray v. R. R. ..... 218 N.C. 392 ..... 255, 424
Murray v. Wyatt ..... 245 N.C. 123 ..... 513, 516
Murrill v. Sandlin ..... 86 N.C. 54 604
Muse v. Morrison ..... 234 N.C. 195 272

N

Nance v. Hitch ..... 238 N.C. 1 ..... 290, 628
Nannie v. Pollard ..... 205 N.C. 362 674
NASCAR, Inc. v. Blevins ..... 242 N.C. 282 413
Nash v. Royster ..... 189 N.C. 408 366
Nash v. Shute ..... 182 N.C. 528 43
Nash v. Tarboro ..... 227 N.C. 283 651
Nash County v. Allen ..... 241 N.C. 543 336
Neal v. Becknell ..... 85 N.C. 299 309
Neely v. Statesville ..... 212 N.C. 365 ..... 278, 279
Nesbitt v. Fairview Farms, Inc. 239 N.C. 481 43
Nettles v. Rea ..... 200 N.C. 44 262
Newell v. Green ..... 169 N.C. 462 653
Newkirk v. Porter ..... 237 N.C. 115 44
Newman v. Coach Co. ..... 205 N.C. 26 168
Newsom v. Anderson ..... 24 N.C. 42 66
Norfleet v. Cromwell ..... 70 N.C. 634 227
Norfleet v. Hall ..... 204 N.C. 573 263
Norman v. Williams ..... 241 N.C. 732 67
Norris v. Johnson ..... 246 N.C. 179 419

O

Oil Co. v. Moore ..... 202 N.C. 708 ..... 508, 646
O'Neal v. Wake County ..... 196 N.C. 184 651
Orr v. Rumbough ..... 172 N.C. 754 290
Osborne v. Coal Co. ..... 207 N.C. 545 314
Overman v. Sasser ..... 107 N.C. 432 321
Owen v. DeBruhl Agency, Inc. ..... 241 N.C. 597 490
Owens v. Kelly ..... 240 N.C. 770 169
Owens v. Manufacturing Co. ..... 168 N.C. 397 418

P

Pack v. Auman ..... 220 N.C. 704 329
Painter v. Finance Co. ..... 245 N.C. 576 63
Palmer's Will, In re ..... 117 N.C. 134 604
Paper Co. v. Sanitary District ..... 232 N.C. 421 107
Parker Co. v. Bank ..... 204 N.C. 432 360
Parker v. Parker ..... 176 N.C. 198 43
Parker v. Potter ..... 200 N.C. 348 559
Parker v. R. R. ..... 232 N.C. 472 390
Parker v. White ..... 235 N.C. 680 468
Pascal v. Transit Co. ..... 229 N.C. 435 ..... 38, 182
Pate v. Oliver ..... 104 N.C. 458 498
Patrick v. Beatty ..... 202 N.C. 454 ..... 99, 578, 703
Patrick v. Insurance Co. ..... 176 N.C. 660 224
Patterson v. McCormick ..... 181 N.C. 311 664
Patterson v. Ritchie ..... 202 N.C. 725 66
Paul v. Neece ..... 244 N.C. 565 34
Paul v. R. R. ..... 170 N.C. 230 168
Peal v. Martin ..... 207 N.C. 106 367
Pearce v. Pearce ..... 225 N.C. 571 668
Peedin v. Oliver ..... 222 N.C. 665 621
Peek v. Shook ..... 233 N.C. 259 306
Peek v. Trust Co. ..... 242 N.C. 1 ..... 150, 434
Peel v. Calais ..... 224 N.C. 421 178
Peel v. Moore ..... 244 N.C. 512 637
Pegram v. Armstrong ..... 82 N.C. 326 309
Pemberton v. King ..... 13 N.C. 376 320
Pemberton v. Lewis ..... 235 N.C. 188 113
Pendergraft v. Royster ..... 203 N.C. 384 ..... 290, 366
Penniman v. Daniel ..... 90 N.C. 154 117
Perkins v. Brinkley ..... 133 N.C. 154 578
Perkins v. Langdon ..... 231 N.C. 386 ..... 190, 191
Perley v. Paving Co. ..... 228 N.C. 479 276
Perry v. R. R. ..... 171 N.C. 158 555
Perry v. Stancil ..... 237 N.C. 442 578
Pettiford v. Mayo ..... 117 N.C. 27 658
Petty v. Print Works ..... 243 N.C. 292 329
Phillips v. Nessmith ..... 226 N.C. 173 ..... 252, 262
Phillips v. Wearn ..... 226 N.C. 290 ..... 226, 233, 234, 235
Pilkington v. West ..... 246 N.C. 575 698
Pinnix v. Griffin ..... 221 N.C. 348 38
Pinnix v. Toomey ..... 242 N.C. 358 270

Plemmons v. Cutshall....234 N.C. 506.... 178
Plemmons v. Improvement Co....108 N.C. 614.... 532
Plemmons v. White's Service, Inc....213 N.C. 148.... 585
Plyler v. Country Club....214 N.C. 453.... 30
Poe v. Hardie.... 65 N.C. 447.... 699, 700, 704
Poe v. Smith....172 N.C. 67.... 575
Poindexter v. Bank....244 N.C. 191.... 430, 709
Polansky v. Insurance Asso....238 N.C. 427.... 265
Pollock v. Household of Ruth....150 N.C. 211.... 559
Poole v. Gentry....229 N.C. 266.... 107, 427
Poovey v. Sugar Co....191 N.C. 722.... 112
Pope v. Burgess....230 N.C. 323.... 608
Powell, In re....241 N.C. 288.... 207, 208, 210
Powell v. Mills....237 N.C. 582.... 179
Powell v. Smith....216 N.C. 242.... 182
Powell v. Water Co....171 N.C. 290.... 67, 68
Power Co. v. Elizabeth City....188 N.C. 278.... 652
Powers v. Trust Co....219 N.C. 254.... 368, 370
Pratt v. Kitterel.... 15 N.C. 168.... 605
Prevatt v. Harrelson....132 N.C. 250.... 302
Price v. Dox.... 83 N.C. 261.... 117
Price v. Gray....246 N.C. 162.... 433, 516, 527
Price v. Whisnant....236 N.C. 381.... 302
Pritchard v. Steamboat Co....169 N.C. 457.... 321
Proctor v. Highway Commission 230 N.C. 687.... 507
Produce Co. v. Currin....243 N.C. 131.... 501
Pruitt v. Wood....199 N.C. 563.... 490
Pruitt v. Wood....199 N.C. 788.... 87, 619, 683
Pugh v. Power Co....237 N.C. 693.... 537
Pumps, Inc., v. Woolworth Co....220 N.C. 499.... 677
Purser v. Ledbetter....227 N.C. 1.... 477, 479
Putnam v. Publications....245 N.C. 432.... 337

R

Rabil v. Farris....213 N.C. 414.... 37
Raby v. Reeves....112 N.C. 688.... 227
Radio Station v. Eitel-McCullough....232 N.C. 287.... 465
R. R. v. Deal.... 90 N.C. 110.... 321
Ralston v. Telfair.... 17 N.C. 255.... 317
Ramsbottom v. R. R....138 N.C. 38.... 168
Ramsey v. Ramsey....224 N.C. 110.... 302
Rankin v. Oates....183 N.C. 517.... 336
Rattley v. Powell....223 N.C. 134.... 167
Rawls v. Roebuck....228 N.C. 537.... 580
Raynor v. Ottoway....231 N.C. 99.... 50
Redd v. Mecklenburg Nurseries 241 N.C. 385.... 324
Redmon v. R. R....195 N.C. 764.... 390
Redmond v. Farthing....217 N.C. 678.... 674
Reece v. Reece....231 N.C. 321.... 530, 595
Reed v. Mortgage Co....207 N.C. 27.... 395

Register v. Gibbs....233 N.C. 456.... 513
Reid v. Holden....242 N.C. 408.... 39, 272
Reid v. Johnston....241 N.C. 201.... 194, 354, 465
Rewis v. Insurance Co....226 N.C. 325.... 717
Reynolds v. Earley....241 N.C. 521.... 355
Reynolds v. Pool.... 84 N.C. 37.... 190
Rhoades v. Asheville....220 N.C. 443.... 683
Rhodes v. Asheville....230 N.C. 134.... 473, 478, 652, 655
Rice v. Lumberton....235 N.C. 227.... 479
Richards v. Smith.... 98 N.C. 509.... 45
Richburg v. Bartley.... 44 N.C. 418.... 466
Richter v. Harmon....243 N.C. 373.... 201
Riddle v. Artis....243 N.C. 668.... 630
Ridenhour v. Ridenhour....225 N.C. 508.... 336
Roane v. Robinson....189 N.C. 628.... 665
Robbins v. Robbins....229 N.C. 430.... 530
Roberson v. Matthews....200 N.C. 241.... 361
Roberts v. Cameron....245 N.C. 373.... 51
Roberts v. Grogan....222 N.C. 30.... 419
Roberts v. Hill....240 N.C. 373.... 335
Roberts v. Saunders....192 N.C. 191.... 316
Roberts v. Sawyer....229 N.C. 279.... 43
Robertson v. Aldridge....185 N.C. 292.... 39
Robinson v. Thomas....244 N.C. 732.... 490
Rogers v. Hall....227 N.C. 363.... 465
Rose v. Bryan....157 N.C. 173.... 703
Rose v. Rose....219 N.C. 20.... 580
Rubber Co. v. Shaw, Comr. of Revenue....244 N.C. 170.... 465
Rudd v. Casualty Co....202 N.C. 779.... 324
Ruffin v R. R....151 N.C. 330.... 229
Russ v. Telegraph Co....222 N.C. 504.... 553

S

St. George v. Hanson....239 N.C. 259.... 106, 107
St. Sing v. Express Co....183 N.C. 405.... 550
Sample v. Jackson....225 N.C. 380.... 701, 703
Sample v. Spencer....222 N.C. 580.... 167
Sams, In re....236 N.C. 228.... 605
Samuels v. Bowers....232 N.C. 149.... 262, 265
Sanderson v. Paul....235 N.C. 56.... 306
Sash Co. v. Parker....153 N.C. 130.... 703
Satterfield v McLellan Stores....215 N.C. 582.... 641
Saunders v. R. R....185 N.C. 289.... 290
Savage v. McGlawhorn....199 N.C. 427.... 271
Savill, In re....156 N.C. 172.... 604
Scenic Stages v. Lowther....233 N.C. 555.... 526
School v. Peirce....163 N.C. 424.... 117
Schwren v. Falls....170 N.C. 251.... 580
Scott v. Bryan....210 N.C. 478.... 214
Scott v. Express Co....189 N.C. 377.... 550
Scott v. Insurance Co....208 N.C. 160.... 278

Scott v. Life Association ..... 137 N.C. 515 336
Scott v. Shackleford ..... 241 N.C. 738 107
Searcy v. Logan ..... 226 N.C. 562 178
Seawell v. Hall ..... 185 N.C. 80 224
Sechler v. Freeze ..... 236 N.C. 522 628
Sedberry v. Parsons ..... 232 N.C. 707 ..... 226, 233, 234, 237
Self Help Corp. v. Brinkley ..... 215 N.C. 615 ..... 178, 214
Seligson v. Klyman ..... 227 N.C. 347 467
Sheets v. Dillon ..... 221 N.C. 426 ..... 225, 236, 237
Sheets v. Walsh ..... 217 N.C. 32 224
Shelby v. Lackey ..... 236 N.C. 369 355
Sheldon v. Childers ..... 240 N.C. 449 ..... 253, 265, 424
Shell v. Aiken ..... 155 N.C. 212 273
Shelly v. Grainger ..... 204 N.C. 488 559
Shelton v. R. R. ..... 193 N.C. 670 602
Shields v. Allen ..... 77 N.C. 375 700
Shields v. McKay ..... 241 N.C. 37 38
Shirley v. Ayers ..... 201 N.C. 51 255
Shives v Sample ..... 238 N.C. 724 685
Shore v. Shore ..... 220 N.C. 802 331
Silver v. Silver ..... 220 N.C. 191 331
Simmons v. Allison ..... 118 N.C. 763 353
Simmons v. Davenport ..... 140 N.C. 407 325
Simmons v. Lee ..... 230 N.C. 216 43
Simmons v. Simmons ..... 228 N.C. 233 395
Simpson v. Houston ..... 97 N.C. 344 701
Singletary v. Nixon ..... 239 N.C. 634 ..... 377, 423, 477
Singleton v. Cherry ..... 168 N.C. 402 668
Singleton v. Mica Co. ..... 235 N.C. 315 23
Singleton v. Roebuck ..... 178 N.C. 201 428
Slade v. Hosiery Mills ..... 209 N.C. 823 ..... 278, 279
Sledge v. Lumber Co. ..... 140 N.C. 459 213
Sloan v. Hart ..... 150 N.C. 269 367
Small v. Utilities Co. ..... 200 N.C. 719 292
Smith v. Benson ..... 227 N.C. 56 302
Smith v. Creamery Co. ..... 217 N.C. 468 ..... 279, 280
Smith v. Davis ..... 228 N.C. 172 ..... 361, 402
Smith v Freeman ..... 243 N.C. 692 546
Smith v. Gastonia ..... 216 N.C. 517 585
Smith v. Gibbons ..... 230 N.C. 600 309
Smith v. Kappas ..... 219 N.C. 850 478
Smith v. Land Bank ..... 213 N.C. 343 310
Smith v. McClung ..... 201 N.C. 648 290
Smith v. Oil Co. ..... 239 N.C. 360 314
Smith v. Paper Co. ..... 226 N.C. 47 276
Smith v. Red Cross ..... 245 N.C. 116 34
Smith v. Sink ..... 211 N.C. 725 ..... 71, 537
Smith v. Smith ..... 223 N.C. 433 213
Smith v. Smith ..... 225 N.C. 189 668
Smith v. Swift & Co. ..... 212 N.C. 608 671
Smithwick v. Ellison ..... 24 N.C. 326 320
Snow v. Boylston ..... 185 N.C. 321 316
Snyder v. Heath ..... 185 N.C. 362 234

Snyder v. Oil Co. ..... 235 N.C. 119 182
Southerland v. Harrell ..... 204 N.C. 675 489
Sowers v. Marley ..... 235 N.C. 607 ..... 112, 628
Sparkman v. Commissioners ..... 187 N.C. 241 651
Sparks v. Sparks ..... 232 N.C. 492 212
Spaugh v. Charlotte ..... 239 N.C. 149 336
Spaugh v. Winston-Salem ..... 234 N.C. 708 ..... 407, 408
Spears v. Randolph ..... 241 N.C. 659 ..... 165, 169
Speas v. Greensboro ..... 204 N.C. 239 479
Speight v. Anderson ..... 226 N.C. 492 50
Spencer v. Jones ..... 168 N.C. 291 224
Springs v. Doll ..... 197 N.C. 240 ..... 113, 290, 291, 314
Springs v. Refining Co. ..... 205 N.C. 444 ..... 320, 321
Spruill v. Nixon ..... 238 N.C. 523 87
Stafford v. Wood ..... 234 N.C. 622 487
Staley v. Park ..... 202 N.C. 155 313
Stanback v. Insurance Co. ..... 220 N.C. 494 384
Stansel v. McIntyre ..... 237 N.C. 148 182
Starkweather v. Gravely ..... 187 N.C. 526 676
Starmount Co. v. Memorial Park 233 N.C. 613 ..... 230, 235
Starnes v. Tyson ..... 226 N.C. 395 213
S. v. Abernethy ..... 220 N.C. 226 688
S. v. Adams ..... 214 N.C. 501 719
S. v. Allen ..... 186 N.C. 302 565
S. v. Ardrey ..... 232 N.C. 721 441
S. v. Arthur ..... 244 N.C. 582 690
S. v. Arthur ..... 244 N.C. 586 690
S. v. Bailey ..... 65 N.C. 426 171
S. v. Bailey ..... 237 N.C. 273 589
S. v. Baker ..... 70 N.C. 530 209
S. v. Baker ..... 231 N.C. 136 520
S. v. Baker ..... 240 N.C. 140 682
S. v. Banks ..... 241 N.C. 572 ..... 521, 589
S. v. Banks ..... 242 N.C. 304 441
S. v. Barefoot ..... 241 N.C. 650 162
S. v. Barnes ..... 243 N.C. 174 720
S. v. Barnhardt ..... 230 N.C. 223 246
S. v. Beal ..... 199 N.C. 278 186
S. v. Bell ..... 228 N.C. 659 612
S. v. Bennett ..... 237 N.C. 749 161
S. v. Best ..... 232 N.C. 575 ..... 207, 210
S. v. Birchfield ..... 235 N.C. 410 297
S. v. Bittings ..... 206 N.C. 798 490
S. v. Blakeney ..... 194 N.C. 651 601
S. v. Boger ..... 202 N.C. 702 646
S. v. Bohanon ..... 142 N.C. 695 75
S. v. Boyce ..... 109 N.C. 739 17
S. v. Brady ..... 237 N.C. 675 ..... 207, 208
S. v. Brady ..... 238 N.C. 404 241
S. v. Bridgers ..... 233 N.C. 577 436
S. v. Brodie ..... 190 N.C. 554 720
S. v. Broughton ..... 29 N.C. 96 298

S. v. Brown ..... 227 N.C. 383 720
S. v. Bryant ..... 236 N.C. 745 ..... 159, 160
S. v. Burgess ..... 192 N.C. 668 682
S. v. Burnett ..... 174 N.C. 796 171
S. v. Burnette ..... 242 N.C. 164 ..... 447, 456, 720
S. v. Cagle ..... 241 N.C. 134 438
S. v. Calcutt ..... 219 N.C. 545 682
S. v. Canady ..... 246 N.C. 613 611
S. v. Cannon ..... 244 N.C. 399 691
S. v. Cantrell ..... 230 N.C. 46 81
S. v. Carpenter ..... 215 N.C. 635 246
S. v. Carter ..... 113 N.C. 639 209
S. v. Caudle ..... 208 N.C. 249 210
S. v. Cephus ..... 239 N.C. 521 436
S. v. Cephus ..... 241 N.C. 562 646
S. v. Chase ..... 231 N.C. 589 612
S. v. Clegg ..... 214 N.C. 675 521
S. v. Clonch ..... 242 N.C. 760 120
S. v. Cochran ..... 230 N.C. 523 565
S. v. Coffey ..... 228 N.C. 119 76
S. v. Coleman ..... 243 N.C. 109 187
S. v. Coppedge ..... 244 N.C. 590 119
S. v. Crook ..... 115 N.C. 760 172
S. v. Crosset ..... 81 N.C. 579 520
S. v. Daniels ..... 231 N.C. 17 683
S. v. Daniels ..... 244 N.C. 671 ..... 598, 599
S. v. Davenport ..... 156 N.C. 596 ..... 520, 687
S. v. Davis ..... 111 N.C. 729 186
S. v. Davis ..... 229 N.C. 386 121
S. v. Dixon ..... 185 N.C. 727 160
S. v. Doughtie ..... 238 N.C. 228 187
S. v. Duncan ..... 244 N.C. 374 76
S. v. Everitt ..... 164 N.C. 399 171
S. v. Ewing ..... 227 N.C. 535 76
S. v. Faggart ..... 170 N.C. 737 520
S. v. Fender ..... 125 N.C. 649 17
S. v. Ferguson ..... 238 N.C. 656 617
S. v. Floyd ..... 241 N.C. 298 441
S. v. Frye ..... 229 N.C. 581 76
S. v. Fulk ..... 232 N.C. 118 76
S. v. Garner ..... 129 N.C. 536 720
S. v. Garrett ..... 71 N.C. 85 437
S. v. Gaston ..... 236 N.C. 499 565
S. v. Gibson ..... 221 N.C. 252 186
S. v. Glatly ..... 230 N.C. 177 75
S. v. Godwin ..... 227 N.C. 449 567
S. v. Godwin ..... 224 N.C. 846 602
S. v. Goff ..... 205 N.C. 545 521
S. v. Goings ..... 98 N.C. 766 209
S. v. Gordon ..... 241 N.C. 356 296
S. v. Gordon, In re ..... 225 N.C. 241 195
S. v. Graham ..... 224 N.C. 347 207
S. v. Graham ..... 225 N.C. 217 ..... 171, 682

S. v. Grainger....238 N.C. 739.... 76
S. v. Grayson....239 N.C. 453.... 437
S. v. Griggs....223 N.C. 279.... 309
S. v. Hall....240 N.C. 109.... 247, 521, 597, 598
S. v. Hammonds....241 N.C. 226.... 186, 187
S. v. Hanford....212 N.C. 746.... 244
S. v. Hanks.... 66 N.C. 612.... 520
S. v. Harbert....185 N.C. 760.... 521
S. v. Hardy....209 N.C. 83.... 246
S. v. Harris....195 N.C. 306.... 520
S. v. Harrison....239 N.C. 659.... 245, 615
S. v. Harvey....228 N.C. 62.... 76
S. v. Harvey....242 N.C. 111.... 187
S. v. Hause.... 71 N.C. 518.... 520
S. v. Hedrick.... 95 N.C. 624.... 171
S. v. Heller....231 N.C. 67.... 690
S. v. Henderson....206 N.C. 830.... 682
S. v. Hewett....158 N.C. 627.... 719
S. v. Hicks....233 N.C. 31.... 520
S. v. Hicks....233 N.C. 511.... 521
S. v. Hoffman....199 N.C. 328.... 297, 687
S. v. Holland....234 N.C. 354.... 297
S. v. Horne....209 N.C. 725.... 456
S. v. Hovis....233 N.C. 359.... 719
S. v. Huffman....205 N.C. 591.... 437
S. v. Hughes.... 72 N.C. 25.... 687
S. v. Hunter.... 94 N.C. 829.... 159
S. v. Ingram....243 N.C. 190.... 611
S. v. Jackson....243 N.C. 216.... 447
S. v. Jacobs.... 50 N.C. 259.... 437
S. v. Jarrell....141 N.C. 722.... 297
S. v. Jaynes....198 N.C. 728.... 683
S. v. Jenkins....234 N.C. 112.... 683
S. v. Jennette....190 N.C. 96.... 651
S. v. Johnson.... 75 N.C. 123.... 209
S. v. Johnson....169 N.C. 311.... 682
S. v. Johnson....199 N.C. 429.... 76
S. v. Jones.... 82 N.C. 685.... 209
S. v. Jones.... 88 N.C. 671.... 186
S. v. Jones....242 N.C. 563.... 644
S. v. Kay....244 N.C. 117.... 171
S. v. Keith....126 N.C. 1114.... 190
S. v. Keller....214 N.C. 447.... 402
S. v. Kelly....243 N.C. 177.... 441
S. v. Kimrey....236 N.C. 313.... 81
S. v. King....219 N.C. 667.... 377
S. v. King....222 N.C. 137.... 599
S. v. Kittelle....110 N.C. 560.... 153
S. v. Kiziah....217 N.C. 399.... 334
S. v. Koone....243 N.C. 628.... 171
S. v. Lakey....191 N.C. 571.... 611, 614
S. v. Lance....244 N.C. 455.... 402
S. v. Laney.... 87 N.C. 535.... 520

S. v. Lassiter ..... 191 N.C. 210 601
S. v. Law ..... 227 N.C. 103 520
S. v. Lawrence ..... 81 N.C. 522 209
S. v. Lefevers ..... 216 N.C. 494 720
S. v. Libby ..... 213 N.C. 662 246
S. v. Love ..... 229 N.C. 99 447
S. v. Lueders ..... 214 N.C. 558 644
S. v. Lytle ..... 138 N.C. 738 599
S. v. McCauless ..... 31 N.C. 375 520
S. v. McCoy ..... 237 N.C. 121 680
S. v. McGowan ..... 243 N.C. 431 643
S. v. McHone ..... 243 N.C. 231 521
S. v. McKinnon ..... 197 N.C. 576 297
S. v. McLamb ..... 235 N.C. 251 241
S. v. McLean ..... 234 N.C. 283 334
S. v. McNeely ..... 244 N.C. 737 334
S. v. McNeill ..... 225 N.C. 560 598
S. v. McNeill ..... 229 N.C. 377 612
S. v. McNeill ..... 239 N.C. 679 ..... 87, 619, 683
S. v. McPeak ..... 243 N.C. 243 ..... 242, 610
S. v. Mangum ..... 245 N.C. 323 334
S. v. Manuel ..... 20 N.C. 144 682
S. v. Mason ..... 35 N.C. 341 520
S. v. Meadows ..... 234 N.C. 657 598
S. v. Miller ..... 225 N.C. 213 ..... 171, 172, 599, 682
S. v. Miller ..... 237 N.C. 427 ..... 590, 591
S. v. Mills ..... 242 N.C. 604 521
S. v. Mills ..... 244 N.C. 487 374
S. v. Mills ..... 246 N.C. 237 521
S. v. Mincher ..... 178 N.C. 698 120
S. v. Minton ..... 228 N.C. 518 76
S. v. Minton ..... 234 N.C. 716 ..... 297, 436
S. v. Moore ..... 192 N.C. 209 455
S. v. Morgan ..... 246 N.C. 596 588
S. v. Morris ..... 235 N.C. 393 589
S. v. Muse ..... 219 N.C. 226 644
S. v. Neill ..... 244 N.C. 252 ..... 207, 208
S. v. Nelson ..... 232 N.C. 602 447
S. v. Newton ..... 207 N.C. 323 441
S. v. Norman ..... 237 N.C. 205 589
S. v. Outlaw ..... 242 N.C. 220 186
S. v. Owens ..... 243 N.C. 673 589
S. v. Oxendine ..... 187 N.C. 658 297
S. v. Pace ..... 159 N.C. 462 186
S. v. Patterson ..... 222 N.C. 179 ..... 588, 589
S. v. Pelley ..... 221 N.C. 487 682
S. v. Perry ..... 210 N.C. 796 160
S. v. Peterson ..... 226 N.C. 255 598
S. v. Phelps ..... 242 N.C. 540 121
S. v. Piper ..... 89 N.C. 551 16
S. v. Pitt ..... 237 N.C. 274 589
S. v. Powell ..... 238 N.C. 550 ..... 87, 683
S. v. Poythress ..... 174 N.C. 809 186

S. v. Pugh....183 N.C. 800.... 720
S. v. Raper....204 N.C. 503.... 688
S. v. Ray.... 32 N.C. 39.... 520
S. v. Reddick....222 N.C. 520.... 75
S. v. Reeves....235 N.C. 427.... 719
S. v. Rhodes....208 N.C. 241.... 595
S. v. Riddle....205 N.C. 591.... 437
S. v. Ritchie....243 N.C. 182.... 611
S. v. Robbins....246 N.C. 332.... 720
S. v. Robinson....226 N.C. 95.... 296
S. v. Robinson....245 N.C. 10.... 120
S. v. Rowe.... 98 N.C. 629.... 298
S. v. Roy....233 N.C. 558.... 719, 720
S. v. Saunders.... 90 N.C. 651.... 171
S. v. Sawyer....230 N.C. 713.... 377
S. v. Sawyer....233 N.C. 76.... 186
S. v. Scates.... 50 N.C. 420.... 113
S. v. Scott....237 N.C. 432.... 521
S. v. Sharp....125 N.C. 628.... 186
S. v. Shepherd....187 N.C. 609.... 682
S. v. Sherrill.... 81 N.C. 550.... 520
S. v. Sherrill.... 82 N.C. 694.... 521
S. v. Shook....224 N.C. 728.... 245
S. v. Sigmon....190 N.C. 684.... 207
S. v. Simmons....240 N.C. 780.... 76
S. v. Simpson.... 12 N.C. 504.... 520
S. v. Simpson....133 N.C. 676.... 437
S. v. Simpson....244 N.C. 325.... 76
S. v. Slate....233 N.C. 558.... 719, 720
S. v. Sloan....238 N.C. 547.... 588, 598
S. v. Smith.... 95 N.C. 680.... 171
S. v. Smith....201 N.C. 494.... 720
S. v. Smith....218 N.C. 334.... 374
S. v. Smith....226 N.C. 738.... 208
S. v. Smith....237 N.C. 1.... 688
S. v. Smith....240 N.C. 99.... 81
S. v. Smith....240 N.C. 631.... 162
S. v. Snipes....185 N.C. 743.... 208
S. v. Speight.... 69 N.C. 72.... 209
S. v. Spencer....176 N.C. 709.... 298
S. v. Springs....184 N.C. 768.... 601
S. v. Stalcup.... 23 N.C. 30.... 687
S. v. Stephens....244 N.C. 380.... 76
S. v. Stevens....244 N.C. 40.... 565
S. v. Stiwinter....211 N.C. 278.... 76
S. v. Stone....240 N.C. 606.... 433
S. v. Stone....245 N.C. 42.... 159, 590, 591
S. v. Stonestreet....243 N.C. 28.... 521
S. v. Strickland....229 N.C. 201.... 76
S. v. Strickland....243 N.C. 100.... 120, 521
S. v. Stroud.... 95 N.C. 626.... 209
S. v. Suddreth....223 N.C. 610.... 186, 564
S. v. Suttle....115 N.C. 784.... 227

S. v. Sutton ..... 225 N.C. 332 374
S. v. Swink ..... 19 N.C. 9 298
S. v. Sykes ..... 104 N.C. 694 186
S. v. Taylor ..... 118 N.C. 1262 521
S. v. Tew ..... 234 N.C. 612 602
S. v. Thomas ..... 236 N.C. 454 ..... 521, 588, 597
S. v. Tilghman ..... 33 N.C. 513 256
S. v. Toole ..... 106 N.C. 736 ..... 207, 208, 210
S. v. Trantham ..... 230 N.C. 641 644
S. v. Trippe ..... 222 N.C. 600 218
S. v. Tucker ..... 190 N.C. 708 437
S. v. Tyson ..... 138 N.C. 627 256
S. v. Vincent ..... 222 N.C. 543 437
S. v. Warren ..... 92 N.C. 825 683
S. v. Warren ..... 228 N.C. 22 210
S. v. Webb ..... 209 N.C. 302 682
S. v. Weinstein ..... 224 N.C. 645 210
S. v. Wells ..... 142 N.C. 590 520
S. v. West ..... 152 N.C. 832 690
S. v. West ..... 229 N.C. 99 447
S. v. Whitehurst ..... 70 N.C. 85 520
S. v. Williams ..... 185 N.C. 685 720
S. v. Williams ..... 186 N.C. 627 334
S. v. Williamson ..... 238 N.C. 652 598
S. v. Winslow ..... 95 N.C. 649 186
S. v. Wiseman ..... 68 N.C. 203 171
S. v. Woodfin ..... 85 N.C. 598 171
S. v. Woolard ..... 119 N.C. 779 402
S. v. Worley ..... 246 N.C. 202 337
S. v. Yearwood ..... 178 N.C. 813 298
S. v. Yellowday ..... 152 N.C. 793 ..... 186, 520
S. v. Yoder ..... 132 N.C. 1111 186
Statesville v. Anderson ..... 245 N.C. 208 507
Steelman v. Benfield ..... 228 N.C. 651 373
Stell v. Trust Co. ..... 223 N.C. 550 621
Stephens v. Clark ..... 211 N.C. 84 317
Stephens Company v. Binder ..... 198 N.C. 295 226
Stephens Co. v. Lisk ..... 240 N.C. 289 224
Stern v. Lee ..... 115 N.C. 426 701
Stevens v. Turlington ..... 186 N.C. 191 ..... 359, 360
Stewart v. Cary ..... 220 N.C. 214 178
Stone v. Milling Co. ..... 192 N.C. 585 133
Story v. Story ..... 221 N.C. 114 530
Strickland v. Draughan ..... 91 N.C. 103 361
Strigas v. Insurance Co. ..... 236 N.C. 734 561
Stultz v. Thomas ..... 182 N.C. 470 168
Styers v. Bottling Co. ..... 239 N.C. 504 143
Suits v. Insurance Co. ..... 241 N.C. 483 ..... 148, 337
Sultan v. R. R. ..... 176 N.C. 136 143
Supply Co. v. Ice Cream Co. ..... 232 N.C. 684 139
Surratt v. Insurance Agency ..... 244 N.C. 121 414
Swainey v. Tea Co. ..... 202 N.C. 272 66
Swindell v. Belhaven ..... 173 N.C. 1 652

Swink v. Asbestos Co. ..... 210 N.C. 303 717
Swinton v. Realty Co. ..... 236 N.C. 723 490

T

Tarault v. Seip ..... 158 N.C. 369 134
Tarrant v. Bottling Co. ..... 221 N.C. 390 ..... 255, 423, 424
Taylor v. Bakery ..... 234 N.C. 660 641
Taylor v. Board of Education ..... 206 N.C. 263 291
Taylor v. Brake ..... 245 N.C. 553 164
Taylor v. Caudle ..... 210 N.C. 60 263
Taylor v. Construction Co. ..... 195 N.C. 30 420
Taylor v. Green ..... 242 N.C. 156 68
Taylor v. Lumber Co. ..... 173 N.C. 112 168
Taylor v. Rhyne ..... 65 N.C. 530 ..... 699, 700
Taylor v. Taylor ..... 174 N.C. 537 57
Taylor v. Taylor ..... 228 N.C. 275 56
Teague v. Oil Co. ..... 232 N.C. 65 419
Teague v. Wilson ..... 220 N.C. 241 601
Teasley v. Burwell ..... 199 N.C. 18 263
Temple v. Temple ..... 246 N.C. 334 644
Templeton v. Kelley ..... 217 N.C. 164 169
Terrace, Inc. v. Indemnity Co. ..... 243 N.C. 595 500
Thigpen v. Trust Co. ..... 203 N.C. 291 309
Thomas v. Clay ..... 187 N.C. 778 99
Thomas v. Conyers ..... 198 N.C. 229 214
Thomas v. Fulford ..... 117 N.C. 667 702
Thomas v. Myers ..... 229 N.C. 234 361
Thomas v. Reavis ..... 196 N.C. 254 637
Thomas v. Rogers ..... 191 N.C. 736 234
Thomason v. Cab Co. ..... 235 N.C. 602 ..... 30, 216, 276
Thomason v. R. R. ..... 142 N.C. 300 450
Thompson v. R. R. ..... 147 N.C. 412 373
Tillis v. Cotton Mills ..... 244 N.C. 587 374
Tolbert v. Insurance Co. ..... 236 N.C. 416 561
Toler v. French ..... 213 N.C. 360 595
Trouser Co. v. R. R. ..... 139 N.C. 382 555
Trust Co. v. Finance Corp. ..... 238 N.C. 478 107
Trust Co. v. Green ..... 239 N.C. 612 ..... 57, 713
Trust Co. v. Greyhound Lines ..... 210 N.C. 293 213
Trust Co. v. Insurance Co. ..... 199 N.C. 465 710
Trust Co. v. McDearman ..... 213 N.C. 141 ..... 699, 703
Trust Co. v. Miller ..... 223 N.C. 1 316
Trust Co. v. Miller ..... 243 N.C. 1 ..... 44, 45
Trust Co. v. Schneider ..... 235 N.C. 446 ..... 127, 316, 665
Trust Co. v. Store Co. ..... 193 N.C. 122 601
Trust Co. v. Waddell ..... 234 N.C. 454 193
Trust Co. v. Waddell ..... 237 N.C. 342 58
Trust Co. v. White ..... 215 N.C. 565 212
Trust Co. v. Whitfield ..... 238 N.C. 69 127
Trust Co. v. Widows Fund ..... 207 N.C. 534 ..... 559, 560
Trust Co. v. Williamson ..... 228 N.C. 458 100
Trust Co. v. Wolfe ..... 243 N.C. 469 ..... 58, 179
Trust Co. v. Wolfe ..... 245 N.C. 535 ..... 57, 58, 403, 665

Tschelller v. Weaving Co.....214 N.C. 449..... 345
Tucker v. Lowdermilk.....233 N.C. 185..... 717
Turner v. Glenn.....220 N.C. 620..... 226, 230, 231, 235, 237
Turner v. Livestock Co.....179 N.C. 457..... 355
Turner v. Power Co.....154 N.C. 131..... 291
Tyner v. Tyner.....206 N.C. 776..... 195
Tysinger v. Dairy Products.....225 N.C. 717..... 329, 541, 628
Tyson v. Ford.....228 N.C. 778..... 255, 424

U

Underwood v. Dooley.....197 N.C. 100..... 67, 68
Upton v. Ferebee.....178 N.C. 194..... 669
Utilities Commission v. Ray.....236 N.C. 692..... 34
Utilities Commission v. Story....241 N.C. 103..... 395
Utilities Commission v. Trucking Co.....223 N.C. 687..... 396

V

Vail v. Vail.....233 N.C. 109..... 575
Vance v. Guy.....223 N.C. 409..... 45
Vanstory v. Thornton.....112 N.C. 196..... 700, 701
Vaughan v. Wise.....152 N.C. 31..... 580
Vaughn v. Booker.....217 N.C. 479..... 39
Vause v. Equipment Co.....233 N.C. 88..... 717
Veazey v. Durham.....231 N.C. 357..... 531
Venable's Will, In re.....127 N.C. 344..... 326
Vernon v. Realty Co.....226 N.C. 58..... 226, 234
Vincent v. Woody.....238 N.C. 118..... 256, 327
Vollers Co. v. Todd.....212 N.C. 677..... 310
Voncannon v. Hudson Belk Co.....236 N.C. 709..... 316

W

Waddell v. Carson.....245 N.C. 669..... 148, 337
Wagoner v. Saintsing.....184 N.C. 362..... 637
Waldrop v. Brevard.....233 N.C. 26..... 230
Walker v. Moss.....246 N.C. 196..... 546
Walker v. Phelps.....202 N.C. 344..... 227
Walker v. Wilkins, Inc.....212 N.C. 627..... 584
Wall v. Bain.....222 N.C. 375..... 254
Waller v. Brown.....197 N.C. 508..... 608
Wallin v. Rice.....170 N.C. 417..... 668, 669
Wallin v. Rice.....232 N.C. 371..... 302
Walser v. Insurance Co.....175 N.C. 350..... 559
Walters, In re.....229 N.C. 111..... 244, 245
Walton v. Walton.....178 N.C. 73..... 668
Ward v. Bowles.....228 N.C. 273..... 183
Ward v. Cruse.....234 N.C. 388..... 335
Ward v. R. R.....161 N.C. 179..... 168
Warlick v. White..... 76 N.C. 175..... 437
Warner v. Leder.....234 N.C. 727..... 345, 347
Waters v. Boyd.....179 N.C. 180..... 637
Waters v. Stubbs..... 75 N.C. 28..... 699

Watkins v. Grier....224 N.C. 334.... 335
Watson v. Clay Co....242 N.C. 763.... 692, 717
Watters v. Hedgpeth....172 N.C. 310.... 703
Weant v. McCanless....235 N.C. 384.... 68
Weavil v. Myers....243 N.C. 386.... 255
Weavil v. Trading Post....245 N.C. 106.... 526
Webb v. Chemical Co....170 N.C. 662.... 368
Weddle v. Weddle....246 N.C. 336.... 532
Welborn v. Lumber Co....238 N.C. 238.... 43
Wells v. Clayton....236 N.C. 102.... 138, 212
Wells v. Odum....205 N.C. 110.... 324
West v. Dept. of Conservation....229 N.C. 232.... 280
Western N. C. Conference
v. Tally....229 N.C. 1.... 355
Westfeldt, In re....188 N.C. 702.... 325
Wheeless v. Barrett....229 N.C. 282.... 355
Whitacre v. Charlotte....216 N.C. 687.... 479
Whichard v. Lipe....221 N.C. 53.... 133
White v. Lacey....245 N.C. 364.... 249, 255, 430
White v. Logan....240 N.C. 791.... 138
White v. Price....237 N.C. 347.... 165
White v. Scott....178 N.C. 637.... 367
Whiteheart v. Gribbs....232 N.C. 236.... 45
Whitehurst v. Elks....212 N.C. 97.... 38
Whiteside v. Purina Co....242 N.C. 591.... 87
Whitson v. Barnett....237 N.C. 483.... 580
Whitson v. Frances....240 N.C. 733.... 112, 377, 628
Whitten v. Peace....188 N.C. 298.... 668
Wilkinson v. R. R....174 N.C. 761.... 255
Williams v. Gooch....206 N.C. 330.... 310
Williams v. Hood, Commissioner 204 N.C. 140.... 674
Williams, In re Will of....215 N.C. 259.... 324
Williams v. Johnson....230 N.C. 338.... 699, 703
Williams v. McLean....220 N.C. 504.... 306
Williams v. Rand....223 N.C. 734.... 316
Williams v. Robertson....235 N.C. 478.... 302
Williams v. Scott....122 N.C. 545.... 703
Williams v. Stumpf....243 N.C. 434.... 617
Williams v. Teachey.... 85 N.C. 402.... 359
Williams v. Williams....175 N.C. 160.... 608
Williams v. Williams....220 N.C. 806.... 79
Willamson v. High Point....213 N.C. 96.... 652
Williamson v. Williamson....232 N.C. 54.... 57
Wilson v. Finance Co....239 N.C. 349.... 165
Wilson v. Massagee....224 N.C. 705.... 347
Wilson v. Mooresville....222 N.C. 283.... 217
Wilson v. Robinson....224 N.C. 851.... 107
Winder v. Martin....183 N.C. 410.... 466
Winder v. Penniman....181 N.C. 7.... 117
Windley v. McCliney....161 N.C. 318.... 354
Winesett v. Scheidt,
Comr. of Motor Vehicles....239 N.C. 190.... 159, 162
Winfield v. Winfield....228 N.C. 256.... 530

Winkler v. Amusement Co.....238 N.C. 589..... 67
Winston-Salem v. Coach Lines....245 N.C. 179..... 619
Withers v. Black.....230 N.C. 428..... 217
Wittowski v. Watkins..... 84 N.C. 456..... 359
Wolfe, In re.....185 N.C. 563..... 326
Wood v. Telephone Co.....228 N.C. 605..... 292
Woodall v. Highway
Commission .....176 N.C. 377..... 651
Woodard v. Clark.....234 N.C. 215..... 316, 665
Woodard v. Mordecai.....234 N.C. 463..... 106
Woody v. Bank.....194 N.C. 549..... 674
Woody v. Barnett.....235 N.C. 73..... 49
Wool v. Fleetwood.....136 N.C. 460..... 580
Wooten v. Order of Odd Fellows 176 N.C. 52..... 559, 560
Worsley v. Rendering Co.....239 N.C. 547..... 33
Wrenn v. Graham.....236 N.C. 719..... 181
Wright v. Credit Co.....212 N.C. 87..... 641
Wright v. Grocery Co.....210 N.C. 462..... 168
Wright v. Insurance Co.....244 N.C. 361..... 561
Wright v. Pegram.....244 N.C. 45..... 164
Wyatt v. R. R.....156 N.C. 307..... 255
Wyatt v. Sharp.....239 N.C. 655..... 107
Wynn v. Grant.....166 N.C. 39..... 360
Wyrick v. Ballard Co., Inc. .....224 N.C. 301..... 290, 514

Y

Yadkin County v. High Point.....217 N.C. 462..... 108
Yancey v. Highway Commission..222 N.C. 106..... 509
Yarborough v. Trust Co.....142 N.C. 377..... 674
York v. York.....212 N.C. 695..... 263
Young v. Anchor Co.....239 N.C. 288..... 290
Young v. Whitehall Co.....229 N.C. 360..... 24
Young v. Young..... 68 N.C. 309..... 317, 318

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1957

RICKMAN MANUFACTURING COMPANY, INC., v. L. P. GABLE AND WIFE, EMMA BROOKS GABLE.

(Filed 10 April, 1957.)

1. Trial § 22a—

On motion to nonsuit, the evidence must be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. G.S. 1-183.

2. Landlord and Tenant § 7—

A lease of premises includes all easements and privileges appurtenant to the demised premises which are reasonably necessary to its enjoyment, and parol evidence is competent to show the meaning of the term "appurtenances" as used in the lease contract.

3. Same—

The owner of a three-story building leased the second and third floors to plaintiff and the first floor to other tenants, with provision in the leases, respectively, that the lessee of the second and third floors should be responsible for two-thirds of the maintenance and upkeep of the heating plant and for two-thirds the fuel costs, etc., and the tenants of the first floor should be liable for one-third thereof. *Held:* The heating system in the basement is an appurtenance to the leased premises and is included in the property leased.

4. Landlord and Tenant § 10—

Provision in a lease that lessee should be responsible for the maintenance and upkeep of the heating plant in the building demised, is equivalent to a general covenant to repair the heating plant.

5. Landlord and Tenant § 11—

Where the lessee is responsible for the maintenance, upkeep and repair of the heating plant in the building, the lessor may not be held liable for damages caused by an explosion in the heating plant when the evidence shows that the explosion was the result of improper maintenance and not the manner of the installation of the equipment itself.

6. Landlord and Tenant § 8—

A lessee in possession under the terms of the lease is entitled to hold possession and control against the world, and the landlord has no right to enter upon the leased premises against the consent of the tenant.

7. Same: Landlord and Tenant § 7—

Where a lease for a term of five years is in writing as required by statute, G.S. 22-2, oral statement of the lessor's son-in-law forbidding lessee to have anything to do with the furnace, an appurtenance of the demised premises, cannot have the effect of modifying the written lease, certainly in the absence of evidence that the son-in-law had legal authority as agent of the lessor to agree or assent to a change in the written lease.

APPEAL by plaintiff from *Armstrong, J.*, at October 1955 Regular Term of ROWAN, being No. 530 at Spring Term 1956 and carried forward to present No. 522.

The case on appeal contains these recitations: This is a civil action instituted by the plaintiff to recover damages allegedly resulting from a boiler explosion proximately caused by the negligence of the defendants.

Plaintiff is a tenant occupying the second and third floors of a building belonging to the defendants. The boiler which exploded is located in the basement of said building.

The plaintiff contends that the boiler and boiler room were no part of the leased premises and were under the control of the defendants.

The defendants contend that the boiler and boiler room were part of the leased premises and under the control of the plaintiff.

The record of case on appeal discloses that: On 21 June, 1951, defendants, L. P. Gable and wife, Emma Brooks Gable, of Anderson, South Carolina, as parties of the first part, entered into a written agreement with plaintiffs, Rickman Manufacturing Company, Inc., and Mary Rickman, individually, of Rowan County, North Carolina, parties of the second part, Exhibit U reading in pertinent part as follows:

"That for and in consideration of the agreements and covenants hereinafter to be fulfilled by the parties of the second part, the parties of the first part do hereby lease unto the parties of the second part, their heirs, successors and assigns, for a period of five (5) years, commencing September 1, 1951, the following described property: The second and third floors of the garage building located at the southwest corner of

the intersection of North Main and West Liberty Street, Salisbury, N. C., known as the Rouzer Building.

"TO HAVE AND TO HOLD the same, with the privileges and appurtenances thereunto in anywise appertaining, to the said parties of the second part, their heirs, successors and assigns, for the above period, upon the following terms and conditions:

" '1. The rental for said term shall be (as set forth).

" '2. This lease is subject to the rights and privileges granted to Carolina Tire Company, Inc., Brad Ragan Motor Company, Inc., and Brad Ragan, individually, for the use of the entrance from Liberty Street, approximately twenty-four feet wide, for the common use of the parties of the second part and Carolina Tire Company, Inc., Brad Ragan Motor Company, Inc., and Brad Ragan, individually, as set forth in their lease, for the purpose of loading and unloading, ingress, egress and regress only, said entrance not to be used for storage or parking by either of the tenants.

" '3. It is further understood and agreed that the parties of the second part, their heirs, successors and assigns, shall be responsible for two-thirds of the maintenance and upkeep of the heating plant and equipment in said building; shall pay two-thirds of the fuel costs; shall pay two-thirds of the expense of water for said building; shall pay all of the expense for maintenance of plumbing and plumbing fixtures on the second floor of said building, together with the upkeep thereof, so that same will be in as good condition at the expiration of this lease as it is on this date.

" '4. It is further understood and agreed that the parties of the second part, their heirs, successors and assigns, shall be responsible for all electrical fixtures for their portion of the building, to have a separate meter for the same, and to make such electrical installations therefor for their own operations, at their own expense . . .' "

And paragraphs 5, 6, 7, 8 and 9 of the lease set forth matters which the parties of the second part, their heirs, successors and assigns, may or may not do, and matters for which they are responsible in relation to the demised premises not here pertinent.

And the next paragraph reads as follows: "10. It is further understood that the parties of the first part are to maintain the roof on said building at their own expense."

And paragraphs 11 and 12 pertain to options for renewals.

Paragraphs 13, 14 and 15 pertain to agreements on part of parties of second part in respect to public liability insurance, etc. And the final paragraph reads: "16. It is further understood and agreed that if the above mentioned building should be destroyed or rendered unfit for use by fire or other casualty during the term of this lease, the same

shall thereupon terminate." Then follows formal closing, and signatures, acknowledgment, probate and entries of registration.

The record of case on appeal also shows that upon cross-examination, plaintiff Mrs. Mary Rickman testified that the lease which Mr. Brad Ragan and the Carolina Tire & Rubber Company entered into which bore the same date as her lease, provides that Brad Ragan Motor Company and the Carolina Tire Company were to assume responsibility for one-third of the maintenance of the heating plant and the cost of fuel.

The record of case on appeal also discloses that:

I. Upon pre-trial hearing an order was entered by the presiding judge. In it it is set forth that "from the pleadings this appears to be an action by plaintiff tenant under a written lease against defendant, the landlord, under said lease, to recover $55,555.07 alleged damages contended to have been suffered by plaintiff on account of the negligence of defendants in maintaining the heating plant in the premises covered by the lease. Plaintiff sets forth in its complaint the negligence complained of, which is denied by the defendants, who in turn plead contributory negligence and also set up a counterclaim against the plaintiff for damages to the leased premises on account of the alleged negligence of the plaintiff. If the plaintiff has stated a cause of action, which the court doubts, it is fairly certain that the defendants have not. Defendants, through counsel, admit that they do not have a cause of action against the plaintiff until the termination of the lease."

And in the order so entered "It is judicially stipulated by all the parties to this action as follows:

"1. That the Rickman Manufacturing Company is a corporation duly incorporated under the laws of the State of North Carolina, with its principal office and place of business in the city of Salisbury, Rowan County, North Carolina, and engaged in the manufacture and sale of cotton goods for wear, etc.

"2. . . . that the defendants own the *locus in quo* as an estate by the entirety.

"3. Plaintiff admits the lease of Rickman Manufacturing Company.

"4. Photographs identified.

"5. It is admitted that Hayden Clement, attorney for Rickman Manufacturing Company, wrote certain letters to L. P. Gable and wife, Emma Brooks Gable, one dated October 24, 1952, one November 24, 1952, and one dated December 18, 1952, and that they were received by the defendant. It is admitted that the letter dated November 17, 1951, to L. P. Gable, Anderson, S. C., was signed by Hayden Clement and was addressed to and received by L. P. Gable.

"It is admitted by defendants, through their counsel, that the following copies of documents may be admitted in evidence instead of the

original provided they are adjudged competent at the trial: Exhibits marked G, H, I and J.

"Original letter dated November 11, 1952, addressed to Ramsey Realty Company, Exhibit K. Letter to L. P. Gable and wife, signed by Hayden Clement, Exhibit L."

"It is stipulated that plaintiff's Exhibit M is a true and correct copy of an original letter mailed March 4, 1952, from the Chief Inspector of Hartford Steam Boiler Inspection and Insurance Company to L. P. and Mrs. Emma B. Gable, and that a copy of this letter was transmitted to Rickman Manufacturing Company by Ramsey Real Estate & Insurance Company by letter dated March 7, 1952."

II. Upon the trial in Superior Court plaintiff offered in evidence these admissions from answer of defendant: ". . . that the defendants, L. P. Gable and wife, Emma Brooks Gable, are citizens and residents of the City of Anderson, State of South Carolina, and that said defendants are and were the owners of the buildings referred to in the complaint in this action . . ."

"That the said Ramsey Realty & Insurance Company did at all times herein alleged collect rentals for defendants on the aforesaid real estate of defendants in Salisbury, North Carolina, and at all times alleged herein was the agent of the defendants in the City of Salisbury, North Carolina, with respect to the collection of said rentals from said properties."

". . . That subsequent to the explosion referred to in the complaint plaintiff's attorney addressed letters to the defendants dated October 24, 1952 and November 24, 1952, with reference to the heating plant of said building and that heating contractors and engineers inspected said heating plant."

". . . That on October 24, 1952, the attorney for plaintiff addressed a letter to the defendant, a copy of which is attached to the complaint and marked Exhibit A; that a letter was also addressed to the defendant by the attorney for plaintiff on November 24, 1952, a copy of which letter is attached to the complaint and marked Exhibit B."

Exhibit A so addressed to defendants reads in pertinent part: "You are hereby notified to forthwith . . . replace or satisfactorily repair the furnace in the premises we are leasing from you at the southwest corner of the intersection of North Main Street and West Liberty Street in order that we may not be further damaged. It is absolutely necessary that we have heat in order to carry on our regular business in the premises . . ."

The plaintiff, Mrs. Mary Rickman, also testified in pertinent part: ". . . I am the President of the Rickman Manufacturing Company . . . a corporation, doing business at 232 N. Main, the second and third floors, on the corner of Liberty and Main Streets of Salisbury

. . . I moved to the property owned by L. P. Gable and wife, Emma Brooks Gable, the last of August 1948. At that time I sublet the premises from Ullman Company, New York . . .

"About the 21st day of June, 1951, I entered into a lease with L. P. Gable and wife, Emma Brooks Gable. I never had any conversation with Mr. or Mrs. Gable with reference to the lease; I have never seen them in my life; I negotiated the lease with Mr. J. B. Wall. The lease was drawn up by Lawyer Hudson, representing L. P. Gable and J. B. Wall. Mr. Wall was with him. The negotiations were conducted in Mr. Clement's law office. Present were Mr. Brad Ragan, Mr. Wall, Mr. Hudson, Mr. Clement and myself. Mr. Ragan represented the Carolina Tire and Rubber Company. The Carolina Tire & Rubber Company occupied the first floor. I was to occupy the second and third floors.

"Mr. J. B. Wall and Mr. Hudson negotiated the terms of the lease with me. They were representing the Gables. Mr. Wall told me that he wanted me to pay the rental on the two top floors and he leased the first floor to the Carolina Tire & Rubber Company and Mr. Ragan. He gave us the price of $605.00 per month for the two top floors for five years, with option of five more, and he also said I should pay two-thirds of the heat, two-thirds of the water, and the Carolina Tire & Rubber Company was to pay a third of each for the first floor . . . I signed the lease as President of Rickman Manufacturing Company and individually. It was also signed, as I understand, by L. P. Gable and wife."

And the witness, Mrs. Rickman, continues: "Along in September 1951, after the lease had been signed, Mr. Wall came into my plant, had some men with him, said he was going to look about the furnace and look about the heating system of the plant. He went all over the two top floors and he was downstairs a number of days . . . I didn't follow him, but I did tell him not to turn my radiators open that we had closed, that they would leak and he said all right. I left to go away that afternoon and when I came back on Saturday morning, the second floor had water all over the floor where I had finished merchandise . . . and the water had got in among the boxes, and the boxes had toppled over and all the merchandise had fallen into the water and were damaged."

Plaintiff here offered in evidence the official tax list of Rowan County for the years 1951 and 1952, the listing of property belonging to L. P. Gable and wife at the corner of Main and Liberty Streets,—the tax scrolls being signed by J. B. Wall, Agent—Exhibits N and O.

And the witness, Mrs. Rickman, continued: "After I discovered that my goods and materials were damaged by water in the building . . . I had Mr. Clement write a letter to Mr. and Mrs. Gable—Exhibit

G— . . . dated November 17, 1951 . . . is the letter. My attorney wrote at my request. In consequence of that letter, I later signed a release in February 1952, running to L. P. Gable and wife, Emma Brooks Gable, and J. B. Wall upon receiving payment from them for the damages to these goods. At the time I signed that release, I made a statement showing the damages to my goods to Ramsey Realty & Insurance Company."

The witness, Mrs. Rickman, further testified: "After this release was executed and delivered by me, Mr. Wall came and told me that after he paid the damages on the goods that he forbid me to go down to the basement or any place to mess with the furnace, or any of my employees, and I told him I had never been in the basement and never intended to go, and that he said he would look after it and take care of it. From then on I did not authorize any of my employees to go down and look at the furnace. I told them to stay out and leave it alone, that we had been forbidden to go down there and I didn't want to have anything to do with it. Mr. Wall said he would look after it himself. He said he had already spent $100.00 on it and I didn't appreciate it . . . He said he had been working on it. From that time on, in consequence of what Mr. Wall said, I did not at any time authorize or instruct any of my employees to work on this boiler."

And the witness, Mrs. Rickman, continued: "On the 21st day of October, 1952, the day that the boiler exploded, I was late coming to work that morning . . . and I was coming to the first floor in the Carolina Tire & Rubber Company and the whole building was full of smoke, and I asked them what was wrong. They said they didn't know, that it was down in the boiler room, something happened to the boiler . . . I called the fire department and told them to come down and see what was wrong. They came down . . . four firemen . . . and two came upstairs after they went down and told me they were condemning the boiler and not to mess with it at all. I walked in my office and called my lawyer, and told him the news. I told my employees standing around to be sure not to go down there or near it and to stay away from it, that it has been condemned and it might blow up. I met Mr. Clement at Mr. Ramsey's office . . . we asked Ramsey to please do something about the boiler that it was going to blow up or something, that the city had condemned it, and I needed heat for my employees, that it was real cold. Mr. Ramsey took out a piece of paper and started writing down the complaints and said 'I will have to get hold of Mr. Wall. I don't know whether he is in town now or not.' Just about that time the fire department and firemen went down the street, and drove off . . . and I ran off . . . and went back to the place. The boiler exploded . . . one explosion before I got to the corner, and I heard three after I got down there . . . After that I had

my attorney write Mr. Gable and his wife a letter to immediately replace or repair the furnace in order that we might have heat to carry on the business of the company. I did not receive any reply to that letter, and in consequence of my failure to receive a reply, on November 24, 1952, I had my attorney again write a letter to Mr. and Mrs. Gable regarding the damage to my property . . . 'Exhibit L.' I did not receive any reply to that letter . . . until December 8, 1952, when I had heat installed on the second and third floors, it was so cold my help could not work . . . I bought gas heaters . . . The cost of installation of those gas heaters was $2,267.59 . . . By reason of the explosion, and the smoke therefrom, my goods were damaged."

And the witness, Mrs. Rickman, testified: "I was furnished a copy of 'Report of Inspection' of the boilers made on March 4, 1952, the original to L. P. and Emma B. Gable," marked plaintiff's Exhibit M, offered in evidence, reading as follows:

"THE HARTFORD STEAM BOILER
INSPECTION AND INSURANCE COMPANY
Hartford, Connecticut

ATLANTA OFFICE
1325 Citizens & Southern Nat'l Bank Bldg.
Atlanta 3, Georgia

March 4, 1952

REPORT OF INSPECTION

Date of Inspection—February 28, 1952 Inspector—J. T. Cuneo
Location—232-36 North Main Street
Salisbury, North Carolina

F. B. Boiler No. 1
Inspected externally while in service

"The boiler was being operated with one fire door open, which we understand is necessary under present conditions to avoid flare-backs. The trouble is apparently due to the boiler room being tight with no provision for ventilation and, therefore, insufficient oxygen for proper combustion. An adequate size ventilation opening should be provided in one of the boiler room walls or doors.

"Inspection of other insured equipment disclosed no conditions that require attention at this time.

Yours very truly
Chief Inspector.

To: L. P. and Mrs. Emma B. Gable
Anderson, South Carolina."

Then on cross-examination the witness, Mrs. Rickman, testified: "I identify a paper writing handed to me as a lease entered into by and between Bernhart-Ullman Company, Inc., and Rickman Manufacturing Company, Inc., with my signature immediately at the bottom of the lease . . . I took possession of the top floor of the premises in question as a result of that lease . . . the date of that lease is August 24, 1948. I was still a tenant under the terms of the lease with Bernhart-Ullman Company on the date on which the lease with Mr. and Mrs. Gable was executed. This one expired August 31, 1951, but the other one didn't take effect until September 1, 1951. I actually executed the lease in June and it didn't become effective until the day after this one expired."

Then over objection and exception by appellant, the witness was asked this question: "Q. I ask you to look at paragraph 7, page 3 of this prior lease, and I ask you if that paragraph is not in these words: '7. The Landlord warrants that the heating equipment in the premises of which the premises hereby let are a part, is in good working order and sufficient to adequately heat the entire building. The Tenant agrees that it will operate the said heating plant at its own expense during such weather as requires heating of the premises and will, if the Landlord should rent the first and second floors of the building, operate the heating facilities for said first and second floors during the normal one-shift factory working hours, provided the said occupant or occupants shall, at the end of each and every month, pay to the Tenant their proportionate share of the cost of operation of the heating plant, said cost to include but not be limited to: (1) Cost of fuel—(2) Cost of repairs—(3) Cost of operating, personnel—(4) Proper insurance coverage. A "proportionate share" shall mean, in each instance, one-third (⅓) of the total costs as to each floor so occupied.

"It is specifically understood that the Tenant assumes no responsibility in furnishing the said heat to the said Tenants of the first and second floors, and the Tenant shall not be liable under any circumstances whatsoever for failure or cessation of heat because of or attributable to any breakdown of equipment, lack of fuel, operating personnel or for any cause beyond the control of the Tenant, it being the express understanding that the Tenant undertakes to supply only such heat to the tenants of the first and second floors, as and when and to the extent same is available out of the capacity of the plant.' " Exception No. 1. "A. Yes, sir."

And the witness, Mary Rickman, identified copy of the lease from L. P. Gable and wife, Emma Brooks Gable, and Rickman Manufacturing Company, dated June 21, 1951.

The witness continued: "After I entered into possession under this lease between myself and Mr. and Mrs. Gable, I billed Brad Ragan

Company for one-third of fuel used in the operation of the plant. I billed them for no other expense. I only billed them for one-third of the fuel oil. This bill dated June 9, 1952, from the Rickman Manufacturing Company for one-third of repairs on motor for boiler downstairs was on a pump that kept water out of the basement, didn't have anything pertaining to the boiler at all; so that the water wouldn't get up in the basement. I have never been down in the basement and don't know whether the pump was located immediately in front of this equipment."

And the witness continued: "I had in my employ on or about October 21, 1952, a man by the name of W. Howard Williams. He was not the man that looked after this equipment. I had no one to look after the equipment after I took the lease over for Mr. Wall. I was only to pay two-thirds of the amount of the bill. I wasn't supposed to look after it.

"I know a man by the name of W. D. Perkins. Mr. Perkins looked after this boiler as long as I was in possession under the first lease. He took care of it for me because Mr. Bernard told me it was a dangerous boiler, and he told me he would get Mr. Perkins. He looked after it. Mr. Wall looked after it after that. I did not pay the bills to anyone; no bills came in."

Then she was asked this question: "In other words, it wasn't maintained?", to which she answered: "Must have been, I never got any bills."

Then the witness, Mrs. Rickman, continued: "I built a wall in that building when I first took over the second floor. The exact date I don't know. It was to block the stairway off from the outside because the downstairs was not rented and anyone could get into my place of business. I put up a concrete wall. I built that wall along the stairway that led down into the basement. I don't recall exactly when I took over the second floor. It was prior to the time I entered into this last lease."

Then on continuation of cross-examination these questions were asked to which she answered as indicated: "Q. I hand you a letter dated March 7, 1952 from the Ramsey Realty & Insurance Company and ask you if that is the letter which accompanied this report which you have offered as your Exhibit M in evidence?" Plaintiff objects—Overruled—Exception No. 2. "A. Yes sir." "Q. This letter which is identified as defendants' Exhibit 14, I ask you if it doesn't read as follows:

"March 7, 1952

Mrs. Mary Rickman
Rickman Manufacturing Company
Corner Liberty and Main Streets
Salisbury, N. C.

Dear Mrs. Rickman:

Attached please find a copy of a letter received from the Hartford Steam Boiler Inspection and Ins. Co., Hartford, Conn.

I will appreciate your attention in having this defect corrected so the inspection will pass. I believe the wall you had put up on the first floor is causing this trouble.

Yours very truly
RAMSEY REALTY & INSURANCE CO.
(s) R. E. Ramsey

RER/b
Enclosure."

Plaintiff objects—Overruled—Exception No. 3. "A. Yes sir."

"This report from the Hartford Steam Boiler Inspection Insurance Company, dated March 4, 1952, is the copy which was attached to it. I am still in possession of the two floors.

"Q. And you are in possession under the terms of the lease which is dated June 21, 1951? A. Yes."

And on re-direct examination the witness said: "When I received that letter dated March 7, 1952, from the Ramsey Realty & Insurance Company agent, that was after I had been notified by J. B. Wall not to touch that furnace or to have anything to do with it . . ."

Plaintiff's witness Morton Penn testified in pertinent part: "I am Vice-President and Secretary of the Rickman Manufacturing Company. I was there the day of the explosion . . . We . . . called the fire department . . . one of the firemen told us he didn't want us to start it. Mrs. Rickman had told all the employees and everybody that they were not to touch the apparatus that would start the thing off . . ."

Mrs. Ruby Farrington, as witness for plaintiff, testified in pertinent part: "I work for Rickman Manufacturing Company . . . I recall the morning of the explosion that occurred October 21, 1952 . . . Mrs. Rickman called the fire department . . . two went up to her office. I saw several of them on the ground floor. I overheard a conversation between Mrs. Rickman and Howard Williams that morning. It was on the ground floor and she started out and turned around and said 'Don't bother the furnace any more. I will go to Lawyer Clement and see if he can't get us some heat.' She told this to all the employees

standing around there, Florine Trexler, and Mr. Penn and Howard Williams. As I remember, after the firemen left, I was standing there and I heard someone say: 'Go ahead and light it and see what happens.' I guess they were talking to Howard Williams. Two firemen, Howard and myself were standing to the side . . . one of the two firemen told Howard about it—told him to go ahead and light it and see what would happen before they returned. I went up the steps at that time—all the way to the third floor . . . The explosion took place approximately five or ten minutes after that conversation . . . I came running out and I said 'I will go and see Howard.' I got to the second floor and met Howard and he was burnt black."

The witness Gaither Cloer testified: "I have been employed by the Rickman Manufacturing Company approximately eight years . . . After this lease was signed on the 21st of June, 1951, I saw Mr. J. B. Wall making repairs to radiators. I did not see him around the boiler. I remember when the water damage was done. He was not there at that time, but he was there before . . . The radiators were opened up and the water damaged some goods and he brought a man with him . . . and went around and examined all the radiators and marked 'X' on all them that were leaking. I don't recall what year that was. Mr. Wall made this statement to me. He said not to mess with them any more; all of them that had 'X' on them were out of fix, leaking . . . that was mostly on the second floor . . . On the morning of the explosion . . . we discovered some smoke coming from the boiler, and me and Mr. Williams went . . . and I put a rag on my face and went to the boiler room and pulled the switch for safety. That would throw it off . . . The only time I had been in the boiler room since January 1951 until the time I cut off the switch was when Mr. Perkins would be there. It always gave trouble in 1950 and 1951. After Mr. Perkins stopped working on the boiler I did not go there."

Plaintiff also introduced as a witness one James E. Hart, consulting engineer, tendered and admitted to be an expert, who on direct examination testified in pertinent part: ". . . I looked at the installation in Salisbury the day after the accident happened . . . I examined and found that there had been an explosion, at least one, and from what I could see the plant was rather poorly maintained; everything was dirty, a general dirty state, which indicated a lack of care. With all oil burners of this type frequent cleaning and adjusting is necessary. If such adjustment is not done almost weekly, trouble can start in a mild way, and if nothing is done to cure that you may have serious trouble later, like occurred on this job. The failure of this equipment, as best I could determine, was due to dirty oil cups which prevented the oil from atomizing properly and dropped liquid oil down in the bottom of the furnace, so that when ignition took place they went off in explosion

rather than ordinary flame ignition. In so doing, it blew the smoke door open and blew the burner out of the boiler and swung it out on its hinges. I believe there were subsequent explosions and they could have been caused from the first one, made a related series of explosions, but in my opinion the whole business was caused by negligence in not keeping the burner adjusted properly and cleaned properly. I base the opinion just expressed upon a visual examination the day after it happened. The whole job was in a rusty and dirty condition, rusty and just not clean; coal dust around the installation, and it had not been fired with coal for some time.

"In my opinion the explosion was caused by one thing and that was the presence of liquid oil, fuel, in the furnace in more quantity than it would normally burn. That liquid oil fuel could be accumulated from different sources. There could be only one reason for the explosion, and that is liquid fuel. Any condition that would have cause(d) that liquid fuel to accumulate would be due to negligence . . .

"I said three things that could cause the presence of liquid oil being in the pit of the furnace: First, a dirty cup which would not atomize it properly; the second, failure of the controls to cycle the burner; the third is the poor adjustment on the fuel air ratio. I could not tell from the examination afterwards which one of those caused the explosion. I would assume that all three, or any one of the three, was caused by negligent maintenance because if they are periodically cleaned they won't do so. I mean by negligence that you don't have a man look at it once a year. You clean the cup once a week or once a day."

Then the witness, under cross-examination, continued: "This was the Kiwanee air burner. From my examination of this equipment on the particular time that I saw it, I did not see any portion of the boiler or the oil burner which was mechanically defective in itself. In my opinion, as I have testified, the only reason that this burner exploded was because it had not been properly maintained. And in the proper maintenance of such equipment, it should be cared for daily, actually, and certainly at least once a week. In my opinion from the conditions existing there at the time of my examination, proper care had not been used in the maintenance of that boiler, because it was dirty. I believe that this boiler and the oil burning unit which was attached to it were equipped with modern and approved controls. As far as the installation of the equipment itself was concerned, it was done in a, shall we say, usual method . . ."

On re-cross-examination the witness concluded with this statement: "I get back to the same thing, the lack of maintenance, in my opinion."

Plaintiff offered other testimony relating in the main to matters of damage.

And the plaintiff having so introduced its evidence and rested its case, motion of defendants for judgment as of nonsuit was allowed. From judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Clarence Kluttz, Lewis P. Hamlin, Jr., W. T. Shuford, and Hayden Clement for Plaintiff Appellant.

Hartsell & Hartsell, William L. Mills, Jr., Hudson & Hudson, and Woodson & Woodson for Defendant Appellees.

WINBORNE, C. J. The principal assignment of error presented on this appeal challenges the correctness of the ruling of the trial court in granting motion for judgment as of nonsuit. G.S. 1-183. On such motion the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. The rule is so well recognized in this State that citation of authority is unnecessary.

When the evidence in case in hand is so taken, this Court holds that judgment as of nonsuit was properly entered.

Here, to summarize, there is a five-year lease of real property, required by law to be in writing and signed by the party to be charged therewith. G.S. 22-2. By its terms defendants, as parties of the first part, leased to plaintiff, as party of the second part, their heirs, successors and assigns, for a period of five (5) years, commencing September 1, 1951, the following described property: "The second and third floors . . . of the Rouzer building. To Have and To Hold the same, with the privilege and appurtenances thereunto in any wise appertaining, to the said parties of the second part, their heirs, successors and assigns for the above period" upon terms and conditions stated.

At the same time and on similar terms and conditions defendants leased to Carolina Tire & Rubber Company and Brad Ragan the first floor of the Rouzer building.

And evidence offered by plaintiff as stated in letter to defendants from plaintiff company by its attorney dated October 24, 1952, tends to show that "it is absolutely necessary" that "we have heat" in the building "in order to carry on our regular business in the premises"; and that the source of supplying heat was an oil furnace in the basement of the building.

Therefore the question arises as to whether the heating system in the basement is an appurtenance to the lease of the second and third floors, and hence within the provisions of the lease. Plaintiff contends that it is not so included in the lease, and defendants contend that it is.

In this connection "It is a settled principle of the law of property that a conveyance of land, in the absence of anything in the deed indicating a contrary intention, carries with it everything properly appurtenant to, that is, essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed, and this principle is equally applicable to a lease of premises. In leases, as in deeds, 'appurtenance' has a technical signification, and is employed for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When the term is thus used, in order to constitute an appurtenance, there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. Moreover as in the case of conveyances, whatever easements and privileges legally appertain to the demised premises and are reasonably necessary to its enjoyment ordinarily pass by a lease of the premises without any additional words. Parol evidence is admissible to show the meaning of the term 'appurtenances.' " 32 Am. Jur., Landlord and Tenant Section 169.

"An 'appurtenance' has been defined as 'a thing which belongs to another thing as principal, and which passes as incident to the principal thing.' It must have such relation to the principal thing as to be capable of use in connection therewith." 4 C.J. 1467, quoted in *Foil v. Drainage Comrs.*, 192 N.C. 652, 135 S.E. 781.

In *Riddle v. Littlefield*, 53 N.H. 503, 16 Am. Rep. 388, this headnote epitomizes the opinion of the Court: "By the lease of a building, everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing and as a part of it, unless especially reserved."

And in *Stevens v. Taylor*, 97 N.Y.S. 925, 111 App. Div. 561, it is held that "Where certain floors of a building were leased with the 'appurtenances,' a furnace, constituting the only means for heating the leased premises, was included in the word 'appurtenances.' "

So in the case in hand this Court holds that the second and third floors having been leased "with privilege and appurtenances thereunto in any wise appertaining," the furnace, constituting the only means for heating the leased premises, was included in the words "appurtenances thereunto in any wise appertaining."

Moreover, among the terms of the lease, paragraph 3 declares that it is understood and agreed that the parties of the second part, their heirs, successors and assigns, shall be responsible for two-thirds of the maintenance and upkeep of the heating plant and equipment in said building. And the testimony by *feme* plaintiff tends to show that the lease which Brad Ragan and Carolina Tire & Rubber Company entered

into, as above recited, provided that the Brad Ragan Motor Company and the Carolina Tire & Rubber Company were to assume responsibility for one-third of the maintenance of the heating plant and the cost of fuel.

The word "maintenance" is defined in Black's Law Dictionary as "the upkeep, or preserving the condition of the property to be operated."

Indeed in *Chambers v. North River Line,* 179 N.C. 199, 102 S.E. 198, this Court in opinion by *Clark, C. J.,* held that the lessee's covenant to maintain the lease premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law.

The appellant contends, however, that the language used here means that the parties of the second part shall only pay for two-thirds of the maintenance and upkeep. But it will be seen that the agreement in paragraph 3 is that the parties of the second part, their heirs, successors and assigns, shall do four things: (1) Shall be responsible for two-thirds of the maintenance and upkeep of the heating plant and equipment in said building; (2) shall pay two-thirds of the fuel costs; (3) shall pay two-thirds of the expense of water for said building; and (4) shall pay all of the expense of maintenance of plumbing and plumbing fixtures on the second floor of said building. When read in the light of the fact that Brad Ragan Motor Company and Carolina Tire & Rubber Company were at the same time agreeing to be responsible for the other one-third, the language used is clear. Too, it is significant that of the sixteen paragraphs devoted to stating terms and conditions of the lease, the only obligation imposed upon the parties of the first part is that they "are to maintain the roof on said building at their own expense."

Hence it is patent that plaintiffs, as parties of the second part, agreed to be responsible for maintenance and upkeep of the heating plant.

And the expert witness offered by plaintiff testified that he did not see any portion of the boiler or oil burner which was mechanically defective in itself. He gave it as his opinion that the only reason that this burner exploded was because it had not been properly maintained; that he believed that the boiler and oil burning unit were equipped with modern and approved controls, and that as far as the installations of equipment itself was concerned, it was done in a usual method.

However plaintiff contends that J. B. Wall, son-in-law of defendants, after September 1, 1951, orally forbade them having anything to do with the furnace. Even so, plaintiff was in possession under the lease, and entitled to hold possession and control against the world. The landlord had no right to enter upon the leased premises against the consent of the tenant. *S. v. Piper,* 89 N.C. 551. A tenant can bring trespass against his landlord for forcibly entering and breaking the

close during the term. *Barneycastle v. Walker*, 92 N.C. 198. See also *S. v. Boyce*, 109 N.C. 739, 14 S.E. 98; *S. v. Fender*, 125 N.C. 649, 34 S.E. 448.

Indeed, the case on appeal is devoid of competent evidence as to J. B. Wall having authority to agree, or to assent to a change in the language of the written word, that is, the written lease of real property for more than three years required to be in writing. G.S. 22-2.

Other assignments of error based upon matter elicited upon cross-examination of *feme* plaintiff have been considered, and in the light of the decision reached as hereinabove set forth, prejudicial error is not made to appear.

Hence the judgment from which appeal is taken is

Affirmed.

CLARENCE H. BRINKLEY v. UNITED FELDSPAR & MINERALS CORPORATION, AND COAL OPERATORS CASUALTY COMPANY.

(Filed 10 April, 1957.)

1. Master and Servant § 55i—

Findings of fact and conclusions of law in respect to claimant's disability embodied in an award upheld by the full Commission and affirmed in the Superior Court, and from which no appeal is perfected, are determinative of claimant's status with respect to disablement on that date.

2. Master and Servant § 40f—

The Compensation Act contemplates that an employee will not be allowed to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated within the meaning of G.S. 97-54, and that if removed from the hazard before such incapacity, he will seek and obtain other remunerative employment. G.S. 97-61.

3. Same—

Incapacity from silicosis within the meaning of the statute is incapacity to perform the normal labor of the last occupation in which remuneratively employed, which may be wholly separate from the one in which the employee was exposed to the hazards of silicosis. G.S. 97-54.

4. Same—

Where an employee is removed from the hazard of silicosis before becoming actually incapacitated within the meaning of G.S. 97-54, and thereafter obtains other remunerative employment, but becomes actually incapacitated from performing normal labor in such other occupation within two years of the time of his last exposure to the hazard of silicosis, he is entitled to compensation for such incapacity to perform the normal labor of the last occupation in which remuneratively employed.

5. Same—

Claimant was removed from the hazard of silica dust before becoming incapacitated within the meaning of G.S. 97-54. He was thereafter employed by the same employer for five years at the same wage at employment free from the hazard of silica dust. *Held:* His retirement from such other occupation at the end of five years could not have been caused by incapacity from silicosis resulting within two years of the last exposure to silica dust, and compensation therefor cannot be sustained. G.S. 97-58.

6. Same—

The evidence in this case *is held* to show that the employment of claimant after he had been removed from the hazards of silica dust was not merely employment at odd jobs of a trifling nature but was a continuous *bona fide* employment of a responsible nature for a period of five years.

APPEAL by defendants from *Pless, J.*, September Term 1956 of MITCHELL.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act for disability due to silicosis.

The original hearing in this cause was before Chairman Huskins at Spruce Pine on 28 May 1951.

Upon the stipulations entered into by counsel and the evidence offered, Chairman Huskins found the following facts: "(1) That the parties are subject to and bound by the provisions of the Compensation Act . . . (2) That Coal Operators Casualty Company is the compensation carrier and was on the risk at the times complained of. (3) That plaintiff's average weekly wage was $68.50. (4) That plaintiff has been exposed to silica dust in North Carolina for two years in the last ten years and has been exposed to silica dust as much as thirty working days, or parts thereof, within seven consecutive calendar months while in the employment of the defendant employer; that such exposure has been of such nature and extent as to constitute an injurious exposure within the meaning of G.S. 97-54. (5) That defendant's employees have been periodically examined and the employer has been notified and knows that his business is subject to the hazards of silicosis. (6) That plaintiff is now suffering from silicosis in its second stage. (7) That plaintiff was first advised by competent medical authority that he had silicosis when he received a letter from Dr. Swisher dated 3 October 1950 so informing him. (8) That plaintiff filed his claim for compensation with the Industrial Commission on 30 October 1950. (9) That on 30 November 1950 plaintiff signed a statement to the effect that he was at that date able to do his work and that he expected to continue to do it; that as of the date of the hearing in this case on 28 May 1951 plaintiff was still working regularly, performing the

normal labors of his job, and had not missed a day within the preceding twelve months; that plaintiff weighs 166 pounds, which is only three or four pounds below his normal weight; that he has a fair appetite and sleeps as well as usual; that his appearance is good; that he has some stiffness of his joints and for the last year his breath has been a little shorter; that plaintiff is not now actually incapacitated because of silicosis from performing normal labor in the last occupation in which remuneratively employed, that is, as mill superintendent and machinery repairman; that plaintiff still possesses the capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of silicosis; that plaintiff is therefore a fit subject for rehabilitation under the provisions of G.S. 97-61 and would be benefited by being removed from employment where the hazards of silicosis exist; that his silicotic condition has progressed to such a degree as to make it hazardous for him to continue in an employment which subjects him to silica dust; that plaintiff has the ability and the capacity to re-adjust himself in some new occupation and does not need, and would not be benefited by, the special training provided for in G.S. 97-61."

Upon the foregoing findings of fact, Chairman Huskins drew these pertinent conclusions of law: (1) That the plaintiff in this case is not disabled within the meaning of G.S. 97-54; (2) that the plaintiff possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of silicosis and that he is not entitled to compensation for disability under G.S. 97-29; (3) that the plaintiff should be rehabilitated under the provisions of G.S. 97-61, and under that section he is entitled to compensation for a period not exceeding 40 weeks (the plaintiff having dependents), beginning as of 1 August 1951. Such compensation will be calculated at a rate equal to 60 per cent of the difference between plaintiff's average weekly wage of $68.50 while injuriously exposed and the average weekly wage he is able to earn during the rehabilitation period. (4) Should the plaintiff actually become disabled as that term is defined by G.S. 97-54 within two years from his last injurious exposure to silica dust, and should his capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation, free from the hazards of silicosis, deteriorate to such extent that there is no longer a reasonable basis for the conclusion that he possesses such capacity, then and in that event, he would be entitled, upon application in apt time, to ordinary compensation provided by G.S. 97-29, unhampered by the limitations contained in G.S. 97-61.

An award was made in accord with these conclusions of law, including an order for the plaintiff's removal from all employment wherein

the hazards of silicosis are present. (The record discloses that the plaintiff has not been exposed to silica dust since 5 October 1950.)

The plaintiff appealed to the Full Commission. The Commission reviewed the evidence, findings of fact, conclusions of law and the award theretofore made and adopted as its own the findings of fact and conclusions of law of the hearing Commissioner and affirmed the award.

An appeal was taken to the Superior Court where the matter was heard on 4 April 1952. The court found as a fact that there was competent evidence in the record to support the findings of fact and conclusions of law of the Industrial Commission. Whereupon, an order was entered affirming in all respects the award entered by the Commission on 29 November 1951.

The plaintiff in apt time gave notice of appeal to the Supreme Court.

On 15 May 1953, the plaintiff filed a petition with the Industrial Commission requesting an increased award upon the ground that his condition had gradually become worse and that he was totally and permanently disabled from silicosis as defined by G.S. 97-54.

Thereafter, the plaintiff filed a motion in the Superior Court of Mitchell County requesting the court to dismiss his appeal to the Supreme Court and to remand the cause to the Industrial Commission for such action as may be proper. The motion was granted on 2 December 1953.

The Commission remanded the cause on 29 April 1954 to a hearing Commissioner for the purpose of determining (a) whether or not the plaintiff had become totally disabled within the meaning of G.S. 97-54, (b) whether or not such total disability occurred within two years of plaintiff's last injurious exposure to silicotic hazard, and (c) any and all other issues which might properly be raised by the parties.

Pursuant to the foregoing order, Deputy Commissioner Currin conducted a hearing in this cause on 5 May 1954.

The evidence discloses that following the hearing originally conducted by Chairman Huskins, as hearing Commissioner, on 28 May 1951, the plaintiff continued his employment and stayed in the office or in and around the supply house at the defendant's plant at Minpro. The plant at Minpro was burned in July or August 1951. The plaintiff was then sent to Glendon in Moore County where a plant had burned and was to be rebuilt, and the plaintiff was to supervise the rebuilding of the plant, clean it up and get it started. The plaintiff testified, "The type of work I did at Glendon was constructing a new plant to grind pyrophyllite. I didn't do any manual labor. At Glendon I was still employed by United Feldspar and Minerals Corporation. I tried to be a layout man. Of course, it was all on me to buy or do whatever I saw fit. . . . After I left Glendon and came back to Spruce Pine in March 1952, I rode a chair down here and tried to sell what equipment I could

and look after the Company's property. . . . The junk that was left down there after the fire was what I . . . was trying to sell. . . . I stayed up here (Spruce Pine) about a year. . . . After I went to Greensboro in March 1953 they used me as an expediter on a new job. I was to find whatever the contractor needed. I was to dig it up for him. The hardest work I did was driving a car. I stayed at that plant until September 1953 when I came home. I have been in Spruce Pine since September 1953. I have been down here at the old plant . . . looking after the property and still selling off equipment and stuff like that. . . . During the period of two years following May 28, 1951, . . . I have not done any strenuous work or any work that required physical exertion. . . . Since May 1951 I have gotten a pay check every payday from that Company. I have made the same thing that I was making in May 1951; no raise whatever. Well, as far as work is concerned, I ain't missed a day since May 1951, no, I haven't been in the hospital or anything that I can think of right off. That's right, I haven't missed a day from doing what I got paid for doing. . . . My weight stays about the same. . . . I don't have any particular trouble about sleeping at night . . . About the only difference I notice now in contrast to my former condition is that my breath is shorter and that I don't have the same strength that I had previously. As far as silicosis is concerned, I have never had a pain . . . I have had no exposure to silica dust since October 1950."

The medical testimony reveals that the plaintiff had silicosis in the second stage on 10 July 1950; that he was again examined on 12 June 1951 and 7 July 1952. Both of these examinations revealed a diagnosis of silicosis in the second stage. On 16 September, 1952, Dr. Otto J. Swisher, Jr., Chief of the Industrial Hygiene Section of the North Carolina State Board of Health, wrote the plaintiff as follows: "The Advisory Medical Committee for the North Carolina Industrial Commission recently met and reviewed the x-ray film of your chest which was made by our Mobile Unit on July 7, 1952, the Committee concurred on your diagnosis as still that of silicosis in the second stage, revealing no progression over your previous film of June 12, 1951, due to these findings we are unable to issue you the usual work card and it is recommended that you have no further exposure to dusty trades."

Dr. Swisher testified that he examined the plaintiff on 26 May 1953, and "at that time interim history since last exposure, he stated that he had had a cough only with a cold, further states he has been short of breath for the past 12 or 13 years. Noticeably all the time while walking or going up stairs, this has been progressing for the past two or three years, strength and energy fair, weight has been stationary, physical examination, general appearance good, weight 167, blood pressure normal, 110/70, skin and mucous membrane negative, pulse regu-

lar, 72, heart normal, chest medium type with expansion of two inches, extremities reveal cyanotic nails and lips, also bowed nails, x-ray interpretation Film 39971, diagnosis by Dr. H. F. Eason is still that of silicosis the second stage, revealing no change over the previous film."

Counsel asked Dr. Swisher this question: If the Commission should find from the evidence that Mr. Brinkley's last employment while exposed to the hazards of silicosis was that of a mill superintendent, that is a superintendent of a feldspar grinding plant, that these duties require that he go over a building which had five or six levels, and which was more than 70 feet high, did he have an opinion as to whether or not the plaintiff was actually incapacitated because of silicosis from performing his duties as such superintendent? Dr. Swisher testified, "I have an opinion satisfactory to myself as to whether or not on September 16, 1952, Mr. Brinkley was actually incapacitated because of silicosis from performing normal labor in this employment which you have outlined to me. My opinion is that he is disabled. That he was so disabled on September 16, 1952."

The crucial finding of fact by the hearing Commissioner was as follows: "11. That sometime prior to 16 September 1952 the claimant became actually incapacitated by reason of silicosis from performing normal labor as plant superintendent, the last occupation in which he was remuneratively employed while exposed to the hazard of silicosis, and that this incapacity occurred within two years of his said last injurious exposure."

The hearing Commissioner concluded as a matter of law that plaintiff was disabled within the meaning of G.S. 97-54 and that his disability occurred within two years from 5 October 1950. Award was made for ordinary compensation under the provisions of G.S. 97-29 for not more than 400 weeks beginning 1 October 1952.

The defendants appealed to the Full Commission. The case was argued before the Commission and remanded on 31 May 1955 for a further hearing. Certain additional evidence was taken on 10 May 1956 and filed with the Commission on 21 May 1956, without any facts being found or any conclusions of law having been drawn thereon by the hearing Commissioner. Whereupon, the Commission adopted as its own the findings of fact, conclusions of law and the award of Deputy Commissioner Currin.

An appeal was taken in apt time to the Superior Court where the defendants' exceptions were overruled and the opinion of the Commission affirmed. Defendants appeal, assigning error.

Fouts & Watson for appellee.

Proctor & Dameron for appellants.

DENNY, J. Before considering the principal question involved in this appeal, we shall dispose of certain preliminary questions that appear on the face of the record.

In the first place, since the findings of fact and conclusions of law, based on the evidence adduced in the original hearing on 28 May 1951, were upheld by the Full Commission and affirmed in the Superior Court, and from which ruling in the Superior Court no appeal was taken and perfected, such findings of fact and conclusions of law will be considered as determinative of the plaintiff's status with respect to disablement on that date.

It follows, therefore, (1) that on 28 May 1951 the plaintiff was not disabled within the meaning of G.S. 97-54, (2) that he was not at that time actually incapacitated because of silicosis from performing normal labor in the last occupation in which remuneratively employed *as a mill superintendent and machinery repairman,* and (3) that the plaintiff possessed the capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of silicosis.

In view of the facts found by Chairman Huskins, as the hearing Commissioner, and the conclusions of law drawn by him, which were upheld as hereinabove pointed out, the plaintiff is not entitled to receive any compensation pursuant to the provisions of G.S. 97-29, unless he has shown that he became actually incapacitated because of silicosis between 28 May 1951 and 5 October 1952 from performing normal labor in the last occupation in which remuneratively employed between the above dates. G.S. 97-54; *Huskins v. Feldspar Corp.*, 241 N.C. 128, 84 S.E. 2d 645; *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410.

It appears from the record that this case was tried upon the theory that the criterion for determining when one afflicted with silicosis is actually incapacitated depends upon whether or not he is actually incapacitated from performing normal labor in the last occupation in which remuneratively employed while exposed to the hazards of silicosis, and whether or not such incapacity occurred within two years of such last injurious exposure. This may be the correct theory in a case where the employee is so incapacitated when removed from the hazards of silicosis that he never had any remunerative employment during the next two years, as was the case in *Singleton v. Mica Co.*, 235 N.C. 315, 69 S.E. 2d 707. However, the provisions of our compensation law with respect to silicosis and asbestosis contemplate that the State medical authorities, whose duty it is to examine employees in dusty trades, will not permit an employee to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated within the meaning of G.S. 97-54. G.S. 97-61.

It must be kept in mind that a claim based on disability resulting from an ordinary industrial accident as defined in G.S. 97-2(i) means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." But where an employee is removed from silica dust, unless actually incapacitated at that time, it is contemplated that he will seek and obtain other remunerative employment. G.S. 97-61. Even so, if within two years from the time of his last exposure to silica dust he becomes actually incapacitated to perform normal labor in his last occupation in which remuneratively employed, he will be entitled to receive ordinary compensation under the general provisions of our Workmen's Compensation Act. G.S. 97-29; G.S. 97-64; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797.

On the other hand, "disability" resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed. G.S. 97-54. The last occupation in which remuneratively employed may be one wholly separate and apart from the employment in which the employee was last exposed to the hazards of silicosis. *Huskins v. Feldspar Corp., supra.*

The reason for allowing two years from the date of the last exposure to silica dust in which to determine actual disability from silicosis is due to the fact "that silicosis is a progressive disease, the lung changes continuing to develop for one or two years after removal of the worker from the silica hazard. Reed and Harcourt: The Essentials of Occupational Diseases, pages 161-174; Reed and Emerson: The Relation Between Injury and Disease, pages 182-186; Goldstein and Shabat: Medical Trial Technique, pages 773-776; Gray: Attorneys' Textbook of Medicine (2d Ed.), pages 1060-1070." *Young v. Whitehall Co., supra.*

We note that the first hearing in this case was held before the decision was handed down in *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426, and that the second hearing was held thereafter but before the decision in *Huskins v. Feldspar Corp., supra.* The decision in the *Honeycutt case*, as pointed out by *Barnhill, C. J.*, in the *Huskins case*, seems to have been misconstrued.

A careful review of the original record in the *Honeycutt case* reveals that Honeycutt was last exposed to asbestos dust on 27 July 1950. He was notified by competent medical authority that he had asbestosis on 5 August 1950. He filed claim for compensation on 15 November 1950. Claim for compensation was heard on 4 April 1951 and it was found as a fact, supported by competent evidence, that claimant was actually incapacitated on 27 July 1950; that he was not physically able to continue to perform his duties as a policeman without physical detri-

ment to himself, and that there was no reasonable basis upon which to conclude that he possessed the actual or potential capacity of body or mind to work with substantial regularity during the foreseeable future in any gainful employment free from the hazards of asbestosis without injury and detriment to his physical condition. This was certainly tantamount to a finding that he was actually incapacitated because of asbestosis from performing normal labor in the last occupation in which he was remuneratively employed, to wit, that of policeman of the Town of Davidson.

On the present record, there is no finding to the effect that the plaintiff became actually incapacitated by reason of silicosis from performing normal labor in the last occupation in which he was remuneratively employed prior to 5 October 1952. Moreover, if such a finding had been made, there is no evidence to support it.

The defendants except to and assign as error the finding to the effect "that some time prior to 16 September 1952, the claimant became actually incapacitated by reason of silicosis from performing normal labor as plant superintendent, the last occupation in which he was remuneratively employed, while exposed to the hazards of silicosis." It is clear that this finding is bottomed on a misconception of the law as to what is meant by the last occupation in which remuneratively employed. Under the facts in this case, the plaintiff was continuously employed in a gainful occupation free from the hazard of silica dust from 5 October 1950 until his retirement on 7 December 1955, which constituted the last occupation in which he was remuneratively employed. Neither was there a finding below to the effect that there is no reasonable basis upon which to conclude that the plaintiff possessed the actual or potential capacity of body or mind to work with substantial regularity during the foreseeable future in any gainful occupation free from the hazards of silicosis without injurious detriment to his physical condition. On the contrary, the medical testimony in this case reveals that from 10 July 1950 until the final examination made on 23 May 1953, which was more than two years after plaintiff's last exposure to silica dust, the x-rays revealed no change from previous films.

The appellee seriously contends that he was not really a *bona fide* employee of the defendant employer between 5 October 1950 and the date of his retirement on 7 December 1955, under the company's retirement system or pension plan. We do not concur in this view. After the hearing on 28 May 1951, the plaintiff continued in the employment of the defendant employer, staying in the office or in and around the supply house, at the plant at Minpro, attending to such duties as were assigned to him. When the plant at Minpro burned in July or August 1951, the plaintiff was sent to Glendon in Moore County to rebuild a

plant that had burned. According to his testimony, he was charged with the responsibility of supervising the rebuilding of a plant to grind pyrophyllite, of buying material, laying out the work, installing the machinery, cleaning it up and getting the plant started. He worked continuously on this job until March 1952. Thereafter, until March 1953, he was engaged in looking after his employer's property at Minpro and trying to dispose of certain equipment and material which his employer wanted him to sell. Furthermore, the plaintiff testified at the hearing on 5 May 1954 that he had not missed a day from his work since May 1951, "I have not missed a day from doing what I got paid for doing."

We appreciate the seriousness of silicosis. It is incurable. However, our compensation law provides only for compensation from silicosis where it is established that actual incapacity occurs within the meaning of G.S. 97-54 and within two years from the last exposure to silica dust. G.S. 97-58. The plaintiff has failed to establish these prerequisites to a recovery. *Huskins v. Feldspar Corp., supra.*

The judgment of the court below is

Reversed.

PAT PENLAND, EMPLOYEE, v. BIRD COAL COMPANY, INC., EMPLOYER, AND AMERICAN FIRE & CASUALTY COMPANY, CARRIER.

(Filed 10 April, 1957.)

1. Master and Servant § 55d—

The findings of fact of the Industrial Commission, if supported by any competent evidence, are conclusive on appeal even though some incompetent evidence may also have been admitted; but a finding not supported by competent evidence or a finding based on incompetent evidence, is not conclusive. G.S. 97-86.

2. Evidence § 48—

Ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure, the basis of the expert's opinion being pertinent on the question of probative force but not on the question of competency.

3. Master and Servant § 40c—

Testimony of claimant and of his expert witness to the effect that the injury received in the course of claimant's employment resulted in partial disability because of pain and increased susceptibility to fatigue when

performing manual labor, *held* sufficient to support a finding of partial temporary disability, and the admission of the expert that his opinion was based upon objective statements of claimant during his professional examination of claimant, does not render the expert testimony incompetent.

4. Master and Servant § 53c—

Where the record on appeal to the Superior Court from an award of the Industrial Commission does not disclose a previous award made to claimant, defendants' contention that the award appealed from cannot be sustained in the absence of a finding of change of condition, is untenable, G.S. 97-47 being applicable only when it is made to appear that a previous award had been made.

5. Master and Servant § 55d—

Review on appeal to the Superior Court from an award of the Industrial Commission is limited to the record as certified and questions of law presented by exceptions duly entered.

6. Appeal and Error § 34—

On appeal from a judgment of the Superior Court affirming or reversing an award of the Industrial Commission, review is limited to the record that was before the Superior Court, and matters which were not in the record before the Superior Court, but which are sent up with the transcript, are no more a part of the record in the Supreme Court than they were in the Superior Court, and may not be made so by certificate of the court below.

7. Appeal and Error § 1—

As a general rule, the Supreme Court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory of trial in the lower court ordinarily precludes consideration on appeal of grounds of defense or opposition not asserted or relied on in the lower court.

APPEAL by plaintiff from *Sink, E. J.*, September, 1956, Special Term of BUNCOMBE.

Proceeding under the Workmen's Compensation Act to determine liability of defendant employer and its insurance carrier to plaintiff, former employee.

These are the findings of fact made by the hearing Commissioner:

"1. That on 27 January 1954 the claimant fell while at work as a truck driver for the defendant employer, thereby causing him to suffer a broken rib and a punctured lung; that he was thereafter hospitalized from the said date and was discharged from said hospital on 7 February 1954.

"2. That the claimant returned to work on 1 March 1954 and worked until 26 March 1954 when he voluntarily left the employment of his employer for reasons unconnected with his injury.

"3. That as a result of the accident giving rise hereto, the claimant now has a permanent partial disability of a general nature in the

amount of 15 to 20 per cent. (Note: The finding here of "permanent partial disability" instead of "temporary partial disability" is an obvious inadvertence. The error is immaterial in view of finding of fact number 5 and the Commission's award based on "temporary partial disability.")

"4. That on or about 4 June 1954 the claimant returned to his former employer and requested that he be rehired, however, as the defendant employer had no job available at the time, the request for re-employment was denied.

"5. That since 4 June 1954 because of the injury which he received as a result of the accident giving rise hereto, the claimant has been temporarily partially disabled and has been only able to earn an average weekly wage of $15.00 from said date to the date of the hearing in Asheville as above set forth."

At the hearing it was stipulated in the record that after the claimant was injured "the defendants . . . admitted liability and paid claimant compensation for temporary total disability from 27 January 1954 to 1 March 1954."

Based on the hearing Commissioner's findings, an award of compensation was made for temporary partial disability at the rate of $11.93 per week from 4 June, 1954, to the date of the hearing, and continuing for such additional period of time as the plaintiff's condition remains unchanged, not to exceed the maximum time and amount as provided by statute.

From the findings of the hearing Commissioner and the award based thereon, the defendants appealed to the Full Commission, and on appeal excepted to findings of fact numbers 3 and 5 and to all crucial conclusions of the hearing Commissioner.

The plaintiff testified in part: "They told me I had a broken rib and a punctured lung. . . . I worked for Bird Coal Company after my injury from the first of March until the 26th of March. It was the same heavy work. I quit because I was suffering, hurting in my right side. . . . it hurt more when I undertook to lift something. Since that time it bothers me every day. . . . The harder I work the worse it hurts. . . . I am not able to go out and do physical labor. When I undertake to do it, it hurts so bad I can't stand it in my right side. . . . the suffering and pain that I complain of when I undertake to do work is the same side that was injured. My breathing is not as good as before, and it hurts when I breathe deep. When I sneeze and cough that hurts. When I try to lift my arms it pulls in there or something hurts. . . . I do not feel that I can go and do a job of common work steady. . . . that is by reason of my injuries. . . . Other than the two weeks work I did for Bird Coal Company since I was injured, I have done a few little jobs, . . . I farmed a little a few days. . . . Really I

don't know what I have earned since I quit work." CROSS-EXAMINATION: "I have been working a little bit and if I do anything I am tired. . . . I haven't worked any to amount to anything. . . . some weeks I didn't work, didn't do anything. . . . I have not been able to make on an average of $15.00 or $20.00 a week in the last year . . . I have a Ford truck, pickup. I haul a load or two. . . . they pay me, whatever they want to give me, my neighbors. . . . When I was working on March 26th, . . . it hurt bad enough until I didn't work. There was pain in there. It pained as much then as it does now; it pained when I worked; worse when I worked. . . . I went to see Dr. Galloway because I was hurting, my side was hurting; he examined me and told me to try it a few more days, see if it would work out; I went back to see Dr. Galloway three or four times, . . . When the company went to pay my last compensation, and came to see me three times, I was in a condition to sign the closing receipt; I wasn't ready to sign it. . . . I was still hurting at that time. As to whether I signed the closing receipt and took the final check, I signed something. . . . (Mr. Roberts shows Mr. Penland Form #27.) It looks like my signature. I don't deny that it looks like it. I believe at that time they gave me a check, my last check when I signed that. . . . As to my condition now being the same as it was when I left Bird Coal Company on the 26th of March, . . . it isn't better; I can't say that it is any worse. I didn't put in my claim earlier because I was trying to work it out."

Dr. J. P. Chapman, Jr., an admitted medical expert specializing in surgery, testified for the plaintiff: that in March, 1955, the plaintiff was referred to him by another physician for treatment of his chest condition; that the case history as given him by the plaintiff disclosed a fractured rib and punctured lung in January, 1954, followed by persistent aching pains in the region of his eighth rib, getting worse with hard work; that he had no history of any other injury. Dr. Chapman testified that in examining plaintiff he tested him "on his quickness of motion on the affected side," for "coordination or awkwardness, strength or weakness . . ." He also tested him on his "ability to reach and stretch"; that he found "a delay in the quickness of his movements caused by the pain produced when he moves," amounting to "a functional disability." Dr. Chapman stated that in his opinion the plaintiff has a disability of a general nature of 25 per cent. This, he qualified by stating on cross-examination that "15 per cent would be roughly a fair estimate . . . an injury such as was received by this claimant would leave some impairment as to his physical condition." Dr. Chapman later saw the plaintiff on April 7 and 18, 1955. The treatment consisted of "salicylates and salimeth which is a muscular relaxant" and a rib belt as support. The belt "helped as long as he was not doing heavy work. When he increased his work or tried to do heavy work

so that his respiration and motion in his chest became greater, even the belt did not help. . . . he gets worse when he works hard. . . . It would be my opinion that whatever I found in March and April of this year (1955) would have been present during most of February, March and April of 1954." CROSS-EXAMINATION: "My examination disclosed a negative physical finding of any illness. . . . He is able to work. . . . The man gets tired easily; he has pain in his chest and the more he works at hard work, which is manual labor, the more the pain is; he has considerable fatigue; that is what he told me; I found no objective symptoms; all findings that I have are based on subjective statements made by the claimant . . . As a result of my examinations, there was no physical cause of disability, nor x-ray cause of disability—none deemable."

All the defendants' exceptions were overruled by the Full Commission, and the findings and conclusions of the hearing Commissioner were affirmed.

The defendants appealed to the Superior Court, noting exceptions to all rulings of the Full Commission in affirming the crucial findings and conclusions of the hearing Commissioner.

When the case came on for hearing in the Superior Court, Judge Sink entered judgment sustaining each of the defendants' exceptions, and on the basis of such rulings decreed that the opinion and award of the Full Commission be reversed and set aside.

The plaintiff excepted to the judgment as entered and appealed to this Court.

W. W. Candler and Cecil C. Jackson for plaintiff, appellant.
Meekins, Packer & Roberts for defendants, appellees.

JOHNSON, J. Decision here turns on whether there is competent evidence to support the Industrial Commission's findings that the plaintiff has suffered temporary disability and partial loss of earning capacity as set out in findings of fact numbers 3 and 5.

Under the Workmen's Compensation Act the Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, except with respect to jurisdictional findings (*Aycock v. Cooper,* 202 N.C. 500, 163 S.E. 569), are conclusive on appeal, both to the Superior Court and in the Supreme Court, when supported by any competent evidence. G.S. 97-86. *Thomason v. Red Bird Cab Co.,* 235 N.C. 602, 70 S.E. 2d 706.

Findings not supported by competent evidence are not conclusive and will be set aside on appeal. *Logan v. Johnson,* 218 N.C. 200, 10 S.E. 2d 653. The rule is that the evidence must be legally competent; and a finding based on incompetent evidence is not conclusive. *Plyler*

v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622. However, where an essential fact found by the Industrial Commission is supported by competent evidence, the finding is conclusive on appeal, even though some incompetent evidence was also admitted at the hearing. *Carlton v. Bernhardt-Seagle Co.,* 210 N.C. 655, 188 S.E. 77.

The defendants in their brief concede that the direct testimony of Dr. Chapman, "standing alone, if competent, would support an award." However, the defendants contend that Dr. Chapman's opinions as to plaintiff's alleged disability should be disregarded and treated as incompetent evidence in view of the witness' admissions made on cross-examination to the effect that the testimony was based upon "subjective statements made by the claimant."

As to this contention, the rule is that ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made, as in the instant case, in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. "In such cases statements of an injured or diseased person, while not admissible as evidence of the facts stated, may be testified to by the physician to show the basis of his opinion." 20 Am. Jur., Evidence, Sec. 866, p. 729; Annotation: 65 A.L.R. 1217, p. 1223 *et seq.* See also: Annotations: 67 A.L.R. 10, 11, 18; 80 A.L.R. 1527; 130 A.L.R. 977; Wigmore on Evidence, Third Ed., Sections 688, 1718, and 1720; Rogers on Expert Testimony, Third Ed., Section 131, p. 301 *et seq.;* McCormick on Evidence (Hornbook), Sec. 266; *Bryant v. Construction Co.,* 197 N.C. 639, 150 S.E. 122, and cases there cited; *Martin v. P. H. Hanes Knitting Co.,* 189 N.C. 644, 127 S.E. 688.

It may be conceded that the probative force of Dr. Chapman's testimony in chief was materially weakened by the admissions made by him on cross-examination. Nevertheless, when considered in the light of the foregoing principles of law, the opinions given by him were admissible. His testimony and that of the plaintiff contains ample competent evidence to support the crucial findings of fact made by the Industrial Commission. The court below erred in sustaining the defendants' exceptions to findings of fact numbers 3 and 5.

The defendants make the further contention that the judgment below reversing the award of the Industrial Commission should be upheld on another ground, namely, that the award is not supported by a finding that plaintiff's condition underwent a change within the meaning of G.S. 97-47. The defendants point to the failure of the Commission to find that the plaintiff's condition changed for the worse after he returned to work on 1 March, 1954, and assert that the award should stand reversed because of this omission. The contention is not sup-

ported by the record. The statute, G.S. 97-47, on which the defendants rely provides for "review of any award" on the ground of a changed condition. Therefore the statute has no application except where it is made to appear that a previous award has been made by the Industrial Commission.

In the instant case, the record before the Superior Court discloses no previous award of the Industrial Commission, but rather that the plaintiff's claim was determined by the hearing Commissioner on the theory that the claim was one for an award of first impression. At the hearing it was stipulated by the defendants that they paid plaintiff for total disability from the time of the injury until he returned to work 1 March, 1954. With the facts in respect to previous payment of compensation so disposed of by stipulation, the hearing Commissioner closed the hearing by dictating into the record the gist of the stipulation of the parties, to the effect that after the plaintiff's injury the defendants "admitted liability and paid claimant for temporary total disability from 27 January 1954 to 1 March 1954." And in making up his findings of fact, the hearing Commissioner made no reference to the previous payment of compensation, nor to whether there was a previous award or whether there was a change of condition after the plaintiff returned to work. The crucial finding of the hearing Commissioner on which the award was made is that as a result of the accident the plaintiff has been temporarily partially disabled since 4 June, 1954 and only able to earn an average weekly wage of $15.00.

On appeal to the Full Commission the defendants by exceptions numbers 5, 6, and 7 challenged the findings and award (1) for failure of the plaintiff to prove a change of condition for the worse after returning to work, and (2) for want of a finding by the hearing Commissioner of any such changed condition. These exceptions, and also all others made by the defendants, were overruled by the Full Commission, and the findings, conclusions and award of the hearing Commissioner were affirmed. All exceptions relating to failure of the Commission to find a changed condition were abandoned and not carried forward on the defendants' appeal to the Superior Court. Moreover, the record on appeal to the Superior Court nowhere discloses any previous award made by the Industrial Commission. Thus the question whether the plaintiff's condition had undergone a change within the purview of G.S. 97-47 was not presented for review before the Superior Court. The defendants' appeal was heard and determined in the Superior Court, as before the hearing Commissioner, upon the theory that the challenged award was one of first impression.

The record as certified to this Court by the Superior Court includes documents which disclose for the first time that an order in the nature of an award may have been made by the Industrial Commission ap-

proving a settlement between the plaintiff and the defendants. The first of these documents is an uncaptioned order or award of the Commission. It recites the filing by the "above parties" (but nowhere are the names of the parties shown) of an agreement for compensation for disability on I. C. Form No. 21 (26) for approval. The order recites approval of the agreement as "a formal award of the Industrial Commission." However, the agreement is not attached and none of its terms are disclosed, except a recital that claimant is "due compensation at the rate of $22.48 per week, payable weekly, beginning February 4, 1954." The other document added to the record on appeal to this Court is a "closing receipt" signed by the plaintiff Penland on 3 May, 1954. It acknowledges receipt of compensation payments totalling $102.76 as compensation for injuries sustained on 27 January, 1954, and recites that payments stop upon execution of the receipt, but that if claimant's condition changes for the worse, further compensation may be claimed by notifying the Industrial Commission within one year from 3 May, 1954. This receipt purports to have been filed with the Industrial Commission 14 May, 1954, but no formal approval by the Commission is shown.

Even if the foregoing documents had been included in the record before the Superior Court, it may be doubted, because of their fragmentary character and incompleteness, that they are sufficient to have presented for review the question of changed condition within the meaning of G.S. 97-47. Especially is this so in view of the defendants' failure to carry forward to the Superior Court their exceptions directed to the question of changed condition. But conceding *arguendo* the sufficiency of the documents, this procedural question arises: May the defendants claim the benefit of matters in the record on appeal to this Court which were not in the record on appeal to the Superior Court, and on the basis of such matters reassert in this Court a defense which on exceptions duly noted was first asserted before the Full Commission but thereafter abandoned and not carried forward on appeal to the Superior Court? A negative answer would seem to be required under application of these established principles of procedural law:

When an appeal is taken from the Industrial Commission, the statute, G.S. 97-86, requires that a certified transcript of the record before the Commission be filed in the Superior Court. *Anderson v. Heating Co.*, 238 N.C. 138, 76 S.E. 2d 458. When the appeal comes on for hearing, it is heard by the presiding judge who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by exceptions duly entered. Necessarily, the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented. *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467.

On appeal from a judgment of the Superior Court affirming or reversing an award of the Industrial Commission, the Supreme Court acts upon the record that was before the Superior Court, and upon that alone, and if the record was defective, it should have been amended in the Superior Court. The Supreme Court can judicially know only what appears in the record which was before the Superior Court. See *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410; *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759; *Utilities Commission v. Ray*, 236 N.C. 692, 73 S.E. 2d 870. Accordingly, matters which were not in the record before the Superior Court, but which are sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the Superior Court, and may not be made so by certificate of the court below.

Moreover, the general rule obtains with us that an appellate court will consider only such questions as were raised in the lower court. *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488. And the rule requiring adherence to the theory pursued below operates ordinarily to preclude the consideration, on appeal to the Supreme Court, of grounds of defense or opposition not asserted or relied on in the lower court. *Collier v. Mills*, 245 N.C. 200, 95 S.E. 2d 529; *Paul v. Neece*, 244 N.C. 565, 94 S.E. 2d 596; *Lyda v. Marion*, 239 N.C. 265, 79 S.E. 2d 726; *Leggett v. College*, 234 N.C. 595, 68 S.E. 2d 263.

It thus appears that the record here does not present for decision the question whether the award made by the Industrial Commission should stand reversed for want of a finding that the plaintiff's condition underwent a change within the meaning of G.S. 97-47. Even so, it may be doubted that the plaintiff's claim is subject to overthrow by application of this statute on a merit basis. See *Smith v. Red Cross*, 245 N.C. 116, at p. 122, 95 S.E. 2d 559, at p. 563.

The judgment of the Superior Court setting aside the award of the Industrial Commission is

Reversed.

A. M. THOMPSON v. L. L. LASSITER.

(Filed 10 April, 1957.)

1. Automobiles § 55—

Liability of the father for the negligence of the son in operating a family purpose car is predicated upon the doctrine of *respondeat superior*.

2. Judgments § 32—

While the plea of *res judicata* ordinarily requires an identity of parties, a person not a party to the prior action may be bound by the judgment rendered therein if he had a proprietary or financial interest in the judgment or in the determination of the issues involved therein, and either individually or in cooperation with others controlled the presentation or prosecution of his side of the case.

3. Same: Automobiles § 48—Father contingently liable under family car doctrine who defends as guardian ad litem suit against minor son held estopped by judgment therein.

In a suit by a passenger in a car against the driver thereof, the drivers of the two other cars involved in the collision were made parties on the original defendant's cross-complaint. The father of the minor driver was appointed guardian *ad litem* and defended the action, and judgment was rendered in favor of the passenger upon adjudication that the negligence of all three drivers concurred in proximately causing the injuries. The father of the minor driver thereafter instituted this suit against the driver of one of the cars to recover damages to his automobile, medical expenses and loss of earnings and services of his minor son. *Held:* The second action was properly dismissed upon the plea of *res judicata*, since the father, in defending the cross-action in the prior suit, exercised complete control of his son's defense, and in doing so was defending the cross-action as much for his own protection as for that of his son, in view of the fact that the father would be liable to the plaintiff in that action under the family purpose doctrine and could have been sued if the judgment against the son had not been satisfied.

APPEAL by plaintiff from *Sharp, Special Judge,* January Extra Civil Term 1957 of MECKLENBURG.

This is a civil action instituted by the plaintiff against the defendant to recover damages suffered by him in a collision between an automobile driven by the defendant and a family purpose automobile owned by the plaintiff and being driven by the plaintiff's minor son, Haskelle M. Thompson.

The plaintiff seeks a judgment: (1) in the amount of $2,000 for damage to his automobile, and (2) in the amount of $5,000 for medical expense and loss of earnings and services of his minor son.

On 26 January 1955, a few days prior to the time this action was instituted (on 3 February 1955), one Isaac Crawford instituted an action also against the defendant in this action in which he alleged that he was a passenger in a third automobile, being operated by one Nathaniel Harris, which collided with the defendant's automobile immediately following the collision between the defendant's automobile and plaintiff's automobile. In that action, the defendant Lassiter set up a cross-action against both Nathaniel Harris, the driver of the third automobile, and Haskelle M. Thompson, plaintiff's minor son who was the driver of plaintiff's automobile, alleging that, if he, Lassiter, was

negligent, then Nathaniel Harris and Haskelle M. Thompson were jointly and concurrently negligent with him and that such joint and concurring negligence, with the negligence of the defendant Lassiter, was also a proximate cause of such collision and damage as the plaintiff (Isaac Crawford) may have sustained. Nathaniel Harris and Haskelle M. Thompson were made parties defendant in order that the defendant Lassiter might litigate his right to contribution under the provisions of G.S. 1-240, in the event the plaintiff recovered a judgment against the defendant Lassiter.

The plaintiff in this action was appointed guardian *ad litem* for his son in the other action and filed an answer for and on behalf of Haskelle M. Thompson, alleging that the collision was caused solely by the negligence of the defendant Lassiter. The case was tried before a jury in August 1956 in the Superior Court of Mecklenburg County and the jury found the defendant Lassiter guilty of negligence and that the negligence of the defendants Haskelle M. Thompson and Nathaniel Harris concurred with the negligence of Lassiter in causing the plaintiff's injuries, and awarded the guest passenger Crawford the sum of $4,000.

A judgment was entered in accordance with the jury's verdict and in the present action the defendant Lassiter was permitted to amend his answer to allege the judgment in the Crawford case as a plea in bar or *res judicata* with respect to the present action.

Upon the foregoing facts the court held "the judgment entered in the civil action commenced by Isaac Crawford *v.* L. L. Lassiter, in which Haskelle M. Thompson was interpleaded for contribution and which cross-action was defended for the said Haskelle M. Thompson by A. M. Thompson, constitutes a bar to the maintenance of this proceeding by A. M. Thompson."

Plaintiff appeals, assigning error.

Craighill, Rendleman & Kennedy for appellant.
Carpenter & Webb for appellee.

DENNY, J. The sole question presented for determination on this appeal is this: Does the fact that a father acted as guardian *ad litem* for his minor son in defending a cross-action against the son (who was driving a family purpose automobile owned by the father), in an action in which a passenger in a third automobile was the plaintiff, and the defendant in this action was also the original defendant in the former action, make the decision on the cross-action in the former litigation binding on the father in an action to recover in his individual capacity for medical expenses and loss of earnings and services of the son and damage to his automobile?

The appellant is relying upon the decision in *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321, and similar cases, to obtain a reversal of the ruling below. The *Rabil case* and the decisions cited in support thereof dealt only with actions brought by a guardian or next friend for and on behalf of the infant, and held in such cases that the guardian or next friend was not a party to the action but that the infant was the real plaintiff. Therefore, when the father acted as guardian or next friend under those circumstances, the cases have held that he was not estopped from bringing an action to recover damages for expenses incurred and loss of services due to injuries to his minor child. It does not appear in the *Rabil case* or any of the other cases cited therein, that the father, acting as guardian or next friend of his infant child, was called upon to defend a cross-action against such child, or what effect an adverse verdict against the minor in such a cross-action would have had upon the question of *res judicata* with respect to the father's right to bring a separate suit for loss of services or medical expenses.

In this connection, however, we call attention to what was said in the case of *Johnston County v. Ellis,* 226 N.C. 268, 38 S.E. 2d 31, with respect to the comparable duties of a next friend and a guardian *ad litem.* The action was brought by the plaintiff to foreclose a tax lien, and without amending the pleadings or obtaining the consent of the court, a new and independent matter was brought in by an intervener and litigated. A next friend for certain minors in the tax case, either by express consent or consent implied through some failure on his part to act, permitted a judgment to be entered against said minors with respect to the independent cause of action. This Court said: "The Court is of the opinion that Ellis as next friend could give no consent, and that no implication arises of a consent which he was not capable of giving. Even if his powers and duties as next friend had been comparable to those of a guardian *ad litem*—which they were not—he would have had no power to consent to a judgment of this kind without special authority of the court; *Butler v. Winston,* 223 N.C. 421, 425, 27 S.E. 2d 124; and the judgment would have been invalid without it; but his office as next friend of his minor suitors did not extend to their general defense. . . . We think it essential to orderly procedure, and to the better protection of the rights of infants and other *non sui juris,* to adhere to the distinctions between next friends and guardians *ad litem* or general guardians traditional in our practice and formally recognized and implied in our statutes: G.S. 1-64; G.S. 1-65 to 1-67; McIntosh, Civil Procedure, pp. 237, 238, Secs. 253, 254. These distinctions stem mainly from the circumstance that a next friend is appointed to bring or prosecute some proceeding in which the infant suitor is plaintiff, or at least where some right is positively asserted; while a

guardian *ad litem* is appointed to defend. In legal effect, the distinctions are substantial and not merely formal."

We have held in several cases that the father of an injured minor may waive his right to recover for expenses incurred, in treating such child for his injuries, loss of time and diminished earning capacity during minority and permit the child to recover the full amount to which both would be entitled. Consequently, when a father institutes an action as next friend or guardian in behalf of his minor child and casts his pleadings and conducts the trial on the theory of the child's right to recover for medical expenses, loss of services or diminished earning capacity during minority as well as thereafter, he will be estopped from asserting a claim thereafter for such loss. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Shields v. McKay*, 241 N.C. 37, 84 S.E. 2d 286.

However, if a parent brings an action as next friend or guardian in behalf of a minor child and pleads as elements of damage the loss of earnings during minority, and expenditures for treatment of injuries sustained, the defendant may have such allegations stricken from the complaint for misjoinder of causes of action if the objection to the misjoinder is made in apt time. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925.

It must be conceded that the relationship between the present plaintiff and the son, Haskelle M. Thompson, in the former action was not one of privity, but was that of principal and agent or master and servant. Ordinarily, where the principal or master is not a party to the suit against his agent or servant, and the principal or master does not participate in the defense of the action, he will not be estopped by the judgment. *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688. However, where the doctrine of *respondeat superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the agent or servant and such judgment is not satisfied, the injured party may bring an action against the principal or master. In such case, however, the recovery against the principal or master may not exceed the amount of the recovery against the agent or servant. *MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 93 S.E. 2d 557; *Bullock v. Crouch*, 243 N.C. 40, 89 S.E. 2d 749; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164. On the other hand, if the agent or servant satisfies the judgment against him or obtains a verdict in his favor, no action will lie against the principal or master. *Pinnix v. Griffin, supra; Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570; *Whitehurst v. Elks*, 212 N.C. 97, 192 S.E. 850. See also 50 C.J.S., Judgments, section 757, page 279, where the authorities are assembled.

In the case before us, we are not dealing with the ordinary relationship of parent and child on the question presented. A father's liability,

if any, under the family purpose doctrine, arises under the doctrine of *respondeat superior. Queen City Coach Co. v. Burrell, supra; Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503; *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603; *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742; *Clark v. Sweaney,* 176 N.C. 529, 97 S.E. 474; *Brittingham v. Stadiem,* 151 N.C. 299, 66 S.E. 128.

Ordinarily, the plea of *res judicata* may be sustained only when there is an identity of parties, of subject matter, and of issues. *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125. Even so, there is a well established exception to this general rule. This Court, in the case of *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167, speaking through *Devin, C. J.,* said: "The principle invoked is stated in Restatement of Judgments, sec. 84, as follows: 'A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions;* if the other party has notice of his participation, the other party is equally bound.'

"The rule is stated in 50 C.J.S. 318, as follows: 'A person who is neither a party nor privy to an action may be concluded by the judgment therein if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action. A person who is not made a defendant of record and is not in privity with a party to the action may, as a general rule, subject himself to be concluded by the result of the litigation if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action, although there is some authority to the contrary.' See also Freeman on Judgments, sec. 432; 30 A.J. 960." (Emphasis added.)

Likewise, with respect to the rule ordinarily requiring identity of parties, it is stated in 30 Am. Jur., Judgments, section 224, page 957, "These rules have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity, is in each case asserting or protecting his individual rights." See also 30 Am. Jur., Judgments, section 248, page 977, and Anno.—Res Judicata—Participation in Suit, 139 A.L.R. 12, where the annotator cites hundreds of decisions from thirty-four State jurisdictions, Federal courts, and the District of Columbia, in support of the above view.

Certainly the plaintiff herein as guardian *ad litem* for his minor son in defending the cross-action in the case of *Crawford v. Lassiter* took every action he could have taken if he had been a defendant himself.

Furthermore, in his capacity as guardian *ad litem* for his son, in defending the cross-action he exercised complete control of his son's defense including the right of appeal. In doing so, he necessarily was defending the cross-action as much for his own protection as for that of his son. The mere fact that he was his son's guardian *ad litem* did not remove the factual existence of the relationship of principal and agent that existed between the father and the son with respect to the very matter in litigation. *Campbell v. Casualty Co.*, 212 N.C. 65, 192 S.E. 906; *Ocean Accident and Guarantee Corp. v. Felgemaker* (C.C.A. 6th Cir.), 143 F. 2d 950.

The facts in the case of *Queen City Coach Co. v. Burrell, supra,* are clearly distinguishable from the facts presented on this record. *Parker, J.*, in speaking for the Court in the *Burrell case,* said: "There is no allegation in the plea in bar that plaintiff here had anything to do with Canipe's case in Burke County, nor any evidence to that effect. . . . The present plaintiff was not a party to Canipe's action in Burke County. It had no control over the conduct of Canipe's trial; it could not cross-examine opposing witnesses, or offer witnesses of its own choice." However, all these rights and privileges were not only available to but exercised by the plaintiff herein as guardian *ad litem* of his minor son in the defense of the cross-action against his son in the previous litigation.

For the reasons stated, the judgment of the court below will be upheld.

Affirmed.

A. W. BUMGARNER v. DR. W. M. CORPENING AND WIFE, AVIS CORPENING.

(Filed 10 April, 1957.)

1. Boundaries § 6—

Title or ownership is not directly in issue in a processioning proceeding, and the proper issue to be submitted to the jury is as to the true location of the dividing line between the lands of the respective parties.

2. Same—

Where, in a proceeding to establish the boundary between adjoining landowners, respondents file answer denying location of the boundary as contended by petitioner and also allege ownership of the disputed area by specific description in the answer, the proceeding in effect becomes an action to quiet title, G.S. 41-10, and on appeal to the Superior Court issue involving ownership is properly submitted to the jury.

3. Boundaries § 3b—

Where the owner of a tract of land divides it by deeds, each calling for a road as the boundary between the tracts, the road is the true dividing

line, and conflicting evidence of the respective parties as to the location of the road at that time is properly submitted to the jury.

4. Adverse Possession § 15—

Where the parties claim under deeds from a common source calling for a road as the dividing line between the tracts, but subsequent deeds in the chain of title of respondents describe the land by specific description without reference to the road, respondents are entitled to claim the land encompassed in the description in the intermediate deeds as under color of title, and when they offer evidence of adverse possession under their deeds, an instruction limiting their claim to the road as it existed at the time of the execution of the deeds from the common source, is error.

5. Adverse Possession § 16—

Where the description in the deed from the common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land.

6. Adverse Possession § 23—

Conflicting evidence as to the character or extent of the possession under color of title raises the issue for the determination of the jury.

APPEAL by defendants from *Pless, J.*, January 1957 Term, CALDWELL.

On 6 June 1955 A. W. Bumgarner instituted a special proceeding in the Superior Court of Caldwell County against W. M. Corpening. His petition, filed when the summons issued, alleged that petitioner was the owner of a tract therein specifically described, that the defendant was the owner of an adjoining tract, that the location of the boundary between the two tracts was in dispute. The petition asserts the true location of the disputed boundary is: "Thence with the center of the old Lovelady Road, North 61 deg. 30' East 14 poles, North 41 deg. East 8 poles, North 24 deg. 30' East 16 poles, North 38 deg. East 20 poles, North 58 deg. 30' East 30 poles to a maple tree on the south bank of Gunpowder Creek." The boundary asserted by petitioner is his northern boundary. He prays that the line between plaintiff and defendant be established in accordance with his contention.

Defendant W. M. Corpening answered. He admitted that he and petitioner were adjoining property owners, that the boundary between their property was in dispute. He denied that the line separating their properties was as alleged by petitioner. He alleged he was the owner of a tract of land specifically described in his answer and averred that the true boundary between his land and the land of the petitioner ran: "Thence South 40 deg. West 76 poles to a stake, formerly a pine; thence South 58½ deg. West 15 poles to a post oak." He alleged: "the line

as claimed by the petitioner is not the correct line, but the line as set out by the defendant is the correct line, and this defendant requests that the line be established . . ."

Pursuant to an order of the clerk, a survey was made and a map filed showing the contentions of the parties. The line claimed by petitioner begins at a pine indicated by the figure 1 and the letter A on the old Lovelady Road and runs with the old Lovelady Road as located by petitioner to figure 5, a point on Gunpowder Creek, a short distance north of the point where Lovelady Road crosses the creek. The location of the line claimed by petitioner is indicated on the map by the figures 1, 2, 3, 4, 5.

Defendant asserts his southern boundary is depicted on the map as beginning at letter B, a large maple on Gunpowder Creek. This point is south of figure 5 and north of the point where the old Lovelady Road crosses Gunpowder Creek. The line claimed by defendant runs from this point south 47 west to a pine on the Lovelady Road indicated by the letter A and the figure 1.

The clerk held a hearing and fixed the location of the line dividing the properties of petitioner and defendant. From this judgment an appeal was taken to the Superior Court in term.

During the course of the trial Avis Corpening, wife of W. M. Corpening, voluntarily made herself a party defendant and the pleadings were amended accordingly.

The court submitted, as determinative of the controversy, issues which were answered as follows:

"1. Is the petitioner A. W. Bumgarner the owner of the disputed lands lying generally to the North of the lines marked A to B on the Court Map?

"Answer: YES.

"2. Are the respondents Dr. W. M. Corpening and wife the owners of the said lands?

"Answer: No."

Judgment was thereupon entered adjudging petitioner the owner of the area in controversy, describing it by metes and bounds. Defendants appealed.

W. H. Strickland for plaintiff appellee.

L. M. Abernethy and Hal B. Adams for defendant appellants.

RODMAN, J. The court charged the jury: "Ordinarily, gentlemen, we have somebody that has an older title and somebody that has been in possession of the land in dispute. In this case, gentlemen, they both go back to a common source of title. They both claim from one of the great-grandfathers, Bumgarner, so neither has an older title than the

other, and neither has exercised any possession of it up until the last three or four years and it takes at least seven years to acquire title by possession . . ."

Defendants excepted to the quoted portion of the charge, insisting that the court had misconstrued the nature of the controversy and failed to give effect to evidence in support of the title asserted by defendants. The exception is appropriately taken. The issues and judgment establish that title was put in issue. The charge proceeds upon the assumption that only a question of boundary is involved.

In processioning proceedings the proper issue is: "Where is the true location of the dividing line between the lands of the plaintiff and those of the defendants?" *Welborn v. Lumber Co.*, 238 N.C. 238, 77 S.E. 2d 612; *Goodwin v. Greene*, 237 N.C. 244, 74 S.E. 2d 630; *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633; *McCanless v. Ballard*, 222 N.C. 701, 24 S.E. 2d 525.

Title or ownership is not directly put in issue in a processioning proceeding. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E. 2d 472; *Brown v. Hodges*, 230 N.C. 746, 55 S.E. 2d 498; *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E. 2d 468; *Geddie v. Williams*, 189 N.C. 333, 127 S.E. 423; *Nash v. Shute*, 182 N.C. 528, 109 S.E. 353; *Parker v. Parker*, 176 N.C. 198, 97 S.E. 223; *Cole v. Seawell*, 152 N.C. 349, 67 S.E. 753.

Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet title as provided by G.S. 41-10. *Simmons v. Lee*, 230 N.C. 216, 53 S.E. 2d 79; *Roberts v. Sawyer, supra; Clark v. Dill*, 208 N.C. 421, 181 S.E. 281. When the question of title is raised, the clerk should transfer the proceeding to the Superior Court in term. G.S. 1-399.

The issue involving ownership was properly submitted to the jury. This is so because defendant, by his answer, asserts ownership of a specific tract of land which includes the area in dispute. Boundary was also at issue.

The evidence discloses that the land to which petitioner asserts title was originally owned by Thomas Bumgarner. The land to which defendants assert title was likewise originally owned by Thomas Bumgarner. In August 1889 Thomas Bumgarner made a deed to T. C. Bumgarner and wife, Polly, for lot number 6, describing it by metes and bounds. The pertinent part of the description in that deed reads:

". . . to a whiteoak by the *sid* of Lovelady N. then E 39 north with the road 26 P. to *posteoak* corner of Lot No. 1 and 2 same course 14 P. to pine then *North 56 E with the road 70 P to a maple near the ford of Big Gunpowder Creek* . . ."

The pine referred to is indicated on the court map by the figure 1 and the letter A. Its location is not in controversy. Defendants, as hereafter noted, connect their claim of ownership with the foregoing deed, but it is not their only source of title to the disputed area.

Petitioner traces his title to a deed from Thomas Bumgarner to M. L. D. Bumgarner dated August 1889. The pertinent portion of the description in that deed is: ". . . North 60 E. with the Road 14 poles to a pine then North 86 E. with R. 70 poles to maple near Big Gunpowder ford . . ."

As between the grantees of Thomas Bumgarner, the Lovelady Road was the true dividing line. *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765; *Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235; *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918; *Gray v. Coleman,* 171 N.C. 344, 88 S.E. 489. Petitioner offered evidence to support his contention that the Lovelady Road in 1889 was not a straight line but conformed with the location shown on the map by the figures 1, 2, 3, 4, and 5. Defendants offered evidence to support their contention that the correct location of the Lovelady Road in 1889 was a straight line from the pine, letter A, to letter B on Gunpowder Creek.

If defendants' contention as to the location of the road was correct, he had the superior title to the disputed area as all of the deeds under which petitioner asserted title fixed the road, as his northern boundary and he asserted no other source of title. It was proper for the court to submit this aspect of the case to the jury. He did so in this language: "Now, gentlemen of the jury, this case relates to where the lines of Lot #6 of the old Bumgarner lands is; that is the question that you have to decide, that is the line in question, the one between Mr. Bumgarner and Dr. Corpening."

Defendants excepted to this instruction. Their exception is well taken. As stated, the location of Lovelady Road was one phase of the case, but it was not necessarily conclusive, and the court should not have so limited it. Defendants do not limit their claim to the disputed area to the title derived from Thomas Bumgarner. They rely on the descriptions contained in the subsequent deeds and possession thereunder as an additional source of title.

In July 1938 Mrs. T. C. Bumgarner conveyed to Mrs. Coyt Wallace the lands claimed by the defendants. The pertinent calls in that deed are: ". . . then down said creek South 3 deg. West 46 poles *to a large maple at the West bank of creek; thence South 40 deg. West 76 poles to a stake formerly a pine* . . ." This description is used in the deed from Mrs. Coyt Wallace to T. A. Bean dated in 1943 and in the deed from Martin, commissioner, to defendants dated 20 June 1947. The absence of the reference to the road in these deeds leaves nothing to control course and distance. Hence, if the Lovelady Road was located

in 1889 as petitioner contends, defendants had good title south as far as the road (the boundary fixed by Thomas Bumgarner, the common source), and color of title from 5 July 1938 (the date of the deed from Mrs. Bumgarner to Mrs. Wallace) to that area lying between the road and the southern line called for in the deed. *Trust Co. v. Miller, supra; Whiteheart v. Grubbs,* 232 N.C. 236, 60 S.E. 2d 101; *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117; *Ingram v. Colson,* 14 N.C. 520.

Defendants, having color of title, could acquire good title by seven years' continuous adverse possession under their color, but such possession, in order to perfect title, must be an actual possession of the disputed area. *Whiteheart v. Grubbs, supra; Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3; *Boomer v. Gibbs,* 114 N.C. 76. Actual possession of the land acquired from the common source would not be constructively extended so as to constitute possession of the land to which defendants only had color of title.

E. M. Bean, a witness for defendants, testified: "This land that is in controversy here has been in our possession for years, I mean the T. C. Bumgarner heirs. It was his before he died, and it was in Aunt Polly's possession before she died. After she died it went to Coyt Wallace. She had it divided up herself, and it has been in the possession of T. C. Bumgarner and Mrs. T. C. Bumgarner and Mrs. Wallace, and T. A. Bean and on down to Dr. Corpening."

Thus there was evidence that the defendants' ancestors in title had had possession *of the land in controversy* under color for more than seven years.

Defendant W. M. Corpening testified that he had had possession of the land "as surveyed" since the date of his deed in 1947. The action was instituted 7 June 1955. True, the defendant, on cross-examination, testified that he had only had the area in controversy under fence some two or three years before the institution of the action, but the conflict in the testimony, if there was conflict, as to the character or extent of the possession was a question for the jury.

Defendants were at liberty to establish their title to the land in controversy without having to plead the source or manner in which they acquired title. *Jones v. Percy,* 237 N.C. 239, 74 S.E. 2d 700; *Richards v. Smith,* 98 N.C. 509.

On the record presented, defendants were entitled to have the jury determine not only the location of the Lovelady Road with the burden on the petitioner, but the possession of the area in controversy under color for the statutory period with the burden of establishing that fact on defendants.

New trial.

W. S. EDWARDS v. G. C. HUNTER AND WIFE, LINA HUNTER.

(Filed 10 April, 1957.)

1. Highways § 11—

The procedure for the establishment of a neighborhood public road, as well as the procedure to establish discontinuance thereof, is by special proceeding before the clerk, and although an interlocutory injunction in connection with the proceeding under the statute may be issued only by the judge, the Superior Court does not have original jurisdiction of the proceeding. G.S. 136-67, G.S. 136-68.

2. Same—

This action was instituted to restrain defendants from blocking an alleged neighborhood road, constituting a segment of an old abandoned highway, situate on defendants' land and sought to be used by plaintiff, owner of adjoining land. The complaint did not allege that the road was a neighborhood public road or any basis for the establishment of a neighborhood public road, but did allege facts upon which the action could be maintained to establish an easement appurtenant. *Held:* Demurrer to the jurisdiction on the ground that the proceeding was in the original jurisdiction of the clerk, was properly overruled.

3. Appeal and Error § 50—

While the findings of fact, as well as the conclusions of law, are reviewable on appeal from the granting of an interlocutory injunction, it will be presumed that the findings of fact made by the hearing judge are correct, and the burden is on the appellant to assign and show error.

4. Injunctions § 8—

A temporary order issued in the cause should be continued to the hearing upon plaintiff's showing of a *prima facie* right to the primary equity when the relief sought will be irrevocably lost if the *status quo* is not preserved to the hearing.

5. Same—

Plaintiff sought a permanent injunction to restrain defendants from blocking a private roadway on their lands. The findings established that the use of the road by plaintiff was not necessary for ingress and egress to his land, but was a matter of mere convenience, based upon the right to an easement appurtenant. *Held:* The continuance of a temporary restraining order to the hearing involved only the relative conveniences and inconveniences to the respective parties, and the dissolution of the temporary order rested largely in the discretion of the hearing judge and will not be disturbed on appeal.

6. Same—

The findings of the court, upon the hearing of a motion to show cause why a temporary restraining order should not be continued to the hearing, are not determinative or relevant when the issues are determined at the trial.

EDWARDS *v.* HUNTER.

APPEAL by plaintiff from order of *Huskins, Resident Judge,* entered 9 February, 1957, in Chambers, from YANCEY.

A permanent injunction, restraining defendants from blocking an alleged neighborhood road and from otherwise interfering with the travel of plaintiff, his agents and employees, thereon, is the sole relief demanded by plaintiff.

Admittedly, defendants have blocked plaintiff's access to their land, defendants averring that since about 1920 the alleged road has been nonexistent and that defendants have had adverse and exclusive possession of their land.

The hearing was on affidavits, including the verified pleadings, to determine whether an *ex parte* temporary restraining order should be continued in effect until the trial. At the conclusion of the hearing, the court vacated the temporary restraining order. His order to this effect was based on the findings of fact set out below.

"FINDINGS OF FACT"

"1. That upon the call of the case for hearing, defendants challenged the jurisdiction of the Court for that plaintiff's remedy, if he has one, is by special proceeding before the Clerk.

"2. That plaintiff owns and has owned since 1907 a 210-acre tract of land with 110 acres thereof east of Cane River; that his residence and the remainder of the tract are west of the river; that there is no bridge across the river connecting the two portions of plaintiff's farm, but for many years plaintiff has forded the river at a point near his barn except during high water; that the land east of the river is used for extensive farming and for raising sheep and cattle.

"3. That defendants own a 108-acre tract of land located in its entirety on the east side of Cane River and bounded on the north by that portion of plaintiff's land which is on the east side of the river.

"4. That prior to the year 1920 a public road led from Tennessee, passed plaintiff's residence, turned a southeasterly direction, crossed Cane River by a ford (hereafter called 'northern ford'), continued southerly up the river through plaintiff's land and on through the land now owned by defendants, crossed the river again by ford (hereafter called 'southern ford') and joined what is now U. S. Highway 19E.

"5. That about 1920 the aforesaid public road was relocated to what is now U. S. Highway 19W, running entirely on the west side of Cane River from plaintiff's residence to the point where it connects with U. S. Highway 19E.

"6. That from 1920 to 1941, plaintiff reached his lands east of Cane River by fording the river at the northern ford near his barn and proceeding along said old roadbed on his own land; that shortly after 1920 a wire fence was built across the old road on the boundary line between plaintiff's land and the lands now owned by defendants; that since 1920 the public has not used that portion of said old road which is located on plaintiff's land east of the river and has not used that portion of said old road which formerly led from plaintiff's southern boundary line (where the wire fence is located) through defendants' land, but said segment of the old road grew up in shrubs and undergrowth which was eventually cleaned off by the then owners and the old roadbed placed in grass or cultivation along with the rest of the field.

"7. That in 1941 the State Highway and Public Works Commission built a bridge across Cane River near the southern ford in connection with improvements to a road leading from said bridge and U. S. 19W into the King Community; that at about the same time said Commission improved, graveled and placed under maintenance a short segment of the old road in question which leads from the King Community Road (at or near the bridge herein referred to) to a dwelling house located on defendants' land several hundred yards from plaintiff's southern boundary line where the wire fence is located.

"8. That the portion of said old road from the point where it crosses Cane River at the northern ford (near plaintiff's residence and barn which are located on the west side of the river and on the present hard-surfaced U. S. 19W) and running east of the river through plaintiff's land to the wire fence between plaintiff and defendants, serves only the plaintiff in that it affords him ingress and egress to his land and to his barns located thereon east of the river; that same does not serve a public use nor as a means of ingress or egress for one or more families; that the portion of said old road that formerly existed through defendants' land (from the wire fence on the line to the King Community Road) has not been used as a road by anyone since about 1920, except as stated in paragraph 11.

"9. That from about 1920 to 1955 plaintiff used the northern portion of the old road located on his own lands for his private use but did not during that time use any portion of the old road that formerly existed through the lands of defendants; that since 1955 the plaintiff, with permission of defendants, has traveled at times through defendants' land on or near the old roadbed where the old road formerly existed—crossing the bridge built in 1941 at the southern ford and then going north from the King Community

Road through defendants' land to his own; that recently such permission was withdrawn and notices erected by defendants notifying plaintiff to keep off defendants' land, whereupon plaintiff asserted a right to travel over defendants' land and brought this action to restrain defendants from interfering with plaintiff's free passage over said alleged neighborhood public road.

"10. That there is not now and has not been since 1947 an occupied dwelling house on plaintiff's land east of Cane River.

"11. That that portion or segment of the old road which formerly existed east of Cane River between the northern ford and the King Community Road does not serve as a necessary means of ingress to and egress from an occupied dwelling house on plaintiff's land; that the southern end of it for a very short distance is now under maintenance and leads to a dwelling on defendants' land, and there is no dispute between the parties with respect to the use thereof by anyone desiring to go to and from said dwelling.

"12. That the segment of old road formerly existing over defendants' land which plaintiff now seeks to travel (a) has not been taken over and placed under maintenance, (b) has been abandoned by the State Highway and Public Works Commission, and (c) does not serve as a necessary means of ingress to and egress from any occupied dwelling house."

The court overruled defendants' plea to its jurisdiction; and, exercising jurisdiction, entered the said order. Plaintiff excepted and appealed. By appropriate exceptive assignments of error he challenges findings of fact 5, 6, 8, 9, 11 and 12, and also the entry of said order.

R. W. Wilson and Fouts & Watson for plaintiff, appellant.

C. P. Randolph, G. D. Bailey, and W. E. Anglin for defendants, appellees.

BOBBITT, J. The statutory procedure for the establishment of a neighborhood *public* road as defined by G.S. 136-67 is by special proceeding instituted before the clerk of the Superior Court in the county where the property affected is situate. G.S. 136-68. *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Grady v. Grady,* 209 N.C. 749, 184 S.E. 512. Too, this is the appropriate procedure to establish the "discontinuance" of a neighborhood public road. *In re Petition of Edwards,* 206 N.C. 549, 174 S.E. 505. When this procedure is applicable, the fact that an interlocutory injunction, affecting the status of the parties *pendente lite,* may be issued only by the judge, does not divest the original jurisdiction of the clerk in respect of the determination of the proceeding on its merits.

If it appeared from the complaint that the sole purpose of this action was to establish a neighborhood *public* road as defined by G.S. 136-67, defendants' motion to dismiss on the ground that the statutory procedure therefor vests original jurisdiction in the clerk would be well taken. However, the segment of old road in controversy is not referred to in the complaint or in plaintiff's affidavits as a neighborhood *public* road, but as a neighborhood road; nor does plaintiff refer to any of the provisions of G.S. Ch. 136, Art. 4.

As pointed out by *Barnhill, J.* (later *C. J.*), in *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371: "There is no legislative sanction, or provision for the establishment, of a neighborhood road, a term ordinarily used to designate a private way which serves a neighborhood as an outlet to a public road."

Moreover, the complaint fails to allege that the segment of old road now in controversy remained "open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families," or that it was "laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare" (*Raynor v. Ottoway,* 231 N.C. 99, 56 S.E. 2d 28), or that it served "a public use and as a means of ingress or egress for one or more families," or that it served "as a necessary means of ingress to and egress from an occupied dwelling." Indeed, since 1920 the public road, at the location of present U. S. Highway 19W, has passed or run through the portion of plaintiff's property on the west side of Cane River on which his residence is located. Hence, regardless of the label, the facts alleged by plaintiff do not bring the segment of old road now in controversy within the meaning of neighborhood *public* road as defined by G.S. 136-67. Compare *Clinard v. Lambeth, supra.*

Before passing from this phase of the case, it should be noticed that the first statute creating and defining neighborhood public roads, which, as amended, is now codified as G.S. 136-67, was enacted in 1933. Public Laws of 1933, Ch. 302. This 1933 statute referred to portions of the public road system of the State which had not been taken over and placed under maintenance or had been abandoned by the State Highway Commission but *were then open and in general use by the public.*

In this action, plaintiff's right to use the segment of old road now in controversy depends upon whether he has a private easement appurtenant to his lands. If plaintiff is to establish such private easement, it would seem that he must do so either by adverse user under claim of right for twenty years or more or as abutting owner on principles considered in *Davis v. Alexander,* 202 N.C. 130, 162 S.E. 372; *Long v. Melton,* 218 N.C. 94, 10 S.E. 2d 699; *Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133.

True, upon an appeal from an order granting or refusing an interlocutory injunction, the findings of fact as well as the conclusions of law are reviewable by this Court. *Deal v. Sanitary District,* 245 N.C. 74, 95 S.E. 2d 362; *Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899. But there is always the presumption that the findings of fact made by the hearing judge are correct and the burden is on the appellant to assign and show error. *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116; *Clinard v. Lambeth, supra.* After considering all the affidavits, including the verified pleadings, the findings of fact, which are supported by plenary evidence, are approved by this Court.

We need not decide whether plaintiff, upon construction in 1920 of the new public road on the west side of Cane River, had a private easement to use as theretofore the section of old road on the east side of Cane River between the "northern ford" and "southern ford." Assuming, for present purposes, that plaintiff had such private easement in 1920, the findings of fact establish defendants' plea in bar, namely, that from 1920 to 1955 plaintiff made no use of the segment on defendants' land, but that defendants have had adverse and exclusive possession thereof and that plaintiff's use of defendants' land since 1955, at or near the location of the old roadbed and elsewhere, was by permission of defendants. *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104; *Hunter v. West,* 172 N.C. 160, 90 S.E. 130.

While we refrain from discussing either the evidence or the findings of fact in detail, there is one feature to which we call attention. Until the bridge *near* the "southern ford" was built in 1941, the plaintiff, in order to reach his land on the east side of the river, had to cross at the "northern ford" or at the "southern ford." There is no evidence or contention that the "southern ford" provided a more satisfactory crossing. Hence, it would seem unlikely that plaintiff until 1941 or thereafter had any reason to proceed by the longer route to reach his land on the east side of the river. Uncontradicted evidence shows that the section of old road on the east side of the river extended from the "northern ford" across (1) the land of plaintiff, (2) the land now owned by defendants, (3) the land of Monroe King, (4) the Whittington farm, and crossed the "southern ford" at the Mary Byrd farm, thence to the Asheville-Burnsville Highway.

Plaintiff contends that he has offered evidence tending to show that after the new road was constructed in 1920 he continued to use the old road along the east bank of the river and evidence of other facts in conflict with the court's findings. Therefore, he contends, even though the court considered the evidence offered by defendants to be of greater weight, the conflict of evidence as to material facts should suffice to

entitle him to a continuance of the temporary restraining order to the final hearing.

The rules applicable upon a hearing to determine whether a temporary restraining order should be continued to the final hearing, stated in *Lance v. Cogdill, supra, Huskins v. Hospital, supra,* and *Clinard v. Lambeth, supra,* need not be repeated. In certain actions, such as an action to restrain the cutting of a shade tree, or an action to restrain the destruction or disposition of certain property, etc., if the temporary restraining order is vacated, irreparable injury results if the plaintiff's cause of action is sound; for no matter how good his proof at the final hearing, the plaintiff will not be able to obtain the relief sought and to which he was entitled.

Here, if, at the final hearing, plaintiff can establish his right to use the portion of the old road that crosses defendants' land he will obtain judgment to that effect. Under the circumstances, it could hardly be said that either plaintiff or defendants would be irreparably injured by the granting or refusal of the interlocutory injunction. Rather, the relative conveniences and inconveniences which the respective parties may suffer from the granting or refusing of the interlocutory injunction would seem determinative; and, when so based, the decision must rest largely in the discretion of the hearing judge. *Lance v. Cogdill, supra; Huskins v. Hospital, supra.*

If a conflict of evidence, standing alone, were determinative, the decision would turn solely on whether the action was *brought* by plaintiff to restrain the blocking of the road or by defendants to restrain plaintiff from trespassing on their lands. Such a consideration is insufficient to control the decision of a court of equity. We think the evidence and findings of fact fully warrant the order of the court below.

Of course, the findings of fact made by the court below are not determinative or relevant when the issues are determined at the trial. *Lance v. Cogdill, supra; Huskins v. Hospital, supra.*

In a case such as this, if plaintiff is entitled to the relief sought, it would seem that his better course would be to proceed to trial at first opportunity rather than by appeal from an order vacating the temporary restraining order.

Affirmed.

C. L. ANDERS AND VALERIE F. COOKSEY v. CARL R. ANDERSON, BARBARA ANDERSON, CHARLES ANDERSON, JACK ANDERSON, VIRGINIA STACKHOUSE, LUTHER B. ANDERSON, PAULINE ANDERSON, OAKLEY ANDERSON AND WYNONA ANDERSON, J. WORTH TAYLOR, CLIFFORD TAYLOR, J. P. TAYLOR, MILDRED T. FAIRCHILD, A. B. HOLLINGSWORTH, WIDOWER, MAX ANDERS, GERALD ANDERS, SARAH ANDERS, JAMES COOKSEY, JR., BETTY COOKSEY, WALTER COOKSEY, PATRICIA COOKSEY, BY HER GUARDIAN AD LITEM, JAMES O. ISRAEL, JR.

(Filed 10 April, 1957.)

1. Wills § 33a—

The rule that a devise in fee will not be defeated or limited by a subsequent portion of the will expressing a wish or desire for the disposition of the property after the death of the devisee, is applicable only when the devise is in fee, unconditionally, and the subsequent clause uses words which are merely precatory.

2. Same—Word "want" as used in devise in this case held imperative rather than precatory.

Where testatrix uses the word "want" in disposing of realty to her father, brother and sister, and the word "want" in regard to her husband having a home there as long as he wished to live with her people, and the word "want" in stating that after her father's, brother's, and sister's deaths, she wanted the property to go to her nieces and nephews, all in the same sentence, the word "want" must be given the same meaning each time used and is imperative rather than precatory. Therefore, the father, brother and sister take no more than a life estate, terminable upon the death of the last survivor of these three, subject to the exclusive right of the husband to occupy the house, at least during the continuance of the life estates.

3. Wills § 31—

If words are used in one part of the will in a certain sense, the same meaning must be given them in another part of the will, unless a contrary intent appears, certainly when an identical word is used repeatedly in a single sentence.

4. Same—

The use of a dispositive phrase does not preclude a testator from limiting it by subsequent language, since the whole of the pertinent provision must be construed from its four corners to ascertain the intent of testator, and when the dispositive phrase is linked with a subsequent provision by the conjunctive "and," the use of the word "and" in itself shows that something is to follow in relation, addition to, or in connection with, the original disposition.

5. Same—

When it is obvious that testatrix was not attempting to use words in their technical sense, they must be given their natural, ordinary and popular meaning.

6. Appeal and Error § 1—

Ordinarily, the Supreme Court will not consider questions not passed upon in the court below.

APPEAL by plaintiffs from *Clarkson, J.,* Regular October Term, 1956, of BUNCOMBE.

Plaintiffs' appeal is from a judgment construing the duly probated *holographic* will of Mrs. Virginia Taylor Hollingsworth.

Mrs. Hollingsworth died 13 May, 1954. A sister, Lottie Anders Anderson, had predeceased her. She was survived by a brother, plaintiff C. L. Anders; a sister, plaintiff Valeria F. Cooksey; her father, A. B. Anders; her husband, A. B. Hollingsworth; and by sixteen nieces and nephews, the children of her said brother and sisters.

The will discloses that the testatrix executed her will 7 July, 1953, when 51 years of age. She did not appoint an executor. On 24 May, 1954, her husband qualified as administrator *c. t. a.*

The controversy relates solely to real property, to wit, a 12-acre tract, on which two houses are located, referred to in this portion of the will, viz.:

"2. I want my property to go to my father, brother, and sister, and I want my husband, A. B. Hollingsworth to have a home as long as he wishes to live with my people, and should he, my husband, outlive my father, brother and sister, I want it to be divided among my nieces and nephews, and I want my people to settle with the Taylor children as they see fit, or give them the land from the branch up the hill to Herman Taylor's property, and when my husband gets through with the house we now occupy I want my sister to have it till her death, and then, after my sister's, brother's, and father's death, I want it to go to my nieces and nephews."

Until her death, the testatrix and her husband had lived in the 6-room house on said 12-acre tract; and since her death her husband has continued to live there. The plaintiffs, "with their families," lived and now live in the 4-room house on said 12-acre tract.

Originally, A. B. Hollingsworth was the sole defendant; and the controversy posed by the complaint presented two questions, (1) whether A. B. Hollingsworth was entitled to occupy the 6-room house as long as he saw fit to do so, and (2) whether plaintiffs were legally entitled to cultivate some four acres of said 12-acre tract, apparently the only portion thereof suitable for cultivation.

After Hollingsworth had filed answer, and upon motion of plaintiff Anders, twenty persons were made additional parties defendant. Four, J. P. Taylor, Mildred Fairchild, Clifford Taylor and J. Worth Taylor, identified as "the Taylor children," filed a joint answer. A separate answer was filed by Luther B. Anderson, "in his own behalf and in

behalf of his brothers and sisters," they being the nine children of Lottie Anders Anderson, the deceased sister of testatrix. A separate answer was filed by James O. Israel, Jr., Guardian *Ad Litem* for Patricia Cooksey Ammerson, a minor, one of the four children of plaintiff Cooksey. The other three children of plaintiff Cooksey, and the three children of plaintiff Anders, were duly served with process but filed no pleadings.

The parties stipulated that the action be treated as an action for a declaratory judgment for the construction of the will.

Implementing the court's interpretation of the will as set forth in the recitals, Judge Clarkson, in judgment entered, Ordered, Adjudged and Decreed:

"1. That the real property of the testatrix according to paragraph 2 of her said will be, and the same is, vested in C. L. Anders, brother of the testatrix, and Valerie F. Cooksey, sister of the testatrix, for and during the term of their natural lives.

"2. That upon the death of the survivor of C. L. Anders and Valerie F. Cooksey said real estate shall go and descend to all of the nieces and nephews of the testatrix living at the death of the said testatrix, and being named in this proceeding, namely: (the said sixteen nieces and nephews of the testatrix).

"3. That the said A. B. Hollingsworth, surviving spouse and widower of the late Virginia Taylor Hollingsworth, testatrix be, and he is hereby granted under said will the right to have a home and occupy the six-room residence on the property of the testatrix as long as he desires to live there, and upon his ceasing to live there and abandoning said property as a home all his right, title and interest therein shall also cease.

"4. That J. Worth Taylor, Clifford Taylor, J. P. Taylor and Mildred P. Fairchild have no interest whatever in the real estate of the said testatrix for the reason that the reference to them in said will is too indefinite for the Court to construe so as for them to receive any interest under said last will and testament, the reference to them being merely precatory."

Plaintiffs excepted to the court's interpretation of the will and to each of paragraphs 1, 2 and 3 of the judgment, and appealed, basing their assignments of error on said exceptions. The said "Taylor children" did not except or appeal. Appearing in this Court as appellees are: (1) A. B. Hollingsworth, represented by separate counsel, who filed a separate brief in his behalf; and (2) the nine children of Lottie Anders Anderson, the deceased sister of the testatrix, represented by separate counsel, who, jointly with James O. Israel, Jr., Guardian *Ad Litem* for Patricia Cooksey Ammerson, filed a separate brief.

Robert S. Swain, Earl J. Fowler, and Williams & Williams for plaintiffs, appellants.

George Pennell and Wade Hall for defendant Hollingsworth, appellee.

Paul J. Smith for defendants Carl R. Anderson, Barbara Anderson, Charles Anderson, Jack Anderson, Virginia Stackhouse, Luther Anderson, Pauline Anderson, Oakley Anderson, and Wynona Anderson, appellees.

James O. Israel, Jr., for defendant Patricia Cooksey, appellee.

BOBBITT, J. The provision of Mrs. Hollingsworth's will to be construed is a *single* sentence. Deleting the clauses referring to "the Taylor children," the testatrix *wrote* these words:

"I *want* my property to go to my father, brother, and sister, and I *want* my husband, A. B. Hollingsworth to have a home as long as he wishes to live with my people, and should he, my husband, outlive my father, brother and sister, I *want* it to be divided among my nieces and nephews, . . . and when my husband gets through with the house we now occupy I *want* my sister to have it till her death, and then, after my sister's, brother's, and father's death, I *want* it to go to my nieces and nephews." (Italics added.)

The question for decision is whether the testatrix devised the said 12-acre tract to her father, brother and sister, in fee simple, unconditionally. If so, it must be held that her references to her husband and to her nieces and nephews have no meaning of legal significance.

Plaintiffs' position is based largely upon the rule stated by *Stacy, C. J.*, in *Barco v. Owens*, 212 N.C. 30, 192 S.E. 862, as follows:

"The general rule is, that where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. (Citations) Conditions subsequent, in the absence of compelling language to the contrary, are usually construed against divestment. (Citations) The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only. (Citations)" Also, see *Brinn v. Brinn*, 213 N.C. 282, 287, 195 S.E. 793; and *Taylor v. Taylor*, 228 N.C. 275, 45 S.E. 2d 368.

The rule stated contemplates a devise in fee, unconditionally, and a subsequent clause containing *precatory words*. See *In re Estate of Bulis*, 240 N.C. 529, 82 S.E. 2d 750.

If the word "want" were construed as used in its precatory sense, the entire sentence now under consideration would be void as a dispositive provision. The testatrix, in her said writing, declares it to be her last will and testament; and it is obvious that the word "want" expresses her will and intention and must be treated as imperative

rather than precatory. *Laws v. Christmas,* 178 N.C. 359, 100 S.E. 587; *Welch v. Rawls* (Tex.), 186 S.W. 2d 103.

The rule is stated in 1 Page on Wills, Lifetime Edition, sec. 91, as follows: "The test is whether or not testator intends, by his language, to control the disposition of his property. If he does, the words in question are testamentary and the instrument is his will, no matter in how mild a form this intention is expressed. Such terms are often said to be mandatory. Or, on the other hand, is he simply indicating what he regards as a wise disposition, or is he merely giving advice, leaving to some other person, frequently the person to whom the property in question is given by some other provision of the instrument, full discretion to ignore such advice and to make a different disposition of the property. If so, it is not a will. Terms of this sort are often said to be precatory."

This rule is not challenged, for all parties claim under the will. It is stated to give emphasis to the fact that the dispositive word under which plaintiffs claim is the identical dispositive word under which the husband and the nieces and nephews claim.

Allen, J., in *Taylor v. Taylor,* 174 N.C. 537, 539, 94 S.E. 7, calls attention to the rule that "if words are used in one part of the will in a certain sense, the same meaning is to be given to them when repeated in other parts of the will, unless a contrary intent appears." *Trust Co. v. Green,* 239 N.C. 612, 619, 80 S.E. 2d 771, and authorities cited. *A fortiori,* this applies when the identical word is used repeatedly in a single sentence.

And *Seawell, J.,* in *Williamson v. Williamson,* 232 N.C. 54, 59 S.E. 2d 214, reminds us that dispositive power does not go out of the testator "step by step as the words are spoken," but that the whole of the pertinent provision must be construed from its four corners to ascertain the intent of the testator. *A fortiori,* this applies when the pertinent provision consists of a single sentence.

"In its conjunctive sense," the word "and" derives "its meaning and force from what comes before and after"; and it is used "to conjoin a word with a word, a clause with a clause, or a sentence with a sentence, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which precedes, . . ." 3 C.J.S., p. 1067; *Oliver v. Oliver,* 286 Ky. 6, 149 S.W. 2d 540.

We do not have here a devise to the father, brother and sister in fee simple, unconditionally, with a subsequent clause or provision purporting to limit the fee by the use of precatory words. Rather, the single sentence, as a whole and each part thereof, must be considered to determine the nature and extent of the devise to the father, brother and sister of the testatrix. *Trust Co. v. Wolfe,* 245 N.C. 535, 537, 96 S.E. 2d 690.

Our task then is to ascertain the intent of the testatrix. *Trust Co. v. Wolfe,* 243 N.C. 469, 473-474, 91 S.E. 2d 246. We have stated the only facts disclosed by the record as to the "circumstances attendant" at the time the testatrix made her will. It is obvious that the testatrix possessed no skill in the art of drafting wills. She did not attempt to use technical words. Rather, she used "simple conversational words," which must be given "their natural, ordinary or popular meaning." 95 C.J.S., Wills sec. 599; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151.

When the pertinent sentence is construed in the light of the foregoing facts and rules of law, we think it plain that the testatrix intended that her beneficiaries should be (1) her father, brother and sister, (2) her husband, and (3) her nieces and nephews. Significance must be given to her dominant purpose. *Trust Co. v. Wolfe,* 245 N.C. 535, 537, 96 S.E. 2d 690.

We think it plain that the testatrix intended that her husband should have the exclusive right to occupy the 6-room house as long as he saw fit to do so during the lifetime of the father, brother or sister of the testatrix. Whether, in the event he *outlived* her father, brother and sister, this right continued throughout the husband's life, as determined by the judgment below, need not be considered; for only the nieces and nephews would be affected adversely by that portion of the judgment and they did not appeal therefrom.

When we consider the respective interests of the plaintiffs and the nieces and nephews, candor compels the admission that the testatrix did not express her meaning in "well chosen words." However, the uncertainty caused by the inept language is not as to *whether* she wants her property "divided among" or "to go to" her nieces and nephews, but rather as to *when* this event will occur. When considered in this light, we agree with the construction of the court below, namely, that she devised to her father and surviving brother and sister no more than a life estate, terminable upon the death of the last survivor of these three, which life estate is subject to the aforesaid rights of A. B. Hollingsworth, her husband.

In our view, the intent of the testatrix was that her property should go to her nieces and nephews as the ultimate beneficiaries under her will; and that she wanted her father and surviving brother and sister to have the property on which they were living available for their use as long as they or either of them lived, subject to her husband's rights in respect of said 6-room house. It is noteworthy that the nieces and nephews of the testatrix included the children of the sister who had predeceased her.

One of the questions originally posed, namely, whether plaintiffs are legally entitled to cultivate some four acres of said 12-acre tract, was

not passed upon in the court below. Hence, especially in the absence of relevant facts, we do not pass upon it here. *Collier v. Mills,* 245 N.C. 200, 95 S.E. 2d 529.

Affirmed.

CHARLES B. TODD AND WIFE, JEAN W. TODD, v. HARVEY S. WHITE, AND JOHN C. QUICKEL AND WIFE, ALICE M. QUICKEL, AND ALVIN E. WITTEN AND WIFE, MERYL S. WITTEN, ON BEHALF OF THEMSELVES AND ALL OTHER RESIDENTS AND PROPERTY OWNERS IN FAIRMOUNT PARK.

(Filed 10 April, 1957.)

1. Dedication § 3: Deeds § 15—

The principle that when the owners of a tract of land subdivide it and convey lots therein by deeds referring to a registered map showing streets and parkways, etc., the owners dedicate such streets and parks to the use of the purchasers and those claiming under them, and also, under certain circumstances, to the public, does not apply when the owners, by unambiguous language, reserve to themselves, their heirs and assigns, title and control of streets and parks, which are not adjacent or necessary to the full enjoyment of the lots conveyed, with right to change, alter or close same.

2. Appeal and Error § 1—

It is not necessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached.

APPEAL by plaintiffs from *Campbell, J.,* December Term, 1956, of GASTON.

Suit for specific performance of contract to purchase land.

Plaintiffs, being under contract to convey to the defendant White a tract of land in the City of Gastonia, tendered deed in accordance with the contract. The defendant White refused the tender and declined to make payment of the purchase price, claiming that the premises, or a portion thereof, are burdened with easements for street and park purposes.

The named defendants, other than Harvey S. White, are property owners in a lot subdivision known as Fairmount Park. None of them filed answer. However, Stahle Funderburk, on behalf of himself and other residents of the subdivision, filed answer denying the material allegations of the complaint and averring that the *locus in quo* is subject to street and park easements.

Jury trial was waived and it was agreed that the trial judge should find the facts, make his conclusions of law, and enter judgment.

Most of the pertinent facts were stipulated. They are set out in substance in the following numbered paragraphs:

1. In 1921, D. B. Hanna and wife, Minnie E. Hanna, being the owners of a large tract of land located in Gaston County, caused it to be subdivided into lots and streets. A map of the subdivision, known as Fairmount Park, was registered in 1921 in the Public Registry of Gaston County. In the year 1922 a revised map of the subdivision was prepared and registered by Hanna and wife. The revised map is identical with the original map, except that on the first map the Park area in controversy is designated as "Park," whereas on the revised map the same Park area is shown as "Park—Subject to Revision." The street area in controversy is in the shape of a street which encircles and borders the Park area on two sides and one end. On both maps this street area in one section is designated "Park Drive," in the other it is designated "Park Avenue." Thus the land in controversy composes as one tract the Park area and also the foregoing sections of the street bordering the Park area. The tract is located in the southwestern part of the subdivision.

2. After the original map was registered in 1921, D. B. Hanna and wife by 22 separate deeds conveyed 31 of the lots by reference to this map. The nearest of these lots is approximately 600 feet from the Park and street area in controversy.

3. In each of the foregoing conveyances D. B. Hanna and wife included certain covenants, restrictions and reservations, consisting of 13 numbered paragraphs, only one of which, Number 12, appears to be pertinent to decision. This paragraph is set out verbatim in the opinion of the Court.

4. At least one of the defendants in this cause, namely, Van A. Covington, Sr. (an additional party defendant who was permitted to adopt the Funderburk answer), holds title to property in the subdivision under a deed from D. B. Hanna and wife, with the description being by reference to the original map registered in 1921.

5. D. B. Hanna and wife have conveyed away all lots shown on the maps of the Fairmont Park subdivision. After the revised map was registered in 1922, all conveyances by the Hannas of such lots were made by reference to the revised map. And in the deeds so made the same restrictions and reservations were included as were in the first series of deeds which made reference to the original map registered in 1921.

6. By quitclaim deed dated 4 May, 1926, and registered in the Public Registry of Gaston County, D. B. Hanna and wife conveyed to J. Y. Todd the property in controversy embracing the Park area and the portions of Park Drive and Park Avenue adjacent thereto.

7. That by deed dated 23 August, 1951, duly registered, J. Y. Todd and wife conveyed to the plaintiffs Charles B. Todd and wife, Jean W. Todd, the Park-street area in controversy, described in the complaint.

8. Thereafter, Charles B. Todd and wife, together with J. Y. Todd and wife, executed a Declaration of Withdrawal from Public Use of the Park-street area in controversy, pursuant to Section 136-96 of the General Statutes of North Carolina. This instrument, copy of which is attached to the complaint, was registered 4 November, 1954.

9. "That none of the land in controversy . . . is necessary for purposes of ingress, egress or regress by any of the defendants in this action, or by any of the property owners" in the subdivision.

10. That "Park Avenue" or "Park Drive" where it borders on the Park area on the south was never opened or used as a street; that during the year 1945 a new subdivision was established known as Glendale, which includes a small portion of Fairmount Park not involved in this controversy, but in platting the Glendale subdivision, and in later opening the streets as contained therein, a street known as Woodlane Drive or Woodlawn Drive was opened. This street covers a portion of Park Drive and likewise a portion of the Park area shown on the maps of Fairmount Park. Woodlawn or Woodlane Drive is now a paved street within the street system of the City of Gastonia.

11. That the land in controversy lies within the corporate limits of the City of Gastonia, and was within the limits of the City in 1921, when Fairmount Park was first platted; that the City of Gastonia has never accepted the Park area as a public park in the Park System of the City; that the Park area has been listed for taxes by Charles B. Todd and wife, and their predecessors in title, namely, J. Y. Todd and wife, since the acquisition of the property by J. Y. Todd and wife from D. B. Hanna and wife by the quitclaim deed. The portion of the Park area adjacent to Woodlane or Woodlawn Drive was assessed for paving when that street was paved by the City of Gastonia, and J. Y. Todd and Charles B. Todd have paid the paving assessments. (Note: the testimony discloses that these assessments amounted to about $5,000.)

Both sides offered testimony as to the uses made of the controverted Park-street area since 1926, when it was quitclaimed by Hanna and wife to J. Y. Todd and wife. According to the plaintiffs' evidence, the area was enclosed by a three-strand barbed wire fence from 1927 until about 1942 and used for a while as a horse and cow pasture by the Todds, who resided just north of the enclosure. It was and is "principally a wooded area." The Todd children played in the enclosure and along a branch that ran through it, and other children were invited and came and played with them. At one time there was an out-door furnace, with shed over it, built and used by the Todds. The area is now grown up in trees and weeds. In early years the Todds put up No Trespass signs. "The area has never been opened or used by anyone

for Park purposes," and the major portion of it remains in its natural state.

One of the defendants testified that his children at times have played in the Park area—"various childrens games, cowboys and Indians, etc," and that he on occasions has tramped through it. Other witnesses testified that children were seen playing in the wooded Park area from time to time.

The trial judge entered judgment finding as a fact and decreeing (1) "that all streets and avenues, or portions thereof, contained in the *locus in quo* are owned in fee simple by the plaintiffs" and they can convey a good title thereto clear of easements previously outstanding; and (2) that the plaintiffs own that portion of the *locus in quo* contained in the area shown on the maps as "Park" and "Park-Subject to Revision," but that this Park area "is subject to the right of the defendants to use same for park purposes," and therefore the plaintiffs cannot convey the fee simple title to any portion of the Park area free from an easement for park purposes.

From the judgment so entered, the plaintiffs appeal.

Garland & Garland for plaintiffs, appellants.
L. B. Hollowell and Verne E. Shive for defendants, appellees.

JOHNSON, J. The Fairmount Park subdivision as shown on the maps contains approximately 125 building lots. All these lots were sold and conveyed by D. B. Hanna and wife, original developers. Each of the deeds contains the following reservation:

"(12). The parties of the first part (D. B. Hanna and wife), their heirs and assigns, shall have the right to change, alter or close up any street or avenue shown upon said map or plat not adjacent to the lot above described and not necessary to the full enjoyment by the party of the second part of the above described property *and shall retain the right and title to, and the control and disposition of all parks*, streets, avenues and planting spaces and areas within the boundaries of Fairmount Park, as shown on said map or plat, subject only to the rights of the party of the second part for the purposes of egress and ingress necessary to the full enjoyment of the above described property." (Italics added.)

The plaintiffs by *mesne* conveyances now own the interest reserved by Hanna and wife in the Park area shown on the maps. The plaintiffs contend the court below erred in finding and concluding that they may not convey the Park area, except as encumbered by easement for park purposes. The contention appears to be well taken.

True, the principle is well settled that when land is divided into lots according to a map thereof, showing streets, alleys, courts, and parks,

and lots are sold with reference to the map, *nothing else appearing,* the owner thereby dedicates the streets, alleys, courts, and parks to the use of the purchasers, and those claiming under them, and also under certain circumstances to the public. *Foster v. Atwater,* 226 N.C. 472, 38 S.E. 2d 316; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13; *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Green v. Miller,* 161 N.C. 24, 76 S.E. 505.

Here, however, something else appears, in the form of a reservation clause, which takes the *locus in quo* out of the operation of the foregoing rule. This reservation clause, appearing in the deeds by which all the lots in the subdivision were conveyed by the original developers of the property, in language free of ambiguity, clearly reserved to D. B. Hanna and wife the title and power to dispose of the Park area unburdened by easement for park purposes. The title and power so reserved is now vested in the plaintiffs by virtue of the *mesne* conveyances of record.

With decision thus resting on the reservation clause, it is not necessary to discuss the legal phases of these questions treated in the briefs: (1) whether the Park area was ever put to use as a park by the residents of the subdivision, or (2) whether there has been an effective withdrawal of the alleged dedication within the purview of G.S. 136-96. It is unnecessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached. *Painter v. Finance Co.,* 245 N.C. 576. Suffice it to say, the record discloses no sufficient evidence to justify a finding that the *locus in quo* or any part thereof was ever opened as a park. Besides, the court below made no specific finding or ruling on either of the foregoing questions.

Let the judgment below be modified so as to accord with the decision here reached, and as so modified it will be affirmed.

Modified and affirmed.

BILLY G. SMITH, WILLIAM K. COTTON T/A SMITH & COTTON GROCERY AND JOHN A. McCLENNY v. ALMA LINDER PATE.

(Filed 10 April, 1957.)

1. Trespass § 1a—

A right of action for trespass is based on wrongful or tortious conduct; therefore, when the invasion of the property of another is the result of an unavoidable accident, there can be no recovery.

2. Automobiles § 7: Pleadings § 31: Trespass § 2—

Plaintiffs brought this action for damages resulting to their building when defendant's automobile collided with it. Defendant set up in the

answer the defense that the collision with the building was due to an unavoidable accident and was not due to any fault of defendant. *Held:* The defense was improperly stricken on plaintiffs' motion.

3. Actions § 6—

The distinction between forms of actions has been abolished, and the right to recover will be determined in accordance with the facts alleged and not by the technical name given the action.

4. Torts § 1—

All damages sustained by the injured as a result of a single wrong must be recovered in a single action.

5. Insurance § 51: Parties § 1—

Where an insurance company has paid only part of the loss resulting from defendant's tort, insurer is subrogated only to the extent of the payment, and insured may maintain an action to recover all the damages in behalf of himself and insurer, in which action insurer may be joined as a proper party but is not a necessary party.

6. Same—

Where an insurance company has fully compensated insured for all damages resulting from defendant's tort, insured is no longer the real party in interest, and insurer is the only party that can maintain the action against defendant for the tort.

7. Insurance § 51: Pleadings § 31—

In this action by the owners of property to recover damages caused by defendant's car colliding with plaintiffs' building, defendant alleged, as a further defense, that the insurer of the building had paid the entire damages to plaintiffs. *Held:* The further defense was improperly stricken on motion.

CERTIORARI to review an order of *Parker, J.*, entered September 1956 Term of WAYNE.

Plaintiff seeks compensation for damages to a building resulting when an automobile driven by defendant ran into the building.

Defendant answered, denying those allegations of the complaint which would create liability and pleaded additional facts to defeat the claim of plaintiffs.

Plaintiffs moved to strike the further defenses. The motion was allowed. Defendant applied for *certiorari* which was granted.

J. Faison Thomson & Son for defendant appellant.

No counsel contra.

RODMAN, J. The complaint, after alleging plaintiffs' possession and ownership of the store building and the operation by defendant of a 1952 Buick sedan automobile, alleges: "5. That upon said date at about

11:20 a.m., the defendant with force and arms broke and entered the premises located at 715 North George Street and forcibly broke open to pieces and damaged the building there standing on said premises with the said 1952 Buick automobile by running the automobile into and through the front wall and plate glass window of the said building to the great damage of the plaintiffs in the amount of $1045.00."

Defendant answers section 5 of the complaint thus: "5. That the allegations of paragraph 5 of the complaint are denied. For further answer to the allegations of paragraph 5, reference is made to the Further Defense, hereinafter appearing." Defendant alleged two additional defenses: first, that the asserted trespass and collision with the building was due to an unavoidable accident arising without fault on her part. The answer sets out in detail how the asserted accidental injury occurred. Defendant, for her second further defense, alleged that the building which her car struck and damaged was fully insured, and as a result of such insurance ". . . Nationwide Mutual Fire Insurance Company, agreed to, and did, pay to the plaintiff all damages that the plaintiffs sustained by reason of the accident."

The court allowed plaintiffs' motion and struck from the answer each of the further defenses. The correctness of this order is the question for decision.

Plaintiffs do not specifically allege that defendant was negligent. They frame their right to recover on an asserted trespass. However framed, their right to recover must rest on wrongful or tortious conduct. The rule exculpating one from liability for injuries accidentally inflicted is illustrated in *Parrott v. Wells*, 15 Wall. 524, 21 L. Ed. 206. Plaintiff there sued to recover damages done to his building as a result of an explosion of nitroglycerin in the custody of defendant. Defendant operated an express line from New York to San Francisco. It leased from plaintiff a portion of plaintiff's building with a provision in the lease to keep in repair the portion of the building leased to it. A package shipped from New York was received by defendant and stored in the building in San Francisco. While in storage it exploded, without fault on the part of defendant, doing extensive damage to plaintiff's building. Defendant complied with the terms of the lease and repaired the portion of the building which it occupied but refused to compensate plaintiff for the damage done the other portions of the building. *Justice Field*, in denying liability, said: "This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants; unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business."

Those off the highway were sometimes injured by those using the highway, prior to the advent of the automobile. *Vincent v. Stinehour*, 29 Am. Dec. 145, decided by the Supreme Court of Vermont in 1835, bears analogy to the case at bar. Plaintiff in that case was walking on a path adjacent to the highway. Defendant, riding in a sulky, drove on the path and knocked plaintiff down and ran over him. Defendant, when sued for the injuries so inflicted, pleaded as a defense his inability to control the horse, an unavoidable accident. The court, speaking with reference to his plea, said: "The plaintiff contends in this case, that the injury arose from the unlawful act of the defendant. This, however, is taking for granted the very point in dispute. If the act which occasioned the injury to the plaintiff was wholly unavoidable, and no degree of blame can be imputed to the defendant, the conduct of the defendant was not unlawful. From an examination of the case, we find the charge of the court was conformable to the law, and is wholly unexceptionable. The principle of law, which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is, that no one can be made responsible, in an action of trespass, for consequences, where he could not have prevented those consequences by prudence and care. Thus it has been laid down that if a horse, upon a sudden surprise run away with his rider, and runs against a man and hurts him, this is no battery. Where a person, in doing an act which it is his duty to perform, hurts another, he is not guilty of battery. A man falling out of a window, without any imprudence, injures another—there is no trespass. A soldier, in exercise, hurts his companion—no recovery can be had against him."

Speaking with reference to the operation of an automobile, we have said: "Where the collision was accidental no action for the recovery of damages can be maintained." *Swainey v. Tea Co.*, 202 N.C. 275, 162 S.E. 557; *Ingle v. Cassady*, 208 N.C. 497, 181 S.E. 562; *Patterson v. Ritchie*, 202 N.C. 725, 164 S.E. 117; 60 C.J.S. 623; 5 Am. Jur. 594.

Plaintiffs did not file a brief in support of the motion and court's ruling. Our own research has disclosed only two cases which may seem at variance with the conclusion we reach. They are *Loubz v. Hafner*, 12 N.C. 185, and *Newsom v. Anderson*, 24 N.C. 42. When one reads those cases, he must keep in mind the factual situation there disclosed. Neither shows unavoidable accident or sudden emergency but damage resulting from negligence. It must also be remembered that forms of action have been abolished, and the rights of parties are no longer determined by the skill of an attorney in selecting a form of action. Would it be suggested that the crew of a vessel thrown by the force of a storm on the beach could not walk to safety carrying their possessions without being guilty of trespass? *Hetfield v. Baum*, 35 N.C. 394.

In an action for trespass, nothing else appearing, the issues are: (1) Plaintiff's title if denied by defendant; (2) the trespass or invasion of plaintiff's possession if denied by defendant; and (3) damages. *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593. Defendant cannot justify the trespass without pleading it. Issues arise only on the pleadings. *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Cecil v. Henderson,* 121 N.C. 244. If defendant would justify his trespass, he should plead it. *Everett v. Smith,* 44 N.C. 303; *Kirkpatrick v. Crutchfield,* 178 N.C. 348, 100 S.E. 602; *Jennings v. Fundeburg,* 13 M'Cord 161 (S.C.); *Blackburn v. Bowman,* 46 N.C. 441; 52 Am. Jur. 886, 887; G.S. 1-543. There was error in striking defendant's first further defense.

Was the court correct in striking defendant's second further defense? Defendant asserts that plaintiffs have been fully compensated for any loss which they sustained by virtue of insurance carried on the property. Hence defendant argues plaintiffs are not the real parties in interest, and that the insurance company, by operation of law, is subrogated to such rights as plaintiffs might have exerted before they were compensated for their loss by the insurance company.

Where an insurance company, pursuant to the terms of its contract of insurance, indemnifies the insured for loss resulting from a wrongful act of a third person, it is by operation of law subrogated to the extent of such payment to the rights of its insured against the tort-feasor. *Winkler v. Amusement Co.,* 238 N.C. 589, 79 S.E. 2d 185; *Lyon & Sons v. Board of Education,* 238 N.C. 24, 76 S.E. 2d 553; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Ins. Co. v. R. R.,* 179 N.C. 255, 102 S.E. 417; *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426; *Cunningham v R. R.,* 139 N.C. 427; *U. S. v. Aetna Cas. & S. Co.,* 338 U.S. 366, 94 L. Ed. 171.

The principle has found its most frequent application in cases involving the destruction of property by fire and collisions of automobiles. It is of course not limited to cases of that kind. *City of Seattle v. Lloyd's Plate Glass Ins. Co.,* 253 F. 321, and *Maryland Casualty Co. v. Cherryvale Gas, Light & P. Co.,* 162 P. 313, were cases growing out of the destruction of plate glass windows by explosions. *Contractors, Pacific Naval Air Bases v. Pillsbury,* 105 F. Supp. 772, presented the right of a hospital association to reimbursement of hospital expenses paid to a member of the association, an employee of plaintiff, which plaintiff employer was legally obligated to pay under the Longshoremen's and Harbor Workers' Compensation Act.

All damages sustained by the injured as a result of a single wrong must be recovered in a single action. *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909; *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686.

When the insurance company has paid only part of the loss resulting from defendant's tort, the insurer is subrogated only to the extent of the payment. The injured party has the right to maintain an action for all the damage resulting from the tortious act of defendant. He holds the recovery in trust for himself and the insurance company in accordance with their respective rights. *Burgess v. Trevathan, supra; Powell v. Water Co., supra.* The insurer is a proper but not a necessary party where only partial compensation has been made. *Taylor v. Green,* 242 N.C. 156, 87 S.E. 2d 11.

Where, however, the insurance company has fully compensated its insured for all damages he has sustained, the insured no longer is the real party in interest. No right of action vests in him. The insurer is the real and only party interested in the result and hence the only party that can maintain the action. *Burgess v. Trevathan, supra; Insurance Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879; *Underwood v. Dooley, supra; Cunningham v. R. R., supra.*

Defendant does not seek to have the insurance carrier made a party plaintiff on the theory that it is a proper party, having compensated plaintiffs for a portion of their loss, but pleads the fact that plaintiffs had been fully compensated, terminating any right of action which they may have. If the facts be as alleged, plaintiffs no longer have a right of action. Such as they had has passed to the insurer. Defendant could not show the facts without pleading them. It follows that there was error in striking defendant's second further defense. *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Dunn v. Dunn,* 242 N.C. 234, 87 S.E. 2d 308.

The order striking the separate further defenses pleaded by defendant is

Reversed.

HUGH E. LEWIS v. MARVIN LEE.

(Filed 10 April, 1957.)

1. Pleadings § 15—

A demurrer admits the truth of the facts properly alleged, and relevant inferences of fact necessarily deducible therefrom, but it does not admit inferences or conclusions of law.

2. Same—

Upon demurrer, the complaint must be liberally construed with a view to substantial justice, giving the pleader the advantage of every reasonable intendment therefrom, and the pleading must be fatally defective before it will be rejected. G.S. 1-151.

3. Automobiles §§ 15, 35—

A complaint alleging that defendant, the driver of the car in which plaintiff was riding as a passenger, was suddenly confronted by a car approaching from the opposite direction on its left of the highway, that defendant pulled to his left of the highway and that the operator of the other car pulled back to his right and collided with defendant on defendant's left of the road, *held* insufficient to state a cause of action, since defendant's act in pulling to the left when confronted by the emergency cannot be held an act of negligence under the circumstances, and the facts alleged show that the collision was independently and proximately produced by the wrongful act of the driver of the other car.

4. Automobiles § 35—

Where the complaint alleges in effect that defendant drove to his left of the highway in order to avoid collision with a vehicle suddenly appearing and approaching from the opposite direction on its left side of the highway, and then alleges that defendant drove to his left without due caution and without keeping a proper lookout and in maneuvering his vehicle to turn right into his driveway, the repugnant allegations destroy and neutralize each other, and the remaining allegations are insufficient to show negligence on the part of defendant.

5. Pleadings § 19c—

Where in stating a single cause of action the complaint alleges two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie.

RODMAN, J., dissenting.

BOBBITT, J., concurs in dissent.

APPEAL by defendant from *Moore, Clifton L., J.,* at October-November 1956 Civil Term, of NASH.

Civil action to recover for personal injuries allegedly proximately caused by negligence of defendant.

It is admitted in the pleadings that on 18 December, 1955, plaintiff was riding as a guest in an automobile owned and operated by defendant Marvin Lee at or about 11:30 a.m., on a rural paved highway leading from Red Oak to Reed's Store in Nash County.

And plaintiff alleges in paragraph 3 of his complaint that "defendant was driving his automobile in a northerly direction at approximately 35 miles per hour and about one mile from Reed's Store and almost in front of defendant's home, when suddenly Dock Richardson, operating an automobile, appeared on the highway in front of the defendant driving in the opposite direction, that is, meeting the defendant and on the wrong side of the road." That "the defendant pulled over beyond the center of the road and to his left-hand side of the road and the

automobile being operated by Dock Richardson pulled back to its right and met the defendant Marvin Lee on Lee's wrong side of the road." That "Lee was in the act of turning in his driveway at the time of the collision and had carelessly, negligently and without proper lookout and due caution drove over on the wrong side of the road causing and bringing about the collision and damages . . . complained of." And in paragraph 7 of the complaint plaintiff alleges "that the negligence of the defendant, Marvin Lee, in driving his automobile on the wrong side of the road as hereinabove alleged, was one of the proximate causes of plaintiff's injuries and damage."

Defendant, answering, denies that he was negligent as alleged in the complaint, and for a further answer and in bar of plaintiff's right to recover in this action, defendant pleaded assumption of risk; and as the sole and proximate cause of collision negligence of Richardson.

Upon the trial in Superior Court plaintiff was the only witness in respect to the collision.

At the close of plaintiff's evidence defendant (1) demurred *ore tenus* to plaintiff's complaint, and (2) moved for judgment as of nonsuit. Both motions were overruled, and defendant excepted to each ruling.

Defendant then announced that he would offer no evidence, and renewed (1) his demurrer *ore tenus* to plaintiff's complaint and (2) his motion, at the close of all the evidence, for judgment as of nonsuit. Both motions were overruled, and defendant excepted to each ruling.

The case was submitted to the jury on two issues, shown in the record, which the jury answered in favor of plaintiff as indicated.

From judgment signed in accordance with the verdict, defendant appeals to Supreme Court, and assigns error.

T. A. Burgess and Davenport & Davenport for Plaintiff Appellee.

Valentine & Valentine and Broughton & Broughton for Defendant Appellant.

WINBORNE, C. J. Defendant appellant renews in this Court his demurrer *ore tenus* to the complaint of the plaintiff. It, like the demurrers filed in Superior Court, was upon the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant for actionable negligence.

For this purpose the truth of the allegations contained in the complaint is admitted, and "ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted. But the principle does not extend to admissions of conclusions or inferences of law." *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761. See among many other cases *Hollifield v. Everhart*, 237 N.C. 313, 74 S.E. 2d 706; *McLaney v. Motor Freight, Inc.*, 236 N.C. 714, 74 S.E. 2d 36, and cases cited.

Also it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." And the decisions of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw*, 215 N.C. 105, 1 S.E. 2d 369, and cases there cited.

In the light of the provisions of the statute, as so interpreted and applied, admitting the truth of the facts alleged in the complaint, this Court is constrained to conclude as a matter of law that the allegations in respect to defendant are fatally defective upon the ground on which the demurrers are predicated, that is, it affirmatively appears upon the face of the complaint that the injury of which plaintiff complains was, as stated by *Stacy, C. J.*, in *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108, "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person," to wit, Dock Richardson. See *McLaney v. Motor Freight Inc., supra,* and cases cited.

The facts alleged show that defendant was traveling at a speed of 35 miles per hour, when the car driven by Dock Richardson suddenly appeared in front of defendant on defendant's right side of the road. Under such circumstances, as contended by appellant in brief filed in this Court, defendant was "confronted with the choice of meeting the Richardson car head-on or turning to his left in the hope of avoiding a head-on collision." Compare *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383. Indeed the allegations present a factual situation similar to that in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337, where *Barnhill, C. J.*, writing for the Court declared: "That the bus driver, when he saw the automobile enter the highway just ahead of him, cut his bus to the left and crossed the center line cannot, under the circumstances of this case, be held an act of negligence. It is a human instinct when a collision is impending between two vehicles to turn or cut away from the other vehicle. The evidence here discloses that it was done in an effort to avoid the collision. There is no circumstance tending to show that it was other than what a man of reasonable prudence would have done."

While it is true that it is set forth in the complaint that the defendant was in the act of turning in his driveway at the time of the collision, and had carelessly, negligently and without proper lookout and due caution driven over on the wrong side of the road causing and bringing about the collision and damages of which complaint is made, this is no more than a conclusion of the pleader and is negatived by the facts alleged immediately prior thereto in the same paragraph.

The two allegations cannot be reconciled. This brings the case within the principle set forth in *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5, that is, that "Where in stating a single cause of action the complaint alleges two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie." See McIntosh, N. C. Practice & Procedure, Section 353; 21 Am. Jur., Pleading, Section 221.

Hence for error in overruling demurrers *ore tenus* the judgment from which appeal is taken is

Reversed.

RODMAN, J., dissenting: I dissent from the opinion of the majority, not because of any disagreement as to legal principles, but because I think the language of the complaint describing the factual situation and defendant's conduct is sufficiently broad, even though lacking in details, to authorize recovery when interpreted in the light of plaintiff's testimony describing the situation under which the collision occurred. He testified: "We were coming down the road and just before we got to Marvin Lee's avenue, which was on our right side that we were on, I looked up and I saw a car coming around the bend up there by the tobacco barns on the Tucker farm and when he come around the curve he was on our side of the road. He was between 250 and 300 yards, probably 400, from us at that time. He stayed on our side of the road a right good while. I would say the car coming towards us got within 35 or 40 yards when he turned into his side of the road." Again he testified: "When we were about 35 to 45 yards apart, Richardson swerved across the road a little bit. He looked like he might have looked up and saw us. He won't directly on our side, but he was straddling the center line when he went across to his proper side. He got on his side fully 45 yards from us; he was on his side then. . . . I don't say that Lee cut to his left when he was about 35 or 45 yards from Richardson to keep from having a wreck. I told you before that there was room on that dirt on Lee's side that he could have got off on his side. There's six feet of flat land there . . ."

The Court treats the allegation of the complaint that Dock Richardson suddenly appeared on the wrong side of the road as having only one meaning: that he suddenly appeared in such close proximity as to create an emergency for which defendant was not responsible. I concede that it might have that meaning, but I think that it may as well describe the condition depicted by plaintiff, viz., that the vehicles were 250 to 400 yards apart when Dock Richardson turned the corner or curve on the wrong side of the road. Such a situation bears no resemblance to the factual situation described in *Henderson v. Henderson,*

239 N.C. 487, nor in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, relied upon by the majority to sustain their position. Defendant did not object to plaintiff's testimony describing the situation. The facts related do not, as a matter of law, in my opinion, portray a sudden emergency created without fault of defendant. Plaintiff could not, of course, allege one cause of action and recover on a different factual situation. The *probata* must correspond to the *allegata*. Hence, it seems to me, that the interpretation placed on the pleadings at the trial by plaintiff, by defendant, and by the court that the facts alleged accorded with the testimony ought now to be accepted by this Court as a correct interpretation of what the plaintiff intended to say when he filed his complaint. If it was lacking in detail, defendant's remedy was by motion to make it more specific and certain.

I think the pleadings suffice to permit the plaintiff to offer evidence. I think there is evidence on which the jury could find in favor of the plaintiff. *Hoke v. Greyhound Corporation*, 227 N.C. 412. No exception was taken to the charge of the court. It is my opinion defendant has not demonstrated error.

BOBBITT, J., concurs in dissent.

STATE v. ANDREW YATES DAVIS.

(Filed 10 April, 1957.)

1. Criminal Law § 29a—

Where the State introduces testimony of statements made by defendant on a particular date, but introduces no evidence in regard to statements made by him on a subsequent date, defendant is not entitled to elicit from the State's witness testimony as to self-serving declarations made by defendant on the later date, the State not having "opened the door" to such testimony.

2. Criminal Law § 53d—

Where the court's instructions to the jury contain a clear, concise and complete charge on all essential features of the case, exceptions to the court's failure to charge on minor aspects of the case cannot be sustained, it being incumbent on defendant, if he desired more detailed instructions, to have tendered a request therefor. G.S. 1-180.

3. Criminal Law § 52a(3)—

While circumstantial evidence must point unerringly to the guilt of defendant and exclude every other reasonable hypothesis in order to be sufficient for conviction, whether it does so is for the jury to determine under instructions to that effect, it being the province of the court upon

motion to nonsuit or for a directed verdict to determine only whether there is substantial evidence of every essential element of the offense.

4. Homicide § 25—

Evidence tending to show that defendant was found dressed in the kitchen of his home about 8:30 in the morning, that his wife had been mortally beaten sometime during the night and was lying near a pool of blood in the bathroom of the house, that blood was found inside the shoes defendant was wearing, and men's clothing on which there was blood was found in the house, *is held* sufficient to be submitted to the jury and sustain a verdict of defendant's guilt of murder in the second degree.

APPEAL by defendant from *Moore (Dan K.), J.*, November, 1956 Term, BURKE Superior Court.

Criminal prosecution tried upon indictment charging the defendant with the first degree murder of his wife, Lois Louise Davis. Upon arraignment the solicitor announced he would not prosecute for the capital felony but only for murder in the second degree or manslaughter as the evidence might warrant. The jury returned a verdict of guilty of murder in the second degree. From a judgment of imprisonment for not less than 12 nor more than 15 years, the defendant appealed, assigning errors.

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

Mull & Patton for defendant, appellant.

HIGGINS, J. The defendant and the deceased, his wife, prior to 5 November, 1955, lived in a rural section of Burke County. At about 8:30 on the morning of that day the State's witness Coleman went to the house where he found the defendant dressed and in the kitchen. The body of his wife was lying on her back in the bathroom near a pool of blood. The coroner, a physician, performed an autopsy and expressed the opinion that death resulted from "extensive bleeding in the chest cavity and on the outside tissue of the brain—produced by blunt force and blows about the face, head, and chest." The coroner performed the autopsy at about one o'clock in the afternoon of 5 November. He expressed the opinion the wounds could have been inflicted about 10 or 12 hours prior to the autopsy. Blood was discovered in several places in the house, and on the inside of the basement door "blood extended three and one-half feet up on the door." On the defendant's upper cheek was an abrased area and three distinct marks downward approximately one-third of an inch apart on the left cheek. When examined at about 3:30 p.m. on the day the body was found, the defendant was wearing a cotton shirt and trousers, and a pair of low-

quarter shoes. There was no blood on his clothing. However, on the inside of defendant's shoes "on the instep was a quantity of dried blood and also on the insoles and over the toes and under the sole of the foot blood was present in both shoes." Men's clothing on which there was blood was found in the house.

The coroner stated on cross-examination that the bruises on the body of the deceased could have been caused in an automobile accident. However, there was no evidence the deceased had been involved in any accident.

On the late afternoon of 4 November, two neighbors saw the deceased walking about one-quarter mile from her home. They gave her a ride to the home. At the time she had a slight limp, seemed fatigued, and had about her the odor of whisky.

The State introduced evidence that the defendant on numerous occasions had threatened to kill his wife and had committed assaults upon her many times, once with a shoe, and once with a "fire stick."

The investigating officer testified as to certain statements made by the defendant on 5 November, 1955, to the effect that on advice of counsel he did not want to make any statement or discuss the case. For the purpose of impeachment counsel asked if the witness "is trying to inject into the jury box that the defendant shut up like a clam and would not talk further." The court sustained the State's objection to the question. Nothing in the testimony appeared to justify the question.

The defendant sought to have the investigating officer testify as to statements made to him by the defendant on 8 November. These statements were excluded on the ground that they were self-serving. The ruling of the court was correct for the reason that the State had not introduced any part of the defendant's conversation on the 8th. The foregoing disposes of the defendant's exceptive assignments Nos. 1, 2, 3 and 4.

The defendant's exception No. 7 relates to the failure of the court to charge on certain minor aspects of the case. The charge, however, taken contextually as it must be, presents clear, concise and complete instructions to the jury on all essential features of the case and is in compliance with G.S. 1-180. If the defendant desired more detailed instructions, he should have requested them. *S. v. Glatly*, 230 N.C. 177, 52 S.E. 2d 277; *S. v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909; *S. v. Bohanon*, 142 N.C. 695, 55 S.E. 797.

The defendant places his main reliance on exceptions Nos. 5 and 6 relating to the failure of the court to direct a verdict of not guilty. In this case the evidence was circumstantial. Beyond question this Court has consistently adhered to the rule that in order to convict on circumstantial evidence, that evidence must not only be consistent with guilt,

it must be inconsistent with innocence. It must point unerringly to guilt and must exclude every other reasonable hypothesis. Unless the evidence measures up to the foregoing standard it is the duty of the jury to acquit and it is the duty of the court so to instruct the jury.

In applying the rule of the sufficiency of circumstantial evidence, not infrequently, however, counsel have confused the function of the trial judge and the function of the jury. In all fairness it may be observed that some of the decisions of this Court have not tended to clarify the distinction between the court's and the jury's functions. When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense. In so far as the duty of the judge is concerned, it is immaterial whether the evidence is direct, circumstantial, or a combination of both. If it is substantial as to all essential elements of the offense, it is the duty of the judge to submit the case 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. Stephens*, 244 N.C. 380, 93 S.E. 2d 431; *S. v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425; *S. v. Duncan*, 244 N.C. 374, 93 S.E. 2d 421; *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904; *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*, 199 N.C. 429, 154 S.E. 730.

We must conclude that under the foregoing rules there was substantial evidence of defendant's guilt. The evidence presented a case for the jury. No reason appears why the verdict and judgment should be disturbed.

No error.

JAMES A. HARRIS AND WIFE, MARY FRANCES HARRIS, v. FANNIE LOU BINGHAM.

(Filed 10 April, 1957.)

1. Fraud § 5—

A person signing a written instrument is under duty to read same for his own protection, and is charged with knowledge of its contents in the absence of mistake, fraud or oppression.

2. Negligence § 11—

The right to assume that another will exercise due care is not absolute, but when a person realizes that another has violated a duty which imperils him, he must be vigilant in attempting to avoid injury to himself.

3. Brokers § 6—Where owner signs contract to sell realty without reading it he may not hold broker liable for failure of contract to disclose that land was subject to highway easement.

Plaintiffs alleged that they advised defendant broker that their land was subject to a right-of-way for a highway, that the broker procured a prospective purchaser and prepared a contract of sale stating that the land was subject to easements for public utilities solely, that plaintiffs signed the writing without reading it and that thereafter the prospective purchaser refused to consummate the sale upon learning that the land was subject to the easement for the highway, that plaintiffs were forced to sell to another at a price less than that which had been offered by the broker's prospect, to the plaintiffs' damage in the amount of the difference. There was no allegation that the actual sale was for less than the value of the land burdened with the easements. *Held:* Demurrer was properly sustained, since plaintiffs are charged with full knowledge of the contents of the contract of sale signed by them, and further, since it appears that the higher offer was based on the property only if it were free of the highway easement, and therefore the allegations do not support the conclusions of damage.

4. Pleadings § 15—

A demurrer admits the truth of allegations of fact contained in the complaint, but it does not admit the legal conclusion of damage based on such facts.

APPEAL by plaintiffs from *Sharp, S. J.*, 7 January 1957, Special Civil Term. MECKLENBURG.

Civil action to recover damages from a broker heard upon a demurrer.

This is a summary of the complaint's allegations: Plaintiffs owned a house and tract of land in Mecklenburg County, which they placed for sale with defendant, who held herself out to the public as skilled in the business of a real estate broker. Plaintiffs explained to the defendant that a portion of the property was subject to a right-of-way for a road, and pointed it out to her. Defendant procured M. F. Stumpf to agree orally to buy the property for $28,000.00. Defendant drafted a

contract of purchase and sale of the property between plaintiffs and Stumpf, which stated the property was free of all easements, except those for public utilities. Plaintiffs, relying upon the special skill and knowledge of the defendant, and being unacquainted with "terminology," employed in real estate contracts, signed the contract. Plaintiffs, relying upon the contract of sale and purchase with Stumpf, entered into a written contract to buy a house. Before the date set for completing the sale to Stumpf, he notified the plaintiffs that he had discovered that the land was burdened with an easement for a roadway across a part of the property, that the contract of purchase and sale recited the property was free of all easements, except those for public utilities, and he declined to go through with the contract of purchase.

Plaintiffs, being obligated by written contract to buy another house, were forced to find an immediate purchaser for the house and land Stumpf had contracted to buy, and after diligent efforts, they sold the property for $24,000.00. Plaintiffs' loss of $4,000.00 was proximately caused by defendant's negligence in not exercising reasonable care and skill in drafting the contract between them and Stumpf and in not possessing the requisite skill and knowledge possessed by other real estate brokers. Wherefore, plaintiffs pray for a recovery of $4,000.00 against the defendant.

The defendant filed a written demurrer.

From a judgment sustaining the demurrer upon the ground the complaint does not state facts sufficient to constitute a cause of action, plaintiffs appeal.

McDougle, Ervin, Horack & Snepp by R. B. McKnight, Jr. for Plaintiffs, Appellants.

No Counsel for Defendant.

PARKER, J. Plaintiffs signed a contract drafted by defendant as their real estate broker to convey a house and tract of land owned by them to M. F. Stumpf, which property the contract stated was free of all easements, except those for public utilities. When Stumpf discovered that a portion of the tract of land was subject to a right-of-way for a road, and that plaintiffs could not convey to him the property free of all easements, except those for public utilities, as they had contracted to do, he refused to consummate the purchase.

There is no allegation in the complaint that plaintiffs did not read the contract, or that they are unable to read, or that they were induced to sign the contract by fraud or deception, or that they were misled as to its contents. "The duty to read an instrument or to have it read

before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity." *Harrison v. R. R.*, 229 N.C. 92, 47 S.E. 2d 698.

This Court said in *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364: "In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained."

The right to rely upon the assumption that another will exercise due care is not absolute, *Union Trust Co. v. Detroit, G. H., & M. R. Co.*, 239 Mich. 97, 214 N.W. 166, 66 A.L.R. 1515, and must yield to the realities of the situation to the extent that if the plaintiff observes a violation of duty which imperils him, he must be vigilant in attempting to avoid injury to himself, *Graff v. Scott Bros.*, 315 Pa. 262, 172 A. 659; 38 Am. Jur., Negligence, Sec. 192. If the defendant were guilty of negligence in failing to exercise reasonable care and skill as a real estate broker in drafting the contract of sale, a question not necessary for us to decide here, the plaintiffs are charged with full knowledge and assent as to the contents of the contract they signed, and they had actual knowledge that the property was not free of all easements, except those for public utilities, as stated therein. Plaintiffs charged with full knowledge that they could not convey title to the property, as they had contracted to do, entered into another contract to buy another house, evidently intending to pay for it in whole or in part with the purchase money received from Stumpf.

It is manifest that, if the defendant had recited in the contract of sale that a portion of the property was burdened with an easement for a roadway across it, Stumpf would not have purchased the property. Clearly, Stumpf's oral offer of $28,000.00 for the property was for property free of all easements, except those for public utilities. Plaintiffs allege that when Stumpf refused to go through with the purchase, they were forced to sell the property for $24,000.00, but they do not allege it brought less than it was worth, subject, as it was, to a right-of-way for a road across a portion of it. Plaintiffs have alleged no ultimate facts showing any damage to themselves. The demurrer admits the truth of allegations of fact contained in the complaint, but does not admit the legal conclusion that plaintiffs were damaged in the sum of $4,000.00. *McKinley v. Hinnant*, 242 N.C. 245, 87 S.E. 2d 568.

Plaintiffs were guilty of utter heedlessness in signing the contract to convey the property to Stumpf with the statements therein as to easements. They cannot avoid their own heedlessness in executing and

relying upon this contract, and then, call that heedlessness someone else's negligence. Plaintiffs' damage, if any, is in effect self-inflicted.

Affirmed.

STATE v. LYNN.

(Filed 10 April, 1957.)

Criminal Law § 50d—

Where the court, during the cross-examination of defendant, interposes questions tending to impeach the defendant and depreciate his testimony, a new trial must be awarded.

PARKER, J., dissents.

APPEAL by defendant from *Phillips, J.*, and a jury, at September Term, 1956, of ALEXANDER.

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

C. L. Leatherman and Sam J. Ervin, III, for the defendant, appellant.

JOHNSON, J. The defendant stands convicted, as charged in the bill of indictment, of having carnal knowledge of a virtuous girl between the ages of twelve and sixteen years in violation of G.S. 14-26. From judgment imposing a prison sentence, he appeals.

The evidence of the State discloses that on or about 15 June, 1955, the prosecuting witness, then under the age of 15 years, and her two older teen-age brothers, went with the defendant, a minister of the Gospel, and his 15-year-old son, on a fishing trip somewhere on the Catawba River. A 16-year-old male cousin of the prosecutrix was also along on the trip. The party pitched camp side of the river and spent the night. The prosecutrix testified that around midnight, while the others were fishing, the defendant had sexual intercourse with her in the station wagon near the camp site. She did not tell anyone about the occurrence or make accusation against the defendant until two or three weeks before she gave birth to a child on 1 April, 1956.

The defendant denied the accusation and testified that the fishing trip was in May, 1955. He said he went to the station wagon about 10:00 o'clock p.m. and lay down; that in a few minutes the prosecutrix opened the door; that he got up and went down to the river and sat down on a blanket; that the prosecutrix followed him and sat down beside him; that he immediately got up, went to the edge of the river and took a seat in a boat and spent the rest of the night in the boat.

During cross-examination by the Solicitor, the court interposed this examination of the defendant: "Q. You said the boys took their blankets, and put them down to sleep on. What arrangements was made for Lynda Kay to sleep that night? A. I don't know. Q. Are you telling the Court and jury that you got out on the water and stayed after everybody else was asleep? A. They were not asleep. The boat was right there and I sat in the boat and the boys were on the bank."

The defendant assigns as error the manner in which he was so interrogated by the presiding judge. He contends that the examination was calculated to impeach him and to cast doubt upon his testimony before the jury.

"The rule is firmly fixed with us that 'no judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility.' (citing authority) And under application of this salutary rule, it is well settled that it is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel, including the district solicitor in a case like this one, but it is never the privilege of a trial judge." *S. v. Kimrey,* 236 N.C. 313, p. 315, 72 S.E. 2d 677, p. 679. See also *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887.

Here it appears that the challenged examination by the court was calculated to impeach the defendant and depreciate his testimony before the jury in a manner amounting to prejudicial error entitling him to a new trial. This being so, the other assignments of error need not be discussed.

New trial.

PARKER, J., dissents.

MAX SNYDER v. EDWARD SCHEIDT, COMMISSIONER OF NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, STATE HIGHWAY PATROL, AND PATROLMAN, C. L. BLACKMON.

(Filed 10 April, 1957.)

1. Automobiles § 2—

The statute directs the revocation of a driver's license for one year upon his conviction of two charges of reckless driving committed within a period of twelve months, and if both offenses were committed within a twelve-month period, it is immaterial that the conviction of the second offense was entered more than twelve months after the first. G.S. 20-17(6).

2. Same—

In upholding the revocation of a driver's license for a period of one year for two convictions of reckless driving committed within a period of twelve months, the failure of the court to specifically find that the convictions were final, will not be held fatal when the driver makes no contention that there was any appeal from the convictions or that the convictions were not final, and it appears that the convictions as certified by the clerk were considered by the court below and all parties as final convictions.

3. Same—

The provisions of G.S. 20-17(6) and G.S. 20-19(f) are mandatory.

RODMAN, J., not sitting.

APPEAL by plaintiff from *Parker, J.*, September Term, 1956, of WAYNE.

Plaintiff was convicted of two separate offenses of reckless driving (G.S. 20-140), the first committed 6 April, 1954, and the second 4 November, 1954. For the first offense, the conviction was on 15 June, 1954, in the Recorder's Court of Chowan County. For the second offense, the conviction was on 20 December, 1955, in the Recorder's Court of Goldsboro. On 15 February, 1956, the Commissioner of Motor Vehicles, having received official reports of said convictions from the clerks of said courts, revoked plaintiff's operator's license for one year, from 20 December, 1955, to 20 December, 1956. Notice thereof was served on plaintiff.

Plaintiff did not surrender his operator's license card. Instead, he brought this action to enjoin said revocation by the Commissioner and obtained a temporary restraining order.

At the hearing below, after finding the facts stated above, the court below vacated said temporary restraining order, adjudging that the Commissioner "is hereby authorized to enter an order revoking the plaintiff's driver's license for a period of one full year pursuant to the requirements of G.S. 20-17(6) and G.S. 20-19(f)," and that "the costs of this action . . . be taxed against the plaintiff."

Plaintiff excepted to the judgment, appealed therefrom, and presents two assignments of error.

J. Faison Thomson & Son for plaintiff, appellant.

Attorney-General Patton, Assistant Attorney-General Giles and Staff Attorney Kenneth Wooten, Jr., for defendant, appellee.

BOBBITT, J. Plaintiff's first assignment of error is that the court erred in its conclusion of law because the second *conviction* was on 20 December, 1955, more than one year after 15 June, 1954, the date of the first *conviction*. Plaintiff's contention is interesting but unsub-

stantial. G.S. 20-17(6) deals with "two charges of reckless driving *committed* within a period of twelve months." (Italics added.) The date of the offense, not the date of the conviction, is the determinative factor.

Plaintiff's second assignment of error is general, that is, directed to the judgment. With reference thereto, plaintiff, by brief, makes two contentions, viz.:

First, plaintiff asserts that there was no evidence before the court upon which to base its findings of fact. We need not list the several reasons why this position is untenable. Suffice to say, the essential facts found by the court are the facts set forth in plaintiff's statement of case on appeal.

Second, plaintiff asserts that, because there was no express finding that said convictions were *final* convictions, the findings of fact were insufficient to support the judgment. True, the word "conviction," as used in G.S. 20-17(6), refers to a final conviction by a court of competent jurisdiction. *Harrell v. Scheidt, Comr. of Motor Vehicles,* 243 N.C. 735, 739, 92 S.E. 2d 182. Plaintiff made no allegation and offered no evidence that he appealed from either of said convictions or that either conviction was otherwise than a final conviction. Moreover, the record fails to show that plaintiff contended at any time in the court below that the convictions were not final convictions. Indeed, it is obvious that the convictions as certified by said clerks were considered by the court below and all parties as final convictions. Nothing else appearing, they are so regarded here.

The provisions of G.S. 20-17(6) and G.S. 20-19(f), are mandatory. *Harrell v. Scheidt, Comr. of Motor Vehicles, supra.* Plaintiff's assignments of error are without merit.

Affirmed.

RODMAN, J., not sitting.

STATE v. MARTHA BOLES.

(Filed 10 April, 1957.)

1. Constitutional Law § 34c—

The refusal of the court to compel a State's witness to disclose the name of a confidential informer who worked with him in purchasing the intoxicating liquor from defendant will not be held for error when at the time the witness's testimony is uncontradicted and nothing appears in evidence concerning the informer except the fact that he was present when the

witness made the purchase, the propriety of forcing a disclosure of the identity of the informer being dependent upon the circumstances of the case and at what stage of the proceedings the request is made.

2. Criminal Law § 6a—

Where the State's evidence shows only that the investigator for an alcohol tax unit gave defendant an opportunity to violate the law and that she freely embraced the opportunity, and defendant's defense is based solely on her contention that she was not present and did not participate in the sale, the question of entrapment does not arise.

APPEAL by defendant from *Johnston, J.*, September, 1956 Term, YADKIN Superior Court.

Criminal prosecution upon a bill of indictment charging eight different violations of the intoxicating liquor laws. The defendant was convicted on the counts charging (1) unlawful possession, (2) unlawful possession for the purpose of sale, and (3) unlawful sale. The court imposed a prison sentence of six months on each count and ordered that they should run concurrently. The defendant appealed.

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

Parks G. Hampton for defendant, appellant.

HIGGINS, J. The State offered the testimony of Alfred J. Scheuch, an investigator for the Alcohol Tax Unit, who was in Yadkin County doing undercover work in an effort to discover violations of the liquor laws. The witness testified that on 15 April, 1956, he went to the defendant's house (accompanied by a confidential informer) and purchased from the defendant and from an unidentified man one gallon of nontaxpaid liquor for which he paid $11.00. He handed the money to the man who in turn handed it to the defendant who put it in her apron pocket. The defendant gave the witness a drink of liquor at the time of the purchase. The witness further testified that on 21 April, 1956, he went to the defendant's house with the sheriff to execute a search warrant. On that occasion no liquor was found.

On cross-examination, defendant's attorney asked the witness to give the name of the confidential informer who was present on the 15th. The witness replied: "Where we are assisting the Federal Government at the present time, I don't wish to reveal him." The following then took place:

Attorney: "Will you require him to give that information?"
Court: "No, sir."
Attorney: "Give me an exception." (Exception No. 4)

Attorney: "What was his name?"
Witness: "I can't tell you that."
Court: (to the Jury): "Gentlemen, go to the jury room."
Court: "What is your purpose?"
Attorney: "I want to know why he isn't here today."
Court: "If that is the reason, I won't permit him to answer."
Attorney: "I want to know if he was there when certain things happened."
Court: "You can ask that."
Attorney: "Give me an exception." (Exception No. 5)

In passing on defendant's assignments based on exceptions Nos. 4 and 5, we must do so in the light of the facts before Judge Johnston at the time he made the ruling complained of. At that time there was no conflict in the testimony. Nothing appeared in the evidence concerning the informer except the fact that he was present when the witness made the purchase. We hold that the defendant did not make a sufficient showing to require the disclosure. The court's refusal to order it under the circumstances was not error.

After the State rested the defendant testified that on 15 April she was not at home; that she did not sell or participate in the sale of liquor on that day; that the first time she ever saw the State's witness was on 21 April when he came to her house with the sheriff. Thus the evidence as to whether the defendant was at home on 15 April and participated in the sale was sharply in conflict.

Had the defendant, in the light of this conflict, requested the name of the confidential informer as a possible defense witness, a more serious question would have been presented. That question, however, was not before Judge Johnston and consequently is not before us. The propriety of disclosing the identity of an informer must depend on the circumstances of the case and at what stage of the proceedings the request is made. *Roviaro v. United States,* decided 25 March, 1957.

The defendant insists a verdict of not guilty should have been directed on the ground that if the defendant sold the liquor as testified to by the State's witness, she was induced and entrapped into doing so by the enforcement officer in order that he might prosecute her for the offense which he had induced her to commit. The State's evidence shows only that the investigator gave her an opportunity to violate the law and that she freely embraced the opportunity. According to the defendant's evidence she was not present and did not participate in the sale. The question of entrapment, therefore, does not arise. The evidence is sufficient to go to the jury.

No error.

C. E. HUIE, C. C. HUIE, J. R. HUIE, NAOMI H. MULLIS, J. H. HUIE AND MRS. MARIE H. RABIDOU v. D. C. TEMPLETON AND WIFE, OLLIE TEMPLETON.

(Filed 10 April, 1957.)

1. Appeal and Error § 34—

The failure of appellant on appeal from judgment of nonsuit to set out the evidence in narrative form in the case on appeal served by him, and becoming the case on appeal, in accordance with Rule of Practice in the Supreme Court No. 19(4), requires dismissal by the Court, even *ex mero motu*, the rule being mandatory.

2. Easements § 2—

In this action to establish an easement by implication from plaintiffs' land across defendants' land to a public highway, nonsuit *held* proper under authority of *Bradley v. Bradley*, 245 N.C. 483.

APPEAL by plaintiffs from *Phillips, J.*, at October 1956 Term, of IREDELL.

Civil action to permanently restrain defendants from using roadway across lands of plaintiffs, in which defendants claim easement by implication of law to reach public highway.

Plaintiffs and defendants own adjoining land, and claim title from a common source.

Upon trial in Superior Court, motion of defendants made when plaintiffs rested their case for judgment as of nonsuit was allowed, and plaintiffs appeal therefrom to Supreme Court and assign error.

Buren Jurney and Adams, Dearman & Winberry for Plaintiffs Appellants.

Land, Sowers, Avery & Ward and McLaughlin & Battley for Defendants Appellees.

WINBORNE, C. J. At the threshold, Rule 19(4) of Rules of Practice in the Supreme Court, 221 N.C. 544, at 553, pertaining to transcript record of an action brought to this Court, reads in pertinent part as follows: "The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, if the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed . . ." This rule is mandatory, and may not be waived by the parties. The requirement of the rule will be enforced *ex mero motu*. The rule has been called

repeatedly to the attention of the legal profession in this State. See among other cases, *Bank v. Fries*, 162 N.C. 516, 77 S.E. 678; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126; *In re DeFebio*, 237 N.C. 269, 74 S.E. 2d 531; *Anderson v. Heating Co.*, 238 N.C. 138, 76 S.E. 2d 458; *S. v. Powell*, 238 N.C. 550, 78 S.E. 2d 343; *Laughinghouse v. Ins. Co.*, 239 N.C. 678, 80 S.E. 2d 457; *S. v. McNeill*, 239 N.C. 679, 80 S.E. 2d 680; *Whiteside v. Purina Co.*, 242 N.C. 591, 89 S.E. 2d 159.

In the instant case the transcript of case on appeal discloses that the case on appeal as served by appellants became the case on appeal, and the transcript of evidence therein (33 pages), other than pleadings offered, is mainly in question and answer form, and the appeal is from a judgment of nonsuit. In such situation under the Rule the appeal will be dismissed.

Nevertheless the record has been read from cover to cover and considered, as have the briefs of the parties, and the ruling of the trial judge in granting the nonsuit appears to be accordant with settled principles of law pertaining to easement by implication of law as enunciated in decisions of this Court, among which are these: *Ferrell v. Trust Co.*, 221 N.C. 432, 20 S.E. 2d 329; *Spruill v. Nixon*, 238 N.C. 523, 78 S.E. 2d 323; *Barwick v. Rouse*, 245 N.C. 391, 95 S.E. 2d 869; *Bradley v. Bradley*, 245 N.C. 483, 96 S.E. 2d 417, applied to plaintiffs' evidence offered in the trial below.

The judgment below is affirmed, and the appeal dismissed.

Judgment affirmed.

Appeal dismissed.

TOM BULLARD v. FRANCIS PHILLIPS.

(Filed 10 April, 1957.)

Animals § 3: Automobiles § 10½—

Evidence that defendant was driving some seven or eight cattle along a much traveled highway in the nighttime without lights, warning, or any notice to the traveling public, that one of the cows jumped in front of plaintiff's car, and that plaintiff's car was damaged in the resulting collision, *held* sufficient to overrule defendant's motion for nonsuit.

APPEAL by defendant from *Johnston, J.*, and a jury, at November Term, 1956, of YADKIN.

Hall & Zachary for defendant, appellant.

Allen, Henderson & Williams for plaintiff, appellee.

PER CURIAM. Civil action in tort arising out of a collision of an automobile with a cow. The plaintiff was driving his automobile after dark along Highway #601 between Mocksville and Yadkinville, when suddenly a cow belonging to the defendant jumped in front of the car and was struck and killed.

The plaintiff alleged that the collision was caused by the negligence of the defendant in driving a herd of untied cattle, some seven or eight in number, along a much traveled highway in the nighttime without lights, warning, or any notice to the traveling public. The defendant denied negligence, pleaded contributory negligence, and set up a cross action for the loss of his cow. Each party introduced evidence in support of his allegations, and the court submitted to the jury all the issues raised by the pleadings. The jury answered the issues in favor of the plaintiff and awarded him damages in the sum of $400. From judgment on the verdict, the defendant appeals, assigning as the only error the refusal of the court to allow his motion for nonsuit at the close of the evidence.

We have reviewed carefully the evidence and find it amply sufficient to sustain the ruling of the trial court. The appeal presents no question requiring extended discussion.

No error.

AMAZON COTTON MILLS COMPANY v. THE DUPLAN CORPORATION.

(Filed 10 April, 1957.)

Appeal and Error §§ 7, 53—

Where the complaint states a defective cause of action, the Supreme Court has the power to dismiss *ex mero motu*. Therefore, petition to rehear on the ground that motion to dismiss was not passed on by the Superior Court and was not the subject of an exceptive assignment of error on appeal, will be dismissed.

PETITION by plaintiff to rehear the above-entitled cause reported in 245 N.C. 496, 96 S.E. 2d 267. This Court denied defendant's request for permission to file a demurrer *ore tenus* on the rehearing.

James L. Rankin, E. T. Bost, Jr., W. H. Beckerdite,
Walser & Walser,
By: Don A. Walser, for plaintiff, appellee.
Ratcliff, Vaughn, Hudson, Ferrell & Carter,
By: R. M. Stockton, Jr., for defendant, appellant.

PER CURIAM. In the petition to rehear the plaintiff contended this Court committed error in ordering the action dismissed. The reason assigned is that the motion to dismiss was not passed on by the Superior Court and not the subject of an exceptive assignment here.

This Court's decision was based on the view that the plaintiff stated a defective cause of action which the Court had the power to dismiss *ex mero motu*. "If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action." *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910. Upon the authority of the case cited, the petition is

Dismissed.

STATE v. GEORGE CLARENCE DUNN.

STATE v. BOSSIE JAMES STOCKS.

(Filed 10 April, 1957.)

APPEALS by defendants from *Parker, J.*, December 1956 Term of GREENE.

Attorney-General Patton for the State.

Jones, Reed & Griffin for defendant appellants.

PER CURIAM. The record originally certified to this Court merely showed that defendants had been placed on trial in the Superior Court on warrants returnable to Greene County Court charging defendant Dunn with (a) possession of nontaxpaid whisky and (b) maintaining a public nuisance—a gambling house; and charging defendant Stocks with possession of nontaxpaid whisky; a mistrial as to the charge against defendant Dunn of maintaining a public nuisance; verdicts of guilty as to each defendant on the charge of possession of nontaxpaid whisky; and prison sentences imposed on the verdicts. The only exception noted and error assigned was to the judgment.

In response to orders of this Court, copies of the record of the Greene County Court have been duly certified to us. It now appears that the defendant Dunn was tried and convicted in Greene County Court on the warrant charging him with possession of nontaxpaid whisky. He was tried and convicted in Greene County Court on the warrant charging him with maintaining a public nuisance—a gambling house. That warrant likewise charged him with disorderly conduct and public

drunkenness. He was found not guilty of the latter charge in Greene County Court. The record shows that he appealed from the judgments rendered by the Greene County Court imposing prison sentences on the charges of possession of nontaxpaid whisky and maintaining a public nuisance.

The record now certified to us shows that defendant Stocks was charged in a warrant returnable to Greene County Court with the possession of nontaxpaid whisky. He was there convicted and from a prison sentence he appealed to the Superior Court. No objection was taken to consolidation of the cases when tried in the Superior Court. No error is made to appear on the record now before us.

No error.

STATE v. JAMES OTIS GREEN.

(Filed 10 April, 1957.)

APPEAL by defendant from *Hall, J.*, January Term 1957 of WARREN.

This is a criminal action originally tried in the Recorder's Court of Warren County upon a warrant charging the defendant with the unlawful possession of nontaxpaid liquor for the purpose of sale. From the judgment entered on a verdict of guilty, the defendant appealed to the Superior Court where he was tried on the original warrant and found guilty as charged. From the sentence imposed, the defendant appeals, assigning error.

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

G. M. Beam for defendant.

PER CURIAM. A careful examination of the exceptions entered in the trial below and assigned as error, leads us to the conclusion that they present no prejudicial error. The evidence was sufficient to carry the case to the jury, and the verdict and judgment will be upheld.

No error.

RONALD E. FINCH, ADMINISTRATOR WITH THE WILL ANNEXED OF WILLIAM C. HONEYCUTT, DECEASED, v. GEORGIA GREER HONEYCUTT, WIDOW; WILLIAM C. HONEYCUTT, JR., A MINOR; NANCY ANN HONEYCUTT, A MINOR; JUDY GREER HONEYCUTT, A MINOR; AND KESTER WALTON AND GEORGIA GREER HONEYCUTT, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF WILLIAM C. HONEYCUTT, DECEASED.

(Filed 17 April, 1957.)

1. Wills § 32—

The presumption that testator did not intend to die intestate will be employed as an aid in seeking to ascertain testator's intent.

2. Wills § 33a—

No particular form of expression is necessary to constitute a legal disposition of property by will, but the courts will give effect to the intent of testator as gathered from the language used.

3. Same—

The doctrine of devise or bequest by implication obtains in this jurisdiction, but is to be applied only when it cogently appears to be the intention of testator as gathered from the language of the entire instrument, and the doctrine cannot be applied merely to avoid intestacy.

4. Same—

Testator's will stated that his estate was a community estate with his wife, and then proceeded to dispose of "my half of my & her (wife) estate" without thereafter again mentioning the other half of the estate or making any provision for his wife. *Held:* The wife took one-half of the estate, both real and personal, as a devise and bequest by implication, this being the inescapable conclusion as to testator's intent as gathered from the language of the instrument as a whole.

5. Trusts § 3b—

The Statute of Uses merges the legal and equitable title in the beneficiary of a passive trust, but this rule does not apply to active trusts, and under an active trust legal title vests and remains in the trustee for the purpose of the trust. G.S. 41-7.

6. Same—

Where there is any control to be exercised by the trustee or any duty to be performed by him in relation to the trust property or in regard to the beneficiaries, the trust is an active trust, and the legal and equitable titles do not merge in the beneficiaries.

7. Trusts § 3a—

In order to create a valid trust, the instrument must employ sufficient words to raise it and specify a definite subject and ascertained object.

8. Same: Wills § 33d—

The will in question devised and bequeathed property to testator's children, but stated the will of testator that the property be held by named

trustees for the benefit of his children, and that the trustees distribute the *corpus* to them on later specified dates, and imposed specified duties on the trustees in the event of the mental or moral irresponsibility of any child, and charged them to look after the children's education, moral and religious, as well as their material, interests. *Held:* The will creates a valid, active trust.

9. Wills § 33h—

Where a will disposes of property to trustees of an active trust for the benefit of named persons *in esse*, with direction to the trustees to distribute the *corpus* of the estate on specified dates, the trust does not violate the rule against perpetuities, since the gift to the beneficiaries vests in them immediately upon the death of the testator although the full enjoyment is postponed to the dates specified.

10. Wills § 39—

Where the judgment of the court in an action to construe a will determines the present vesting of all property disposed of by the instrument, questions as to the disposition of the property upon the happening of certain contingencies, which are merely speculative and not considered by the court below, will not be considered on appeal.

APPEAL by defendants and each of them, including Guardians *ad litem,* from *Patton, Special J.,* at July 1956 Civil "A" Term of BUNCOMBE.

Civil action instituted by Ronald E. Finch, the Administrator, with the will annexed of William C. Honeycutt, deceased, under the Declaratory Judgment Act, Article 26 of Chapter 1 of the General Statutes of North Carolina for the purpose of obtaining from the court instructions with reference to certain questions that have arisen in the administration by him of the estate of William C. Honeycutt, deceased.

From the pleadings it appears:

(1) That William C. Honeycutt, late of the county of Buncombe, State of North Carolina, died on the 19th day of January, 1956, leaving a last will and testament, which has been duly probated and recorded, of which the following is a copy:

"My Will"

"My estate is a community estate with my wife Georgia Greer Honeycutt and has been held as such for several years when paying Fed. and State Income Tax.

"Therefore it is my will that my half of my & her (wife) estate be given to my three children - - - Judy Greer Honeycutt, Nancy Ann Honeycutt, and William Carson Honeycutt, to share & share alike. After all taxes or other debts have been settled. It is my will that said property be held in trust by my wife & my friend Kester Walton, Atty. for said children until & when the year 1980—then ⅓ of residue be paid

to my children or his or her children if any child of mine should die before reaching the year 1980. Trustee may have two years to pay said ⅓ of estate to said children or their heirs—½ of balance of residue estate shall be distributed in the year 1992 on the same conditions as outlined above. The balance of the estate is to be distributed in the year 2005 on the same conditions as outlined above.

"It is my desire that my trustees serve as long as they are physically & mentally able to do so, However if any reason they should be disqualified or resign or die then I desire the Wachovia Bank & Trust Co, Asheville to act as Trustee for said children—I desire that my good friend & Atty, Ronald E. Finch, Black Mtn, N. C. to handle all bookkeeping and work to keep a true picture of said estate for the Trustee. also to advise with appointed trustee. I desire that Mr. Finch be paid an agreed yearly salary in keeping with work done & the ability to pay—and so long as Mr. Finch lives I desire that piece real estate be held as long as possible. I desire "Oitsa" or about 500 hundred acres on Lakey Gap Rd Black Mtn Township Buncombe Co., N. C. to be held or so much as possible until the year 2005. Then I hope my children & grandchildren if any keep most of said property as long as possible. without hardship.

"If any child becomes disabled mentally or habits causing irresponsibility—a spendthrift—without heirs of his or her own or adopted children. Then his or her part of the estate shall be withheld at any one of the periods of distribution—and given to him or her as needed.

"If any of my issue have heirs or adopted children, and become disabled mentally or by habits—then such children shall take the benefits along with its father or mother.

"It is my desire that my Trustees will look after my childrens educational, moral and religious interests as well as their money or material interests.

William C. Honeycutt"

"This 25 day of July 1955."

(2) That William C. Honeycutt was survived by his widow Georgia Greer Honeycutt, and by his three children born of his marriage to Georgia Greer Honeycutt, named Judy Greer Honeycutt, a minor daughter, born on December 10, 1948, Nancy Ann Honeycutt, a minor daughter, born September 15, 1952, and William Carson Honeycutt, Jr., a minor son, born on August 12, 1954, as his nearest of kin, and heirs at law surviving him, all of whom are parties to this action.

(3) That under the will of William C. Honeycutt a trust is attempted to be created and established for the benefit of the three above named children and for their "children or his or her children," and that Kester

Walton and Georgia Greer Honeycutt are named trustees of the trust, and they are parties to this action.

(4) That Georgia Greer Honeycutt had been duly appointed as general guardian for said minor defendants, Judy Greer Honeycutt, Nancy Ann Honeycutt, and William Carson Honeycutt, Jr., but, it appearing that a conflict of interest arises in this action between Georgia Greer Honeycutt, as beneficiary and claimant under the will of William C. Honeycutt, deceased, and the said three minor defendants, as beneficiaries and claimants under the said will, John C. Cheesborough, a disinterested, fit and suitable person to represent them, was appointed guardian *ad litem* for, and to act in behalf of said minors in this action, and to defend same in their behalf, and as such guardian he is a party to this action.

(5) That since there may be persons not now *in esse*, namely, the unborn issue of said minor defendants, Judy Greer Honeycutt, Nancy Ann Honeycutt, and William Carson Honeycutt, Jr., who shall be beneficiaries under the will of William C. Honeycutt, deceased, and who shall have an interest in his estate, Earl Fowler was appointed guardian *ad litem* for, and to act in behalf of the unborn issue of said minors, and to represent them and to defend this action in their behalf, and, as such guardian *ad litem*, he is a party to this action.

(6) That as plaintiff alleges in his complaint, there has come into his hands, as administrator with the will annexed of William C. Honeycutt, both real and personal property in specified large amounts.

(7) That plaintiff also alleges in paragraph 7 of the complaint that as to the first two sentences of the will of William C. Honeycutt, deceased, and construing the will as a whole, these questions arise:

(a) Is Georgia Greer Honeycutt entitled to receive a one-half interest in fee in all the property of William C. Honeycutt, deceased?

(b) And, if not, to what interest, if any, is she entitled?

(8) And that plaintiff alleges in paragraph 8 of the complaint that as to the second paragraph (unnumbered) of the will of William C. Honeycutt, deceased, and construing the will as a whole, these questions arise:

(a) Are the three named children entitled to a one-half interest in all the property of William C. Honeycutt, deceased, share and share alike, after all taxes or other debts have been settled under this provision of the will?

(b) If not, to what interest, if any, are they entitled?

(c) Under this provision of the will, are Georgia Greer Honeycutt and Kester Walton entitled to receive and hold, as Trustees for the three named children, the property specified in said provision and to dispose of it in accordance with the directions set out therein?

(9) That the defendant Georgia Greer Honeycutt answering the complaint, in pertinent part, contends that she is entitled to receive one-half the estate of William C. Honeycutt in fee under the provisions of his said will.

(10) That the defendants Kester Walton and Georgia Greer Honeycutt, Trustees under the last will and testament of William C. Honeycutt, deceased, answering the complaint, contend that the answer to the question set out in paragraph 8(a) should be "Yes" on the terms and provisions set out in the will; and that the answer to the question set out in paragraph 8(c) should be "Yes" in accordance with the directions set out in the will.

(11) That the defendant John C. Cheesborough, guardian *ad litem* for William C. Honeycutt, Jr., Nancy Ann Honeycutt and Judy Greer Honeycutt, minor children of William C. Honeycutt, deceased, answering the complaint, contends: (1) That the answer to the question set forth in subsection (a) of paragraph 7 should be "No," and that the answer to the question set forth in subsection (b) of paragraph 7 should be: A child's part, or one-fourth interest in the personal property of said estate, and a dower interest in the real property; (2) that the answer to the question set forth in subsection (a) of paragraph 8 should be "No"; that the answer to the question set forth in subsection (b) of paragraph 8 should be: Three-fourths of the personal property, and the entire interest in the real property of said estate, subject only to the dower rights of defendant Georgia Honeycutt; and that the answer to the question set forth as subsection (c) of paragraph 8 should be "No" for substantially two reasons: 1. That the trust attempted to be set up is passive and void; and 2, that it is violative of the rule against perpetuities.

(12) That the defendant Earl J. Fowler, Guardian *ad litem* for the unborn issue of William C. Honeycutt, Jr., Nancy Ann Honeycutt and Judy Greer Honeycutt, answering the complaint, propounds questions in respect to certain sentences in the will of William C. Honeycutt, as follows: 1. That as to the third sentence of the second paragraph (unnumbered) and construing the will as a whole:

"A. What interest are the unborn children of Judy Greer Honeycutt, Nancy Ann Honeycutt and William Carson Honeycutt, Jr., entitled to under this provision of the will?

"B. What portion of the income from the estate held by the Trustees, Kester Walton and Georgia Greer Honeycutt, are the three children Judy Greer Honeycutt, Nancy Ann Honeycutt, and William Carson Honeycutt, Jr., entitled to receive?"

2. That as to the provision reading: "If any of my issue have heirs or adopted children, and become disabled mentally or by habits . . .

then such children shall take the benefits along with its father or mother," and construing the will as a whole: "A. If any of the children of the testator become disabled, mentally or by habits, and at such time has a child or children in being, is the said child or children entitled to receive that portion of the estate of the testator, as originally provided for the child of the testator?"

This cause came on for hearing before Patton, Judge presiding over the July 1956 "A" Term of the Superior Court of Buncombe County, North Carolina, on 25 July, 1956. And all the parties to the action having agreed to waive jury trial, and that all matters raised by the pleadings in the cause might be determined by the court sitting as a jury, the Judge, after reciting facts accordant with the facts as hereinabove set forth, finds that all the defendants, including guardians *ad litem,* have filed verified answers to the complaint, and that all parties who have or who may have any interest in the estate of William C. Honeycutt, deceased, whether such interest be present or prospective, vested or contingent, are now properly before the court, and the court has jurisdiction of the parties and of the subject matter of this action, and is entitled to proceed to hear and determine the matters involved in this action under the general equity powers of the court and the provisions of Chapter 1, Article 26, of the General Statutes of North Carolina.

And the parties stipulated and agreed that judgment might be signed after the adjournment of said term of court and out of the district *nunc pro tunc,* as of the 25th day of July, 1956.

Pursuant thereto, and upon consideration (1) of all the evidence presented, the foregoing findings of fact (which the parties stipulate are supported by the evidence and the pleadings), and (2) of statements and arguments of counsel for the respective parties, the presiding judge entered judgment in which "IT IS ORDERED, ADJUDGED AND DECREED:

"(A) That considering the wording of said will, the intent of the testator, as gathered from a consideration of the will in its entirety, there was willed and devised by the testator, William C. Honeycutt, to his wife, Georgia Greer Honeycutt, one-half interest in all of the personal and real property of which he died seized, and that the said Georgia Greer Honeycutt is entitled to receive a one-half interest in fee in all the property of the said William C. Honeycutt, deceased, by virtue of the terms of said will.

"(B) That the three children of William C. Honeycutt are entitled to receive under the terms of the will of the said William C. Honeycutt a one-half interest in all the property of William C. Honeycutt, deceased, share and share alike, after all taxes and other debts owed by the deceased and his administrator have been fully paid and settled.

"(C) That the testator, by his will, did not create a legal and valid trust whereby Kester Walton and Georgia Greer Honeycutt, as Trustees, are entitled to hold or receive any property willed to his three minor children.

"(D) That the plaintiff herein, after having fully administered said estate, and subject to the final orders and approval of the Clerk of the Superior Court of Buncombe County, is directed to dispose of and distribute the property then remaining in his hands and belonging to the estate of William C. Honeycutt, deceased, in accordance with the terms and conditions of this judgment.

"(E) Let the costs of this action, including all allowances to attorneys for plaintiff and defendants, and guardians *ad litem,* as hereinafter made by order of the court, be taxed against the plaintiff, to be paid out of the personal property of the estate."

To the foregoing judgment the defendants (other than Georgia Greer Honeycutt individually) and each of them, except and appeal to Supreme Court, and assign error.

Harkins, Van Winkle, Walton & Buck for Georgia Greer Honeycutt, Widow.

Harkins, Van Winkle, Walton & Buck for Kester Walton and Georgia Greer Honeycutt, Trustees.

John C. Cheesborough, Guardian Ad Litem.

Earl J. Fowler, Guardian Ad Litem for Unborn Persons.

WINBORNE, C. J. The assignments of error based upon specific exceptions taken by the several appellants to conclusions of law made by the trial judge of Superior Court, and presented in this Court, challenge the correctness of the judgment from which appeal is taken in two basic aspects in holding: (1) That William C. Honeycutt, by his will, devised and bequeathed to his wife Georgia Greer Honeycutt one-half interest in all of the real and personal property of which he died seized and possessed; and (2) that William C. Honeycutt, by his will, did not create a legal and valid trust for the benefit of his three children in one-half of his property, and hence the children took such one-half without regard to trust provisions set out therein.

A careful consideration of the provisions of the will, in the light of applicable principles of law, leads to the conclusion that in the first such aspect the ruling is correct and proper, but that in the second such aspect the ruling is in error.

Pertinent to such aspects of the case in hand, the intent of the testator is the paramount consideration in the construction of his will.

"In searching for the intent of the testator as expressed in the language used by him, we start with the presumption that one who makes

a will is of disposing mind and memory, and does not intend to die intestate as to any part of his property." *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231, where the subject is fully discussed. See also *Jones v. Jones,* 227 N.C. 424, 42 S.E. 2d 620.

In the *Ferguson case, supra,* it is also stated that "Even where a will is reasonably susceptible of two constructions, the one favorable to complete testacy, the other consistent with partial intestacy, in application of the presumption, the former construction will be adopted, and the latter rejected."

No particular form of expression is necessary to constitute a legal disposition of property. Hence, although apt legal words were not used and the language is inartificial, the courts will give effect to it where the intent is apparent. Even the form will be disregarded. *Kerr v. Girdwood,* 138 N.C. 473, 50 S.E. 852; 107 A.S.R. 551.

Moreover, the doctrine of devise or bequest by implication is well established in our law. *Burcham v. Burcham,* 219 N.C. 357, 13 S.E. 2d 615. See also *Burney v. Holloway,* 225 N.C. 633, 36 S.E. 2d 5; *Efird v. Efird,* 234 N.C. 607, 68 S.E. 2d 279.

In the *Burcham case, supra,* this statement of the principle is quoted with approval: "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." 1 Underhill on Wills Section 463.

True it is said in the *Burney case, supra,* "The settled policy of the law, however, founded upon strong reason, does not favor a devise or even a bequest, by implication, permitting it only when it cogently appears to be the intention of the will . . . Probability must be so strong that a contrary intention 'reasonably be supposed to exist in testator's mind,' and cannot be indulged merely to avoid intestacy."

Nevertheless, in the light of these principles, applied to the wording of the will of William C. Honeycutt here considered it is apparent that a gift by implication was effected of one-half of his estate to his wife, Georgia Greer Honeycutt. In the first sentence he refers to "my estate" as being "a community estate with my wife, Georgia Greer Honeycutt," and that "it has been held as such for several years when paying Fed. and State Income Tax." Then the next sentence reads, "Therefore it is my will that my half of my and her (wife) estate be given to my three children . . .," and no mention is again made of the other half. Indeed, no devise or bequest otherwise is made to his wife. The conclusion is inescapable that he intended she should have one-half of his

estate. And it will not be presumed that he intended to die partially intestate.

Therefore this Court holds that the ruling of the trial court in this aspect is proper, and should be affirmed.

Now as to whether the testator, William C. Honeycutt, by the language used in his will, created a legal and valid trust whereby the Trustees named are entitled to hold and to receive any property willed to his three minor children: The Statute of Uses, 27 Henry VIII, preserved in this State by G.S. 41-7, merges the legal and equitable titles in the beneficiary of a passive trust, but the rule established by the statute does not apply to active trusts. *Chinnis v. Cobb,* 210 N.C. 104, 185 S.E. 638.

As to active trusts the legal title vests and remains in the trustee for the purpose of the trust. *Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493. See also *Security National Bank v. Sternberger,* 207 N.C. 811, 178 S.E. 595.

The distinction between a passive and active trust is clearly pointed out in opinion by *Adams, J.,* in *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572.

In the *Chinnis case, supra,* in opinion by *Devin, J.,* later *C. J.,* it is said that "an active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose." Then the opinion quotes with approval this statement from Underhill on Wills, Section 773: "In other words, when any control is to be exercised or any duty performed by the trustee, however slight it may be . . . the trust is active"; and the opinion goes on to say, "Since it would be impossible for the trustee to perform the duties imposed upon him unless permitted to retain the legal estate in himself, equity will not permit it to be transferred to the beneficiary under the Statute of Uses."

Moreover, it is well settled in this State that to constitute a valid trust "three circumstances must concur—(1) sufficient words to raise it, (2) a definite subject, and (3) an ascertained object." *Thomas v. Clay,* 187 N.C. 778, 122 S.E. 852.

In the light of these principles, applied to the wording of the provisions of the will of William C. Honeycutt, it is manifest that the three essentials are present. It is clear that the testator intended to create a trust for the benefit of his children. It is expressly so stated, and he named the trustees. And aside from other provisions of the will the concluding sentence that "It is my desire that my trustees will look after my childrens educational, moral and religious interests as well as their money or material interests," implies that the trustees shall have control of the estate in the performance of these duties. As stated

above, it would be impossible for the trustees to perform the duties thus imposed unless permitted to retain the legal title. Hence equity will not permit it to be transferred to the beneficiaries under the Statute of Uses.

But it is contended that the trust attempted to be set up is violative of the Rule Against Perpetuities. "Under this rule, no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years plus period of gestation, after some life or lives in being at the time of the creation of the interest. If there is possibility such future interest may not vest within the time prescribed, the gift or grant is void." *McQueen v. Trust Co.*, 234 N.C. 737, 68 S.E. 2d 831.

The contention is not well founded here. For "it is generally held, nothing else appearing in the will to the contrary, that where an estate is devised to a trustee in an active trust for the sole benefit of persons named as beneficiaries, with direction to divide up and deliver the estate at a stated time, this will have the effect of vesting the interest immediately on the death of the testator. The intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only its enjoyment." *Coddington v. Stone*, 217 N.C. 714, 9 S.E. 2d 420.

The gift in the instant case to the children vested in interest to them immediately upon the death of the testator, although the full enjoyment is postponed to later dates. When these conditions exist, a trust does not violate the Rule against Perpetuities. *McQueen v. Trust Co., supra.*

Even though the postponements here ultimately invade the Twenty-first Century, reference to the ages of the children indicates that the postponements are within the life or lives of the beneficiaries in being and twenty-one years and ten lunar months thereafter, the limitation of the Rule against Perpetuities. *Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E. 2d 104.

Hence the ruling of the trial judge in holding that the testator, William C. Honeycutt, by his will, did not create a legal and valid trust whereby Kester Walton and Georgia Greer Honeycutt, as Trustees, are entitled to hold or receive any property willed to his three minor children must be, and it is hereby reversed. And in accordance therewith the holding of the trial Judge that the three children of William C. Honeycutt are entitled to receive, under the terms of the will of the said William C. Honeycutt, a one-half interest in all the property of William C. Honeycutt, deceased, share and share alike, after all taxes and other debts owed by the deceased and his administrator have been fully paid and settled is modified so that the legal title be vested in the trustees, and the beneficial interest vested in the children in keeping with the trust provisions set out in the will.

Finally, the questions propounded by the guardian *ad litem* for persons not in being were not considered by the trial Judge. Indeed presently they are merely speculative, and are not considered.

Hence in accord with this opinion, the judgment from which appeal is taken is

Modified and affirmed.

CITY OF GOLDSBORO v. ATLANTIC COAST LINE RAILROAD COMPANY, CHEMICAL CORN EXCHANGE BANK, TRUSTEE, C. C. HOWELL, JR., TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, AND WILLIAM M. HOWELL, TRUSTEE.

(Filed 17 April, 1957.)

1. Trial § 55—

In a trial by the court under G.S. 1-184, the court is required to find the facts on all the issues of fact joined on the pleadings, declare the conclusions of law arising on the facts found, and enter judgment accordingly, G.S. 1-185, but where judgment of nonsuit is allowed, such judgment is in effect a holding that all the evidence, taken in the light most favorable to plaintiffs, is insufficient to support a favorable finding for plaintiffs on any issue raised by the pleadings, and is in itself sufficient.

2. Trial § 54—

In order to preserve for review on appeal an adverse ruling on a motion for judgment of nonsuit made in the course of a trial by the court under G.S. 1-184, it is necessary that appellant except to the findings of fact in apt time on the ground that such findings are not supported by the evidence.

3. Appeal and Error § 49—

Where the findings of fact by the court are supported by competent evidence, they are as conclusive as a verdict of a jury.

4. Appeal and Error § 22—

Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal.

5. Same—

Motion to nonsuit made in the course of a trial by the court under G.S. 1-184 does not present the question as to whether the findings of fact are supported by competent evidence when no exceptions have been taken to the admission of the evidence, the findings of fact, or the conclusions of law.

7. Appeal and Error § 21—

An exception to the signing of the judgment presents whether the facts found support the judgment and whether error of law appears upon the face of the record.

8. Eminent Domain § 1—

Ordinarily, land devoted to the public use cannot be taken for another public use unless specifically authorized by express or implied legislative authority, but this rule does not apply to property owned by a public service corporation but which is not in actual use or is not necessary or vital to the operation of the business of the owner.

9. Same—

A municipal corporation has power, under its charter and the general powers of eminent domain conferred upon it by statute, to condemn for necessary street purposes a strip of land owned by a railroad company when such property is not being used by the railroad company and is not necessary nor essential to the operation of its business.

APPEAL by respondent Atlantic Coast Line Railroad Company from *Williams, J.*, December Civil Term 1956 of WAYNE.

This is a special proceeding by the City of Goldsboro, petitioner, to condemn and take certain property from the respondents, Atlantic Coast Line Railroad Company and lien holders, for use by the petitioner for street purposes, to wit, a traffic circle.

It was stipulated that the court might hear the evidence, find the facts, sign and render judgment in or out of term, in or out of the district. The following judgment was signed on 31 January 1957 and filed on 6 February 1957:

"This cause coming on to be heard, and being heard, before his Honor, Clawson L. Williams, Judge presiding at the December 1956 Term of the Superior Court of Wayne County, North Carolina, and counsel for the petitioner, City of Goldsboro, and the respondents, Atlantic Coast Line Railroad Company, and C. C. Howell, Jr., Trustee, and William M. Howell, Trustee, having waived a trial by jury by oral consent and agreement in open court, and duly entered on the minutes that the court might find the facts and render judgment thereon, and that such judgment might be signed out of term and out of the district in order that a transcription of the testimony might be completed and made available for further study by the court:

"And it appearing to the court from the pleadings and records that all of the parties to this proceeding are properly represented before the court except Chemical Corn Exchange Bank, Trustee, a co-trustee with C. C. Howell, Jr., Trustee, and United States Trust Company of New York, a co-trustee with William M. Howell, Trustee, and that their only interest in this proceeding is in their fiduciary capacities as trus-

tees in two certain trust instruments embracing the land which is the subject of this controversy, and that each has duly and lawfully accepted service of summons, together with a copy of the petition herein, as provided for in Section 102(2), Chapter 1, of the General Statutes of North Carolina, as amended, and that neither has filed any answer, demurrer, or other pleadings, nor has any extension of time to file pleadings been granted, and that the time within which pleadings may be filed has been expired for several months;

"And after hearing, studying and considering all of the pleadings, testimony and exhibits of all of the parties, and the arguments, both oral and written, of their counsel, it appears to the court, and the court so finds, the following to be the material facts in respect to this controversy:

"1. That the City of Goldsboro is a Municipal Corporation, duly chartered and existing under and by virtue of the laws of the State of North Carolina, and as such when acting in its governmental capacity is a governmental agency of the said State.

"2. That the Atlantic Coast Line Railroad Company is a corporation organized under the laws of the State of Virginia and is engaged in the operation of a railroad business for profit within the City of Goldsboro and elsewhere within and without the State of North Carolina.

"3. That the land sought to be acquired in this proceeding by the City of Goldsboro from the Atlantic Coast Line Railroad Company is a strip of land 41 feet in width and 63 feet in length, lying just North of and adjacent to the Northern edge of Ashe Street and lying between North Center Street, West, and North Center Street, East, within the City of Goldsboro, upon which is located two parallel tracks of respondent: (1) The end of the former 'old Main Line' track for a distance of 28.7 feet and the end of a spur track for a distance of 31 feet; that the average length of one railroad car is 50 feet and this part of either track is not sufficient to store one car; that said tracks in said area are covered by soil, weeds and grass over the top of the rails and show no evidence of use within recent years; that said tracks from the switch connections to the ends within the 41 feet area, are about one-fourth of a mile in length.

"4. That the said strip of land is sought to be acquired, and such acquisition is necessary, for utilization along with other land in the construction of a traffic circle at and within the intersection of Center and Ash Streets in Goldsboro.

"5. That the construction of such traffic circle is in the public interest and for a public purpose, and will, when completed, materially serve and promote the public safety, welfare, convenience and necessity of the City of Goldsboro, its residents and the general public.

"6. That the petitioner, upon acquisition of said strip of land, intends in good faith to utilize the same for the purpose of such traffic circle.

"7. That the petitioner has not been able to acquire said strip of land from the respondent, Atlantic Coast Line Railroad Company, the owner, by purchase, despite efforts made in good faith to do so.

"8. That the petitioner has brought this proceeding under the power and authority granted it under Section 37, Chapter 397, of the Private Laws of 1901, as amended, and subsection (d) of Chapter 163 of the Session Laws of 1951, and is utilizing the procedure prescribed in Article 2, of Chapter 40, of the General Statutes of North Carolina.

"9. That the strip of land herein sought to be condemned is not necessary or essential to the owner, Atlantic Coast Line Railroad Company, in the operation of its railroad business.

"10. That the said strip of land is not being utilized by the owner, Atlantic Coast Line Railroad Company, in the operation of its railroad business.

"11. That the said strip of land has not been utilized to any extent or any consequence, if at all, for a period of a number of years, by respondents for any railroad or other public use.

"12. That the acquisition of said strip of land in this proceeding by the petitioner, City of Goldsboro, from the owner, Atlantic Coast Line Railroad Company, will in no wise seriously interfere with or impair the operation by said owner of its railroad business.

"13. That the only present public use to which said strip of land is being put is the occasional use by the Southern Railway Company and the Atlantic and East Carolina Railway Company of their tracks lying on part of the Westernmost and Easternmost portions, respectively, of said strip of land, and that both of said railroad companies have agreed with the City of Goldsboro to relinquish and cease any use heretofore made by them of such portion of their tracks within said strip when requested to do so by the City.

"14. That the use to which said strip of land will be put and devoted by the petitioner, City of Goldsboro, upon the acquisition thereof in this proceeding, will promote and serve the public interest, safety, convenience and necessity to a much greater degree and extent than would any use that the respondent, Atlantic Coast Line Railroad Company, might devote said strip of land to.

"15. That the parties hereto have stipulated and agreed that if it be adjudged that the petitioner is legally empowered and entitled to acquire by condemnation the strip of land which is the subject of this controversy, then the fair market value of said strip of land shall be determined to be the sum of $1.00 per square foot, or a total value of $2583.00; and that the City of Goldsboro, the petitioner herein, shall

as full compensation for the purchase price of said land and all damage resulting from the acquisition thereof, do the following:

"a. Pay as the fair market value of said strip of land the sum of $2583.00.

"b. Remove at its own expense the portions of the two tracks belonging to the respondent, Atlantic Coast Line Railroad Company, and located within the said 41 foot strip, and deliver the rails and cross-ties so removed to the said railroad company, without compensation, at the site.

"And upon such findings of fact the court makes the following conclusions of law:

"1. That the 41 x 63 foot strip of land which is the subject of this controversy, though owned by a public-*quasi* corporation, is not now devoted to, or needed for any public use by said corporation.

"2. That the use to which said strip of land will be put and devoted by the petitioner, upon its acquisition thereof in this proceeding, will promote and serve the public interest, convenience and necessity to a much larger degree and extent than does now or will the use to which it is now, or may be, put and devoted by the respondent.

"3. That the petitioner, the City of Goldsboro, is entitled to condemn said 41 x 63 foot strip of land without any special legislative authority other than the authority already granted it under Section 37, Chapter 397, of the Private Laws of 1901, as amended, and subsection (d) of Chapter 163 of the Session Laws of 1901 (1951), as well as under Chapter 160 of the General Statutes.

"Now, therefore, it is CONSIDERED, ORDERED, ADJUDGED AND DECREED:

"1. That the strip of land of the respondent, Atlantic Coast Line Railroad Company, described below and in the petition herein be and the same is hereby condemned to the uses of the petitioner, City of Goldsboro, for use in the construction of a traffic circle as a part of its overall street and traffic system.

"2. That upon the petitioner paying the sum of $2583.00 to the Clerk of the Superior Court of Wayne County, North Carolina, for the use and benefit of the respondents as their respective interests might appear or be agreed upon; and the petitioner further removing the two tracks of the Atlantic Coast Line Railroad Company from the said strip of land and delivering at the site the rails and cross-ties so removed, to the said Atlantic Coast Line Railroad Company, without compensation therefor, then the respondents be immediately divested of all of their rights, title and interest in and to, and the petitioner be immediately vested with, for use in the construction of a traffic circle as a part of its overall street and traffic system, the title to that certain strip of land within the City of Goldsboro, Wayne County, North

Carolina, adjacent to the Northern edge of the intersection of Ash and Center Streets and more particularly described as follows:

"A strip of land extending in depth 41 feet from the Northern edge of Ash Street in a Northerly direction, and lying between Western edge of North Center Street, East, and the Eastern edge of North Center Street, West, a width of approximately 63 feet.

"3. That the petitioner have the right to enter upon said strip of land above described for the purpose of removing the two tracks therefrom as aforesaid.

"4. That the costs of this action be taxed against the respondents.

"5. That the respondents, Chemical Corn Exchange Bank, Trustee, and United States Trust Company of New York, Trustee, be and they are hereby bound by this judgment in the same manner as the respondents who filed answer and appeared herein."

The respondent Atlantic Coast Line Railroad Company appeals, assigning error.

Edwin C. Ipock and James N. Smith for petitioner.

W. B. R. Guion, W. Powell Bland, and George K. Freeman, Jr., for respondent Railroad.

DENNY, J. The primary question posed for determination on this appeal is this: Does a municipal corporation, pursuant to the general powers of eminent domain conferred upon it by the State, both by General Statutes and by charter provisions, have the authority to condemn, for street purposes, land owned by a railroad which is not necessary or essential to the owner in the operation of its railroad business?

The appealing respondent in the hearing below excepted only to the refusal of the court to sustain its motion for judgment as of nonsuit at the close of petitioner's evidence and at the close of all the evidence, and to the signing of the judgment.

When a jury trial is waived in the manner provided by statute, G.S. 1-184, and the facts admitted or found by the court are in its opinion insufficient to support a verdict in favor of the plaintiff, a motion to dismiss or for judgment as of nonsuit may be allowed. *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885. However, when a trial by jury is waived, G.S. 1-185 requires the court "to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly." *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639. Therefore, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such

findings are not supported by the evidence. *Scott v. Shackelford,* 241 N.C. 738, 86 S.E. 2d 453; *Buchanan v. Clark,* 164 N.C. 56, 80 S.E. 424. Exceptions to such findings must be taken within the time allowed by G.S. 1-186. But when a judgment as of nonsuit is allowed in a hearing in which a trial by jury has been waived, "the effect of the written judgment is that when taken in the light most favorable to plaintiffs, all the evidence is insufficient to support a favorable finding for plaintiffs on any issue raised by the pleadings." Such judgment will be deemed sufficient compliance with the statute. G.S. 1-185; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13.

Where facts are found by the court, if supported by competent evidence, such findings are as conclusive as the verdict of a jury. *St. George v. Hanson, supra; Trust Co. v. Finance Corp.,* 238 N.C. 478, 78 S.E. 2d 327; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

Moreover, where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664; *Wyatt v. Sharp,* 239 N.C. 655, 80 S.E. 2d 762; *Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601. Therefore, where a trial by jury has been waived, a motion for judgment as of nonsuit, where no exceptions have been taken to the admission of evidence, the findings of fact or the conclusions of law, will not present the question as to whether or not the findings of fact are supported by competent evidence. *Burnsville v. Boone, supra.*

It follows, therefore, in the instant case, since no exceptions were taken to the findings of fact or the conclusions of law, the exception to the refusal to grant the appellant's motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. The exception to the signing of the judgment, however, does present these questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208; *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Paper Co. v. Sanitary District,* 232 N.C. 421, 61 S.E. 2d 378.

It is conceded by the petitioner that it has no special legislative authority to condemn the land herein sought. It is depending solely on the general power of eminent domain conferred upon it by the provisions of its charter as set forth in section 37 of Chapter 397 of the

Private Laws of 1901, section 1 of Chapter 101 of the Private Laws of 1915, subsection (d), section 1 of Chapter 163 of the Session Laws of 1951, and Chapter 160 of the General Statutes, together with the procedure authorized in Article 2 of Chapter 40 of the General Statutes. G.S. 160-205.

Ordinarily, land devoted to the public use cannot be taken for another public use unless express or implied legislative authority has been given which authorizes such taking. *Yadkin County v. High Point,* 217 N.C. 462, 8 S.E. 2d 470, and cited cases; Anno.—Eminent Domain—Property Not Used, 12 A.L.R. 1502; 18 Am. Jur., Eminent Domain, section 93, page 719; 29 C.J.S., Eminent Domain, section 74, page 861. However, the rule is otherwise where the property is not in actual public use and not necessary or vital to the operation of the business of its owner. *Yadkin County v. High Point, supra.*

"Land not devoted to the public use, although owned by a public service corporation, may be taken under general legislative authority as freely as from a private individual; special legislative authority is not necessary." 18 Am. Jur., Eminent Domain, section 94, page 720; *Vermont Hydro-Electric Corp. v. Dunn,* 95 Vt. 144, 112 A. 223, 12 A.L.R. 1495; *Bd. of Education v. Campbells Creek R. Co.,* 138 W. Va. 473, 76 S.E. 2d 271; 29 C.J.S., Eminent Domain, section 74, page 864; McQuillin on Municipal Corporations (3rd Ed.), Volume 11, section 32.70, page 406.

In view of the finding by the court below to the effect "that strip of land herein sought to be condemned is not necessary or essential to the owner, Atlantic Coast Line Railroad Company, in the operation of its railroad business," and the other findings to which no exception has been taken, we hold that the petitioner has the authority under its general power to exercise the right of eminent domain to condemn the property it seeks for street purposes. Furthermore, we hold that the findings of fact are sufficient to support the conclusions of law and the judgment entered pursuant thereto. Therefore, the judgment of the court below is

Affirmed.

FREDERICK NAPOLEON LANE, ADMINISTRATOR OF THE ESTATE OF SYLVESTER MOORE, DECEASED, v. ELIZABETH BRYAN.

(Filed 17 April, 1957.)

1. Death § 3—

In an action for wrongful death, the burden is on plaintiff to establish that defendant was guilty of a negligent act or omission and that such act or omission proximately caused the death of his intestate.

2. Negligence § 5—

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

3. Negligence § 19b(4)—

Actionable negligence may be established by circumstantial evidence, either alone or in combination with direct evidence.

4. Same: Trial § 23e—

In order to be sufficient, circumstantial evidence must tend to establish the fact in issue as an inference based on facts established by clear and direct proof, since an inference may not be based on an inference.

5. Trial § 23a—

If the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than a basis for speculation and conjecture, it is insufficient to be submitted to the jury.

6. Automobiles § 41l: Negligence § 3½—

The doctrine of *res ipsa loquitur* does not apply to establish the negligence of the driver of a car along a highway as a proximate cause of the death of a person whose body is thereafter found on the highway with fractured skull, crushed chest and fractured legs.

7. Automobiles § 41l—Evidence held insufficient to establish negligence of defendant as proximate cause of pedestrian's death.

The evidence tended to show that intestate was seen walking normally in a westerly direction on the northern side of a paved road, that shortly thereafter his body was seen lying prostrate on the southern side of the road, and sometime later was seen lying prostrate on the northern side of the road, at which time a car was seen to run over the body. The evidence further tended to show that sometime during this period defendant was driving her car east, saw a person in the road and thought he moved, that she was unable to stop and that her bumper hit the body. An autopsy revealed that intestate's skull was fractured, chest crushed and legs fractured. *Held:* The evidence leaves in the realm of conjecture, surmise and speculation whether the alleged negligent act or omission on the part of defendant was the proximate cause of the death of intestate, and nonsuit was correctly entered.

APPEAL by plaintiff from *Joseph W. Parker, J.*, November Civil Term 1956 of LENOIR.

Action by administrator to recover damages for an alleged wrongful death.

An asphalt road 18 feet wide, with 8 feet shoulders, runs from Mewborn's Crossroads west to Dawson's Station. About dusk dark on the afternoon of 12 December 1953, and about 25 or 30 minutes before his death, Sylvester Moore, plaintiff's intestate, a man 31 years old, was seen walking normally on his right hand side of this road about 300 to

400 yards from where he was killed, headed west in the direction of his home. At that time it was drizzling rain.

Plaintiff introduced and read into evidence the adverse examination of Elizabeth Bryan, the defendant. This is the substance of her testimony. About 6:30 p.m. on 12 December 1953, she was driving her 1952 Dodge automobile east on a paved road in the direction of Mewborn's Crossroads and at a point about a mile west of it. She was asked did her car strike or run over Sylvester Moore. She replied: "My wheels didn't. As far as I know, the car could have, the bumper, but I don't know. I don't know whether I struck Sylvester Moore or not. I didn't hear any bump or feel any jolt. After the accident I slowed down, and I decided the best thing to do would be to get to the nearest telephone, and call the officers. I did that." She slowed down, and called the officers, because she saw him on the road and knew her car had passed over his body. She called the officers from Mr. Bizzell's at Mewborn's Crossroads, and returned to the scene. A group of people were there, including L. G. Pate, a Highway Patrolman. Immediately after the accident, she said she saw an object in the road, and thought it was a box. At the scene she told Patrolman Pate she was driving on her side of the road and saw something in the road, and as she got closer she saw it was a person down on the road in her path, and she thought he moved; she tried to stop her car, but couldn't by the time she reached him. She did not sound her horn. No repairs were made to her car as a result of the accident. At the scene she was told Sylvester Moore was dead.

On this evening—no exact or approximate time is stated—L. L. Barrow was driving his car west on this road toward Dawson's Station, carrying his wife to her aunt's home. It was raining, and he was going 35 to 40 miles an hour. He saw something lying on the road, and when he got "right side of it," he saw it was a person. "He kind of raised his head up and it looked like he had it propped on his hand." He was lying in the southern lane with his feet toward the shoulder of the road and his head toward the center line. From there Barrow drove a mile and a half to the aunt's, put his wife out, and without cutting off his engine went directly back to where he had seen the man lying on the road. He testified: "When I got there, there was a car coming up, and I pulled off on the shoulder of the road and it did too. I stopped my car about twice the length of the courtroom before I got to the man, and the other car run across the body. It was on his side of the road, and it ran across the body and pulled up and stopped, and about that time Miss Bryan and her sister—I don't know whether they were there or drove up, or how—they were there, but Miss Margaret got out and said, 'Will you go get Ralph?' I told her I would. I got on my car and went after him, and when I came back the Patrolman and all the people

were there. Miss Margaret is the sister of Miss Elizabeth. When I came back, the body was on the opposite side of the road. It was on the south side when I went on and when I came back it was on the north side. I was going east when I came back. As I stopped, someone passed over the body and that person stopped. I went and looked at the body and two boys did." After Barrow passed this person lying prostrate on the road, he testified on cross-examination as follows: "I took my wife and children about a mile and a half to her aunt's, put them out of the car and came right back. I don't know what happened between that time and the time I got back. I don't know how many cars passed. I met two, but there are two dirt roads before you get there. I don't know whether any of these cars ran over him or not."

Patrolman Pate arrived at the scene about a mile west of Mewborn's Crossroads before Sylvester Moore's body was removed from the road. This is in substance his testimony. The road is straight and level on each side of the place the body was lying in the northern lane of traffic for a good half mile. He reached the scene at 6:15 p.m. It was raining and dark: the visibility was bad. There he interviewed the defendant in her car. She said she was going 50 miles an hour. He asked her what happened, and she replied: "As she got near this man that his head raised up and she struck him with her bumper. . . . this subject or object was lying in the road and as she got near it, he raised his head and that the bumper of her car hit the subject." She made no statement as to how far she was from the object in the road when she first saw it. He examined defendant's car at the scene, and saw no mark on it.

The coroner of the county went to the scene. He saw there the dead body of Sylvester Moore. He detected no odor about him.

An undertaker saw the dead body in the road. He embalmed the body. He detected no odor of any alcoholic beverage. Sylvester Moore's skull was fractured, chest crushed and both legs fractured.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, upon motion of the defendant, plaintiff appeals, assigning error.

Wallace & Wallace—By F. E. Wallace, Jr., for Plaintiff, Appellant.
Whitaker & Jeffress for Defendant, Appellee.

PARKER, J. Plaintiff's alleged cause of action is for death by wrongful act based on negligence. The burden of proof rests upon plaintiff to produce evidence sufficient to establish the two essential elements of his alleged case: one, that the defendant was guilty of a negligent act or omission, and two, that such act or omission proximately caused the

death of his intestate. *Garland v. Gatewood,* 241 N.C. 606, 86 S.E. 2d 195; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670.

The only negligence of legal importance is negligence which proximately causes or contributes to the death or injury under judicial investigation. *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459; *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Byrd v. Express Co.,* 139 N.C. 273, 51 S.E. 851.

Evidence of actionable negligence need not be direct and positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence. *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879; *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711. A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption. *Whitson v. Frances, supra; Sowers v. Marley, supra.*

In *Sowers v. Marley, supra,* this Court said, speaking of circumstantial evidence in a death case: "An inference of negligence cannot rest on conjecture or surmise. Citing authorities. This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof."

This Court said in *Brown v. Kinsey,* 81 N.C. 245: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the Court will not leave the issue to be passed on by the jury." This has been quoted with approval in *Byrd v. Express Co., supra,* and in *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12, where *Brogden, J.,* the writer of the opinion, adds in apt and accurate words: "This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation." See *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227; *Whitson v. Frances, supra.* "Cases cannot be submitted to a jury on speculations, guesses or conjectures." *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 368.

Byrd v. Express Co., supra, was an action to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence in failing to forward a package of medicine for the intestate, who was ill with typhoid fever. A motion of nonsuit was sustained as the evidence did not tend to show that the failure to receive the medicine caused the intestate's death. The Court said in respect to the evidence, "there is no room here for anything more certain than rank conjecture."

In *Currie v. Gen. Accident Fire & L. Assur. Corp.,* 241 Wis. 564, 6 N.W. 2d 697, the Court held in view of deceased's bad heart condition, there was not sufficient evidence produced to remove the cause of his

death, whether from heart disease or from accident, from the field of speculation and conjecture. The Court said: "A jury could do no more than guess at the cause of death, and this being so, there is no basis for recovery."

The doctrine of *res ipsa loquitur* is not applicable to the facts here. *Pemberton v. Lewis,* 235 N.C. 188, 69 S.E. 2d 512; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251.

The evidence presents a story filled with mystery. The sole evidence connecting defendant with the case comes from her own lips.

About dusk dark in a drizzling rain on 12 December 1953, plaintiff's intestate was seen walking normally on his right hand side of a paved road headed west, and about 300 to 400 yards from where he was killed. He was walking on the northern part of the road. There is no evidence he was drinking. Shortly thereafter, his body was seen lying prostrate on the southern side of the road by defendant and L. L. Barrow. Had he been struck or run over by a car? The evidence gives no answer. We are left to conjecture. The only evidence that he was not dead, when first seen by defendant and Barrow, is their evidence they saw a movement of the body.

After defendant's car passed over the body, she drove a mile to Mewborn's Crossroads, telephoned the officers, and returned to the scene. Barrow passed by the body, drove a mile and a half to his wife's aunt's home, put his wife out, and without cutting off his engine returned to the scene. Upon his return defendant was there. Did Barrow pass the body, and see him "kind of raised his head up and it looked like he had it propped on his hand," before or after defendant's car passed over the body? We can only guess, because the evidence affords no logical inference.

When Barrow returned the body was on the northern side of the road. How did it get from the southern to the northern side of the road? When Barrow stopped, he saw a car coming up, and this car ran across the body. Did the defendant's car kill plaintiff's intestate? Was he killed by the car which ran over him, when Barrow returned? Was he killed by being run over by a car between those times? How many times was he struck and run over? The wheels of defendant's car did not pass over the body. Could defendant's car in passing over the body fracture both legs and crush the chest?

It would be absurd to say the deceased was killed twice. *S. v. Scates,* 50 N.C. 420. Plaintiff has the burden of showing that the alleged negligent act or omission of the defendant proximately caused the death of his intestate. Considering plaintiff's evidence with the liberality we are required to do on a motion for nonsuit, we are of opinion that he has failed to produce any evidence from which a reasonable inference can

be drawn as to the proximate cause of his intestate's death. The evidence leaves it all in the realm of mere conjecture, surmise, and speculation, and one surmise may be as good as another. Nobody knows. A cause of action must be something more than a guess.

The judgment of nonsuit below is

Affirmed.

ANNA B. THRUSH v. W. E. THRUSH.

(Filed 17 April, 1957.)

1. Actions § 10—

A civil action is commenced by the issuance of summons or by the filing of affidavit that personal service is not intended to be made in this State. G.S. 1-88.

2. Attachment § 1—

A warrant of attachment provides a source from which any judgment obtained by plaintiff may be satisfied, and though warrant of attachment and levy pursuant thereto are not sufficient to institute action, when supplemented by the service of process in a manner prescribed by law, it also brings the defendant into court.

3. Process § 5b—

Personal service on a nonresident in this State while attending court as a party litigant is not void, but is merely voidable, and until he elects to claim his exemption under the statute, the service is binding. G.S. 8-68.

4. Process § 6—Court may extend the time for service of summons by publication beyond thirty-one days after issuance of order of attachment.

At the time of filing complaint, plaintiff filed an affidavit stating that defendant is a resident of this State, but claimed to be a resident of another state, and was about to remove his property from this State with intent to defraud creditors, etc. Writ of attachment was issued and personal service duly had on defendant. On the hearing of defendant's motion to dismiss upon special appearance heard more than a year later, the court found that defendant is a nonresident and was such at the time of personal service, and that personal service was had on him while he was in this State attending court as a party litigant. Thereupon the court vacated the personal service and extended the time for service of summons by publication. Defendant objected to the order on the ground that the statute makes it mandatory that publication begin not later than thirty-one days after the issuance of order of attachment. *Held:* The court had authority to extend the time for service by publication, the prior decisions to this effect not being altered by the 1947 amendment. G.S. 1-440.7.

5. Attachment § 1—

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. G.S. 1-440.11(c).

THRUSH *v.* THRUSH.

APPEAL by defendant from *Bundy, J.*, November 1956 Civil Term of NEW HANOVER.

On 26 April 1955 plaintiff filed in the office of the clerk of the Superior Court of New Hanover her complaint against defendant, praying for damages resulting from slanders uttered in 1954 and 1955. At the same time plaintiff made and filed an affidavit in which she asserted that defendant is "a resident of the State of North Carolina, but claims he is a resident of the State of Florida (or) that the said W. E. Thrush is about to remove some of his property from the State, with intent to defraud his creditors, (or) has assigned, disposed of (or) secreted, (or) is about to assign, dispose of (or) secrete some of his property with intent to defraud his creditors." Bond, as required by the statute, was filed. Thereupon summons for defendant, writ of attachment against his property, and summons for Wilmington Savings & Trust Co. issued, directed to the sheriff of New Hanover County.

The summons and copy of the complaint were served on defendant in New Hanover County on 26 April 1955. The sheriff attached certain real estate in New Hanover and served the summons on Wilmington Savings & Trust Co. as garnishee.

On 28 April 1955 defendant entered a special appearance and moved to vacate the service of summons and warrant of attachment. In support of his motion he filed an affidavit in which he stated that on or about 19 January 1954 he had gone to Florida with the intention of becoming a resident thereof and was at the time of the filing of the affidavit a *bona fide* resident of Florida; that he had sold or obligated himself to sell all of his real estate in North Carolina; that the only reason for his presence in North Carolina when served with process was to attend court as a defendant in a civil action then pending in the Superior Court of New Hanover County.

Defendant's motion was heard by Judge Frizzelle on 3 May 1955. He signed an order reciting that by consent of the parties certain of the properties attached were released. His order concludes: "IT IS ALSO ORDERED that the garnishment against defendant's personal property, including money in hands of H. B. Meiselman and Wilmington Savings and Trust Company, is vacated and released. Otherwise to remain in effect as to Tract #20, Myrtle Grove Farms, recorded Book 279, page 587, Registry of New Hanover County."

The cause was heard by Judge Bundy on 29 November 1956 "upon a special appearance by the defendant and motion to vacate service of summons previously had in this cause, and motion to dismiss the attachment of the plaintiff, and also upon motion of the plaintiff for an extension of time in which to make service of summons upon the defendant by publication, and for leave to amend her affidavit to obtain attachment . . ." Judge Bundy found as a fact that there had been no publi-

cation of summons; that defendant, W. E. Thrush, was, at the time process was served on him, and still is, a resident of Florida; that when process was served on him, he was attending court in New Hanover County as a party in a matter then pending and being heard in the Superior Court of New Hanover County; that personal service of process could not be had on defendant in the State of North Carolina. Upon his findings he adjudged:

"1. That the personal service of summons in this action upon the defendant W. E. Thrush is hereby vacated and set aside, and declared to be void and of no effect.

"2. That the Court in its discretion hereby extends the time in which plaintiff may commence service of summons on the said W. E. Thrush by publication to and including the 5th day of December, 1956; and further orders that service of process in the above entitled action be made by publication as by law provided.

"3. That the affidavit of the plaintiff to obtain attachment is hereby amended so that the opening words in paragraph 3 thereof is stricken out as follows: 'That the said W. E. Thrush and is now as he is informed and believes a resident of the State of North Carolina, but claims he is a resident of the State of Florida (or),' and in place thereof is amended to read as follows: '3. That the said W. E. Thrush is now a resident of the State of Florida, and further'; and further that said amendment shall relate back *nunc pro tunc* to the date that such affidavit was made and the order of attachment entered."

Defendant excepted to the judgment and appealed.

J. H. Ferguson and Aaron Goldberg for defendant appellant.

No counsel contra.

RODMAN, J. Plaintiff is not here represented by counsel. No suggestion is made that the consent order signed by Judge Frizzelle puts at rest the validity of the attachment and the service of process.

Defendant asserts that the judgment is erroneous for that personal service of process was ineffective because by public policy he was exempt from such service, and the statute, G.S. 1-440.7, is mandatory in its requirement that publication must begin not later than the thirty-first day after the issuance of the order of attachment; hence, Judge Bundy was without authority, more than eighteen months after the issuance of the warrant of attachment, to authorize the service of summons by publication.

A civil action is commenced by the issuance of summons or by the filing of an affidavit that personal service is not intended to be made in this State. G.S. 1-88.

A warrant of attachment serves a dual purpose: It provides a source from which any judgment obtained by plaintiff may be satisfied, and, when supplemented by the service of process in the manner prescribed by law, brings the defendant into court so that the rights of the parties may be determined. *Mohn v. Cressey,* 193 N.C. 568, 137 S.E. 718; 4 Am. Jur. 564.

A warrant of attachment and a levy pursuant thereto is not sufficient to institute an action. The time within which the action must be instituted in attachment proceedings is prescribed by statute, G.S. 1-440.7.

The statute recognizes the three different methods which plaintiff may pursue in instituting an action and prescribes the time in each instance in which the process must be served.

Here there was strict compliance with the letter of the statute. Personal service in the State was contemplated and completed within thirty days. Defendant was a litigant, and if a nonresident, was accorded the privilege of claiming an exemption from service of civil process. G.S. 8-68; *Bangle v. Webb,* 220 N.C. 423, 17 S.E. 2d 613; *Winder v. Penniman,* 181 N.C. 7, 105 S.E. 884; *Cooper v. Wyman,* 122 N.C. 784. But the privilege was personal. The service was not void. It was merely voidable, and, until the defendant elected to exercise his privilege by claiming his exemption and establishing his nonresidence, the service was binding. *School v. Peirce,* 163 N.C. 429, 79 S.E. 687; *Cooper v. Wyman, supra.* Plaintiff, when the attachment issued, could not truthfully make the affidavit required for service of summons by publication, G.S. 1-98.4(a)(3), that defendant could not, "after due diligence, be found in the State."

The present statute dealing with attachment was enacted in 1947. It represents the work of the General Statutes Commission and neither makes, nor was intended to make, any radical change in the law then existing relating to attachments. It was intended primarily as a work of clarification incorporating in the statute the judicial interpretations of the existing statutes. See 25 N.C.L. Rev. 386.

The statute prior to 1947 required personal service within thirty days or, upon the expiration of that period, service of summons by publication. G.S. 1-444. The language of that statute is as mandatory as the language of G.S. 1-440.7. We find nothing to indicate that the Legislature of 1947 meant that our present statute dealing with the time within which process must be served should have a different meaning from that given to the statute then in existence. It was consistently held under the former statute that the court had a right to extend the time for service by publication. *Jenette v. Hovey,* 182 N.C. 30, 108 S.E. 301; *Mills v. Hansel,* 168 N.C. 651, 85 S.E. 17; *Finch v. Slater,* 152 N.C. 155, 67 S.E. 264; *Penniman v. Daniel,* 90 N.C. 154; *Price v. Cox,* 83 N.C. 261.

When the action was instituted, the affidavit on which the warrant of attachment issued stated that defendant was a resident of the State of North Carolina but claiming to be a resident of Florida. If that were so, defendant was amenable to service of process in this State even though he might then be engaged in litigation here. When it appeared, and the court found, that the defendant had in fact given up his residence in North Carolina and adopted Florida as his domicile, it had the authority to permit process to be then served by publication. No injustice is done the defendant. He was informed in April 1955 by copy of the complaint of the nature and extent of plaintiff's claims against him. He did not press his motion to have the matter determined within the thirty-day period so that plaintiff could have caused publication to be made within what he now asserts is the period limited by statute.

Defendant's second assertion is that the original affidavit on which the warrant was issued is fatally defective in that the affiant failed to set forth the facts on which she formed her belief that the defendant had removed or was about to remove some of his properties from the State. The answer is found in the statute, G.S. 1-440.11(c), which expressly authorizes the court in its discretion to "allow any such affidavit to be amended even though the original affidavit is wholly insufficient."

The judgment appealed from is

Affirmed.

STATE v. HOWARD SMITH.

(Filed 17 April, 1957.)

1. Bastards § 4—

A warrant in a criminal prosecution under G.S. 49-2 which fails to charge that defendant's failure to support his illegitimate child was wilful, is fatally defective.

2. Bastards § 1—

The wilful failure or refusal to support an illegitimate child is a continuing offense.

APPEAL by defendant from *Bickett, J.*, February Criminal Term, 1957, of WAKE.

Defendant was tried in the Domestic Relations Court of Wake County on a warrant, based on the affidavit of Yvonne Jones, charging in pertinent part that he "did willfully, maliciously and unlawfully beget upon the body of Yvonne Jones a child: Leonard Lee Jones, born 5-18-52, and has failed to support said child since birth, . . ."

On 2 July, 1953, at conclusion of said trial, the judge of said court made this entry: "Upon the trial of this case the defendant is found guilty and is ordered and adjudged that *prayer for judgment continue* for (5) five years on condition that this defendant pay into this court each week for the support of Leonard Lee Jones born May 18, 1952, $4.00 beginning July 6, 1953. Pay the costs. The court finds that this defendant is the father of Leonard Lee Jones. This cause retained." (Italics added.)

On 15 October, 1956, the judge of said court made this entry:

"The court finds that this defendant has willfully failed to comply with the terms of the judgment of this court by failing and refusing to make and pay into this court the support payments ordered by this court. The defendant, Howard Smith, is sentenced to serve (6) six months in jail assigned to the State Highway Commission to be worked on the roads of this state."

Defendant appealed to the Superior Court. Various motions were made by defendant and overruled, including his motion for a trial *de novo*.

After hearing evidence, Judge Bickett found particular facts and made the ultimate finding that "the defendant has willfully violated and failed to comply with the terms of the judgment of the Domestic Relations Court under the terms of which *judgment was suspended.*" (Italics added.)

Thereupon, Judge Bickett ordered that capias and commitment issue forthwith and that "in accordance with the said judgment of the Domestic Relations Court of the County of Wake the defendant be confined in the common jail of Wake County for a term of six (6) months," etc.

Defendant excepted and appealed, assigning errors.

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

Griffin & Grimes for defendant, appellant.

PER CURIAM. The warrant is fatally defective in that it does not charge that defendant wilfully neglected or refused to support and maintain his illegitimate child, an essential allegation in a criminal prosecution under G.S. 49-2; and, as frankly conceded by the Attorney-General, the judgment must be arrested on authority of *S. v. Coppedge*, 244 N.C. 590, 94 S.E. 2d 569, and cases cited therein.

However, the statute, as interpreted by this Court, creates a continuing offense. *S. v. Coppedge, supra,* and cases cited therein.

As to the significance of the finding made 2 July, 1953, in the Domestic Relations Court, that "this defendant is the father of Leonard Lee

Jones, see *S. v. Clonch,* 242 N.C. 760, 89 S.E. 2d 469, and *S. v. Robinson,* 245 N.C. 10, 15, 95 S.E. 2d 126.

Judgment arrested.

STATE v. LOUIS HARDY STRICKLAND.

(Filed 17 April, 1957.)

Criminal Law § 23—

A prosecution under an indictment void for failure to charge any criminal offense cannot bar prosecution upon a subsequent valid indictment.

APPEAL by defendant from *Sharp, S. J.,* June 1956 Term of WAKE.

A bill of indictment was returned at the December 1955 Term. It contained three counts charging the defendant with (1) breaking and entering, (2) larceny of sixty pounds of wieners of the value of $25, and (3) receiving sixty pounds of wieners of the value of $25, knowing them to have been stolen.

Defendant pleaded not guilty, with a further plea of former jeopardy. In support of his plea of former jeopardy, defendant relies on the record in the case of *S. v. Strickland,* heard at the July Term of Wake Superior Court, heard here on appeal at the Fall Term 1955 and reported 243 N.C. 100, 89 S.E. 2d 781. During the trial, defendant moved to quash the indictment for inconsistency in the second and third counts. At the conclusion of the evidence the court sustained defendant's motion to nonsuit the third count. The jury returned a verdict of guilty on the charges of breaking and entering, and larceny. Judgment of imprisonment was imposed and defendant appealed.

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

E. Reamuel Temple for defendant appellant.

PER CURIAM. Defendant's plea of former jeopardy has no merit. The bill of indictment returned in July 1955 charged no criminal offense. He is now, for the first time, charged with the criminal offense of which he stands convicted. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781. The motion to quash is without merit. *S. v. Mincher,* 178 N.C. 698, 100 S.E. 339. Defendant's other assignments of error have been examined and have been found to be equally wanting in merit.

No error.

STATE v. JAMES FAISON, JR.

(Filed 17 April, 1957.)

APPEAL by defendant from *Seawell, J.*, November Criminal Term 1956 of WAKE.

Criminal prosecution tried upon a bill of indictment charging the defendant with an assault with intent to commit rape upon the body of a female person, he, the defendant, being a male person over 18 years of age: a violation of G.S. 14-22.

Defendant pleaded Not Guilty. The jury returned a verdict of Guilty of an assault on a female.

From a judgment of imprisonment, defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Taylor & Mitchell for Defendant, Appellant.

PER CURIAM. The evidence was amply sufficient to carry the case to the jury, and to sustain the verdict and judgment. We have carefully examined all of defendant's assignments of error, and all are overruled. The charge has not been brought forward. Therefore, it is presumed that the jury was charged correctly as to the law arising upon the evidence, as required by G.S. 1-180. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132. The defendant has failed to show any error or reason sufficient to disturb the trial and judgment below. *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37.

No error.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C.T.A., D.B.N. OF FRANK JULIUS LIIPFERT, DECEASED, AND WACHOVIA BANK & TRUST COMPANY, SUCCESSOR TRUSTEE UNDER THE WILL OF FRANK JULIUS LIIPFERT, DECEASED, v. THEO LIIPFERT TALIAFERRO; MILES CHRISTOPHER HORTON, JR., AND HIS WIFE, RUTH CLINE HORTON; FRANK LIIPFERT HORTON; JULIA CAROLINE HORTON, A MINOR; MILES CHRISTOPHER HORTON, JR., GUARDIAN AD LITEM FOR JULIA CAROLINE HORTON, A MINOR; AND WILLIAM S. MITCHELL, GUARDIAN AD LITEM FOR UNBORN PERSONS.

(Filed 1 May, 1957.)

1. Wills § 31—

In construing a will, the intent of the testator as gathered from the entire instrument will be given effect unless contrary to some rule of law or at variance with public policy.

2. Same—

In construing a will, greater regard is to be given to the dominant purpose of the testator as ascertained from the language used, construed as a whole, than to the use of any particular words.

3. Wills § 33d: Trusts § 28—Trust for use of married woman held to terminate upon the dissolution of the marriage by divorce.

Testator died, survived by his wife, son, and daughter. At the time of the execution of his will his daughter and her husband had separated, and she and her two children were living in his home. The will set up a trust to last during the life of his wife and for that period after her death during which his daughter should be married. *Held:* The purpose in continuing the trust during the period the daughter should be married was to protect his daughter during coverture and referred to her then marriage, and therefore upon the termination of that marriage by divorce prior to the death of the widow, the trust terminates in accordance with the dominant purpose of testator upon the death of the widow, notwithstanding the later remarriage of the daughter.

4. Trusts § 28—

The duration of a trust depends largely on the intention of the trustor as gathered from a proper construction of the instrument and the nature and purposes of the trust.

5. Same—

Even after the termination of a trust in accordance with the terms of the instrument, the fiduciary relationship continues between the trustee and the beneficiaries until the beneficiaries have received their share of the *corpus* of the trust.

APPEAL by all the defendants, except Theo Liipfert Taliaferro, from *Crissman, J.*, January Term 1957 of FORSYTH.

This is an action brought pursuant to the provisions of our Declaratory Judgment Act, G.S. 1-253, *et seq.*, for the construction of the last will and testament of Frank Julius Liipfert, deceased.

The Wachovia Bank & Trust Company, the plaintiff, a North Carolina banking institution, was appointed administrator *c.t.a., d.b.n.* of Frank Julius Liipfert on 9 June 1928 and is still acting in such capacity. Said bank also became the successor trustee under the terms of said will.

The parties waived a jury trial and agreed that his Honor should hear the evidence, find the facts, make his conclusions of law and enter judgment pursuant thereto.

The facts are not in dispute and may be summarized as follows:

1. Frank Julius Liipfert died a resident of Forsyth County on 2 April 1927, leaving a last will and testament and codicil thereto which have been duly probated in the office of the Clerk of the Superior Court of Forsyth County.

2. The last will and testament of Frank Julius Liipfert was executed on 22 May 1924, and the codicil thereto was executed on 10 July 1926.

3. The pertinent parts of the will of Frank Julius Liipfert, relating to the trust or trusts, are as follows:

"Item I. I bequeath and devise the residue of my property, of whatever nature and wherever situated, whether real, personal, or mixed, to my wife, Cora Hamlen Liipfert, and to my son, Francis Julius Liipfert, jointly, to hold in trust for the purposes hereinafter specified during the life of my wife, Cora Hamlen Liipfert, and for that period after the death of my wife, Cora Hamlen Liipfert, during which my daughter, Theo Liipfert Horton, shall be married: Provided, however, that if after the death of my wife, Cora Hamlen Liipfert, the surviving Trustee, Francis Julius Liipfert, shall deem it advisable to bring this trust to an end and to divide the subject matter thereof as hereinafter provided, I empower such Trustee to do so. Provided, further, that if my son Francis Julius Liipfert, predecease my wife, Cora Hamlen Liipfert, I name and appoint the Wachovia Bank & Trust Company, of Winston-Salem, North Carolina, Trustee in his stead. Provided, further, that if my Trustee, Cora Hamlen Liipfert, die and subsequently thereto my son, Francis Julius Liipfert, die before the termination of this trust, I name and appoint the Wachovia Bank & Trust Company sole Trustee during the life of this trust.

"Item 5. I direct that my Trustee or Trustees,—after paying all taxes, insurance, repairs and renewals, and setting aside each quarter a reasonable amount to cover depreciation, and after giving my wife, Cora Hamlen Liipfert, in quarterly installments so long as she may live, an amount which, when added to the amount my wife, Cora Hamlen Liipfert, receives in dividends paid during the calendar year on certain shares of the Class B common stock of the R. J. Reynolds Tobacco Company, to-wit: *1866* shares of the Class B. common stock of the R. J. Reynolds Tobacco Company, being certificates J. 22766 to N. 22780 inclusive, N. 35642 to N. 35644 inclusive, No. 3712 and No. 10644, which stock I gave to my wife, Cora Hamlen Liipfert, on the 21st day of December 1922, shall provide an annual income of seventy-five hundred dollars ($7,500.00),—give and distribute the balance of the income of this trust in equal shares, share and share alike, to my daughter, Theo Liipfert Horton, and to my son, Francis Julius Liipfert, and upon the death of either or both to his or her children, and if either or both have no children at the time of their death, then to their lawful heirs.

"Item 10. Should it at any time appear to my Trustee or Trustees that due to the falling off or diminution of the income of this trust, the income of my wife, Cora Hamlen Liipfert, or of either of my children, Theo Liipfert Horton or Francis Julius Liipfert, and in the case of their

death to their children, be insufficient for their proper maintenance and support, then I direct that the necessary portion of the *corpus* of this trust be sold by my Trustees or Trustee, and that the proceeds of such sale an amount be paid to the particular beneficiary or beneficiaries of this trust named in this item, which in the opinion of the Trustees be necessary for said beneficiary or beneficiaries' proper maintenance and support; and I direct that such payment or payments be a charge against his or her or their lawful share in the division of my estate at the termination of this trust.

"Item 11. At the termination of this trust as hereinabove provided, I direct that my estate be divided equally between my daughter, Theo Liipfert Horton, and my son, Francis Julius Liipfert, share and share alike, and if at the time of the termination of this trust either shall be deceased, then I direct that his or her share of my estate shall go to his or her children, and if they have no children at the time of their death, then to his or her lawful heirs."

4. This action was instituted on 9 June 1955 and all adult persons having any interest in the subject matter have been made parties defendant and duly served with summons. They filed answers and appeared through counsel at the hearing. Julia Caroline Horton, a minor, is the only great-grandchild of Frank Julius Liipfert. She has been served with process as provided by law and is represented in this action by her duly appointed guardian *ad litem,* Miles Christopher Horton, Jr. William S. Mitchell was appointed guardian *ad litem* for all unborn persons having any interest in the will of Frank Julius Liipfert. Each guardian *ad litem* filed an answer.

5. Theo Liipfert Horton and Francis Julius Liipfert were the only children born to Frank Julius Liipfert and his wife, Cora Hamlen Liipfert. Francis Julius Liipfert died 1 June 1928. He was never married and had no children. Cora Hamlen Liipfert, the widow of Frank Julius Liipfert, died 19 August 1932. Theo Liipfert Horton, the only living child of Frank Julius Liipfert, was born in 1891. She married Miles Christopher Horton, Sr. on 17 December 1913. Theo Liipfert Horton had two children by her husband Miles Christopher Horton, Sr. One of these children is Miles Christopher Horton, Jr. who was born 7 August 1916. He is now married to Ruth Cline Horton. No children have been born to this union. However, Miles Christopher Horton, Jr. did have a child by a former marriage: Julia Caroline Horton, an infant, 14 years of age. The other child of Theo Liipfert Horton and her husband, Miles Christopher Horton, Sr., is Frank Liipfert Horton, who was born 21 March 1918. He is not married and has no children.

6. Theo Liipfert Horton and her husband, Miles Christopher Horton, Sr., separated on 15 July 1923, and thereafter she and her two children lived in the home of her parents in Winston-Salem until after she was

granted an absolute divorce from Miles Christopher Horton, Sr. in the Superior Court of Forsyth County, North Carolina, on 13 November, 1928.

7. The estate of Frank Julius Liipfert, at the time of his death, consisted primarily of Class B common stock of the R. J. Reynolds Tobacco Company and numerous parcels of real estate. All the property held by the plaintiff as trustee had a value at the time of its qualification in excess of $350,000 and that amount had increased to more than $500,000 at the time of the trial.

In light of the facts found and the provisions of the will, his Honor concluded as follows:

"9. The will of Frank Julius Liipfert dated May 21, 1924 created a single trust, and directed that the said trust should continue during the life of the testator's wife, Cora Hamlen Liipfert, and for that period after the death of the wife during which the testator's daughter, Theo Liipfert Horton (now Theo Liipfert Taliaferro) should be married. The provisions of Item I of the said will 'during which my daughter, THEO LIIPFERT HORTON, shall be married' refer to the marriage of the said Theo Liipfert Horton to Miles Christopher Horton, Sr., and she ceased to be married to Miles Christopher Horton, Sr., on November 13, 1928. Cora Hamlen Liipfert, the wife of the testator, having survived him, Frank Julius Liipfert, Jr. (Francis Julius Liipfert), the son of the testator, having survived him but having died during the life of his mother without leaving issue, Theo Liipfert Horton having been divorced from Miles Christopher Horton, Sr., prior to the death of her mother and having survived her mother, the trust under the will of Frank Julius Liipfert terminated at the death of Cora Hamlen Liipfert on August 19, 1932, and thereupon Theo Liipfert Taliaferro, one of the defendants herein, being the same person as Theo Liipfert Horton, became entitled to have the trust property distributed to her free from all trust.

"10. Consideration has been given to the codicil to the will of Frank Julius Liipfert dated July 10, 1926. The provisions of the said codicil have been carried into effect, and the Trustee shall be entitled to credit therefor in the settlement of its account.

"11. During the administration of the trust since the death of Cora Hamlen Liipfert on August 19, 1932, the plaintiff has continued to hold the property and to administer the trust under the will as if it were still in existence. By consent of the defendant Theo Liipfert Taliaferro, it shall be entitled in the settlement of its account for disbursements made by the Trustee, and for the costs of administration, including its commissions in all respects as if the trust terminated at the time of its settlement with Theo Liipfert Taliaferro pursuant to the provisions of this judgment."

Therefore, the court ordered, adjudged and decreed:

"1. Only one trust was created by the will of Frank Julius Liipfert dated May 22, 1926.

"2. Item I of the said will governs the duration of the trust. Since Frank Julius Liipfert (Francis Julius Liipfert), the son of the testator, predeceased the testator's wife, Cora Hamlen Liipfert, it is the true and correct meaning of Item I of the said will that the trust could continue only 'for that period after the death of my wife, Cora Hamlen Liipfert during which my daughter, THEO LIIPFERT HORTON, shall be married'; and the words 'during which my daughter, THEO LIIPFERT HORTON, shall be married' referred primarily to her marriage to Miles Christopher Horton, Sr., but in no event were intended to refer to any marriage contracted later than the death of Cora Hamlen Liipfert.

"3. Theo Liipfert Horton (now Theo Liipfert Taliaferro) having been divorced from Miles Christopher Horton, Sr. on November 13, 1928, and having contracted no other marriage prior to the death of Cora Hamlen Liipfert, the trust under the will of Frank Julius Liipfert terminated according to the specific terms thereof at the death of Cora Hamlen Liipfert on August 19, 1932.

"4. The defendant, Theo Liipfert Taliaferro, is entitled to have transferred and conveyed to her, and Wachovia Bank & Trust Company, successor Trustee under the will of Frank Julius Liipfert, deceased, will forthwith transfer and convey all of the trust property in its hands to Theo Liipfert Taliaferro, subject, however, to the adjustments and allowances set forth and described in Paragraph 11 of the findings and conclusions above.

"5. The cost of this action will be taxed against and paid by the plaintiff, including such allowances to the guardians *ad litem* as may be ordered herein, and the plaintiff shall be entitled to credit therefor in the settlement of its account."

All the defendants, except Theo Liipfert Taliaferro, appeal, assigning error.

Womble, Carlyle, Sandridge & Rice for plaintiff appellee.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for Theo Liipfert Taliaferro, appellee.

Hayes & Wilson for defendant appellants.

William S. Mitchell, guardian ad litem for unborn persons.

DENNY, J. The appellants present for our consideration and determination the following question: Did the trial court err in its findings of fact and conclusion that the trust created by the will of Frank Julius Liipfert terminated at the death of Cora Hamlen Liipfert?

The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator. In our effort to ascertain the testator's intent we must consider the instrument as a whole and give effect to such intent unless it is contrary to some rule of law or at variance with public policy. *Mewborn v. Mewborn,* 239 N.C. 284, 79 S.E. 2d 398; *Gatling v. Gatling,* 239 N.C. 215, 79 S.E. 2d 466; *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

In our opinion, the provisions of the will of Frank Julius Liipfert make it clear that the primary objects of the testator's bounty were his wife, Cora Hamlen Liipfert, and his children, Theo Liipfert Horton and Francis Julius Liipfert. Therefore, greater regard is to be given to the dominant purpose of the testator than to the use of any particular words. Even so, his intent is to be ascertained from the will as written. *Heyer v. Bulluck, supra; Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578.

Unquestionably, the reason the testator provided for the continuance of the trust created in Item I of his will during the life of his wife, Cora Hamlen Liipfert, and for that period after her death during which his daughter, Theo Liipfert Horton, "shall be married," was to make certain that the trust would not end while his daughter was married to Miles Christopher Horton, Sr.

At the time of the execution of his will, his daughter's marriage to Miles Christopher Horton, Sr. had ended in a separation, and she and her two children had been living in his home for more than ten months. Moreover, the testator doubtless knew that his daughter, under the law as it existed at that time, could not get a divorce based on separation until she and her husband had lived separate and apart for five successive years. He likewise knew that in the meantime his wife might die before his daughter could obtain a divorce from Miles Christopher Horton, Sr. Therefore, he provided that the trust should continue until the occurrence of the latter of two events, viz., the death of his wife, and the dissolution of the marriage between his daughter and her husband, Miles Christopher Horton, Sr. It so happened that, according to the record, his daughter was granted an absolute divorce on 13 November 1928 on the ground that, without her fault, she and her husband had lived separate and apart for five successive years. At the time she obtained her divorce her father had been dead more than a year and a half and her brother, Francis Julius Liipfert, had died on the 1st day of the previous June. Therefore, when the bonds of matrimony between Theo Liipfert Horton and her husband, Miles Christopher Horton, Sr. were dissolved on 13 November 1928, there was no reason or condition set forth in the last will and testament of Frank Julius Liipfert for a continuance of the trust, save and except that which provided

for its continuance during the life of the testator's wife, Cora Hamlen Liipfert.

Consequently, we concur in the ruling of the court below to the effect that the will of Frank Julius Liipfert created but one trust and that the provision in Item I of said will, to wit, "during which my daughter, Theo Liipfert Horton, shall be married," refers to the marriage of his daughter to Miles Christopher Horton, Sr., and Theo Liipfert Horton having been divorced from Miles Christopher Horton, Sr. prior to the death of her mother, and having survived her mother, the trust terminated at the death of Cora Hamlen Liipfert on 19 August 1932.

The appellants insist that the trust created under the last will and testament of Frank Julius Liipfert has not terminated and will not do so until the death of Theo Liipfert Taliaferro. We do not concur in this view. Moreover, in our opinion, the intention of the testator as expressed by the language used by him in his will, does not support the appellants' view.

"Under general rules, ordinarily, a trust for the separate use of a married woman and intended to protect the property from her husband will terminate according to the creator's intention on a dissolution of the coverture. Thus, the trust will terminate on the death of either the husband or the wife, or on a divorce." 89 C.J.S., Trusts, section 92, page 925.

It is said in Scott on Trusts, 2nd Edition, Volume III, section 337.5, ". . . where the sole beneficiary of a trust is a married woman and the only purpose of the settlor in creating the trust was to protect her during coverture, she can compel the termination of the trust when her coverture ceases by the death of her husband or by divorce."

It is further said in 89 C.J.S., Trust, section 92, page 923: "The duration of a trust depends largely on the intention of the creator as shown by a proper construction of the trust instrument and the nature and purposes of the trust. The settlor's intention is paramount to the wish of the beneficiary."

It is likewise said in 54 Am. Jur., Trusts, section 70, page 75, "A trust is in general limited or conditioned in duration by the terms of the trust, in which case the trust expires in accordance with the limitation or condition stated. . . . But while a trust is in general limited in duration by its terms, it continues to exist, nevertheless, at least in the sense that the trustee continues to stand in the relationship of trustee to the beneficiaries until they receive all the property and money due them by the trust."

The judgment of the court below is in all respects

Affirmed.

J. B. CALLOWAY AND WIFE, INA CALLOWAY, v. VERNA WYATT.

(Filed 1 May, 1957.)

1. Trial § 23f—

The evidence cannot be submitted to the jury on a theory of liability not supported by allegations, since proof without allegation is as ineffective as allegation without proof.

2. Pleadings § 19c—

The rule requiring a liberal construction of a pleading cannot warrant the construction into a pleading of an essential allegation which it does not contain. G.S. 1-151.

3. Fraud § 4—

Intent to deceive is an essential element of an action for fraud, and a complaint which fails to allege intent to deceive, or facts from which the equivalent of an intent to deceive may be legitimately implied, is fatally defective.

4. Fraud § 5—

The right to rely on representations is inseparably connected with the correlative duty of the representee to use due diligence to ascertain the facts unless prevented from doing so by some artifice, or unless the representation is of such character as to induce action by a person of ordinary prudence.

5. Same—Plaintiff held not entitled to rely upon representation under facts of this case.

The evidence disclosed that in the negotiations for the purchase of a tract of land, the purchasers particularly asked about the supply of water from the well because of knowledge that wells and springs were going dry all over that locality, that the vendor repeatedly represented there was "plenty of water," and that the purchasers relied upon the representation without making any investigation. *Held:* The purchasers could have ascertained the volume of water by the exercise of the slightest diligence in turning on the spigots before purchasing, and in the absence of allegation that the purchasers were prevented by artifice or any act on the part of the vendor from making an investigation, action for fraud will not lie upon later discovery of the inadequacy of the water supply.

APPEAL by plaintiffs from *Johnston, J.*, Regular October-November Term 1956 of WILKES.

Action to recover $771.90 expended in digging a well on premises to secure an adequate supply of water, which expenditure was allegedly caused to be made by reason of an alleged misrepresentation by the vendor of the sufficiency of the water supply of the well on the premises.

These are the essential allegations of the complaint: Plaintiffs, husband and wife, entered into negotiations with defendant to purchase from her a house and lot so as to vest in them an estate by

the entirety. During the negotiations and prior to the purchase plaintiffs asked defendant if the house had an adequate water supply to meet the needs of their family, and "the defendant guaranteed to the plaintiffs and assured the plaintiffs that the house had ample water and that the well had ample water in it in order to meet the needs of the plaintiffs and their family." Pursuant to the guaranty and statement of defendant the plaintiffs paid the defendant $3,900.00 for the house: plaintiffs "predicated the purchase of (*sic*) the statement, guarantee and declaration which the defendant made that the said well located on said property had an ample supply of water to furnish the plaintiffs and their families with all the water they would need." After the purchase plaintiffs learned that the defendant's statements were false, that she knew they were false when she made them, that the well did not have sufficient water to meet the needs of plaintiffs and their family, and that defendant's guarantee was inaccurate. Plaintiffs notified defendant of the insufficiency of the water supply, and requested her to correct it by boring a deeper well or otherwise "in order to comply with her guarantee and in order to comply with the warranty which she made at the time of said sale," which request and demands defendant ignored. Wherefore, plaintiffs expended $771.90 in digging a well 178 feet deep on the premises to secure a sufficient supply of water, and "to bring said property to the place where it would comply with the warranty made by the defendant and in order to comply with the guarantee made by the defendant."

Plaintiffs' evidence tends to show these facts: In April 1956 plaintiff J. B. Calloway saw a For Sale sign on the premises. He went to the house accompanied by the folks in his car, told defendant he would like to look over the house, and asked her about the water. She replied: "Plenty of water, always had plenty of water, plenty of water for the use in the house, plenty of water." They walked over the premises, and came back by the well. Calloway asked defendant if she had ever had the well cleaned out or anything done to it. She replied: "No, had nothing done to it, always had plenty of water, plenty of water." They agreed on a price of $3,900.00, but Calloway said he wouldn't trade that day because it was Sunday and his wife was not with him.

Next day he and his wife went to the house. Calloway walked in the kitchen, and said he wanted a drink of water. He turned on the faucet, and there was no water. Defendant said the power was off. Defendant said: "I guarantee you plenty of water, plenty of water for the family. How many have you got in your family?" Calloway said four. Defendant said: "Oh, plenty of water, plenty of water for them; I guarantee that." On Saturday Calloway went back, and paid her $3,900.00 for the property. He asked her how the water was holding out. She replied: "Oh, plenty of water, plenty of water."

A week later Calloway went to the property, and found no water at all. A few days later Calloway saw defendant pulling out of the driveway to the street. He stopped her, and said: "Mrs. Wyatt, there is not any water. What is the matter?" "Oh," she says, "I never told you there was any water." Calloway said: "You told five or six of us there was plenty of water for a family, and you know it." "Oh," she says, "don't you aggravate me. I have been in the hospital, and I will sue you if you aggravate me and cause me to have to go back to the hospital."

A week or so after the purchase Calloway went to the premises to set out some boxwoods. He turned on the faucet on the outside of the well house to get some water and got only two buckets full. Defendant did nothing about the water supply. Plaintiffs had a well dug at a cost of $771.90. If the property had been as guaranteed or warranted to plaintiffs, its fair market value would be $3,900.00; its fair market value as plaintiffs found it was $3,200.00.

On cross-examination Calloway said the deed conveying the property to him had no warranty in it about water; that it did not mention water; "I didn't have the draftsman of the deed to mention anything about water in the deed." He didn't turn the spigots and make an investigation because the defendant was "so earnest about plenty of water, plenty of water." Plaintiff J. B. Calloway further testified on cross-examination: "There were spigots out in the yard. I turned them on after I bought the property. I turned one on in the kitchen before I bought the property and the power was off. I don't think I turned it on again before I bought the property. I would say that my health hindered me from measuring the water in the well. I have asthma and I can't crawl down and crawl in wells."

At the time of purchase of the property Mrs. Ina Calloway asked the defendant if there was water for the house all the time. Defendant replied she hadn't done any laundry since she had lived there, but there had been plenty of water for the house. Plaintiffs set out some boxwoods on the premises. To get water for them Mrs. Calloway started the pump on the premises, and it quit running. She could get no water. They found nothing wrong with the pump. They got water from a Mr. Johnson's well. Plaintiffs did not move in the house on the premises after the boxwoods were planted, until they had a well dug, because Mrs. Calloway was used to having water, and could not keep house without it. Before moving there they tried to get water nearly every day from the well without success.

Mrs. Wilma Moretz, a daughter of J. B. Calloway, before the purchase heard defendant tell her father in reply to his question about water, "we have plenty of water to use."

Mrs. Shelby Jean Wyatt, estranged wife of a son of defendant, heard defendant tell J. B. Calloway "there was using water."

Joe Calloway and Velva Lynn Calloway heard defendant tell their father, J. B. Calloway, before the purchase there was plenty of water. Joe Calloway said when they went there to water the boxwoods, they always got some water, about a bucket full. He also testified that before the purchase there was nothing to prevent him from turning on the spigots in the yard to see if there was water, and from measuring the water in the well.

Joe S. Johnson lived next door to the property purchased by plaintiffs. He moved there in September 1955. During the time he lived there defendant got water from his well practically every day. In the first part of 1956 Johnson began to have water trouble, and had to have his well dug deeper. He never got any water from defendant's well.

From a judgment of compulsory nonsuit entered at the close of plaintiffs' evidence, upon motion of the defendant, plaintiffs appeal.

W. H. McElwee and W. L. Osteen for Plaintiffs, Appellants.

Whicker & Whicker by J. H. Whicker, Sr., for Defendant, Appellee.

PARKER, J. Plaintiffs state in the beginning of their brief: "The plaintiffs' evidence intended (*sic*) to show false representation on the part of the defendant, that the defendant knew the representation was false at the time it was made and at (*sic*) this representation was made with the intent to induce the plaintiffs to part with their funds for the purpose of defrauding the plaintiffs." These are the closing words of their brief: "If the evidence is to be believed, the statements as to water supply were false. They were made under circumstances which would permit the jury to infer the purpose was to induce the plaintiff to pay more for the property to his detriment. These are some of the inferences which a jury might draw from the evidence."

It is clear that plaintiffs base their action upon fraud. Their evidence makes out no case of breach of warranty. See *Jones v. Furniture Co.*, 222 N.C. 439, 23 S.E. 2d 309, which was an action to recover for an alleged breach of express warranty. In that case the complaint alleged defendant's salesman guaranteed to plaintiffs that a second-hand bed was free of bed bugs; that relying upon said guarantee, plaintiffs purchased the bed; that the bed was infested with bugs; and thereby the warranty was breached. A demurrer *ore tenus* to the complaint was allowed in this Court, on the ground it did not state a cause of action.

"The court cannot submit a case to the jury on a particular theory unless such theory is supported by both the pleadings and the evidence." *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25. This Court said in *McKee v. Lineberger*, 69 N.C. 217, 239: "Proof without allegation is as

ineffective as allegation without proof." A plaintiff cannot make out a case which he has not alleged. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

A complaint must allege a cause of action by a statement of proper facts. Even under the liberal construction of pleadings required by G.S. 1-151, a court cannot construe into a pleading that which it does not contain. *Jones v. Furniture Co., supra;* McIntosh, North Carolina Practice and Procedure, 2d Ed., Vol. I, p. 555.

No fiduciary or confidential relationship is alleged or shown in the instant case. We have many cases setting forth the essential elements of actionable fraud. One of these elements is that the defendant made the false representation with intention that it should be acted upon by plaintiff, or as otherwise phrased, with intent to deceive. *Stone v. Milling Co.,* 192 N.C. 585, 135 S.E. 449; *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919.

A pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred. *McLane v. Manning,* 60 N.C. 608; *Anderson v. Rainey,* 100 N.C. 321, 5 S.E. 182; *Bank v. Seagroves,* 166 N.C. 608, 82 S.E. 947; *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165; *Hill v. Snider,* 217 N.C. 437, 8 S.E. 2d 202; *Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; 37 C.J.S., Fraud, Sections 83-84; 24 Am. Jur., Fraud and Deceit, Section 247.

"It is accepted in this jurisdiction that the facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged." *Colt v. Kimball, supra.* In *Stone v. Milling Co., supra,* the Court said: "A complaint which failed to allege that the fraud charged against the defendant was intended to injure the plaintiff, was held defective in *Farrar v. Alston,* 12 N.C. 69 . . . A complaint which contains no allegation of a fraudulent intent, or facts from which it may reasonably be inferred, fails to state a cause of action for deceit, and such defect may be taken advantage of by demurrer. *Bryan v. Spruill,* 57 N.C. 27."

It is not alleged in the complaint that the false representations were made by the defendant with intent to deceive the plaintiffs. There is no allegation that the defendant intended such representations to be acted on by the plaintiffs, or that they were made by defendant with the knowledge or expectation that they were to be acted on by plaintiffs. In the complaint there is no averment the representations were fraudulently made, or that they were knowingly false, or that the representations were made with a reckless disregard of their truth or falsity, and with the intent that they be acted on, or that the false statement was

made unqualifiedly by defendant as of her own knowledge and with intent to induce action. In our opinion, there are not sufficient averments of facts in the complaint from which the equivalent of an intent to deceive may be legitimately implied. The complaint fails to allege a case of actionable fraud, and is fatally defective.

Plaintiff J. B. Calloway testified on cross-examination: "I did know when I came over here that the wells were going dry all over this country and the springs were. That is the reason I was so anxious about water to inquire about it. I didn't turn the spigot on and make an investigation because she was so earnest about plenty of water, plenty of water." The volume of water in the well on the premises was a fact that could have been determined by the plaintiffs by the exercise of the slightest diligence on their part by turning on the spigots before the purchase. When the power was off, they could easily have waited until the power was on and turned on the spigots, before consummating the purchase. It was not necessary to measure the water in the well to determine its amount, because shortly after the purchase J. B. Calloway turned on the spigots and found the water shortage. The complaint contains no allegation that plaintiffs were prevented by the artifice of the defendant, or by any act on her part, from making an examination to find out about the water in the well.

This Court said in *Harding v. Ins. Co.*, 218 N.C. 129, 10 S.E. 2d 599: " 'It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true, however, where the parties have not equal knowledge and he to whom the representation is made has no opportunity to examine the property or by fraud is prevented from making an examination.' 12 R.C.L., 384. When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie. *Cash Register Co. v. Townsend*, 137 N.C. 652; *May v. Loomis*, 140 N.C. 350; *Frey v. Lumber Co.*, 144 N.C. 759; *Tarault v. Seip*, 158 N.C. 369, 23 A.J., 981."

This Court also said in *Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444, after stating the principle of law set forth immediately above: "But the rule is also well established that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. 23 A.J. 970, Restatement Torts, secs. 537, 540."

The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in

respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest.

Plaintiffs knew there was a shortage of water in the wells and springs in that section. With that knowledge, it would seem that the repeated and vague statements of the defendant "plenty of water, plenty of water" would naturally tend to arouse the suspicion of the plaintiffs that the representations were false, and that such representations were not of a character to induce action by a person of ordinary prudence. Under such circumstances the law imposed upon plaintiffs the duty of turning on the spigots, or making some investigation, to find out about the water supply, and failing to do so, they cannot avail themselves of the seller's misrepresentations. 23 Am. Jur.,, Fraud and Deceit, Section 157; Anno. 61 A.L.R., pp. 513-514; 37 C.J.S., Fraud, Section 31.

In *Hays v. McGinness*, 208 Ga. 547, 67 S.E. 2d 720,, the false representations were "that the well on said land (which was the only water supply on said land) would at all seasons of the year furnish a sufficient supply of water for the usual domestic purposes of a family of four; for household use, cooking, drinking, bathing, and laundry and for the maintenance of such livestock as is usual on a small farm of 15 acres, as one cow, one mule, two hogs and 50 chickens." Petitioners showed that a reasonable and adequate supply of water for a household, domestic, and farm purposes for a family of four (including two small children) is from 75 to 100 gallons per day, and that the well did not at any time furnish a supply of water sufficient for domestic and household use, and that the water in said well was seepage water only, and that said well at no time contained more than 30 gallons of water a day. The Syllabus by the Court is as follows: "A sale of land will not be vitiated by false representations of the seller as to the quality or condition of the land, where the purchaser had sufficient opportunity to examine the subject of the representations but made no examination or investigation, and was not prevented from so doing by any artifice of the seller; and where, as here, the representations relate to the volume of water in a well and its daily flow, the purchasers will not be heard to complain, as they were wilfully negligent in not exercising the slightest diligence to ascertain this question themselves, nor do they allege that they were prevented from doing so by any artifice of the seller."

The judgment of compulsory nonsuit entered below is

Affirmed.

SMITH BUILDERS SUPPLY, INC., v. JAMES D. DIXON.

(Filed 1 May, 1957.)

1. Evidence § 8: Payment § 9—

Where defendant admits the amount due on a claim as asserted by plaintiff, the burden is upon defendant to prove his affirmative defense of payment or his counterclaim alleged as justification for his failure to pay.

2. Evidence § 36—

Accounts and ledger sheets prepared in the usual course of business and properly identified, are competent in evidence, and their introduction renders harmless any error in the admission of testimony of a witness in regard thereto prior to the introduction of the ledger sheets in evidence.

3. Trial § 17½—

The court has discretionary power to reopen a case and admit additional evidence, and where it is apparent that defendant's request for instructions was based upon testimony as to entries on ledger sheets relating not only to matters during the period in controversy but also, through inadvertence, to matters prior thereto, the action of the court in reopening the evidence and permitting the introduction of the ledger sheets limited to those entries relating to the period in controversy, will not be held for error.

4. Pleadings § 24—Under plaintiff's general denial of a counterclaim, as distinguished from affirmative defense thereto, plaintiff is not limited to transactions specifically alleged.

Where defendant sets up a counterclaim based upon plaintiff's refusal, in violation of contractual obligation, to accept lumber cut by defendant, without specifying lumber cut from any particular tract, but defendant's evidence in support of the counterclaim is explicit that the counterclaim was based upon plaintiff's refusal to accept lumber from a specified tract, defendant may not complain that plaintiff's evidence, under a general denial of the counterclaim in the reply, related to plaintiff's refusal to accept, for failure to meet specifications, lumber cut from other tracts, and defendant's contention that he was taken by surprise by the evidence of unacceptability of lumber cut from other tracts, is untenable, the scope of the inquiry not being so limited either by defendant's counterclaim or plaintiff's reply thereto.

5. Trial § 31g—

Appellant's assignment of error to the charge as to the credibility of witnesses overruled on authority of *Styers v. Bottling Co.*, 239 N.C. 504.

APPEAL by defendant from *Bundy, J.*, November Term, 1956, of NEW HANOVER.

Plaintiff's action was to recover on two causes of action: *first,* to recover a balance of $253.44, with interest, allegedly due for goods, wares and merchandise sold and delivered by plaintiff to defendant between 7 June, 1946, and 13 January, 1947; and *second,* to recover a

balance of $357.14, with interest, allegedly due by defendant to plaintiff on account of advancements of money made by plaintiff to defendant between 6 December, 1946, and 8 May, 1947.

Answering, defendant admitted that the item of $253.44 was a correct charge against him, but denied that he owed said sum, "for it has been more than paid and offset by other items in other amounts owed by the plaintiff to the defendant." Except as stated, defendant denied the essential allegations of the complaint.

"AND FOR A FURTHER DEFENSE, SET-OFF AND COUNTERCLAIM," defendant alleged:

> "The plaintiff agreed with the defendant to pay the defendant $50.00 per thousand for lumber which the defendant was to cut and deliver to the plaintiff, on a certain tract of land; and the defendant under that agreement cut a large quantity of timber into lumber and delivered the same to the plaintiff, and was continually cutting and sawing trees into lumber for the plaintiff's account, and under that contract, when suddenly and without warning the plaintiff refused to accept deliveries and to pay the defendant, when there was 47,000 feet of lumber cut, and continued to refuse to accept the deliveries and put the defendant off from time to time until said lumber ruined and became worthless; and by said wrongful breach of said agreement and contract, the defendant has lost the $50.00 per thousand for said lumber, amounting to $2350.00, and the plaintiff has damaged the defendant the said $2350.00, and owes him said amount of money."

Plaintiff, replying, denied the allegations of said counterclaim, averring that the reason for its refusal to accept and purchase additional lumber from defendant was the fact that the lumber brought in by defendant did not comply with agreed specifications.

The issues submitted were answered by the jury as follows:

"1. In what amount, if anything is the defendant indebted to the plaintiff on the plaintiff's first cause of action. Answer: $253.44.

"2. In what amount, if anything, is the defendant indebted to the plaintiff in the plaintiff's second cause of action? Answer $357.14.

"3. In what amount, if anything, is the plaintiff indebted to the defendant on the defendant's counterclaim as alleged in the Answer? Answer: NOTHING."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed, assigning errors.

Mintz, Tillery & Cobb and Kirby Sullivan for plaintiff, appellee.

Isaac C. Wright for defendant, appellant.

BOBBITT, J. Plaintiff was engaged in the business of selling building supplies, including lumber.

As to the first cause of action, defendant's admission established that $253.44 was the correct charge. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16. Therefore, the burden was upon defendant to prove his affirmative defense of payment. *White v. Logan,* 240 N.C. 791, 83 S.E. 2d 892. He offered no evidence of payment, but relied solely upon his alleged counterclaim as justification for his failure to pay.

As to the separate account for advancements, plaintiff's evidence tended to show that plaintiff made advancements to defendant for his payroll; that plaintiff bought lumber from defendant at the prevailing market price; that each week, when paying for the lumber brought in by defendant, plaintiff deducted and applied on defendant's indebtedness to plaintiff for advancements a portion of the amount due defendant as purchase price for such lumber; that each weekly transaction was shown on a tally sheet, a duplicate of which was furnished to defendant on Friday of each week; that the charges on account of advancements and the credits on account of said deductions were entered on plaintiff's ledger sheets; and that, in addition to the charges for advancements, five additional charges were entered against defendant on said ledger sheets, to wit, amounts paid by plainitff to the Morris Plan Bank, representing stumpage at $20.00 per thousand, for application on defendant's indebtedness to said bank.

The ledger sheets, admitted in evidence under the circumstances stated below, for the period beginning 6 December, 1946, show the dates and amounts of 33 charges aggregating $25,946.52, and the dates and amounts of 27 credits aggregating $25,589.38, leaving a balance of $357.14. For said period, the first charge was on 6 December, 1946, and the last on 8 May, 1947; and the first credit was on 14 December, 1946, and the last on 27 May, 1947. Plaintiff's five checks to said bank, the basis for the aforesaid five charges on account of stumpage payments, were offered by defendant. One refers specifically to "Stumpage on Rackley Tract."

It appears that the witness Smith, who was plaintiff's president and in charge of its business, accompanied defendant when he undertook to borrow the money to purchase a timber tract; and that, as a feature of this loan, it was agreed that plaintiff would deduct and forward to the bank for application on defendant's note the amounts for stumpage, calculated as indicated, on lumber cut from said tract. Smith testified that he was uncertain as to the specific tract involved in this arrangement. Defendant testified positively that this arrangement related to the Keystone tract located "out from Scotts Hill."

Smith testified that the entries on the ledger sheets were made under his supervision at the time of the respective transactions. (The account

bears the caption, "Jim Dixon, Market Street Road, Wilmington, N. C.," and all entries are machine-made.) Thereupon, Smith was permitted to call out from said ledger sheets the dates and amounts of certain charge and credit entries appearing thereon, and to testify that the balance due as shown by the ledger sheets was $357.14. This testimony was admitted, over defendant's objections.

Smith testified further that plaintiff in May, 1947, refused to accept additional lumber from defendant because of its defective and unmarketable condition.

The ledger sheets so identified were competent evidence. *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895; Stansbury, N. C. Evidence, sec. 155.

Moreover, if it be conceded that the testimony of Smith as to entries appearing on the ledger sheets was incompetent when offered and admitted, the prejudicial effect was removed when the ledger sheets themselves were offered and admitted in evidence.

Even so, appellant contends that it was improper for the court to admit the ledger sheets under these circumstances, viz.:

According to the record, the ledger sheets were not offered in evidence during the *original* taking of evidence. (Note: The briefs refer to the re-offering of the ledger sheets.) When announcement was made that the evidence was closed, appellant requested that the court charge the jury as follows:

> "The plaintiff's witness Mr. Smith testified that he had advanced and paid the defendant $25,946.52 and that Jim Dixon had delivered to the Smith Builders Supply Company lumber at the market price which was allowed by plaintiff, amounting to a total of over $31,000, an overpayment of over $4,500 which the plaintiff Smith Builders Supply Company owes the defendant, Jim Dixon."

Whereupon, it became apparent to plaintiff's counsel and to the court that Smith, in calling out credit entries on said ledger sheets, had referred inadvertently to four credits that antedated the period involved, namely, 8 November, 1946, $1,808.01, 16 November, 1946, $758.39 and $394.36, and 30 November, 1946, $2,731.06; and that these items, aggregating $5,691.82, constituted the basis for defendant's request for said special instruction. Under these circumstances, plaintiff moved to reopen the evidence and offer additional evidence, to wit, the ledger sheets.

The ledger sheets plainly show that, in transactions between plaintiff and defendant prior to 6 December, 1946, various charges and credits were entered; that the account for these charges was balanced and fully settled prior to 6 December, 1946; and that the four credits aggre-

gating $5,691.82 were in settlement of charges made prior to 6 December, 1946. The court admitted the ledger sheets, but only as to entries thereon for the period beginning 6 December, 1946.

Whether the case should be reopened and additional evidence admitted was discretionary with the presiding judge. *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448; *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708. Certainly, under the circumstances stated, there was no abuse of discretion. Moreover, when the ledger sheets were admitted, appellant's request for special instruction was properly denied.

The jury found, in accordance with plaintiff's contention, that the true balance due on said advancements account was $357.14. In this connection, we have considered carefully the testimony of Smith, elicited on cross-examination, when questioned concerning certain tally sheets produced by Smith. Our appraisal of this evidence is that, in the view most favorable to defendant, it does no more than cast doubt upon the accuracy of the entries in the advancements account. It does not suffice to show affirmatively, nor did defendant offer evidence tending to show, that defendant did not receive proper credit for all lumber delivered to and accepted by plaintiff.

Turning now to defendant's counterclaim, it should be noted that defendant made no reference in his pleading to the Keystone tract; nor did plaintiff's reply specify any particular tract or tracts from which the alleged unacceptable lumber was cut.

Defendant's testimony was to the effect that the 47,000 feet of lumber on which his counterclaim was based was cut from the Keystone tract. The gist of his testimony was as follows: H. J. Rackley, who owned the mill, sawed the lumber from the Keystone tract for him. Defendant testified: "Mr. H. C. Croom tallied the lumber so Mr. Rackley would know the amount of his money each week. . . . Mr. Rackley wanted the money weekly for what was cut." The last tally sheet "with the name of Rackley on it was January 18, 1947." Defendant testified: "After January 18th I continued to deliver lumber to Mr. Smith from the mill out on the Market Street Road. All the lumber Mr. Smith obligated (*sic*) to take from me came from the mill Mr. Rackley operated, . . ." Again: "Mr. Smith and Mr. Pope, who was Superintendent, told me to slow up *on that mill.*" (Italics added.) Again: "In the original trade Mr. Smith guaranteed me $50.00 a thousand on the mill Mr. Rackley ran . . ." According to defendant's testimony, while he could have gotten $50.00 a thousand for the 47,000 feet of lumber cut from the Keystone tract, he was obligated (and never released) "to deliver to him (Smith) the Keystone lumber, and to no one else, . . ."

Thereupon, defendant offered evidence tending to show that Pope said that plaintiff was overstocked; that Pope and Smith told him to

continue cutting the lumber from the Keystone tract and to stack it at or near defendant's sawmill site; that plaintiff would "take it in a few days"; that plaintiff did not do so; that the 47,000 feet, from exposure, turned blue and was ruined; and that, after it was ruined, plaintiff refused to take this lumber but continued to take lumber from defendant from another mill or mills.

The testimony of Croom, Sanders and James D. Dixon, Jr., witnesses for defendant, tended to show that no complaints were made to them as to lumber cut by Rackley from the Keystone tract.

While defendant's counterclaim was indefinite, defendant's evidence was explicit to the effect that it was based on plaintiff's refusal to take lumber cut from the Keystone tract. It is noted that defendant's evidence as well as that of plaintiff tended to show that, during the cutting on the Keystone tract and subsequent thereto, defendant delivered to plaintiff and plaintiff accepted from defendant lumber cut from another or other tracts and that this continued until May, 1947.

When recalled, Smith testified, in substance, that plaintiff had never refused to accept lumber from Mr. Rackley's mill; that the unacceptable lumber, on account of which plaintiff refused to continue to buy from defendant, came from defendant's other mills; that plaintiff needed the lumber in its business, was not overstocked, and had ample facilities to stack lumber on its premises; and that he never heard of any spoiled lumber until defendant's answer was filed.

Also, plaintiff offered in evidence, without objection, copies of letters dated 12 June, 1947, 29 July, 1947, 5 September, 1947, 27 September, 1947, 20 November, 1947 and 8 January, 1948, in which plaintiff made demand on defendant for payment; and in three of these letters plaintiff set forth the amounts of the respective balances, to wit, $253.44 on the open account, and $357.14 on the advancements account. True, defendant testified that he did not receive these letters; that he was sick the last of 1946 and in 1947 and was not in his office; that Charlie George, *his partner* and son-in-law, got the mail and, assisted by defendant's son, attended to the business in his absence; and that Charlie George may have received these letters. In addition, Rackley, subpoenaed while the trial was in progress, was called as a witness by plaintiff. He testified, in substance, that he remembered nothing about a large quantity of lumber, sometimes referred to as 47,000 feet, that turned blue and was wasted.

We cannot burden this opinion with a narration of the evidence in greater detail. Indeed, the above has been set forth with some reluctance; but it appeared necessary to demonstrate that an assignment of error on which appellant lays considerable emphasis must be rejected as untenable. We refer to appellant's contention that it was error "to have his claim denied on a defense not pleaded and of which he had not

been given prior notice and an opportunity to prepare to meet plaintiff's claim."

As noted above, defendant, in pleading his counterclaim, did not allege that the 47,000 feet of lumber referred to therein was cut from the Keystone tract. According to Smith's testimony, Smith had never heard of any claim by defendant concerning lumber alleged to have spoiled on account of plaintiff's refusal to accept it. Since all the evidence tended to show that plaintiff's dealings with defendant continued to May, 1947, long after the lumber from the Keystone tract had been cut, plaintiff, in replying, had reasonable grounds to believe that defendant's counterclaim referred to lumber cut from other tracts, to wit, the lumber plaintiff refused to accept in May, 1947. Plainly, the allegations in plaintiff's reply referred only to lumber which plaintiff admittedly refused to accept.

When defendant, by his evidence, disclosed at the trial that lumber cut from the Keystone tract was the basis of his counterclaim, the true issue was for the first time drawn clearly into focus, namely, whether plaintiff wrongfully refused to accept 47,000 feet of lumber cut from the Keystone tract with resulting damage to defendant by reason of such wrongful refusal. This crucial issue, under the court's instructions, was submitted for jury determination. In respect thereof, the burden of proof was on defendant. As to this, plaintiff made no contention that it refused to accept any lumber cut from the Keystone tract. On the contrary, in respect of this issue, plaintiff's evidence tended to show that it never refused to accept lumber cut from the Keystone tract; that no lumber from said tract spoiled from exposure or otherwise; and that the defective lumber, referred to in its reply, was from other tracts, brought in by defendant in May, 1947, or shortly prior thereto.

It would appear that plaintiff, if anyone, was taken by surprise when defendant's evidence related the indefinite allegations of the counterclaim solely to the lumber cut from the Keystone tract. We find nothing to substantiate the view that defendant was prejudiced by the allegations of plaintiff's reply. It must be kept in mind that the issue concerned defendant's case, to wit, his alleged counterclaim, not an affirmative defense thereto. Plaintiff simply took the position that the allegations of its reply were in explanation of its refusal in May, 1947, to continue to buy lumber from defendant and had no reference to lumber cut from the Keystone tract. The elimination from the case of any issue as to the quality of the lumber cut from the Keystone tract would appear favorable rather than prejudicial to defendant's position. The issue then was clear-cut, whether (1) plaintiff wrongfully refused to take lumber cut from the Keystone tract, and (2) if so, whether any such lumber spoiled from exposure to defendant's damage.

As to cases cited by appellant as bearing on this assignment of error: *Sultan v. R. R.*, 176 N.C. 136, 96 S.E. 897; *Ewing v. Kates*, 196 N.C. 354, 145 S.E. 673; *King v. Coley*, 229 N.C. 258, 49 S.E. 2d 648; and *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25, are authority for the proposition that *a plaintiff* must recover, if at all, on the cause of action alleged in the complaint. *McLaurin v. Cronly*, 90 N.C. 50, and *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785, are authority for the proposition that, unless an *affirmative* defense is pleaded, evidence tending to establish such affirmative defense is not admissible. Here, in respect of the third issue, plaintiff's defense to the counterclaim was a general denial, not an affirmative defense.

Appellant assigns as error (AE #7) the general charge of the court as to matters to be considered in passing upon the credibility of witnesses. No authority is cited. It is noted that the instruction was not pointed to any particular witness or party. This assignment is overruled. *Styers v. Bottling Co.*, 239 N.C. 504, 80 S.E. 2d 253; *Herndon v. R. R.*, 162 N.C. 317, 78 S.E. 287.

While we forbear discussion thereof in detail, we have considered all other of defendant's assignments of error; but, when considered in the light of the facts narrated above, we find no prejudicial error.

This action was commenced 19 November, 1949. The complaint was then filed. The answer was filed 10 December, 1949. The reply was filed 19 December, 1949. At this point, commendable diligence in the filing of pleadings was followed by a long season of inactivity; for apparently the action was quiescent until November Term, 1956. In view of the available preliminary procedures, *e.g.*, adverse examination, motion to make more definite and certain, pretrial hearing, etc., it seems rather remarkable that either party, at the time of the trial, should have been in doubt as to his adversary's position and contentions.

No error.

HENNIS FREIGHT LINES, INC., v. BURLINGTON MILLS CORPORATION AND J. O. CAUDLE

and

PAUL BROOKS v. BURLINGTON MILLS CORPORATION AND J. O. CAUDLE.

(Filed 1 May, 1957.)

1. Negligence §§ 10, 20—

It is not error for the court to omit all reference to the doctrine of last clear chance in charging upon the issue of negligence, since that doctrine presupposes negligence and contributory negligence and applies only when

plaintiff's contributory negligence would preclude recovery in the absence of the doctrine.

2. Appeal and Error § 19—

An assignment of error must be based on an exception duly noted and may not present by amplification a question not embraced in the exception.

3. Automobiles §§ 15, 46—Charge held to have sufficiently presented contention of defendant's negligence in failing to take steps to avoid collision after seeing plaintiff's vehicle skidding out of control.

The evidence tended to show that plaintiff's vehicle was skidding, without fault on the part of its driver, down a hill, that defendant driver, operating a vehicle approaching from the opposite direction, saw or should have seen plaintiff's vehicle out of control and failed to take proper steps to avoid the collision. In charging upon the issue of negligence, the court instructed the jury as to the duty of maintaining a proper lookout, the duty of a driver in meeting a vehicle approaching from the opposite direction, the duty of a driver meeting another vehicle approaching in an apparently helpless condition, to exercise increased exertion in order to avoid a collision, and stated plaintiff's contentions as to the acts of negligence of defendant driver, including the contention that defendant driver, in view of the circumstances, could and should have turned to the right on the shoulder of the road, or stopped. *Held:* The charge presented all substantive phases of the law relating to the issue of negligence relied upon by plaintiff that arose upon the evidence.

4. Trial § 31b—

Where the charge presents all substantive phases of the law arising upon the evidence, a party desiring instructions upon a subordinate feature must aptly tender a request therefor.

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

APPEAL by plaintiffs from *Armstrong, J.*, and a jury, at 17 September 1956 Term of FORSYTH.

Civil action in tort arising out of collision of two motor vehicles.

The collision occurred in the daytime on Highway No. 52 near Pilot Mountain. The two vehicles were meeting near the bottom of a long hill. The tractor belonging to the plaintiff Hennis Freight Lines, Inc., driven by the plaintiff Paul Brooks, was going down the hill. It was being met by a tractor-trailer belonging to the defendant Burlington Mills Corporation, driven by the defendant J. O. Caudle. The Hennis tractor was a bob-tail unit without trailer, about 18 feet in length. The Burlington Mills tractor-trailer unit was 46 feet long. In the collision both drivers were injured and both vehicles were damaged.

Hennis Freight Lines, Inc., and driver Brooks instituted separate actions against Burlington Mills Corporation and its driver, J. O. Caudle.

The plaintiffs Hennis and Brooks alleged in gist that as the Hennis tractor started descending a long hill, 500 feet or more above a bridge near the bottom of the hill, the tractor-trailer of Burlington Mills was approaching the bridge from the opposite direction; that after the Hennis tractor had gone a short distance down the hill, it began to skid, without any fault of driver Brooks, and continued to skid all the way down the hill until it collided with the oncoming Burlington Mills tractor-trailer; that notwithstanding the Hennis tractor was plainly out of control as it skidded down the hill, swaying from side to side, the defendant Caudle, driving the Burlington Mills vehicle, continued on meeting the skidding tractor, pulled over to the left and collided with it on its right hand side of the center of the highway; that the collision was proximately caused by the negligence of the defendant Caudle (1) in failing to keep a proper lookout; (2) in failing to slow down his vehicle; (3) in failing to stop his vehicle; (4) in failing to keep his vehicle on the right side of the highway; (5) in failing to drive upon the right shoulder of the road; and (6) in turning his tractor-trailer to the left across the highway, thereby blocking the highway and making it impossible for the plaintiff's driver to avoid a collision.

The defendants denied the plaintiffs' allegations of negligence, pleaded negligence of the plaintiff Brooks, both as the sole and as a contributing cause of the collision, and set up counterclaims for property damage and personal injuries. The plaintiffs replying (1) denied the defendants' allegations charging them with negligence and contributory negligence, and (2) alleged facts which they aver entitle them in any event to recover of the defendants under application of the doctrine of last clear chance. The actions were consolidated for trial.

The plaintiff Brooks testified in substance: that it had been raining about two hours and the highway was wet; that up to the crest of the hill the highway was paved with black top and gravel; that from a point just over the crest and on down to the bottom of the hill the pavement was just slick black top; that this section "was wet, and it had grease, oil, fuel, and everything else on it where the tractors had run over it"; that as he started going down the hill he slowed to about 20 miles per hour and disengaged his front wheels; that he applied his brakes and found them working all right; that as he reached the slick portion where the gravel stopped, his tractor turned sideways. He gave it a little gas and tried to pull it out but it wouldn't straighten up. The wheels just spun. He then cut his wheels to the left. This had no effect. He then shut off the gas. The tractor continued to skid, and got faster. It skidded on down the hill, swaying from side to side but staying on the 22-foot pavement. As he skidded down the hill the Burlington Mills tractor-trailer was approaching from the opposite

direction. It passed over the bridge at the bottom of the hill and traveled about 250 feet beyond the bridge and collided with the plaintiff's tractor. The plaintiff Brooks further testified that his tractor was "just about the middle of the road as it was skidding sideways down the hill"; that he "was straddling the center line, sliding sideways down the hill," with about half, or 9 feet, of his tractor in the left traffic lane; that just before the collision the Burlington Mills driver cut his wheels over to the left and "got over in my lane. . . . I didn't know he was going to cross over on me. . . . There wasn't too much of a shoulder on my left side of the road; . . . there was about 15 foot over on that side, . . ."

H. M. Tyson, plaintiffs' witness, said he talked with the defendant Caudle at the hospital; that Caudle said "as he entered the bridge he saw this Hennis unit coming, it was skidding and he slowed up but held his power . . . and that when it zagged he was going to zig, he was going to try to duck it, and that in order to miss it he pulled left, but . . . didn't get far enough left to avoid contact."

The defendant J. O. Caudle testified in substance: that he was just "coming off the bridge" when he first saw the Hennis tractor. "I had five forward gears . . . the third gear is used for hills, . . . the Bridge was rough, and when I hit the bridge I pulled it back in third gear, . . ."; that he "was fixing to change to fourth" when he saw the Hennis tractor coming down the hill, so he just left it in third; that the Hennis tractor ran off the road; that the driver "jerked it back and throwed the rear end around to the right; then he jerked it around again and throwed the back end to the left, and then it looked like he come sliding down . . . kind of caterbias; then I slowed down . . . I thought maybe he'd get it straightened up, so I just stayed in my lane and stayed in third gear . . . at that point I wasn't running over 15 miles an hour. Just before he got to me he cut to the right, and I figured . . . he'd get back on his side, so just before he got to me, just a few feet, he cut it back to the right, and when he did the rear end of the tractor started gaining on the front, and that is when he hit me . . . he was practically across the road. . . . At the time the impact occurred my tractor was on the right of the center line of the highway looking in the direction in which I was going. . . . I never crossed from my right hand side of the highway across the center line. . . . The Hennis tractor was traveling at least 40 miles an hour at the time it struck me. . . . it didn't look like to me he slowed up or diminished his speed any as he came down the road. . . . the Hennis tractor skidded 250 feet from the time it first started skidding to the point of impact. . . . The shoulder on . . . my right hand side of the highway looked wet to me, and with loose dirt in there it was bound to have been soft."

A. Ray Simmons, witness for the defendants, said he lives in Pilot Mountain; that he was "driving right behind the Hennis tractor and saw the collision"; that "the Hennis tractor slipped to the left, and then it slid all the way down the hill crossways, and it stayed in that position until just before the impact, . . . (when) the rear of the Hennis tractor seemed to gain on the front, . . . and that is when the collision happened. . . . the Hennis tractor was across the road and, if anything, more to the left of the center of the road. . . . the rear end of the tractor wasn't over two feet from the left-hand edge of the road looking north when the collision occurred; . . . The Burlington Mills tractor and trailer was on his right side when they hit, . . . the Hennis tractor was traveling around 40 miles an hour when I saw it go into the skid, . . . I don't think he . . . slowed up any from . . . 40 miles an hour to the time the impact occurred. . . . The Hennis tractor traveled a total distance of 200 feet or maybe 250 feet from the time it went into the skid until the two vehicles collided."

All issues raised by the pleadings were submitted to the jury. In the plaintiffs' actions, the issues were (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages. All these issues (numbered as indicated) were resolved in favor of the defendants, and the plaintiffs were awarded nothing in damages. On the defendants' counterclaims, the issues were (1) negligence, and (2) damages. These issues were resolved in favor of the defendants, and damages were awarded Burlington Mills in the amount of $1,472 and Caudle in the sum of $10,000.

From judgment on the verdict, the plaintiffs appeal.

Deal, Hutchins & Minor for plaintiffs, appellants.
Womble, Carlyle, Sandridge & Rice for defendants, appellees.

JOHNSON, J. The appeal rests on Exception No. 8, which is: "The plaintiffs except to the charge because the Court failed to declare and explain the law arising on the evidence given in the case in that the Court failed to declare and failed to explain the principles of last clear chance or discovered peril as such principles related to the first issue."

The exception is without merit. The doctrine of last clear chance was not germane to the first issue.

The doctrine of last clear chance presupposes negligence on the part of the injured person, and has no application on his behalf unless he is chargeable with contributory negligence which would preclude a recovery in the absence of the doctrine. *Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Mfg. Co. v. R. R.*, 233 N.C. 661, 65 S.E. 2d 379; 38 Am. Jur., Negligence, Sec. 217; 65 C.J.S., Negligence, Sec. 137(b), p. 762. Here the doctrine of last clear chance was relevant only to the third

issue. In charging on that issue the trial judge gave the jury an exhaustive explanation of the principles governing the doctrine and its application.

It is noted that the language of Exception No. 8 limits its challenge to the failure of the court "to declare" and "to explain the principles of last clear chance or discovered peril as such principles related to the first issue." However, the plaintiffs in their Assignment of Error No. 8, based on Exception No. 8, make this further challenge to the charge: "The grounds for this assignment of error are that the main element of negligence alleged against the defendants by the plaintiffs in their respective complaints were that the tractor of Hennis Freight Lines, which was being driven by Paul Brooks, skidded without fault on his part; continued to skid down a long hill; that the defendant J. O. Caudle saw the truck skidding, realized that it could not be stopped; that he had ample time to avoid a collision, and failed to do so, and that such conduct on his part was negligent. The Court wholly failed to charge the jury as to this primary element in the plaintiffs' cause of action as alleged in the complaint."

The foregoing contention is further amplified in the plaintiffs' brief in gist as follows: that the defendant Caudle, being under the duty of exercising due care in maintaining a lookout and in controlling his vehicle, was charged with knowledge that the plaintiffs' tractor as it skidded down the hill, without fault on the part of its driver, was creating a situation of imminent danger, calculated to result in a collision, which the defendant Caudle in the exercise of due care could and should have avoided; that the conduct of the defendant Caudle in failing to avert the danger and prevent the collision by the exercise of due care in maintaining a lookout and in controlling his vehicle was primary negligence on his part bearing directly on the first issue; and that the judge failed to explain the principles of law involving such primary negligence and failed to apply such principles to the first issue, in violation of G.S. 1-180.

It may be doubted that the foregoing amplified challenges to the charge are supported by Exception No. 8. An assignment of error must be based on an exception duly noted and may not present by amplification a question not embraced in the exception. See *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602. However, conceding *arguendo* that the amplified challenges are supported by the exception, we conclude that they are without merit.

The record discloses that after the trial judge read all the issues to the jury, he then explained, without special reference to either of the issues, the general principles of law arising upon the issues, viz.: actionable negligence, contributory negligence, the doctrine of last clear

chance, the doctrine of sudden peril, and various highway safety statutes: G.S. 20-140, 20-141, 20-146 and 20-148.

The trial judge also in his general charge told the jury "that the mere fact that a motor vehicle may skid on a public highway is not, of itself, negligence in the operation of the vehicle. . . . (and) therefore . . . that the fact, if it is a fact, that plaintiffs' truck skidded down this hill is not, in itself and standing alone, sufficient to make plaintiffs guilty of contributory negligence or of negligence."

In explaining the application of G.S. 20-148, entitled "Meeting of vehicles," the judge told the jury: "A person operating a motor vehicle then has the right to act upon the assumption that every other person whom he meets operating another vehicle upon the public highways will also exercise ordinary care and caution according to the circumstances and he will not negligently or recklessly expose himself to danger, but, rather, make an attempt to avoid it. But when the operator, . . . of a motor vehicle upon the public highway has had time to realize, or by the exercise of proper care and watchfulness should realize, that a person whom he meets upon the public highway is in a somewhat helpless condition, or apparently unable to avoid the approaching motor vehicle, he must exercise increased exertion to avoid a collision."

The trial judge also explained to the jury the principles of common law negligence based on failure of a motorist to exercise due care in maintaining a lookout and in keeping his vehicle under proper control.

When the judge came to charge specifically on the first issue, he gave a detailed statement of the plaintiffs' contentions. These may be summarized as follows: (1) that the plaintiffs' tractor went into an uncontrollable skid without fault of the driver; (2) that the defendant's driver saw or should have seen the plaintiffs' tractor skidding for 800 feet or more and knew, or should have known, it could not be stopped; (3) that the defendant's driver could and should have turned to the right on the shoulder of the road or stopped; (4) that he failed to do either; (5) that in so failing he was negligent in not keeping a proper lookout, (6) in not reducing speed, (7) in not keeping the vehicle under proper control, (8) in failing to yield the plaintiffs one-half the main traveled portion of the highway, and (9) in cutting across the highway to the left. There was no request for additional instructions as to contentions.

The judge in concluding his charge on the first issue told the jury in substance they should answer the first issue "yes" if they found the plaintiffs' injuries and damage to have been proximately caused by negligence of the defendant Burlington Mills' driver in that: (1) he drove the tractor-trailer upon the left hand side of the highway, in the direction he was traveling, unless it was impracticable to travel on the right hand side of the highway, in violation of General Statutes 20-146;

or (2), if he in operating the tractor-trailer met the plaintiffs' tractor proceeding in the opposite direction, and failed to yield at least one-half, as nearly as possible, of the main-traveled portion of the highway, in violation of General Statutes 20-148; or (3), if he operated the tractor-trailer upon the highway without keeping a reasonable lookout; or (4), if he operated the vehicle upon the highway without keeping it under proper control. The judge had previously explained to the jury a motorist's common law duties of proper control and reasonable lookout and what amounts to negligence in respect thereto.

It thus appears that the judge's charge on the first issue presented to the jury all substantive phases of the law of negligence relied on by the plaintiffs that arose upon the evidence. A party desiring instructions upon a subordinate feature of the case must aptly tender a request therefor. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Chestnut v. Sutton*, 207 N.C. 256, 176 S.E. 743. Here there was no request for more specific instructions.

The plaintiffs' other assignments of error are without merit. They present no new questions requiring discussion. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

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

LOUIS E. BOYD AND VERNON LUTHER TOWE T/A PLAZA GRILL v. T. W. ALLEN, SAM ETHERIDGE AND FRANK T. ERWIN, AS MEMBERS OF THE BOARD OF ALCOHOLIC CONTROL, STATE OF NORTH CAROLINA.

(Filed 1 May, 1957.)

1. **Constitutional Law § 14: Intoxicating Liquor § 1—**

Under its inherent police power, the State has the power to prohibit, regulate or restrain the use, manufacture or sale of beer within its bounds.

2. **Intoxicating Liquor § 3½—**

A retail beer permit grants the holder a special privilege limited by the statutes under which it is granted, and such permit is not a contract, or property right, or vested right in any legal or constitutional sense.

3. **Same—**

A proceeding by the State Board of Alcoholic Control to suspend a beer permit for alleged violations by the holder of G.S. 18-78.1, is an administrative proceeding, which does not involve any criminal liability of the holder of such permit. G.S. 18-78.

4. Same—

The revocation or suspension of a retail beer permit for violation of the statutory regulations is done in the exercise of the police power of the State in the interest of public morals and welfare, and does not violate Article I, Section 17, of the Constitution of North Carolina.

5. Same—

Findings of fact, supported by evidence, that the employees of the holders of a beer permit sold whiskey on the premises, and sold beer consumed by the purchaser on the premises after closing hours and at a time when the sale of beer was prohibited by law, support judgment suspending the permit, notwithstanding the further stipulation that the holders had no knowledge of the unlawful conduct of the employees.

APPEAL by petitioners from *Seawell, J.*, September Term 1956 of WAKE.

Petition for a judicial review, under G.S. 143-306 *et seq.*, of a final administrative decision by the State Board of Alcoholic Control suspending the retail beer permit of petitioners for a period of twelve months.

Petitioners, as partners, operate the Plaza Grill in Charlotte, a restaurant and "drive-in," and have a retail beer permit for the premises. Respondents are the chairman and members of the State Board of Alcoholic Control.

On 13 April 1956 Earl L. Weathersby, Assistant Director of the Malt Beverage Division of the State Board of Alcoholic Control, wrote petitioners a letter notifying them that the State Board of Alcoholic Control had received a report from one of its inspectors charging them on 24 March and 6 April 1956 with violating the Alcoholic Beverage Control Laws and the regulations promulgated by the State Board by (1) possessing and allowing the possession of whiskey on licensed premises, by (2) allowing the sale and consumption of whiskey on licensed premises, by (3) selling and allowing the sale of beer on licensed premises during illegal hours, by (4) failing to give licensed premises proper supervision, and by (5) failing to maintain a suitable outlet for the sale of beer. This letter notified petitioners of the date, hour and place for them to appear, and show cause, if any they could, why their beer permit should not be revoked, and stated to them they had a right to have counsel and offer evidence.

Weathersby conducted the hearing, when and where considerable evidence was offered by the parties. These are the crucial findings of fact made by Weathersby: Petitioners have six employees, including two curb boys. About 11:00 p.m. on 24 March 1956 State ABC Investigator, Fred W. Thompson, drove his car on the premises of the Plaza Grill, where there is drive-in curb service. There he asked John Cure-

ton, a curb boy employee of petitioners, for whiskey. Cureton said he was out of tax paid whiskey, but had a jar of white whiskey. Thompson said he would take it. Cureton went to his car at the rear of petitioners' drive-in lot, and got out of the trunk a half gallon jar of non-tax paid whiskey. Thompson paid him $5.50 for it. About 11:55 p.m. on 6 April 1956 the same investigator again visited the premises of Plaza Grill, and purchased after closing hours from James Robinson, another curb boy employee of the petitioners, a can of beer, which he drank on the premises. At the same time the investigator made arrangements with John Cureton for the purchase of a case of whiskey. Upon the findings made by him, Weathersby recommended that petitioners' beer permit be suspended for twelve months.

The State Board of Alcoholic Control rendered a final administrative decision reviewing and approving the findings of fact by Weathersby to the effect that petitioners allowed the sale of beer on licensed premises during illegal hours, allowed the possession and sale of whiskey on licensed premises, and failed to give licensed premises proper supervision. Whereupon, the State Board suspended petitioners' retail beer permit for twelve months, effective 26 May 1956.

Petitioners filed a petition in the Superior Court of Mecklenburg County praying for a writ of *certiorari* to bring up for review the decision of respondents, and for a permanent injunction to prevent the suspension of their retail beer permit. By consent of the parties the proceeding was transferred to the Superior Court of Wake County, and it was stipulated and agreed by the parties that the petition filed in the Superior Court of Mecklenburg County should be regarded for all purposes as a petition filed under the terms of G.S. 143-309.

Judge Seawell, after examining and considering the record and the argument of counsel, rendered judgment affirming the findings of fact and decision of the State Board of Alcoholic Control, and ordering that petitioners surrender to the State Board their retail beer permit. However, the surrender of the beer permit was stayed pending this appeal.

The parties entered into this stipulation: "That there is no evidence in the record before defendant that petitioners herein had any knowledge of the conduct of their servants, John Cureton or James Robinson, whose activities constitute the basis of the charges filed against petitioners before the Board of Alcoholic Control for the State of North Carolina."

From the judgment entered, petitioners appeal.

McDougle, Ervin, Horack & Snepp By: Frank W. Snepp for Plaintiffs, Appellants.

George B. Patton, Attorney General, Claude L. Love, Assistant Attorney General, and Thomas S. Harrington, Staff Attorney, for Defendants, Appellees.

PARKER, J. Under its inherent police power the State of North Carolina has the right to prohibit, regulate or restrain the use, manufacture and sale of beer within its bounds. *S. v. Kittelle,* 110 N.C. 560, 569, 15 S.E. 103; *Bailey v. Raleigh,* 130 N.C. 209, 41 S.E. 281; *S. v. Williams,* 146 N.C. 618, 61 S.E. 61; 30 Am. Jur., Intoxicating Liquors, sec. 22; 48 C.J.S., Intoxicating Liquors, sec. 33. The liquor business "stands, by universal consent, in a class peculiarly within the police power." *Blackman Health Resort v. Atlanta,* 151 Ga. 507, 107 S.E. 525, 17 A.L.R. 516.

A retail beer permit grants the holder a special privilege or permission to engage in the beer selling business, and is limited by the statutes under which such permit or license is granted. The permit is not a contract, and confers no contract rights. It is generally held that the permit or license is not property or a vested right, in the ordinary meaning of those terms, in any legal or constitutional sense. 48 C.J.S., Intoxicating Liquors, sec. 109(a); 30 Am. Jur., Intoxicating Liquors, sec. 136. In *Fitzpatrick v. Liquor Control Commission,* 316 Mich. 83, 25 N.W. 2d 118, 172 A.L.R. 608, the Court said: "A license to engage in traffic in alcoholic liquor is not a contract in the sense that the licensee has thereby acquired any vested property rights. It is in the nature of a permit and the traffic is at all times subject to the control of the State in the exercise of its police power."

In 30 Am. Jur., Intoxicating Liquors, Section 142, it is said: "A liquor license is at all times within the control of the legislature, and may be revoked, annulled, or amended at its pleasure."

G.S. 18-78.1 provides that no holder of a license authorizing the retail sale of beer, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall (3) sell beer "upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law," or "(5) sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license."

G.S. 18-141 prohibits the sale and consumption of beer on licensed premises during certain hours.

G.S. 18-78 states the State Board of Alcoholic Control "may revoke or suspend the State permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by said Board," (Beverage Control Act of 1939). This statute provides for a notice to the licensee and for a hearing, which was done here.

The petitioners had no license to sell whiskey. The findings of fact, which are supported by sufficient competent evidence, are that John Cureton, a curb boy employee of petitioners, on 24 March 1956, sold to a State ABC Inspector on the licensed premises a jar of non-tax paid

whiskey for $5.50, and that on 6 April 1956, after closing hours and during a prohibited time, James Robinson, another curb boy employee of petitioners, sold a can of beer on the licensed premises to the same Inspector, and that at the same time and place, John Cureton made arrangements to sell the Inspector a case of whiskey.

The parties stipulated that there is no evidence in the record that petitioners had any knowledge of John Cureton's sale of whiskey on the licensed premises, or of James Robinson's sale of beer on the licensed premises during prohibited hours and of Cureton's arrangements to sell a case of whiskey. Petitioners contend that the State Board of Alcoholic Control is not authorized by law to suspend their retail beer permit for the illegal acts of their two curb boy employees done without their knowledge or consent.

The proceeding by the State Board of Alcoholic Control is not a criminal proceeding against petitioners, but an administrative proceeding authorized by G.S. 18-78 for the purpose of revocation or suspension of petitioners' retail beer permit for alleged violations of G.S. 18-78.1. This is a specific remedy authorized by statute for violations of the Beverage Control Act or of any rule or regulation adopted by the Board. It is to be noticed that the question in this case is not whether petitioners are criminally liable for their employees' acts, but whether their retail beer permit can be suspended by the State Board because of their employees' violations of G.S. 18-78.1.

The petitioners had a retail beer permit issued to them by the statutory law of the State, and they placed beer in charge of John Cureton and James Robinson, their curb boy employees, to sell as a beverage. These employees had no license to sell beer. Can petitioners put these employees in their shoes, give them the benefit of the permit issued to them, and not be held responsible for their violations of the law found as facts in the instant proceeding, because they had no knowledge of these violations of the law? Upon the facts found the law has been violated. Can petitioners set up their beer emporium, receive its profits, and abdicate their duties to prevent illegal sales of beer and whiskey on their premises by their employees? Or, will the law look to the licensees, the persons it permitted to sell beer on their premises, and hold them responsible for the unlawful acts of their employees engaged in the retail sale of beer?

It is generally agreed that the business of dealing in or with intoxicating liquors is not a common, inherent, constitutional or vested right, but, if a right at all, is one held subject to the police power of the State. It is one affecting the public health, morals, safety and welfare in such a way that State control of it under the police power is so great as to range from complete prohibition to many lesser degrees of regulation and constant surveillance. 30 Am. Jur., Intoxicating Liquors, p. 262,

sec. 19 *et seq.;* p. 264, sec. 22 *et seq.;* p. 326, sec. 136; Anno. 3 A.L.R. 2d, pp. 108-111. The legislation for the revocation or suspension of a retail beer permit for the causes found to exist in this proceeding is an exercise of the police power of the State in the interests of public morals and welfare, is reasonable, bears a real and substantial relationship to the public purpose sought to be accomplished by the Legislature in the Beverage Control Act, tends to preserve public morals and welfare, and is not in violation of Article I, Section 17, of the North Carolina Constitution, as contended by petitioners. 11 Am. Jur., Constitutional Law, Sections 305 and 306. See 12 Am. Jur., Constitutional Law, Sections 405, 463, 467, 497 and 499.

In 12 Am. Jur., Constitutional Law, Section 467, it is written: "It is settled that the states have full control over all matters relating to intoxicating liquors within their local sovereignties and that the usual regulations pertaining to liquors in general do not violate any of the constitutional rights of the citizen. Thus, the entire business of manufacturing and selling intoxicating liquors is completely within the control of the states. There is nothing in the Constitution of the United States to prevent them from regulating and restraining the traffic or from prohibiting it altogether. The right to sell intoxicating liquors is not one of the privileges or immunities of a citizen of the United States or an inherent right of citizenship. The state may grant to one class the privilege to sell liquor and deny it to another class. It may restrict the right to obtain licenses for the sale of intoxicating liquors to the male inhabitants of the state."

The petitioners, the licensees, elected to operate their retail beer business at least in part with employees, and they must be responsible to the licensing authority for their employees' conduct in the exercise of their license, whether they know about it or not, else we would have the absurd result that beer could be sold at forbidden hours on the premises by their employees and whiskey sold on the premises by their employees, and the licensees would be immune to disciplinary action by the State Board of Alcoholic Control, if they had no knowledge of it. Such a result would cause a complete breakdown of beverage control by the State, and cannot have been contemplated by the Legislature.

In a number of cases the courts have upheld revocation, cancellation or suspension of liquor licenses because of improper, or wrongful or unlawful acts of the licensees' employees or agents, although such acts are committed against the instructions of the licensee or without his knowledge or consent. This is sound law, which we adopt. *Cornell v. Reilly,* 127 Cal. App. 2d 178, 273 P. 2d 572, 578; *Mantzoros v. State Bd. of Equalization,* 87 Cal. App. 2d 140, 144, 196 P. 2d 657, 660; *Chambers v. Herrick,* 172 Kan. 510, 241 P. 2d 748; *Anschutz v. Michigan Liquor Control Commission,* 343 Mich. 630, 73 N.W. 2d 533; *In re Suspension*

of License by Oregon Liq. Contr. Com., 180 Oregon 495, 177 P. 2d 406; *Bradley v. Texas Liquor Control Board*, Tex. Civil Appeals, 108 S.W. 2d 300; 48 C.J.S., Intoxicating Liquors, p. 282; 30 Am. Jur., Intoxicating Liquors, Section 146 and particularly the 1956 Cumulative Supp., Section 146, "p. 331 Add, following note 3"; Anno. 3 A.L.R. 2d pp. 108-111, where numerous cases are cited; Ann. Cas. 1912 A 1111, where many cases are cited. See *Texas Liquor Control Board v. Warfield*, Tex. Civil Appeals, 122 S.W. 2d 669. See also *Sandstrom v. California Horse Racing Board*, 31 Cal. 2d 401, 189 P. 2d 17, 3 A.L.R. 2d 90, where it was held that: "The state may reasonably provide for the suspension, irrespective of guilty participation or culpable negligence, of a race horse trainer's license if stimulating or depressive drugs shall be found to have been administered to a horse participating in a race on the result of which wagering is permitted"; and also Anno. 3 A.L.R. 2d p. 114.

In *Chambers v. Herrick, supra*, the Supreme Court of Kansas said: "In our opinion there is no room for debate on the question whether, for the purpose of suspension or cancellation of licenses, the holder of a retail liquor license should be held responsible for the acts and conduct of his employee in the operation of the business. Sound public policy requires that he is responsible. To hold otherwise would lead to a complete breakdown of the whole system and theory of supervision contemplated by the Act, and would permit a licensee to escape liability for suspension or revocation of his license merely on the ground he had no knowledge of and had not authorized or approved a violation by the employee. In an effort to get at this very thing the Legislature has seen fit to classify those persons to whom licenses may be granted and who may be employed by licensees. In the nature of things it must be held that the licensee is responsible at all times for the acts and conduct of his employee in the operation of the business. The rule under consideration is not unreasonable, arbitrary, capricious or in contravention of the Act, and is not unconstitutional."

The lower court was correct in upholding the decision of the State Board of Alcoholic Control, and the judgment is

Affirmed.

STATE v. ARVILLE TOBIAS KERLEY.

(Filed 1 May, 1957.)

1. Criminal Law § 52a (2)—

Testimony of State's witnesses that they had not previously known defendants, and that defendants were the persons who assaulted and robbed one of the witnesses with a pistol, is sufficient to overrule motion for judgment of nonsuit, the criminal record of the State's witnesses being relevant only upon the question of their credibility.

2. Criminal Law §§ 34g, 50f—Plea of nolo contendere by one defendant is not competent to be considered as evidence of guilt of the other defendant.

Where two defendants are jointly indicted for a crime which is several in nature, the fact that one of them tenders plea of guilty or *nolo contendere* is not competent as evidence of guilt of the other, and it is improper for the solicitor to argue to the jury that defendants jointly committed the crime, and that if one of them pleaded guilty, the other was also guilty, and the failure of the court, upon timely objection of the defendant then on trial, to charge that the plea of the codefendant should not be considered as evidence bearing upon the guilt of the defendant then on trial, and that the latter's guilt must be determined solely on the basis of the evidence against him, must be held for prejudicial error.

APPEAL by defendant from *Armstrong, J.*, January Term, 1957, of DAVIDSON.

The bill of indictment (#8051) charged, in substance, that one J. D. Logan Powell and Arville Tobias Kerley, on 29 September, 1956, unlawfully, wilfully and feloniously, by the use and threatened use of a dangerous weapon, to wit, a pistol, whereby the life of one Garney Church was endangered and threatened, took from the person of said Church the sum of $551.00, being the felony defined in G.S. 14-87.

Both defendants pleaded "Not Guilty," and a jury was sworn and impaneled.

The State's evidence, in substance, tended to show that about 3:30-4:00 a.m. Saturday, 29 September, 1956, Powell and Kerley forced their way into Church's two-room house in Lexington; that Kerley had a pistol; that they assaulted Church and threatened and endangered his life; and that, after Church had been badly beaten, Powell got his pocketbook and took therefrom the sum of $551.00.

The State's evidence tended to show further that one Crooks was living with Church and was present on the occasion of the alleged robbery. Both Church and Crooks, the State's principal witnesses, identified Powell and Kerley as the persons who committed the alleged robbery.

Kerley was arrested the following Monday morning, about 9:15 a.m., while at work on his job as a carpenter. He consistently denied any participation in or knowledge of the alleged robbery. His testimony, and the testimony of several defense witnesses, tended to show that from near midnight until 6:00 or 7:00 a.m. Saturday, 29 September, 1956, he was at "J. B. Earnhardt's place," near Kannapolis, North Carolina, some thirty-five miles from Lexington.

On cross-examination, Kerley testified that he had known Powell "about all" of his life.

The agreed case on appeal shows the following:

"During the progress of the trial in Case No. 8051 as against J. D. Logan Powell, the defendant, through his counsel, Mr. Turner Wall, withdraws his plea of 'Not Guilty,' and tenders PLEA of *Nolo Contendere* to the charge. By permission of the Court, the State accepts the plea of *Nolo Contendere.*

"In other cases appearing upon the docket, to-wit: cases Nos. 8094 to 8107, inclusive, the defendant, J. D. Logan Powell, tenders a Plea of *Nolo Contendere* to the charges in the Bills of Indictment. By permission of the Court, the State accepts the pleas."

The trial continued as to Arville Tobias Kerley, appellant; and the jury returned a verdict of guilty as charged. The agreed case on appeal shows the following:

"During the course of his argument to the jury, the Solicitor for the State, over the objection of the defendant, was in the process of making the argument to the jury, in effect, as follows: That the defendant Kerley went on trial in the case along with his co-defendant and friend, J. D. Powell, and that during the progress of the trial, the friend and co-defendant of this defendant had come in and admitted his guilt by withdrawing his plea of not guilty and entering a plea of *nolo contendere.* Several times during the course of this argument the Solicitor referred to the co-defendant, Powell, as 'The admitted Robber' and as 'The confessed Robber.' To this argument by the Solicitor the defendant Kerley, in apt time, objected. Objection overruled. Defendant excepts. EXCEPTION No. 8."

The judgment pronounced was that Arville Tobias Kerley "be confined in the Central Prison for a term of not less than five nor more than fifteen years (and) assigned to do labor as provided by law."

Kerley excepted and appealed, assigning errors.

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

B. W. Blackwelder for defendant, appellant.

BOBBITT, J. The State's witnesses, Church and Crooks, testified that they had not previously known either Powell or Kerley. True, their testimony may have been less reliable by reason of their own admitted criminal records. Even so, their testimony was sufficient in all respects to support the verdict of guilty as charged. The weight to be given their testimony was for the jury. Hence, the motion for judgment of nonsuit was properly overruled.

However, we are constrained to hold that assignment of error #5, based on exception #8, is well taken.

We are not concerned here with the legal significance of Powell's plea of *nolo contendere* in a civil action or another criminal action *against him. Winesett v. Scheidt, Comr. of Motor Vehicles,* 239 N.C. 190, 79 S.E. 2d 501; *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259; *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77. The question presented here is whether Powell's plea of *nolo contendere,* considered as the equivalent of a confession of his guilt, is competent evidence against Kerley; and, if not, whether the solicitor, with the sanction of the court, used Powell's plea as evidence in such manner as to constitute prejudicial error.

If Powell had been separately tried and convicted or had pleaded guilty *prior* to Kerley's trial, the record of Powell's prior conviction or plea would not have been admissible against Kerley. *Leroy v. Government of Canal Zone,* 81 F. 2d 914 (C.C.A. 5th); *Kirby v. United States,* 174 U.S. 47, 19 S. Ct. 574, 43 L. Ed. 890. Moreover, upon Kerley's separate trial, testimony that Powell had been convicted or had pleaded guilty to the same charge would not have been competent. *Paine v. People* (Colo.), 103 P. 2d 686; *Leech v. People* (Colo.), 146 P. 2d 346; *State v. Jackson* (N.M.), 143 P. 2d 875; *United States v. Hall,* 178 F. 2d 853 (C.C.A. 2nd). "The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *United States v. Toner,* 173 F. 2d 140 (C.C.A. 3rd).

While Powell and Kerley were indicted jointly, the crime was several in nature. The guilt of one was not dependent upon the guilt of the other. If one were convicted or pleaded guilty, this would not be evidence of the guilt of the other; nor would the acquittal of one be evidence of the innocence of the other. Moreover, the admissibility of Powell's plea *as evidence* was not altered by the fact that it was tendered and accepted, presumably in the presence of the jury, during the progress of the trial. *Paine v. People, supra.*

The withdrawal by Powell of his plea of not guilty, and the tender and acceptance of his plea of *nolo contendere,* under the circumstances stated, would not of itself, standing alone, constitute prejudicial error as to Kerley. *S. v. Hunter,* 94 N.C. 829; *S. v. Bryant,* 236 N.C. 745,

73 S.E. 2d 791; 23 C.J.S., Criminal Law sec. 969; *S. v. De Bellis* (N.J.), 136 A. 603; *S. c.*, 138 A. 923; *S. v. Sutherland* (N.J.), 9 A. 2d 807; *S. c.*, 15 A. 2d 749; *Hines v. United States,* 131 F. 2d 971 (C.C.A. 10th); *Kelling v. United States,* 121 F. 2d 428 (C.C.A. 8th) *Grandbouche v. People* (Colo.), 89 P. 2d 577; *Schliefer v. United States,* 288 F. 368 (C.C.A. 3rd); *Richards v. United States,* 193 F. 2d 554 (C.C.A. 10th); *United States v. Hartenfeld,* 113 F. 359 (C.C.A. 7th); *United States v. Falcone,* 109 F. 2d 579 (C.C.A. 2nd); *United States v. Dewinsky* (D.C. of N.J.), 41 F. Supp. 149; *Graff v. People* (Ill.), 70 N.E. 299; *Commonwealth v. Biddle* (Pa.), 50 A. 262; *United States v. Rollnick,* 91 F. 2d 911 (C.C.A. 2nd).

In certain of the cited cases, *e.g.,* the *Sutherland, Richards, Graff, Biddle* and *Rollnick cases,* and in *S. v. Bryant, supra,* the codefendant whose plea of guilty was involved testified as a State's witness to facts tending to establish his own guilt. In this setting, his plea, of itself and standing alone, was held not sufficiently prejudicial to warrant a new trial.

It is noted that Powell was *not called* as a State's witness. There is nothing to indicate that if called he would have implicated Kerley. Be that as it may, had he *testified* to facts tending to establish Kerley's guilt, then Kerley's right to be confronted by his accuser and to subject him to cross-examination would have been recognized. *Kirby v. United States, supra;* Constitution of North Carolina, Art. I, sec. 11; *S. v. Dixon,* 185 N.C. 727, 730, 117 S.E. 170; *S. v. Perry,* 210 N.C. 796, 188 S.E. 639.

In certain of the cited cases, *e.g.,* the *Hines, Kelling, Hartenfeld, Graff, Falcone and Rollnick cases,* it appears that the presiding judge, in the absence of request, instructed the jury that the codefendant's plea of guilty was not to be considered as evidence against the defendant then on trial. Thus, in *Hines v. United States, supra,* the trial judge specifically admonished the jury that the guilty plea of Palmer (codefendant) had no bearing one way or the other on the guilt or innocence of Hines (then on trial); "that they were not to 'speculate' on the reason for the failure of Palmer to go to trial, and that their verdict should be based on the evidence in the case submitted to them under the indictment." See also *S. v. Bryant, supra.*

What prompted Powell's plea of *nolo contendere* is a matter concerning which the record affords no answer. If we were to indulge in speculation we could not overlook the fact that simultaneously he entered pleas of *nolo contendere* in 14 other cases then pending against him. Nothing appears to indicate that Kerley was charged or in any way involved in such other cases.

None of the cited cases supports the view that the codefendant's plea of guilty is competent for consideration as evidence against the defendant then on trial.

When request therefor is made, it is the duty of the trial judge to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea. *Babb v. United States,* 218 F. 2d 538 (C.C.A. 5th); *United States v. Toner, supra; United States v. Hall, supra; O'Shaughnessy v. United States,* 17 F. 2d 225 (C.C.A. 5th).

Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted as evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749, 753, 76 S.E. 2d 42, and cases cited. While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it. Compare: *Paoli v. United States,* 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278.

Powell had the right to tender his plea; and the State, with the approval of the court, had the right to accept it. True, the jury may have found it difficult wholly to disregard an event taking place before their eyes. Even so, Powell's confession of guilt by plea was certainly no more competent against Kerley than his extrajudicial confession, had he made one, would have been. The State, apparently well aware of this fact, did not offer Powell's plea as evidence against Kerley.

Reference is made to the cases cited in two Annotations: 48 A.L.R. 2d 1004; 48 A.L.R. 2d 1016. In the latter, the annotator, after noting that a mere reference to a codefendant's plea or conviction may not be deemed sufficiently prejudicial under the circumstances of a particular case to warrant a new trial, states: "Where, however, a prosecuting attorney urges such other conviction as justification for the jury to find the accused guilty or urges or implies that it is evidence of the accused's guilt, real prejudice results and requires not only prompt but forceful action by the trial court to eliminate the harmful effect; under some circumstances, even curative instructions to the jury will not eradicate the prejudice to the accused." The cases cited support this statement of the prevailing rule.

Here, the solicitor was permitted to use Powell's plea *as evidence* upon which to base this argument: (1) Kerley and Powell were friends; (2) they were jointly charged and identified by the State's witnesses as the men who jointly committed the robbery; (3) Powell pleaded guilty; (4) therefore, Kerley must be guilty, too. The record shows that the

solicitor made this argument, with the sanction of the court, over defendant's timely objections.

The practical force and prejudicial effect of the solicitor's said argument is apparent. Powell's plea being incompetent as evidence against Kerley, the sanctioned use thereof as the evidential basis for said argument constitutes reversible error for which Kerley is entitled to a new trial.

An examination of the charge does not disclose that the trial judge gave any instruction to dispel the idea that Powell's plea was competent for consideration by the jury in passing upon Kerley's guilt or innocence. *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656.

We are not concerned here with cases such as *S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424, where error is assigned because of alleged abusive or improper remarks by the solicitor as to the appearance or conduct of *the defendant then on trial.*

As to Powell, the case ended when the State, with the court's approval, accepted his plea of *nolo contendere. Winesett v. Scheidt, Comr. of Motor Vehicles, supra.* Thereafter, Kerley alone was on trial. The circumstance that he had been indicted jointly with Powell did not deprive him of any right to which he would have been entitled had he been indicted as sole defendant. While a positive instruction probably would not have removed entirely the subtle prejudice that unavoidably resulted from Powell's plea, yet, upon timely objection to the solicitor's argument, we think Kerley was entitled to a prompt and forceful instruction to the effect that Powell's plea was not evidence against Kerley and that it was improper for the solicitor and for the jury to treat it as such.

New trial.

PAUL E. PRICE v. EDWARD F. GRAY, JR., AND EDWARD F. GRAY, SR.

(Filed 1 May, 1957.)

1. Automobiles § 41g—

The collision in suit occurred in an intersection having no traffic control signs or signal devices. The evidence tended to show that defendant driver entered the intersection at excessive speed, from plaintiff's left, and struck plaintiff's vehicle midway on its left side. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant driver's negligence in failing to yield the right of way to plaintiff. G.S. 20-155(a).

2. Automobiles § 42g—

Evidence tending to show that plaintiff's vehicle approached an intersection having no traffic control signs or signal devices, at a speed of 20 miles per hour, that plaintiff looked without seeing any impeding traffic, and entered the intersection, where his car was struck on its left side by the

car operated by defendant driver, which approached the intersection from plaintiff's left, traveling some 50 miles per hour, *is held* not to show contributory negligence as a matter of law on the part of plaintiff.

3. Evidence § 52—

The fact that the form of a hypothetical question is objectionable will not be held prejudicial when the answer of the expert witness discloses that it was based not upon the hypothetical facts, but upon facts within the personal knowledge of the witness gained from examination and diagnosis.

4. Appeal and Error § 41—

An exception to the admission of testimony is waived when other evidence of the same import is admitted without objection.

5. Negligence § 5—

There may be more than one proximate cause of an injury.

6. Same—

The issue of negligence is properly answered in the affirmative if defendant's negligence is a proximate cause of plaintiff's injuries, regardless of whether the negligence of some outside agency or responsible third party, or even the contributory negligence of plaintiff, concurs in causing the injury, the question of contributory negligence of the plaintiff as a bar to recovery being for the consideration of the jury upon the subsequent issue relating to that question.

7. Automobiles § 46: Negligence § 20: Appeal and Error § 20—

An instruction that the issue of negligence should be answered in the affirmative if the jury should find from the greater weight of the evidence that defendants' negligence was "a" proximate cause of plaintiff's injury, is without error, and the fact that in all other portions of the charge the court instructed the jury to answer that issue in the affirmative if they found by the greater weight of the evidence that defendants' negligence was "the" proximate cause of the injury, is favorable to defendants and they cannot be heard to complain thereof.

8. Automobiles § 46: Negligence § 20: Appeal and Error § 42—

A charge which in one instance alone inadvertently placed the burden upon defendant to show that plaintiff's contributory negligence was "the," rather than "a," proximate cause of the injury, but which in other portions repeatedly stated the correct rule that plaintiff's contributory negligence would bar recovery if a proximate cause of the injury, or one of them, and also that if the negligence of both contributed to the injury, neither could recover, so that construed contextually it could not have misled the jury, will not be held for prejudicial error for the one technical deviation from the correct rule.

9. Appeal and Error § 39—

Appellants must not only show error, but that the error amounted to a denial of a substantial right.

APPEAL by defendants from *Parker, J.*, October, 1956 Term, LENOIR Superior Court.

This civil action grew out of an automobile collision at a street intersection in a residential district of Kinston. The accident occurred about nine o'clock on the morning of 17 October, 1955. A mist of rain was falling. The plaintiff was driving west on Dixon Street. The defendant, Edward F. Gray, Jr., son and agent of Edward F. Gray, Sr., was driving north on Charlotte Avenue. Both intersecting streets are paved and each is 30 feet wide. There were no traffic control signs or signal devices at the intersection.

The plaintiff sustained serious and permanent injuries. Both cars were damaged. The pleadings raise the issues of negligence, contributory negligence, personal injury to the plaintiff, and property damage to the Gray car. The negligence and contributory negligence and damage issues were answered in favor of the plaintiff. From the judgment on the verdict, the defendants appealed.

Owens & Langley for plaintiff, appellee.
Wallace & Wallace and White & Aycock for defendants, appellants.

HIGGINS, J. The defendants assign as error the refusal of the court to allow the motion for nonsuit. The plaintiff testified there was a mist of rain falling; that he entered the intersection at about 20 miles per hour; that he looked, did not see any impeding traffic; when he looked again he saw the defendants' car 15 feet to his left; that the front of the Gray car hit the plaintiff's car about midway between the left wheels. The plaintiff, without objection, testified the Gray car was running about 50 miles per hour.

The evidence that defendant Gray, Jr., failed to yield the right of way to the plaintiff who was on the right, G.S. 20-155(a), *Taylor v. Brake*, 245 N.C. 553, 96 S.E. 2d 686; *Wright v. Pegram*, 244 N.C. 45, 92 S.E. 2d 416; *Emerson v. Munford*, 242 N.C. 241, 87 S.E. 2d 306; *Harrison v. Kapp*, 241 N.C. 408, 85 S.E. 2d 337; *Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316, and that the defendant was driving at 50 miles per hour through the intersection, raised the issue of defendants' negligence, G.S. 20-140.1, G.S. 20-141(b)(2), G.S. 20-155(a); *Freeman v. Preddy*, 237 N.C. 734, 76 S.E. 2d 159; *Bennett v. Stephenson*, 237 N.C. 377, 75 S.E. 2d 147. From the relative speed of the cars and the point of collision, it cannot be concluded that plaintiff's contributory negligence appears as a matter of law. *Wright v. Pegram, supra; Emerson v. Munford, supra; Donlop v. Snyder, supra; Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. On the evidence presented, both negligence and contributory negligence were jury questions. The motion for nonsuit at the close of all the evidence was properly denied.

The defendants insist that if the decision is adverse to them on the motion to nonsuit, at least they are entitled to a new trial for errors

in the admission of testimony and in the charge. The plaintiff asked his witness, Dr. Witherington, a long hypothetical question relating to the necessity for removing the plaintiff's kidney following the injury. The defendants' objection was overruled and the witness answered: "It is my opinion that the damage to his left kidney was the result directly of the accident. From my findings when he came in he had tenderness and fullness in the region of the left kidney immediately after the injury; he was passing blood from that left kidney and x-ray studies revealed damage." The form of the question is objectionable, however, the exception cannot be sustained for two reasons: First, the doctor's answer shows rather plainly that it was based, not upon the hypothetical facts, but upon his personal knowledge, diagnosis, and findings. Second, before the question was asked, Dr. Witherington had already testified without objection: "We hoped when he first came in that we could arrest the hemorrhage from his kidney. We don't want to take out a kidney unless we have to. The first week we had hopes that he would straighten out. The second week we had dye studies made and it looked like we could save it. He then went out—and it started bleeding again and we sent him to Dr. Roberts at Watts Hospital, hoping they could save the kidney. They did some more study and the kidney was mashed so badly there wasn't any hope of saving any of it."

An exception is waived when other evidence of the same import is admitted without objection. *Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577; *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908; *White v. Price,* 237 N.C. 347, 75 S.E. 2d 244.

The defendants except to the charge for that the court in one instance instructed the jury to answer the first issue (defendant's negligence) "yes" if they found by the greater weight of the evidence that the defendants' negligence was a proximate cause of the plaintiff's injury; and in one instance to answer the second issue (plaintiff's contributory negligence) "yes" if they found by the greater weight of the evidence the plaintiff's negligence was the proximate cause of his injury. However, in all other instances the court charged the jury to answer the first issue "yes" if they found by the greater weight of the evidence that the defendants' negligence was the proximate cause of plaintiff's injury; otherwise to answer the issue, "no." And in all other instances the court charged the jury that if they came to the second issue to answer it "yes" if they found by the greater weight of the evidence the plaintiff's contributory negligence was a proximate cause of his injury; otherwise to answer it, "no." In addition, the court charged: "If you find by the greater weight (of the evidence) that both parties were

negligent and that such negligence on the part of both parties is one of the proximate causes of the injury, then neither party may recover."

Without doubt, the rule in North Carolina as well as in a majority of the states is that there can be more than one proximate cause of an injury. "Accordingly, where several causes combined to produce injury a person is not relieved from liability because he is responsible for only one of them." 65 C.J.S., sec. 110, pp. 676, 677, citing cases from courts of last resort in 30 states, including the following from North Carolina: *Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346; *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876; *Lancaster v. Greyhound*, 219 N.C. 679, 14 S.E. 2d 820. ". . . it is well settled, however, that negligence in order to render a person liable need not be the sole cause of an injury." 38 Am. Jur., sec. 63, p. 715, citing many cases, including *Paul v. R. R.*, 170 N.C. 230, 87 S.E. 66.

The defendants rely on *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536, and *Gentile v. Wilson*, 242 N.C. 704, 89 S.E. 2d 403, as grounds for a new trial for that in one instance the court cast upon the plaintiff the burden of showing the defendants' negligence was a proximate cause of his injury and in one instance the court cast upon the defendants the burden of showing the plaintiff's contributory negligence was the proximate cause of plaintiff's injury. In the *Harris* and *Gentile cases* issues of negligence and contributory negligence were involved. The cases therein cited as authority do not involve a charge to the jury. The questions arose on demurrer challenging the sufficiency of the pleadings or on motion for nonsuit challenging the sufficiency of the evidence. It must be conceded, however, that the two cases relied on by the defendants, when literally interpreted, furnish authority for the defendants' position. However, both cases recognize there may be more than one proximate cause of an injury. They also furnish authority for the proposition that the plaintiff is only required to satisfy the jury that the defendants' negligence was one of the proximate causes of the plaintiff's injury "where the evidence also tends to show that the negligence of some other person or agency concurred with the negligence of the defendant in producing plaintiff's injury." We think the departure in those cases was due to the fact that the court failed to recognize that the plaintiff's contributory negligence was the negligent act of another person or agency—the plaintiff's—which concurred with the negligence of the defendant in producing the injury. The cases cited as authority for the holding in the *Harris* and *Gentile cases* are based on what must be shown in order to charge the defendant with *liability* rather than what must be shown to justify an *affirmative answer on the issue of negligence.* The combined findings on issues both of negligence and contributory negligence are necessary to determine liability.

No valid reason appears why the contributory negligence of the plaintiff should not be deemed included in the term "negligence of some other person or agency." Numerous cases are authority for the proposition that where there is evidence of negligence on the part of the defendant and likewise of a third party, which negligence is not attributable to the plaintiff, the defendant is *liable* if its negligent act constituted one of the proximate causes of the injury. *Sample v. Spencer,* 222 N.C. 580, 24 S.E. 2d 241; *Rattley v. Powell,* 223 N.C. 134, 25 S.E. 2d 448. Again, liability is spoken of, and liability is not determined by the issue of negligence alone. Where the question of liability involves issues of negligence and contributory negligence it is sufficient for the court to charge that if the jury finds from the evidence and by its greater weight that the defendant was negligent and that his negligence was *the proximate cause, or one of the proximate causes* of the plaintiff's injury, it should answer the issue, "yes"; otherwise, "no." And on the issue of contributory negligence it is sufficient to charge that if the jury finds from the evidence and by its greater weight that the plaintiff was also negligent and that his negligence contributed to his injury *as one of the proximate causes thereof,* it should answer the issue, "yes," otherwise, "no." We think the confusion has arisen in attempting to apply the rule of liability when charging on the single issue of negligence. When contributory negligence is also involved, liability can only be determined by the answer to both issues. Fully sustaining the foregoing are the cases of *Hinnant v. Power Co.,* 187 N.C. 288, 121 S.E. 540; *Bullard v. Ross,* 205 N.C. 495, 171 S.E. 789; *Godwin v. Cotton Co.,* 238 N.C. 627, 78 S.E. 2d 772.

In the three cases just cited, issues of negligence and contributory negligence were presented. The *Hinnant case* involves the following instruction to the jury: "You not only have to find that the injury was the result of negligence upon the part of the defendant, but you have to go further and find that the negligence was the proximate cause or one of the proximate causes of plaintiff's intestate's death. In a case of this character there may be one proximate cause of the injury, or there may be more than one. There may be an indefinite number of causes which resulted in the death which are proximate causes, and it is for you to say, when you come to this question, whether or not you find that the defendant was guilty of negligence in occasioning this injury, and if such negligence was the proximate cause or one of the contributing proximate causes of his death. Proximate cause is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which the event would not have occurred. That is the legal definition of proximate cause." In passing on that charge, this Court had the following to say: "We think the charge, under the facts and circumstances of the case, is in accord

with the decisions of this Court." Citing *Drum v. Miller,* 135 N.C. 204, 47 S.E. 421; *Ramsbottom v. R. R.,* 138 N.C. 38, 50 S.E. 448; *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342; *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299; *Ward v. R. R.,* 161 N.C. 179, 76 S.E. 717; *Paul v. R. R.,* 170 N.C. 230, 87 S.E. 66; *Taylor v. Lumber Co.,* 173 N.C. 112, 91 S.E. 719; *Lea v. Utilities Co.,* 175 N.C. 459, 95 S.E. 894; *Stultz v. Thomas,* 182 N.C. 470, 109 S.E. 361.

In *Bullard v. Ross, supra,* in referring to a charge on contributory negligence, the Court said: "We find no error in the instruction relating to the second issue. There may be concurrent proximate causes of an injury. *White v. Realty Co.,* 182 N.C. 536, 109 S.E. 564; *Harton v. Tel. Co., supra.*" In that case issues of negligence and of contributory negligence were before the jury.

In the case of *Godwin v. Cotton Co., supra,* the following charge was up for review: ". . . if you find the truck driver was negligent, and that his negligence was the proximate cause of the injury to Mrs. Godwin, and then you further find that she was negligent and that her negligence combined and concurred with his negligence and was the proximate cause of her injury, then you would answer the second issue, yes." In ordering a new trial, this Court said: "It is clear that if the negligence of the defendant was the proximate cause of the plaintiff's injuries, and not merely a proximate cause or one of the proximate causes thereof, then the negligence of the plaintiff, if any, would not constitute contributory negligence. *Construction Co. v. R. R.,* 184 N.C. 179, 113 S.E. 672. On the other hand, if the negligence of the plaintiff was the proximate cause of her injuries, the idea of negligence on the part of the defendant would be excluded. *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Absher v. Raleigh,* 211 N.C. 567, 190 S.E. 897; *Wright v. Grocery Co.,* 210 N.C. 462, 187 S.E. 564; *Newman v. Coach Co.,* 205 N.C. 26, 169 S.E. 808; *Lunsford v. Mfg. Co.,* 196 N.C. 510, 146 S.E. 129; . . ." The negligence of each party was *a* proximate cause; the negligence of neither was *the* proximate cause. The concurrence of a proximate cause resulting from the defendants' negligence and a proximate cause resulting from plaintiff's contributory negligence produce the proximate cause or causes of the injury.

In view of what has already been said, it appears the Court imposed an undue burden on the plaintiff by requiring him to show by the greater weight of the evidence that the defendants' negligence was the proximate cause of the plaintiff's injuries in order to entitle him to a favorable answer on the issue of the defendants' negligence. This instruction was favorable to the defendants. They were not prejudiced thereby and cannot be heard to complain.

The only question remaining is whether the case should be sent back for a new trial because the judge in one instance inadvertently placed

on the defendants the burden of showing by the greater weight of the evidence that the plaintiff's contributory negligence was the proximate cause of the plaintiff's injury. Repeatedly in the charge the trial judge placed the burden on the defendants of satisfying the jury by the greater weight of the evidence that the plaintiff's contributory negligence was a, or one of, the proximate causes of his injury. Also the court charged that if the negligence of both contributed to the injury and damage, neither could recover. In the charge on contributory negligence the interchange of "the" for "a" one time was apparently an inadvertence, an oversight, a slip of the tongue, on the part of the trial judge. The issues of negligence and contributory negligence were clear-cut and the evidence thereon sharply in conflict. Construing the charge as a whole it is difficult to believe the jury was or could have been misled. What is said here is not intended as a relaxation of the rule that where conflicting charges are given on a material aspect of the case a new trial will be awarded on the theory that the jury cannot tell in which instance the judge charged correctly. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163; *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682; *Green v. Bowers,* 230 N.C. 651, 55 S.E. 2d 192; *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380.

When the charge is considered contextually and as a whole, the slip of the tongue in the one instance cannot be considered as anything more than a highly technical deviation from the correct rule, too microscopic to have been misunderstood by the jury or to have affected the outcome. Appellants must not only show error, but that the error amounted to a denial of a substantial right. *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; *Billings v. Renegar,* 241 N.C. 17, 84 S.E. 2d 268; *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863. The record fails to disclose a valid reason why the verdict should be disturbed.

No error.

CLIFTON LOUIS BARBOUR v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES.

(Filed 1 May, 1957)

1. Appeal and Error § 21—

An appeal in itself presents the question whether the findings of fact are sufficient to support the judgment and whether error of law appears on the face of the record.

2. Criminal Law § 60a—

The payment of costs constitutes no part of the punishment in a criminal case.

3. Same—

Prayer for judgment continued upon payment of the costs is not a final disposition of a criminal prosecution from which an appeal would lie, but the cause remains in the court for appropriate action upon motion.

4. Same: Automobiles § 2—

Where, in prosecutions for speeding, prayer for judgment is continued upon payment of the costs, there are no final convictions within the purview of G.S. 20-24(c), and defendant's license to drive may not be revoked therefor pursuant to G.S. 20-16.

APPEAL by petitioner from *Seawell, J.*, October Civil Term 1956 of WAKE.

On 19 December 1955 the petitioner was found guilty in Harnett County Recorder's Court of speeding 65 miles per hour, and after verdict an order was entered continuing prayer for judgment upon payment of costs.

Likewise, on 28 June 1956 the petitioner was found guilty in the Superior Court of Wake County of speeding 65 miles per hour. After verdict, the presiding judge entered the following order: "Prayer for judgment continued for two years upon payments of costs."

No judgment has been imposed in either of the aforesaid cases. The petitioner paid the costs in each case and interposed no objection to the entry of the respective orders.

Based on the record in these cases, the Commissioner of Motor Vehicles, on 11 July 1956, issued an order pursuant to the provisions of G.S. 20-16(9) suspending the petitioner's driver's license for a period of six months.

On 17 August 1956, at the request of the petitioner for a hearing to the end that the order of suspension be revoked, a hearing was held before a hearing officer of the Department of Motor Vehicles as authorized by G.S. 20-16(c). Thereafter, the petitioner was advised that the suspension order would remain in effect. The petitioner appealed in apt time to the Superior Court of Wake County, as authorized by G.S. 20-25. Upon the facts as set out herein the matter was heard by his Honor Malcolm B. Seawell, Judge holding the courts of the Tenth Judicial District, sitting without a jury, at the October Term 1956 of the Wake Superior Court. His Honor held that the petitioner has within a period of twelve months been "convicted" on two charges of speeding in excess of 55 miles per hour, and upheld the action of the respondent Commissioner of Motor Vehicles in suspending the license of the petitioner pursuant to the provisions of G.S. 20-16.

Judgment was entered accordingly and the petitioner appeals, assigning error.

Charles W. Daniel and Carl P. Holleman for petitioner.

Attorney-General Patton, Assistant Attorney-General Giles, and Kenneth Wooten, Jr., for the State.

DENNY, J. The appellant took no exception to any finding of fact or to the signing of the judgment. He merely gave notice of appeal to this Court. Consequently, our review is limited to the question as to whether the findings of fact are sufficient to support the judgment and whether error of law appears on the face of the record. *City of Goldsboro v. R. R., ante,* 101; *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320.

G.S. 20-24(c) contains the following provision: "For the purpose of this article the term 'conviction' shall mean a final conviction."

The appellant takes the position that a conviction in a criminal case is not final within the meaning of the above provision in the statute, where no judgment is imposed on the verdict, but merely an order is entered continuing prayer for judgment upon payment of costs.

We have repeatedly held that where no judgment has been imposed on a verdict in a criminal case, an appeal must be dismissed as premature. *S. v. Kay,* 244 N.C. 117, 92 S.E. 2d 667; *S. v. Koone,* 243 N.C. 628, 91 S.E. 2d 672; *S. v. Smith,* 95 N.C. 680; *S. v. Hedrick,* 95 N.C. 624; *S. v. Saunders,* 90 N.C. 651; *S. v. Woodfin,* 85 N.C. 598; *S. v. Wiseman,* 68 N.C. 203; *S. v. Bailey,* 65 N.C. 426.

In the case of *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473, L.R.A. 1918A 955, at the May Term 1917 of the Superior Court of Wayne County, the defendant was indicted for conducting a bawdy house. The defendant entered a plea of *nolo contendere,* and prayer for judgment was continued upon payment of the costs. At the August Term 1917 of said court, the solicitor moved for judgment, the defendant being present and represented by counsel who excepted to the motion. Judgment was imposed. Upon appeal to this Court the defendant contended that the payment of the costs was the punishment inflicted in the case and that no further punishment could be imposed. The Court said, "The judgment in this case was continued upon payment of the cost, which plainly gave the solicitor the right to pray judgment at any time. Of course, notice should be given and the defendant allowed a hearing, as was done in this case." *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Graham,* 225 N.C. 217, 34 S.E. 2d 146.

In *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274, this Court, in dealing with the effect of a judgment suspended upon payment of costs and other conditions, quoted with approval from the case of *Com. v. Dowdican's Bail,* 115 Mass. 133, in which it was held to be proper "when the court

is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file nor the payment of costs, . . . entitled the defendant to be finally discharged." The payment of costs constitutes no part of the punishment in a criminal case. *S. v. Crook,* 115 N.C. 760, 20 S.E. 513, 29 L.R.A. 260; 15 Am. Jur., Criminal Law, section 486, page 140.

In the case of *Berman v. United States,* 302 U.S. 211, 82 L. Ed. 204, *Chief Justice Hughes,* speaking for the Court, said: "To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill v. United States,* 298 U.S. 460, 80 L. Ed. 1283), but, when so followed the finality of the judgment was not lost because execution was suspended."

However, where there is a conviction and a sentence imposed, the fact that the court may suspend the judgment or its execution upon payment of costs or other conditions, and no appeal is taken, the judgment will be considered final when the time for appealing the case has expired, and the defendant may not be heard thereafter to complain on the ground that his conviction was not in accord with due process of law. G.S. 15-197; *S. v. Miller, supra.* But, where a defendant appeals, although the judgment may have been suspended, it will not be deemed a final conviction unless the judgment of the trial court is upheld by the appellate court. *Arbuckle v. State,* 132 Tex. Cr. R. 371, 105 S.W. 2d 219; *Adams v. State,* 136 Tex. Cr. R. 331, 125 S.W. 2d 583; *Ashcraft v. State,* Okla. Cr. App., 94 P. 2d 939.

In this connection, under the provisions of G.S. 20-17, it is mandatory upon the Department of Motor Vehicles to revoke the license of any operator upon receiving the record of such operator's conviction for any one of certain enumerated offenses *when such conviction has become final. Parker, J.,* speaking for the Court in construing this statute in the case of *Harrell v. Scheidt,* 243 N.C. 735, 92 S.E. 2d 182, said: "The provisions of G.S. 20-17 . . . become effective only after judgments of conviction have become final. . . . These statutes, G.S. 20-17 and G.S. 20-19(d) emphasize the effect of a conviction, and the result following

the imposition of punishment fixed by the court in the judgment on the conviction. No action or order of the court is required to put the revocation of the license into effect."

Hence, it is our view that the conviction alone, without the imposition of a judgment from which an appeal might be taken, is not a final conviction within the terms of G.S. 20-24(c). *Smith v. Commonwealth,* 134 Va. 589, 113 S.E. 707.

In 24 C.J.S., Criminal Law, section 1556, page 17, it is said: "In the restricted or technical legal sense in which it is sometimes used, conviction means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to a verdict, confession, or plea of guilty. Frequently the term is used to denote the judgment or sentence itself, or to signify both the ascertaining of the guilt of accused and judgment thereon by the court. A judgment or sentence is indispensable to a conviction in this sense of the term, and the mere ascertainment of guilt by verdict or plea, which satisfies the ordinary legal definition of conviction, does not suffice. In construing the term conviction, it has been held that the technical meaning ought not to be attributed to it, unless there is something in the context to indicate that it was used in such sense."

In *Smith v. Commonwealth, supra,* the trial involved the question of the removal of Smith from office on the ground that he had been convicted of an act constituting a violation of a penal statute involving moral turpitude. On the trial below, the court had instructed the jury in substance that the verdict of the jury in the Federal court of itself constituted a conviction of the accused of the offense charged against him in that court, without the verdict being followed by any judgment of the Federal court convicting the accused of said offense. The Supreme Court of Appeals of Virginia said: "We are of the opinion that, as applied to a case such as that in judgment . . . the word 'conviction' in the statute in question means conviction by judgment, and requires a judgment of conviction, in addition to the verdict of the jury."

In view of the provision in G.S. 20-24(c) to the effect that a "conviction," when used in Article 2 of the Uniform Driver's License Act, shall mean a final conviction, it would seem to require that before a license may be revoked pursuant to the provisions of G.S. 20-16(9), there must be a conviction of two or more offenses enumerated in subsection (9) of the statute, followed by a judgment from which an appeal might have been or may be taken.

In neither case, upon which the Commissioner of Motor Vehicles relies as the basis for the exercise of his discretionary power to suspend the license of the petitioner, was there a judgment of any kind imposed. Therefore, we conclude that the court below was in error in upholding

the order of the Commissioner of Motor Vehicles suspending the petitioner's driver's license.

The judgment below is

Reversed.

PETER KELLY v. JOHN KELLY AND WIFE, BETTY G. KELLY (ORIGINAL PARTIES DEFENDANT), AND FRANKLIN COUNTY (ADDITIONAL PARTY DEFENDANT).

(Filed 1 May, 1957.)

1. Taxation § 40—

In a tax foreclosure suit under C.S. 8037 as rewritten in Section 4, Chapter 221, Public Laws of 1927, the order of publication of notice of summons and the notice pursuant to such order must contain a description of the land which is in fact and in law sufficient to identify the land in itself or by reference to something extrinsic to which the notice refers, and in the absence of such sufficient description, the foreclosure proceeding is fatally defective.

2. Ejectment § 17—

Where, in an action in ejectment, plaintiff introduces evidence that he and defendants claim from a common source and that there was a fatal defect in the tax foreclosure forming a link in defendants' chain of title, nonsuit should be denied.

3. Same—

In an action in ejectment, nonsuit may not be properly entered on defendant's claim of title by adverse possession, but such claim raises an issue or issues to be submitted to the jury upon proper charge of the court.

APPEAL by plaintiff from *Seawell, J.*, at February-March Term 1956, Civil Term of FRANKLIN.

Civil action to recover two tracts of land in Franklin County, described by reference to two certain deeds to Sam Kelly, Sr.

The record and case on appeal reveal that an action entitled the same as above set forth was considered on appeal to this Court, and reported in 241 N.C. 146, 84 S.E. 2d 809, in opinion filed 24 November, 1954, in which the judgment therein was modified and affirmed; and that the present action was instituted by plaintiff, Peter Kelly, on 17 March, 1955.

Reference to the opinion of this Court so reported discloses that there the plaintiff was seeking to recover two tracts of land in Franklin County, North Carolina, containing 13.12 and 15.68 acres, more or less, respectively. For further factual data in regard thereto reference is here made to facts there recited. And the Court having then declined to consider or express an opinion of plaintiff's contention (1)

that proper service of publication was not obtained on Sam Kelly, Jr., in the tax foreclosure proceeding pursuant to which defendant John Kelly claims to have obtained title to the lands in question, or (2) as to the sufficiency of the description of the property in the tax foreclosure proceeding, plaintiff paid the costs of the former action, *Kelly v. Kelly, supra,* and instituted the present action as above stated, for recovery of the lands involved in former action.

I. And upon trial in Superior Court, for the purpose of attack, and for the purpose of showing that plaintiff and defendants claim under a common source of title, and for no other purpose, plaintiff introduced in evidence the entire judgment roll in tax suit No. 1008, being the original papers filed in the office of the Superior Court of Franklin County, in action to foreclose certificate of tax sale, in Superior Court of Franklin County, North Carolina, entitled "County of Franklin, plaintiff *v.* Sam Kelly, Jr., and wife, Lillian Kelly," comprised of the following: (1) Summons, dated 29 August, 1930, for Sam Kelly and wife, Lillian Kelly—showing the printed form of return not filled out and not signed.

(2) Complaint, verified by G. L. Cooke, County Accountant and Auditor of Franklin County, alleging among other things "that for the year 1928 there was listed for taxation in the name of Sam Kelly, Jr., a certain tract of land situate in Louisburg Township, Franklin County, State of North Carolina, and more particularly described as follows to wit: '28A Hawkins';" and "that the Board of County Commissioners for Franklin County duly levied a tax against the above described lands for the year 1928; that said taxes attached to and became a lien upon the lands described on June 1, 1928, and on account of failure of defendants to pay said taxes, and same are now a first lien upon said lands; that for failure to pay said taxes when due the sheriff of Franklin County, after due advertisement as by law required, sold the above described land at public auction at the courthouse door in Louisburg, N. C., on June 3, 1929, for said taxes, at which sale the County of Franklin became the last and highest bidder at the price of $19.80, and received from said sheriff a certificate of sale for said lands, which certificate is now the property and in the possession of plaintiff, and same will be offered in evidence when in the trial of the cause it may become necessary; and that although plaintiff has made repeated demands upon defendants for payment of aforesaid taxes, as represented by the certificate of sale, as above set out, they have failed and refused to pay same, and there is now due and owing from defendants to plaintiff the amount bid for said lands with interest thereon as allowed by law," and containing prayer for relief specifically set forth.

(3) Certificate of sale of real estate for taxes—1008—dated June 3, 1929, as above set forth, describing the land as "the following described

real estate in said County and State, to wit: 28 acres Hawkins listed by Sam Kelly, Jr., in Louisburg Township."

(4) Order of publication of notice, pursuant to Section 2, Chapter 334, N. C. Public Laws 1929, to all persons, other than the above named, who claim any interest in the subject matter of this action to appear, present, set up and defend their claim within six months, etc.

(5) An affidavit (signed by G. L. Cooke and sworn to Sept. 16, 1930) praying order for service of notice of summons by publication to defendants Sam Kelly, Jr., and wife, Lillian Kelly, in which affidavit, among other things, it is set forth that "this is an action brought by Franklin County for the purpose of foreclosing a tax sale certificate issued for taxes due on a certain tract or parcel of land situate in the aforesaid county and State;" . . .

(6) Order of Clerk of Superior Court of Franklin County, dated Sept. 16, 1930, for service of summons on Sam Kelly, Jr., and wife, Lillian Kelly, by publication of notice thereof in which order it is recited among other things that "it further appearing that a cause of action exists against the defendants for the purpose of foreclosing a tax sale certificate issued for taxes due on real estate listed for taxation in the name of Sam Kelly, Jr., . . . defendants herein," and, therefore, it is ordered that there be set forth the title of the action, the purpose of same, and requiring defendants to appear at the office of the Clerk of Superior Court of Franklin County, in the courthouse at Louisburg, N. C., on October 10, 1930, and answer or demur to the complaint of plaintiff.

(7) Notice of publication under caption of action dated September 16, 1930, and signed by Clerk of Superior Court, to defendants Sam Kelly, Jr., and wife Lillian Kelly to "take notice that an action entitled as above has been commenced in the Superior Court of Franklin County, North Carolina," for the purpose of foreclosing tax sale certificate issued for 1928 taxes due on real estate listed for taxation in the name of Sam Kelly, Jr.," and that "the said defendants will take notice that Sam Kelly, Jr., and wife, Lillian Kelly, are required to appear at the office of Clerk of Superior Court in Louisburg, N. C., on 10th day of October, 1930, and answer or demur to the complaint," etc.

(Note: It was stipulated and agreed in open court by plaintiff and defendants that the foregoing notice was published in the *Franklin Times*, a newspaper published in Franklin County, in the issues dated 19 September, 1930, 26 September, 1930, 3 October, 1930, and 10 October, 1930, and that further proof of publication was waived.)

(8) Interlocutory Judgment of Foreclosure, under caption "Franklin County *v.* Sam Jelly, Jr., and wife, Lillian Kelly, and all other persons claiming any interest in the lands herein described" . . . bearing date

Nov. 10, 1930, and purporting to be signed "J. J. Young, deceased—2-1-49—*nunc pro tunc* by John W. King, Clerk of Superior Court," in the handwriting of John W. King, Clerk of Superior Court. In this purported interlocutory judgment of foreclosure two tracts of land are described by specific metes and bounds, as containing 13.12 acres and 15.68 acres more or less.

(9) Report of sale to Franklin County as last and highest bidder at $178.00, dated Dec. 22, 1930. Filed December 22, 1930

CSC

(10) Newspaper clippings of notice of sale dated Nov. 17, 1930, signed by G. M. Beam, Com'r.

(11) Final decree, dated 9th day of June, 1931 (Signed) J. J. Young, Clerk of Superior Court, including confirmation of sale and ordering execution of deed, and that county be put into possession.

II. Plaintiff offered in evidence, without objection, (a) deed from Sam Kelly, Jr., and wife, to Peter Kelly and wife, as tenants by the entirety, dated 27th day of April, 1948, purporting to convey the two tracts of land in controversy with full covenants of seizin, right to convey, freedom from encumbrances and general warranty. Signed, sealed and acknowledged and filed for registration at 9 A. M., May 1, 1948. It appears that the wife of Peter Kelly had died prior to the institution of this action.

(b) Deed from Sam Kelly and wife, Delany Kelly to Sam Kelly, Jr., dated May 25, 1918, purportedly conveying two tracts of land in controversy, with full covenants, etc. Signed, sealed and acknowledged and filed for registration May 25, 1918 at 2 o'clock P. M., and registered same date.

(c) For purpose of showing that plaintiff and defendants claim under a common source of title, and for the purpose of attack, and for no other purpose, plaintiff introduced in evidence (1) the record of deed from G. M. Beam, Commissioner, to Franklin County, purporting to have been executed pursuant to order of foreclosure above referred to, and to convey land in controversy; and (2) the record of the deed from County of Franklin to John Kelly, recorded in Book 440, p. 117 of Franklin County Registry—purporting to convey the two tracts of land here in controversy.

All the parties stipulated that the volumes containing the records of deeds introduced in evidence by plaintiff are official records from the office of Register of Deeds of Franklin County, and the official tax judgment docket from office of Clerk of Superior Court, and that further proof of their authenticity was waived.

Plaintiff offered other evidence and testimony of witnesses, which need not now be recited.

At the close of the evidence of plaintiff, motion of defendants for judgment as of nonsuit was entered by the court. Plaintiff excepted thereto, and appeals to Supreme Court and assigns error.

John F. Matthews for Plaintiff Appellant.

Gaither M. Beam and Edward F. Yarborough for Defendants Appellees.

WINBORNE, C. J. Plaintiff, appellant, assigns as error the ruling of the trial court in allowing motion for judgment as of nonsuit, and the entry of judgment dismissing the action. It is pointed out that the description of the subject matter of suit to foreclose tax sale certificate, as shown upon the face of the judgment roll therein, is insufficient, and fails to meet the requirement of the statute prescribing procedure in such cases.

In this connection the statute, C.S. 8037, as re-written in Section 4 of Chapter 221, Public Laws 1927, in effect when the tax foreclosure suit here involved was pending, required that the person in whose name the real state shall be listed for taxation, together with the wife or husband, if married, shall be made defendants in said action and shall be served with process as in civil actions. Moreover, the statute requires that notice by posting at the courthouse door shall be given to all persons claiming any interest in the subject matter of the action to appear, present and defend their claims; and that "the court shall require a description which is in fact and in law sufficient description of the real estate to be set out in the published notice." *Comrs. of Beaufort v. Rowland,* 220 N.C. 24, 16 S.E. 2d 401.

Sufficient description of the land must be such as is certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the notice refers.

Indeed, this Court has uniformly recognized the principle that a deed conveying land, or a contract to sell and convey land, or a memorandum thereof, within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land, the subject matter thereof, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers. The principle has been the subject of these recent decisions in which earlier decisions are cited and assembled. *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723; *Comrs. of Beaufort v. Rowland, supra; Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29; *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *Linder v. Horne,* 237 N.C. 129, 74 S.E. 2d 227; *Cherry v. Ware-*

house Co., 237 N.C. 362, 75 S.E. 2d 124; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759; *Holloman v. Davis*, 238 N.C. 386, 78 S.E. 2d 143; *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321; *Haith v. Roper*, 242 N.C. 489, 88 S.E. 2d 142; *Baldwin v. Hinton*, 243 N.C. 113, 90 S.E. 2d 316; *Brown v. Hurley*, 243 N.C. 138, 90 S.E. 2d 324; *Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246. (Compare *Johnston County v. Stewart*, 217 N.C. 334, 7 S.E. 2d 708.)

In the light of these requirements of the statute C.S. 8037 as so rewritten, neither the order of publication of notice pursuant to Section 2 of Chapter 334, Public Laws 1929, nor the notice pursuant to order of publication of notice of summons for Sam Kelly, Jr., and his wife contains a description which is in fact and in law sufficient description to identify the land involved in the tax foreclosure,—and to inform those to whom the notices were directed what lands were involved.

Hence the Court is constrained to hold that there is fatal defect in the tax foreclosure proceeding, and, therefore, plaintiff's record title from the common source is superior to that of defendant. Nevertheless defendant pleads that he has ripened title to the lands involved by adverse possession. This raises an issue or issues in that respect which must be submitted to a jury under proper charge of the court.

For reasons stated the judgment from which appeal is taken is

Reversed.

MRS. MILLICENT T. NORRIS v. KING DAVID JOHNSON, ORIGINAL DEFENDANT, AND CHARLES S. NORRIS, ADDITIONAL DEFENDANT.

(Filed 1 May, 1957.)

1. Torts § 6—

G.S. 1-240 creates as to parties jointly and severally liable a new right, so that when one joint tortfeasor is sued alone he may join other joint tortfeasors for contribution under the statute without permission from the original plaintiff.

2. Same—

Where one joint tortfeasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff.

3. Same—

Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant,

and such counterclaim is improperly stricken upon motion of the original defendant.

4. Same—

An additional party joined under G.S. 1-240 on the cross action of the original defendant for contribution is not entitled to nonsuit at the close of plaintiff's evidence, the sufficiency of the evidence on the cross action being determinable only after the original defendant has introduced his evidence in support thereof.

5. Same: **Automobiles § 48—Driver of each car may be guilty of concurring negligence in causing collision at intersection controlled by traffic lights.**

Driver of each car colliding at an intersection controlled by traffic lights may be guilty of concurring negligence, since, notwithstanding the negligence of the one in entering the intersection against the red light, the other may be guilty of concurring negligence in failing to maintain a proper lookout and seeing the other's disobedience to the traffic light in time to have avoided the collision, and therefore, in an action by a passenger in one of the cars against the driver of the other, in which the driver of the first car is joined for contribution by the original defendant, motion to nonsuit the cross action on the ground that there was no evidence tending to establish that the drivers were joint tortfeasors, should be denied.

APPEAL by Charles S. Norris from *Bundy, J.*, January 1957 Civil Term of HARNETT.

Millicent T. Norris brought suit against King David Johnson to recover for personal injuries sustained in a collision between an automobile owned and operated by her husband, Charles S. Norris, and a pickup truck owned and operated by defendant Johnson. Plaintiff alleged that the collision was caused by the negligence of defendant Johnson. She alleged that the driver of the vehicle in which she was riding was free of negligence.

Defendant Johnson answered. He denied each allegation of negligence and alleged that the collision was due to the negligence of the operator of the vehicle in which plaintiff was riding, and that his negligence was the sole proximate cause of the collision. He then alleged if in fact the collision was in any way due to his (Johnson's) negligence, Charles S. Norris, by his (Norris's) negligence, contributed to plaintiff's injuries, and answering defendant was entitled to have Charles S. Norris made a party defendant for contribution. Thereupon an order was entered making Charles S. Norris a party defendant.

Charles S. Norris filed an answer admitting the allegations of the complaint and denying the allegations of negligence set out in Johnson's answer. As a further defense and by way of counterclaim he alleged that his automobile had been damaged in the collision, that the damage was due to the negligence of defendant Johnson, and prays to recover for his damage.

The answer and counterclaim of defendant Norris was not served on defendant Johnson. When the case was called for trial, defendant Johnson demurred *ore tenus* and moved to strike as sham and irrelevant the counterclaim of defendant Norris. The demurrer and motion to strike were allowed and defendant Norris excepted.

The court submitted three issues to the jury: (1) negligence of defendant Johnson, which was answered in the affirmative; (2) damage to plaintiff, which was answered in the sum of $1000; (3) negligence of defendant Norris contributing to plaintiff's injuries, which was answered in the affirmative. Judgment was entered that plaintiff recover of defendant Johnson $1000 and costs and that the defendant Johnson recover of defendant Charles S. Norris one-half of the amount for which he, Johnson, was adjudged liable. Defendant Charles S. Norris excepted and appealed.

Fletcher & Lake for defendant appellant.
Nance, Barrington & Collier for defendant appellee.

RODMAN, J. Defendant Norris, by appropriate assignment of error presents for determination the correctness of the ruling striking out his counterclaim. If he had the right to assert against Johnson in this action his claim for damages, his rights have been prejudicially restricted.

Appellee Johnson does not here contend that the counterclaim is subject to a demurrer for failure to state a cause of action or for misjoinder of parties and causes of action. He asserts that the claim of appellant Norris for damage to the automobile is in no way related to plaintiff's claim for personal injuries, and since it presents no defense to the cause being tried, it should be stricken. He cites in support of his motion *Howell v. Ferguson*, 87 N.C. 113; *Horton v. Perry*, 229 N.C. 319, 49 S.E. 2d 734; and *Wrenn v. Graham*, 236 N.C. 719, 74 S.E. 2d 232. First appearances might seem to support his view, but closer examination will demonstrate its fallacy. In the cases cited the named plaintiff was seeking to hold defendants for wrongs assertedly done to plaintiff. The rights of defendants *inter se* were of no concern to plaintiff; so defendants were not permitted to complicate and delay the action to plaintiff's detriment.

In this case Millicent T. Norris and Charles S. Norris do not, as between themselves, occupy the position of plaintiff and defendant. She seeks no redress against appellant and cannot obtain a judgment against him. Appellee Johnson could not, except for the statute, G.S. 1-240, have insisted on appellant's appearance as a party. *Clark v. Guano Co.*, 144 N.C. 64; *Doles v. R. R.*, 160 N.C. 318, 75 S.E. 722; *Bargeon v. Transportation Co.*, 196 N.C. 776, 147 S.E. 299.

The enactment of the contribution statute created as to parties jointly and severally liable a new right and ready means for the enforcement of that right. *Hoft v. Mohn*, 215 N.C. 397, 2 S.E. 2d 23.

Now when some, but not all of the parties jointly and severally liable are sued, they are permitted in that action to sue those not originally joined. They are not required to seek permission from the original plaintiff. The right is theirs by virtue of the statute, G.S. 1-240. The original defendants are, as to the new defendants, plaintiffs, and as such required to establish their right of action. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534.

The party brought in may, of course, assert any defense appropriate to the cause of action asserted against him. He may plead estoppel by settlement, *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805, a judgment binding the parties, *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E. 2d 345. It follows that relevancy does not relate to the claim of the original plaintiff but to the right of action asserted by the original defendant against the party whom he brings in. Defendant appellant was entitled to assert his counterclaim. *Morgan v. Brooks*, 241 N.C. 527, 85 S.E. 2d 869; *Grant v. McGraw*, 228 N.C. 745, 46 S.E. 2d 849; *Powell v. Smith*, 216 N.C. 242, 4 S.E. 2d 524.

Appellant, at the conclusion of plaintiff's evidence, moved for nonsuit on defendant Johnson's cross action. The court was correct in denying the motion. That was not an appropriate time for the motion. Johnson, who was plaintiff as to appellant, had not then presented his case against his defendant.

At the conclusion of all of the evidence appellant again moved for nonsuit as to Johnson's cross action for that there was no evidence tending to establish the fact that appellant and appellee were joint tort-feasors and hence there could be no contribution.

The collision occurred at the intersection of Broad Street and Ellis Avenue in Dunn. Traffic is controlled at this intersection by a light hung over the center, installed and maintained by the town. Appellant's vehicle was traveling west on Broad Street. Johnson's truck was traveling north on Ellis Avenue. Each party offered evidence that the light, as he approached and entered the intersection, showed green on his side and hence red on the intersecting street. Each offered evidence from which the jury could find that he entered the intersection first in accord with the permission granted by the green light. Each offered evidence tending to show that he was traveling at a reasonable rate of speed. All agree that the collision occurred at or near the center of the intersection. It is not asserted that the view of the drivers was obstructed. The jury might find from the evidence that one of the vehicles negligently entered the intersection when warned not to do so by a red light, but the operator of the other vehicle, by exercising a proper look-

out, could and should have seen the disobedience to the signal command in time to avoid the collision. If so, the failure to maintain a proper lookout proximately causing damage created liability. *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354. The jury could, in its attempt to resolve the conflicts in the testimony, find that the operator of each motor vehicle was negligent, and that the negligence of each contributed to the collision and resulting damage. Hence, appellant's motion to nonsuit at the conclusion of all of the evidence was properly overruled.

It is not necessary to consider or discuss appellant's exceptions and assignments of error relating to the charge.

No exception has been taken to the judgment obtained by the plaintiff, Millicent T. Norris, against King David Johnson. That portion of the judgment is not under attack. It stands unaffected by the appeal.

The rights of appellant Norris and appellee Johnson must be determined at a trial where each is permitted to assert his claim and his defense. On the appeal of defendant Norris there is

Error.

STATE v. ERNEST ROOSEVELT ST. CLAIR.

(Filed 1 May, 1957.)

1. Indictment and Warrant § 12—

When motion to quash the warrant on the ground that it was issued by a police officer is not made until after plea of not guilty is entered, the motion is addressed to the discretion of the trial court and its exercise of such discretion is not reviewable on appeal.

2. Indictment and Warrant § 10—

Where defendant's name appears in the warrant which refers to the affidavit, forming a part thereof, the omission of defendant's name from the affidavit is not a fatal defect. G.S. 15-153. An affidavit form which fails to name the person charged is disapproved.

3. Statutes § 2—

Chapter 82, Session Laws of 1945, authorizing certain police officers of a particular municipality to issue warrants, does not relate to the establishment of courts inferior to the Superior Court or to the appointment of justices of the peace, and therefore does not violate the provisions of Article II, Section 29, of the Constitution of North Carolina.

4. Constitutional Law § 6½—

A defendant may waive a constitutional right relating to a matter of mere practice or procedure.

5. Automobiles § 72—

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to support a verdict of defendant's guilt of operating a motor vehicle upon a public highway while under the influence of intoxicants. G.S. 20-138.

6. Criminal Law § 62f—

Where defendant appeals from a suspended judgment, the judgment will be stricken on appeal for want of defendant's consent, and the cause remanded for proper judgment on the verdict.

APPEAL by defendant from *Preyer, J.*, at August 1956 Term and October 1956 Term, of CABARRUS.

Criminal prosecution upon a warrant issued in the County Recorder's Court of Cabarrus County, North Carolina, as the record and addendum to record on this appeal, show in words and figures the following:

"WARRANT

NORTH CAROLINA,
CABARRUS COUNTY

IN THE COUNTY RECORDER'S COURT
Before C. L. PROPST, JR.
Recorder

The State
v.
Ernest Roosevelt St. Clair

J. L. Coley, being duly sworn, complains and says that on or about the 3rd day of July, 1956, with force and arms, at and in the County aforesaid, did willfully, unlawfully, operate a motor vehicle upon the public highway while under the influence of intoxicants in violation of Section 20-138 of the General Statutes of North Carolina, against the Statute in such cases made and provided against the peace and dignity of the State.

/s/ J. L. Coley Complainant

"Subscribed and sworn to before me
this 3rd day of July, 1956.
/s/ E. R. McKay Lt.

"STATE OF NORTH CAROLINA, To the Sheriff or other lawful officer of Cabarrus County, Greetings:

"THESE are to command you forthwith to apprehend the said Ernest R. St. Clair and him have before C. L. Propst, Jr., Recorder, in the County Court House for Cabarrus County on the 9th day of July, 1956, then and there to answer the above complaint and dealt with according to law.

"Given under my hand and seal this 3rd day of July, 1956.

By /s/ E. R. McKay Lt."

The record and case on appeal show:

1. In the case of State *v.* Ernest Roosevelt St. Clair defendant gave bond for his personal appearance at a session of the County Recorder's Court to be held in the courthouse of Cabarrus County on 19 July, 1956, "and answer the above charge and not depart the court without leave" etc.

2. The case was tried in Recorder's Court on Thursday, 19 July, 1956. The defendant pleaded not guilty, but was found guilty, and from judgment entered in Recorder's Court defendant gave notice of appeal in open court, and posted bond in the amount of $200.00, and the case was sent up to Superior Court of Cabarrus County.

3. In Superior Court before pleading to the charge contained in the warrant, and before entering upon the trial, defendant appeared in court and through his counsel moved the court to quash the warrant appearing of record for that it was defective on its face, in that it was signed by one E. R. McKay, Lt., a lieutenant of the Police Force of Concord, North Carolina, purporting to act under the provision of 1945 Session Laws of North Carolina, Chapter 82, "for that said Session law is illegal, unconstitutional and void" in that "said Act is contrary to the provisions of the Constitution of North Carolina, Article II, Section 29, and the provisions of N. C. General Statute 15-18." Motion was denied, and defendant excepted.

4. Also in Superior Court the defendant entered a plea of not guilty and was tried at August Term 1956. The jury returned a verdict of guilty, and prayer for judgment was continued until October Term of Superior Court, when judgment was pronounced: That defendant be confined in common jail of Cabarrus County for 4 months, and be assigned to work under the supervision of State Highway and Public Works Commission,—the "sentence suspended on condition that the defendant pay $100.00 and cost; and that he not operate a motor vehicle in the State of North Carolina for twelve (12) months."

Defendant gave notice of appeal, and appeals to Supreme Court and assigns error.

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

C. M. Llewellyn, Ann Llewellyn Greene, Marshall B. Sherrin, and John R. Boger, Jr., for Defendant Appellant.

WINBORNE, C. J. The appellant presents on this appeal, in the main, two assignments of error, the first based upon exception one to the denial of his motion to quash the warrant; and the second upon exception two to the denial of his motion for judgment as of nonsuit.

As to the first assignment of error, it does not appear of record that motion to quash was made in the County Recorder's Court where defendant pleaded not guilty and was tried,—the motion being first made in Superior Court, on appeal thereto from judgment of County Recorder's Court. Hence the motion for consideration as a matter of right was not made in apt time. Decisions of this Court are uniform in holding that a motion to quash the warrant or bill of indictment, if made after plea of not guilty is entered, is addressed to the discretion of the trial court. The exercise of such discretion is not reviewable on appeal. *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51, citing *S. v. Jones,* 88 N.C. 672; *S. v. Pace,* 159 N.C. 462, 74 S.E. 1018; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. See also *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623.

Moreover, defendant moves in this Court that he be allowed to amend his motion to quash the warrant by showing a further defect therein, to wit: That the affidavit of the complaining witness upon which the order of arrest was based does not allege that defendant operated a motor vehicle while under the influence of intoxicating liquor, but that on the contrary it is not alleged that defendant did anything at all.

In this connection no point was made at the time that the name of defendant is not mentioned in the affidavit upon which the warrant on which defendant stands charged is based, it appears upon the face of the record that his name does appear in the warrant and that the warrant expressly refers to the affidavit.

In *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919, opinion by *Walker, J.,* this Court, speaking of a similar case, had this to say:

"The complaint did not allege any offense against the defendant, as his name was not mentioned therein, but the warrant refers distinctly to the complaint, and, besides, was physically annexed to it. When this is the case, it may supply any omission or deficiency in the former, and if the two, when considered together as parts of the same proceeding, sufficiently inform the defendant of the accusation made against him, nothing else is necessary to be done. We so held in *S. v. Yellowday,* 152 N.C. 793, where it was said: 'The second objection is that the allegations of the complaint or affidavit were not inserted in the warrant; but this is untenable, as the warrant clearly refers to the affidavit and called upon the defendant to answer its allegations. This is all that the law requires in such a case,' citing *S. v. Winslow,* 95 N.C. 649; *S. v. Davis,* 111 N.C. 729; *S. v. Sharp,* 125 N.C. 634; *S. v. Yoder,* 132 N.C. 1113; to which we add *S. v. Sykes,* 104 N.C. 694."

To like effect is *S. v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515.

Therefore, as stated by this Court in *S. v. Outlaw,* 242 N.C. 220, 87 S.E. 2d 303, in the light of the holding in the case of *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, such defect would not be fatal, citing G.S.

15-153. The affidavit and warrant were almost identical in form with those in the instant case.

Even so, this Court again calls attention to what is said in *S. v. Hammonds, supra,* with respect to drafting warrants. Indeed the use of the form of affidavit in which the person to be charged is not named, should be discontinued. Time and costs now expended would be saved, and the administration of justice expedited.

But it is contended that the act, Chapter 82 of 1945 Session Laws entitled "An Act to Permit Certain Police Officers of the City of Concord to Issue Warrants" under authority of which the police lieutenant purported to act, is unconstitutional in that it is violative of Article II, Section 29 of the Constitution of North Carolina, which declares, among other things, not here pertinent, that "the General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court," or "relating to the appointment of justices of the peace." However reference to the act fails to show that it relates to the establishment of courts, or to appointment of justices of the peace. Hence it is apparent that the question of the constitutionality of the act is not properly raised.

Moreover, a defendant may waive a constitutional right relating to a matter of mere practice or procedure. See *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642, opinion by *Parker, J.*

Now as to the denial of motion for judgment as of nonsuit, the evidence offered on the trial below, as shown in case on appeal, taken in light most favorable to the State, as is done in considering such motion, is sufficient to take the case to the jury, and to support a verdict of guilty of operating a motor vehicle upon public highway while under the influence of intoxicants in violation of G.S. 20-138.

Since it appears that judgment was suspended on conditions stated, and defendant has not consented thereto, the judgment is stricken out, and the cause remanded for proper judgment on verdict returned. *S. v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793; *S. v. Coleman,* 243 N.C. 109, 89 S.E. 2d 791.

Cause remanded for proper judgment.

G. E. KEITH v. THEADO LEE AND WIFE, QUEEN LEE.

(Filed 1 May, 1957.)

1. Agriculture § 6: Partnership § 1a—

A farming contract under which one person furnishes the land, implements, etc., in consideration of a share of the crops grown on the land by the other, does not create an agricultural partnership. G.S. 42-1.

2. Trial § 31b—

Where the trial court states the contentions of the parties, but inadvertently fails to explain and declare the law arising on the evidence, assignment of error to the charge must be sustained. G.S. 1-180.

APPEAL by plaintiff from *Seawell, J.*, at October 1956 Second Civil Term, of WAKE.

Civil action to recover damages for alleged breach of farming contracts.

It appears from the pleadings these facts are admitted:

I. Plaintiff and defendants, residents of Wake County, North Carolina, on or about 22 January, 1955, entered into a half-share farming contract for the year 1955, by the terms of which the defendants were to plant, cultivate, and harvest the following crops on land leased by plaintiff located in Wake County:

"1. Lands denominated as Rogers Farm:
6.1 acres of tobacco
12 acres of corn
2 acres of sweet potatoes
"2. Lands denominated as Johnson Farm:
4.3 acres of tobacco."

II. And on or about 20 May, 1955, plaintiff and defendants contracted that defendants would take over the cultivation, harvesting, grading, curing and sales of certain tobacco planted by A. T. Mills, Jr., for plaintiff on a 3.3-acre tract leased by plaintiff on property denominated as the Simmons Farm on a half-share farming contract, by the terms of which plaintiff was to furnish to defendants a tractor when needed, a truck when needed, proper storage area for cured tobacco, necessary farm equipment, machinery or implements, one-half of the fertilizer to be used in making said crop, advances for money for food and supplies as needed by defendants, and that upon gathering and harvesting said crops of tobacco, potatoes and corn, the same, or the proceeds of the sale thereof, were to be equally divided between plaintiff and defendants, subject, however, to lien of plaintiff for advances of money, food, supplies and one-half of the fertilizer used on said crops.

III. In consideration of the acts of plaintiff, defendants, who were experienced in farming operations, generally and specifically in growing crops of tobacco, corn, and potatoes, and were and are fully cognizant of the proper growing, storage, and curing methods necessary for the production of adequate crops, were to grow, harvest and cure said crops by proper farming methods under the direction of plaintiff.

Plaintiff alleges in his complaint substantially the following:

IV. That thereafter plaintiff, in conformity with the contract between these parties, did supply all equipment, seed, plants, and one-half the fertilizer necessary for the farming operations as well as the advances contracted for; but defendant failed and refused to properly care for, maintain, and harvest the corn and potatoes; and failed to properly grow, sucker, harvest, store and cure said tobacco crops in conformity with said contract in the following particulars, among others, to wit:

(1) That in the tobacco acreage on Rogers Farm and while tobacco was growing in the fields defendants failed to sucker the crops, resulting in damage to the quality of the tobacco leaves.

(2) That upon harvesting tobacco leaves, a crop easily damaged by mishandling, defendants mishandled, and allowed those working for them to mishandle and thus damaged same.

(3) That in curing the tobacco defendants so packed the tobacco barn as to prevent the proper curing of the tobacco, despite available space in proper curing barns made by plaintiff.

(4) That defendants failed and refused to maintain and keep a proper lookout and proper heat in a tobacco barn during the curing process, resulting in the loss of 800 pounds of tobacco through fire.

(5) That defendants, despite the facilities provided for by plaintiff to store tobacco in a dry, safe place, stored tobacco in open and damaged buildings, resulting in weather damages to said tobacco and necessitating the re-drying of said tobacco and a lower market for same so re-dried.

V. That defendants harvested and failed to account for a portion of the tobacco crop grown on said farms, to wit: 4500 pounds of primer grade, in accordance with said contracts and the law of the State of North Carolina, alleged upon information and belief.

VI. "That as a result of the breach of said contract by the defendants the yield from said Rogers Farm's six acres was 3,708 pounds of tobacco, whereas the said yield under proper farming methods should have been between 8,000 and 9,000 pounds; that the yield from the Simmons and Johnson farms was 7,884 pounds of tobacco, whereas the yield under proper farming methods should have been 8,224 pounds, resulting in the loss to the plaintiff of $1,837.00; that, further, said tobacco grown and harvested by the defendants herein was damaged,

resulting in depressed prices due to damaged tobacco and as a result therefrom the plaintiff suffered damages in the sum of $250.85."

Defendants, answering, admit the contracts, but deny that they breached the contracts, or that they are indebted to plaintiff.

And by way of further answer and defense, defendants aver that plaintiff failed to perform certain of the obligations assumed by him.

Upon the trial in Superior Court plaintiff testified, and offered testimony of others with respect to matters alleged in his complaint.

The defendants introduced no evidence, and the case was submitted to the jury on these issues, which the jury answered as indicated:

"1. Did the plaintiff and defendants enter into a contract, as alleged in the Complaint? Answer: Yes.

"2. Did the defendants breach said contract? Answer: No.

"3. What amount of damage, if any, is the plaintiff entitled to recover of the defendants? Answer: ....."

To judgment on verdict in favor of defendants, plaintiff excepts and appeals to Supreme Court and assigns error.

Sam J. Morris and Wright T. Dixon, Jr., for Plaintiff Appellant.
Taylor & Mitchell for Defendants Appellees.

WINBORNE, C. J. Defendants, appellees, file in this Court demurrer *ore tenus* to the complaint, that is, that the complaint fails to state a cause of action. The demurrer is not well taken. It is based upon false premise that the contracts here involved create as between plaintiff and defendants an agricultural partnership. But this is not true for the statute, G.S. 42-1, originally enacted in 1868-9, Chapter 156, Section 3, and brought through various codifications as The Code, Section 1744, Revisal Section 1982, and Consolidated Statutes Section 2341, declares that "No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee."

It is true that before this statute was enacted the Supreme Court did hold in the case of *Lewis v. Wilkins* (1867), 62 N.C. 303, on which appellees, rely, that a relationship such as is here involved was an agricultural partnership, and that decision was followed in *Curtis v. Cash* (1878), 84 N.C. 41, and in *Reynolds v. Pool* (1880), 84 N.C. 37. But those decisions were explained and corrected in the light of the provisions of the statute. See *Day v. Stevens* (1883), 88 N.C. 83; *Belcher v. Grimsley* (1882), 88 N.C. 88; *Grissom v. Pickett,* 98 N.C. 54; *Lawrence v. Weeks* (1890), 107 N.C. 119, 12 S.E. 120; *S. v. Keith,* 126 N.C. 1114, 36 S.E. 169. And these decisions have been followed in recent years: *Perkins v. Langdon,* 231 N.C. 386, 57 S.E. 2d 407; *Johnson v.*

Gill, 235 N.C. 40, 68 S.E. 2d 788; *Moss v. Hicks,* 240 N.C. 788, 83 S.E. 2d 890.

In *Day v. Stevens, supra,* this headnote epitomizes the opinion in this manner: "The statute expressly provides that the lessor, by reason of his receiving a share of the crop, shall not be regarded as a partner of the lessee."

And in *Perkins v. Langdon, supra,* it is held that "The fact that lessor is to receive as rent a percentage of the proceeds or net profits of the business, does not constitute lessor a partner therein," citing G.S. 42-1. Hence the demurrer is overruled.

Now turning to the assignments of error presented by appellants, exception to the failure of the trial judge to declare and explain the law arising on the evidence given in the case is well taken, G.S. 1-180, *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522, particularly as to what constitutes a breach of the contracts. It appears that the judge stated the contentions of the parties, but inadvertently failed to declare and explain the law arising on the evidence.

For this error there must be a

New trial.

VIRGINIA A. CARTER, C. NORFLEET CARTER, LANDON B. CARTER AND BEVERLY H. HAILEY AND ANY OTHER HEIRS-AT-LAW OF EMMA B. EGERTON, DECEASED, WHO DESIRE TO JOIN IN THIS ACTION, AND MARY RUSSELL SESSUMS, BY HER NEXT FRIEND, E. C. BULLUCK, v. NEALY DAVIS, PANNIE DAVIS, CAROLYN D. DUGGER, VIOLA D. HINES AND ETHEL B. GALBRAITH, R. W. THORNTON, ADMINISTRATOR C.T.A. OF ESTATE OF EMMA B. EGERTON, AND R. W. THORNTON, EXECUTOR OF ESTATE OF N. M. THORNTON.

(Filed 1 May, 1957.)

1. Wills § 32—

The presumption against partial intestacy is to be applied only as an aid in construction and will not prevail where intestacy is effected by the plain and unambiguous language of the will.

2. Wills §§ 38, 42—

The will devised real property to a named devisee and later provided that the rest and residue of testatrix' personal property should go to named legatees. The devisee predeceased testatrix. *Held:* The residuary clause cannot control the disposition of the realty upon the lapse of the devise, since the residuary clause is limited to personalty, and the realty must be distributed to testatrix' heirs at law as in case of intestacy.

APPEAL by defendants Nealy Davis, Pannie Davis, Carolyn D. Dugger, Viola D. Hines and Ethel B. Galbraith, from *Hall, J.*, at January-February, 1957, Civil Term of WARREN.

G. M. Beam for appellants.

Charles P. Green for appellees.

JOHNSON, J. Civil action under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) to determine conflicting claims between heirs-at-law of Emma B. Egerton, deceased, and the beneficiaries under her will.

The single question presented for decision is whether the real estate described in the lapsed devise to N. M. Thornton, who predeceased the testatrix, passed under the residuary clause in Item 4 of the will or descended to her heirs-at-law as though no will had been made.

There is no dispute as to the facts. We have only a question of interpretation. These are the portions of the will pertinent to decision:

> "(3) All the rest and residue of whatever real property I may own at the time of my death, together with any notes due me representing balance due on purchase price of land . . . I give and devise in fee simple absolute to the said N. M. Thornton, . . .
>
> "(4) All of the rest and residue of my personal property, owned by me at the time of my death which now consists of certificates of stock, a note of W. P. Gholson for Twenty-two Hundred and Fifty Dollars ($2250.00) and what cash money that I may have on hand at the time of my death, I wish divided as follows:
>
> "My stock in the Carolina Power & Light Co. to go to my niece, Viola B. Davis, and four of her children, to-wit: Pannie B. Davis, Carolyn Davis Dugger, Nealy Davis, and Viola Davis Hines. And in the division of said stock my niece Viola B. Davis shall receive thirty-two (32) shares and the remainder shall be divided equally among her said four children:
>
> "My other stock together with the W. P. Gholson note, I direct my executor to convert into cash and divide the proceeds equally between my nephew, Edwin Russell, and my niece Ethel Boyd; whatever cash I may have on hand, either in bank or otherwise, shall be applied to the payment of the legacy to Lottie Egerton Snipes and the cost of administering my estate and the surplus, if any, shall be divided equally between Viola B. Davis, Pannie B. Davis, Carolyn D. Dugger, Nealy Davis, Viola Hines, Ethel Boyd, and Edwin Russell."

These are the other pertinent facts: N. M. Thornton, the legatee and devisee named in Item 3 of the will, predeceased the testatrix, and the

real property devised to him became a lapsed devise. It consists of an undivided interest in a tract of land in Warren County. The testatrix left no children, but left surviving her two nieces and twenty great nieces and great nephews. The beneficiaries named in the will are: (1) a nephew, Edwin Russell, who predeceased the testatrix leaving a widow and an adopted daughter; (2) a niece, the defendant Ethel Boyd Gailbraith; (3) Viola D. Davis, who predeceased the testatrix leaving four children; (4) the four children of Viola B. Davis, deceased, namely, the defendants Nealy Davis, Pannie Davis, Carolyn D. Dugger, and Viola D. Hines; and (5) these two persons who were not next of kin: Lottie E. Snipes, who received a specific bequest of $1,000 which has been paid; and N. M. Thornton, whose devise and legacy lapsed.

The plaintiffs, heirs-at-laws of Emma B. Egerton, claim that the land described in the lapsed devise to N. M. Thornton passed to the heirs under the intestacy statutes of North Carolina; the defendants, appellants, namely, Nealy Davis, Pannie Davis, Carolyn D. Dugger, Viola D. Hines, and Ethel B. Gailbraith, claim that the land passed under the residuary clause of Item 4 of the will.

The court below concluded and adjudged that the residuary clause by its express terms is inapplicable to real estate and that therefore the land described in the lapsed devise to N. M. Thornton descended to the heirs-at-law of the testatrix according to the intestacy statutes.

We concur in the decision of the court below. True, where there is a will, it is presumed that the testator intended not to die intestate as to any part of his estate. *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651. However, this presumption against partial intestacy applies only as an aid in construction; and the presumption will not prevail where intestacy is effected by the plain and unambiguous language of the will. *Armstrong v. Armstrong,* 235 N.C. 733, 71 S.E. 2d 119. Here, the residuary clause by its plain and unambiguous language applies only to personal property. Hence the testatrix died intestate as to the real estate described in the lapsed devise to N. M. Thornton.

Affirmed.

JAMES EDISON RAPER v. J. C. BERRIER AND SADIE BERRIER.

(Filed 1 May, 1957.)

1. Constitutional Law § 20—

In a court proceeding all parties are entitled to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it if they can. Constitution of North Carolina, Article I, Section 35.

2. Same: Infants § 22—

In this proceeding for the custody of a minor child, the order of the court disclosed that the judge conferred with the minor in its chambers in the absence of counsel and the parties. *Held:* The judgment must be reversed and the cause sent back for rehearing upon objection duly entered by petitioner, the record failing to show consent or waiver of his constitutional right by petitioner.

APPEAL by petitioner from *Olive, J.*, February, 1957 Term, DAVIDSON Superior Court.

This proceeding was instituted by the natural father under G.S. 50-13 for the purpose of having the court award to him custody of his daughter, Judith Ann Raper, a minor of the age of 13 years. The minor had lived in the home of the respondents for the past nine years except from April, 1956, to December, 1956, during which time she lived with the petitioner, her stepmother, a sister, age 15, and a brother, age 11. In December, 1956, she returned to the home of the respondents where she prefers to live.

After hearing affidavits of more than 80 persons, Judge Olive made findings of fact in much detail and from them reached the following conclusions: "That the reasons justifying placing the said Judith Ann Raper in the care and custody of respondents are substantial and strong and weighty and powerful." From the order awarding custody to the respondents, the petitioner appealed.

Charles W. Mauze; Cooley & May,
By: Hubert E. May, for petitioner, appellant.
DeLapp & Ward, for respondents, appellees.

HIGGINS, J. The petitioner assigns as error the findings of fact made by the trial court and its failure to find facts as requested. The findings actually made are supported by the evidence. They cover all essential features of the case and are sufficient to sustain the order awarding custody to the respondents. 53 Am. Jur., 789; *Holmes v. Sanders, post,* 200; *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114.

Assignment No. 35 relates to the following part of the court's order: "Evidence having been offered by both the parties and arguments having been made by the attorneys for both parties, and the Court having conferred with Judith Ann Raper, the minor child involved in this proceeding in its chambers in the absence of counsel for petitioner and respondents and in the absence of the parties to this proceeding and no one else being present, the court finds the following facts," etc.

Did the court commit error in conferring with Judith Ann Raper in the absence of parties and counsel during the pendency of the proceeding? Her affidavit was before the court and the findings show that great weight was attached to her views and feelings, and properly so. However, in a court proceeding all parties are entitled to be present at all of its stages so that they may hear and refute if they can. In the *Gibbons case* the court conferred with the child whose custody was at issue and with others in the absence of parties and counsel. This Court held: "The court committed error in receiving testimony from witnesses without offering petitioner an opportunity to be present and know what evidence was offered." It is true witnesses other than the child were examined in the *Gibbons case,* but the error was not in the number but in the fact that any witness was so examined. While we recognize that in many instances it may be helpful for the court to talk to the child whose welfare is so vitally affected by the decision, yet the tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35. The public, and especially the parties are entitled to see and hear what goes on in the courts. *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E. 2d 777; *In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675; *In re S. v. Gordon,* 225 N.C. 241, 34 S.E. 2d 414; *Bank v. Motor Co.,* 216 N.C. 432, 5 S.E. 2d 318. That courts are open is one of the sources of their greatest strength. There is no suggestion that the able and conscientious judge was improperly influenced by the private interview but the petitioner's right to hear all that was offered in his case must not be denied him. *In re Gibbons, supra,* and cases there cited; *Carter v. Kubler,* 320 U.S. 237; *Commission v. R. R.*, 227 U.S. 88.

Without doubt the court may question a child in open court in a custody proceeding but it can do so privately only by consent of the parties. We are advertent to the fact that trial courts on occasion have held private conversations with children involved in custody hearings, *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; but the record in that case discloses that the interview conducted by Judge Alley was upon a prior hearing to determine temporary custody and not upon the final hearing from which the appeal came to this Court. In *Tyner v. Tyner* no exception was taken to the interview. No appeal was taken from the order awarding temporary custody. The private interview was not the subject of an assignment of error in *Tyner v. Tyner.* It was in the case of *In re Gibbons,* and it is on this appeal.

Respondents argue that the affidavit of Judith Ann Raper was read in evidence at the hearing and that the petitioner did not request an opportunity to cross-examine her; that he made no objection to the interview at the time and he should not be heard to object now. But evidently the court desired more information from the child than the

affidavit disclosed, otherwise the interview would have been pointless. There is nothing in the record that indicates the petitioner consented to the private examination. Reference to it appears for the first time in the court's findings of fact. The petitioner duly excepted, preserved his exception by an assignment of error, and supported the assignment by argument both orally and in the brief. For the reasons indicated, the exception must be sustained and the case sent back to the Superior Court of Davidson County for re-hearing.

Reversed.

PARKER, J., dissents.

JAMES R. WALKER, JR., v. C. D. MOSS, W. D. HARDEN AND E. DANA DICKENS, CONSTITUTING THE BOARD OF ELECTIONS OF HALIFAX COUNTY.

(Filed 1 May, 1957.)

1. Evidence § 2—

The Supreme Court is required to take judicial notice of a public law of this State.

2. Appeal and Error § 6—

An action to determine plaintiff's right to have his vote counted in the tally for the votes for the office of a member of a county board of education becomes moot and must be dismissed when, pending the appeal, the General Assembly, pursuant to a public law, has appointed the members of the county board of education.

APPEAL by the plaintiff from *Stevens, J.*, August, 1956 Term, HALIFAX Superior Court.

In this civil action the plaintiff sought to invoke the Uniform Declaratory Judgment Act and asked the court "for a declaration of his right to have his vote for one member of the county board of education counted in the tally for the votes for that office; that plaintiff seeks a declaration declaring Chapter 1104 of the 1955 Session Laws of North Carolina unconstitutional." The defendants filed a written demurrer, also demurred *ore tenus*. The demurrers were sustained, and the plaintiff appealed.

Taylor & Mitchell and James R. Walker, Jr., for plaintiff, appellant.

Allsbrook & Benton, Crew & Crew, Johnson & Branch, and Dickens & Dickens for defendants, appellees.

George B. Patton, Attorney General, for the State.

HIGGINS, J. The demurrer *ore tenus* challenges the complaint upon the ground that it fails to state a cause of action for that the General Assembly of North Carolina under the mandatory provision of the statute is required to appoint members of county boards of education, G.S. 115-18. While the law permits political parties in primaries or in conventions to make nominations and have them declared to the State Superintendent of Public Instruction to be transmitted to the Chairman of the Committee on Education of the House of Representatives, however, the appointment must be made by the General Assembly.

As provided in G.S. 115-19, the General Assembly on 27 March, 1957, ratified an Act appointing boards of education for the designated counties of the State, including Halifax. The appointments became effective the first Monday in April, 1957, and continue in effect for two years. The Act of 27 March, 1957, is a Public Law of the State of North Carolina, of which this Court is required to take judicial notice. The appointment already having been made by the proper authority, the questions raised by plaintiff are now moot.

The cause is remanded to the Superior Court of Halifax County where judgment will be entered dismissing the action.

Remanded for Judgment Dismissing the Action.

O. L. DUNCAN, ADMINISTRATOR OF THE ESTATE OF SELLARS STANCIL, DECEASED, v. MARY S. RENFROW, STEPHEN STANCIL AND WIFE, RONIE STANCIL, ROBY RENFROW AND WIFE, MRS. ROBY RENFROW.

(Filed 1 May, 1957.)

Pleadings § 28—

Where petitioner is allowed to file an amended petition by leave of court, respondent's motion for judgment on the pleadings relates to the amended, and not the original, petition, and when the amended petition is sufficient, exception to the overruling of motion for judgment on the pleadings is without merit.

APPEAL by defendant Roby Renfrow from *Seawell, J.*, January Term, 1957, of JOHNSTON.

Special proceeding by administrator to obtain authority to sell the land of Sellars Stancil for the payment of his debts and the costs of administration.

Sellars Stancil died April, 1951. Upon the probate in common form of a paper writing purporting to be his last will and testament, Stephen Stancil qualified as executor thereunder. However, a caveat was filed;

and at September Term, 1951, the said paper writing was adjudged null and void. On 18 June, 1952, plaintiff was appointed and qualified as administrator.

Mary S. Renfrow, a sister, and Stephen Stancil, a brother, are the only heirs at law of Sellars Stancil.

Shortly after plaintiff's qualification, Mrs. Ronie Stancil, wife of Stephen Stancil, brought suit against the administrator to establish her claim for services rendered the intestate; and at September Term, 1954, she obtained judgment for $3,200.00. This unpaid judgment is the principal debt necessitating the sale of land by the administrator.

Meanwhile, by decree entered 11 March, 1952, the land, containing some 36½ acres, was partitioned. In this partition, a tract of 20.4 acres was allotted to Mary S. Renfrow and a tract of 16.1 acres was allotted to Stephen Stancil.

By deed dated 25 March, 1954, Mary S. Renfrow (widow), "in consideration of other considerations and Ten and No/100 ($10.00) Dollars," conveyed to defendant Roby Renfrow, her son, the said 20.4 acre tract (with minor exceptions) previously allotted to her in said partition.

The original petition alleged that said deed from Mary S. Renfrow to Roby Renfrow was void as against the creditors of the Sellars Stancil estate.

Defendant Roby Renfrow, by answer, asserted that he was a *bona fide* purchaser for value and owned the land free from claims of creditors of the Sellars Stancil estate.

Defendant Mary S. Renfrow, answering, denied that the personal property was insufficient to pay the debts, alleging specifically that Stephen Stancil had failed to account to the administrator for moneys received by him while serving as executor.

Defendant Stephen Stancil and Mrs. Roby Renfrow also answered.

Defendant Roby Renfrow filed motion for judgment on said original pleadings. At February Civil Term, 1955, Judge Morris denied his said motion; and defendant Roby Renfrow excepted to this order.

Thereafter, by leave of court, petitioner filed amendments to his original petition; and defendants Roby Renfrow and Mary S. Renfrow answered the allegations set forth in said amendments.

At March Term, 1956, Judge Bickett, reserving for jury trial in the Superior Court the issues raised as to the validity of said deed from Mary S. Renfrow to Roby Renfrow, appointed Pope Lyon, Esquire, as referee, to determine all other issues arising on the pleadings.

The referee, after hearing, reported his findings of fact and conclusions of law. He found, setting out the facts in detail, that Stephen Stancil had fully accounted, except as to $36.00, arising from an error in his calculations; that the administrator had no assets with which to

pay the debts; and that a sale of the land by the administrator was necessary.

At January Term, 1957, Judge Seawell, after affirming the referee's report, proceeded with trial by jury on the issues reserved. The issues submitted and the jury's answers were as follows:

"1. Did Mrs. Mary Renfrow execute and deliver to Roby Renfrow a deed bearing date of March 25, 1954, for the property herein described as containing 20.4 acres inherited from the estate of Sellars Stancil, with knowledge and notice of the pendency of the action entitled, 'Mrs. Ronie Stancil *v.* Otis L. Duncan, Administrator of Sellars Stancil?' Answer: Yes.

"2. At the time of the delivery of the deed from Mrs. Mary Renfrow to Roby Renfrow bearing date of March 25, 1954, did Roby Renfrow purchase said property for value? Answer: No.

"3. Did Roby Renfrow at the time of the delivery of the deed from Mrs. Mary Renfrow bearing date of March 25, 1954, take the deed without notice of the pendency of the suit entitled, 'Mrs. Ronie Stancil *v.* Otis L. Duncan, Administrator of Sellars Stancil?' Answer: No."

The final judgment entered by Judge Seawell: (1) dismissed the action as to defendant Mrs. Roby Renfrow; (2) adjudged that said deed from Mary S. Renfrow to Roby Renfrow "be, and the same is hereby declared null and void and is hereby vacated and set aside as to the personal representative of said decedent and as to his creditors"; (3) adjudged that the share of Stephen Stancil be charged with said sum of $36.00; and (4) adjudged that the commissioner, therein appointed, sell the land to make assets unless within 30 days the heirs elected to pay the debts and costs of administration and thereby obviate the necessity for such sale.

Defendant Roby Renfrow appealed.

Wiley Narron for defendant, appellant.

No counsel contra.

PER CURIAM. The only assignment of error brought forward in appellant's brief, to wit, the denial by Judge Morris at February Civil Term, 1955, of his motion for judgment on the pleadings, is manifestly without merit. The sole basis for said motion was the alleged insufficiency of the allegations of the *original* petition. Appellant ignores the fact that, by leave of court, the original petition was amended, and that the trial was on the issues raised by the amended pleadings. The

amended petition, obviously sufficient, was not and is not challenged by appellant.

No error.

SEABORNE HOLMES v. BANNIE SANDERS AND MARTHA SANDERS.

(Filed 1 May, 1957.)

1. **Infants § 22—**

Findings and conclusions, supported by evidence, that the best interest of the child requires that he remain in the custody of his maternal grandparents and that there had been no material change in the conditions since the custody of the child had been awarded to them upon like predicate, *held* to support order denying petition of the child's father for modification of the former decree.

2. **Infants § 21—**

Our courts have jurisdiction to award the custody of a child resident here, notwithstanding that the domicile of the child, following that of his father, is in a foreign jurisdiction.

APPEAL by petitioner from *Bickett, J.*, May Civil Term 1956 of JOHNSTON.

Special proceeding by a father to obtain custody of his son Ransome Solomon Holmes, born 1 September 1953, from the deceased mother's parents, heard upon a petition for modification of a judgment rendered by Williams, J., in chambers on 11 June 1955, which judgment was affirmed by the Supreme Court in *Holmes v. Sanders,* 243 N.C. 171, 90 S.E. 2d 382.

Judge Williams made elaborate findings of fact to the effect that it is to the best interest of the child that he remain in the custody of his maternal grandparents, the respondents, and rendered judgment accordingly. This Court in affirming Judge Williams' order said: "In matters pertaining to their custody, the welfare of children is 'the polar star by which the discretion of the courts is to be guided.' "

The basis of the petition for modification of Judge Williams' judgment is the contention that by reason of change in circumstances, it is now to the best interest of Ransome Solomon Holmes that he be placed in the custody of his father in Washington, D. C., instead of remaining in the custody of his maternal grandparents in Johnston County, North Carolina.

Judge Bickett heard voluminous evidence, and made detailed findings of fact. Among his findings he found that the petitioner bears a good reputation in Washington, D. C., but that it is for the best interest of Ransome Solomon Holmes that he remain in the custody of his maternal grandparents, and that it is not for the child's best interests that he be

placed in the custody of petitioner. Judge Bickett further found that petitioner has failed from the evidence to show any material change in the facts and circumstances as found in the order entered in the proceeding by Judge Williams on 11 June 1955, that the conditions are still substantially as found by Judge Willims, and that no facts or reasons are shown to the court to warrant a modification of Judge Williams' order. Upon the facts found Judge Bickett rendered judgment that the maternal grandparents continue to have the custody of Ransome Solomon Holmes until further orders of the court, and that petitioner have certain rights of visitation of his son.

From the judgment entered, petitioner appeals.

R. O. Everett, Robinson O. Everett and Kathrine R. Everett for Plaintiff, Appellant.

Wellons & Wellons for Defendants, Appellees.

PER CURIAM. There is plenary competent evidence to support Judge Bickett's findings of fact, and his findings of fact support his judgment. The findings of fact by Judge Williams and Judge Bickett clearly show there are substantial reasons to deprive petitioner of the custody of his child. Judge Bickett's judgment is in accord with our decisions that the child's welfare is the paramount consideration, and that a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby. *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759; *Finley v. Sapp*, 238 N.C. 114, 76 S.E. 2d 350; *Atkinson v. Downing*, 175 N.C. 244, 95 S.E. 487.

Petitioner contends Ransome Solomon Holmes' domicile is in Washington, D. C., and the court below lacked jurisdiction. The child has been living with his maternal grandparents in Johnston County, North Carolina, since the day before Thanksgiving 1954. Petitioner came into this State, and invoked the jurisdiction of our courts. The answer to petitioner's contention is given by *Cardozo, J.*, speaking for the Court in *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937, quoted with approval and followed by this Court in *Richter v. Harmon*, 243 N.C. 373, 90 S.E. 2d 744: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. Citing authorities. For this, the residence of the child suffices, though the domicile be elsewhere."

All of petitioner's assignments of error are overruled.

The judgment entered by Judge Bickett is

Affirmed.

STATE v. VERNON R. WORLEY.

(Filed 1 May, 1957.)

1. **Appeal and Error § 19—**

Exceptions must be brought forward and assigned as error. Rule of Practice in the Supreme Court No. 19(3).

2. **Same—**

Assignments of error not supported by exceptions therein noted cannot be considered.

APPEAL by defendant from *Hobgood, J.*, December Mixed Term 1956 of JOHNSTON.

The defendant was originally tried and convicted upon a warrant returnable to the Recorder's Court of Johnston County charging him with the unlawful and willful operation of a motor vehicle on the public highways of the State in a reckless and careless manner and while under the influence of intoxicants or narcotics, this being his second offense, driving after license had been revoked, etc.

From judgment rendered, the defendant appealed to the Superior Court where he was tried *de novo* on the original warrant. The jury returned a verdict of guilty as charged, driving under the influence and careless and reckless driving.

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

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

E. Reamuel Temple for defendant.

PER CURIAM. The record contains numerous exceptions. However, they have not been brought forward and assigned as error, as required by Rule 19, Section 3 of the Rules of Practice in the Supreme Court. 221 N.C. 554; *Investment Co. v. Chemicals Laboratory*, 233 N.C. 294, 63 S.E. 2d 637.

The appellant does have what purports to be assignments of error, but none of them is supported by an exception. This Court will not search through a record in an effort to determine whether or not it contains an exception or exceptions that will sustain assignments of error. *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735.

We have examined the record. The verdict supports the judgment and no error of law appears on the face of the record. Judgment affirmed.

Appeal dismissed.

W. E. LINTHICUM & SONS, INC., v. KELLY CONSTRUCTION COMPANY, A CORPORATION, AND W. R. LETSON AND WIFE, MRS. W. R. LETSON.

(Filed 1 May, 1957.)

Parties § 9: Laborers' and Materialmen's Liens § 10—

Where a subcontractor sues the owners and a named corporation as the contractor to enforce his lien for materials furnished, but it appears that the contractor was an individual trading as a company of the same name as the alleged corporation, and that the individual contractor was not made a party, nonsuit as to the owners is properly entered, since the principal contractor is a necessary party to an action to enforce the lien of a subcontractor.

APPEAL by plaintiff from *Paul, J.*, at November 1956 Term, of ONSLOW.

Civil action to enforce alleged subcontractor's lien for materials furnished to contractor for use in constructing a building for and on the land of defendants Letson.

Plaintiff brings this action against Kelly Construction Company, a corporation, as the contractor to whom it furnished material for the above purpose,—a fact denied by answer of individual defendants. And the evidence offered by plaintiff upon trial in Superior Court tends to show that Kelly Construction Company, the contractor, was in fact William E. Kelly, Jr., trading as Kelly Construction Company. And the record and record of case on appeal fails to show that William E. Kelly, Jr., so trading, was made a party to this action.

And while plaintiff offered other evidence motion of defendants Letson made at the close of plaintiff's evidence for judgment as of nonsuit was allowed. Plaintiff excepts thereto and appeals to Supreme Court, and assigns error.

Carl V. Venters for Plaintiff Appellant.
Jones, Reed & Griffin for Defendants Appellees.

PER CURIAM. The principal contractor is a necessary party to an action to enforce the lien of a subcontractor. *Lumber Co. v. Hotel Co.*, 109 N.C. 658, 14 S.E. 35. Hence at the threshold of this appeal plaintiff is confronted with an insurmountable obstacle of not having the contractor in court as a party to this action.

So holding, it is not deemed expedient at this time to venture upon discussion of evidence in the case which might prejudice the case, in the event plaintiff should elect to proceed again under G.S. 1-25.

For reason stated the judgment from which appeal is taken is

Affirmed.

NORMAN B. GRANTHAM, SR., v. WILLIAM MYERS, GREEN MOTOR LINES, INC., AND ROBERTSON PRODUCE COMPANY.

(Filed 1 May, 1957.)

Automobiles § 43—

Two trucks, traveling in opposite directions, sideswiped each other, resulting in injury to plaintiff's car, which was following one of the trucks. The evidence tended to show that one of the trucks was driven on its right side of the highway at a lawful speed and at no time prior to the accident crossed the center line to its left. *Held:* The motion to nonsuit by the owner of such truck should have been allowed in the action by the owner of the car against both truck owners.

APPEAL by defendant Vernon L. Robertson, trading as Robertson Produce Company, from *Hobgood, J.*, September Term 1956 of JOHNSTON.

This is an action instituted in the Small Claims Division of the Superior Court of Johnston County to recover for damages to plaintiff's automobile resulting from a motor vehicle collision which occurred on 27 December 1955, about 11:00 p.m., between the trucks of the defendants Green Motor Lines, Inc., and Vernon L. Robertson, trading as Robertson Produce Company, hereinafter called Robertson.

The truck of the Green Motor Lines, Inc., was proceeding south on U. S. Highway No. 301 near the southern end of the Neuse River bridge about two miles south of the Town of Smithfield. The bridge across the Neuse River is 28 feet wide. Robertson's truck was proceeding north on the said highway and had just entered the southern end of the bridge when the trucks sideswiped each other. Plaintiff's automobile, a family purpose car, was being driven by his son, Joe Grantham, on said highway and was following the Robertson truck. After the trucks sideswiped each other, the truck of Green Motor Lines, Inc., jackknifed and damaged the plaintiff's car in the alleged sum of $845.00.

His Honor heard the plaintiff's evidence (the defendants offered no evidence) and answered the issues as follows:

"1. Was the plaintiff's automobile damaged by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. What amount, if any, is the plaintiff entitled to recover on account of his damages? Answer: $400.00."

From the judgment entered on the verdict the defendant Robertson appeals, assigning error.

E. V. Wilkins for plaintiff appellee.

Grover A. Martin and Albert A. Corbett for Green Motor Lines, Inc., defendant appellee.

Smith, Leach, Anderson & Dorsett for defendant appellant.

PER CURIAM. The principal assignment of error is to the failure of the court below to sustain the motion of defendant Robertson for judgment as of nonsuit.

We have carefully examined the plaintiff's evidence and it fails to show that Robertson's truck crossed the center line of the highway to its left at any time prior to the accident, or that it was traveling at an excessive or unlawful rate of speed. In fact, the driver of plaintiff's automobile testified: "The truck ahead of me had been traveling at a speed of 45 miles an hour and was on his own side of the road going in a straight path. It had not been zigzagging or anything else but had been proceeding properly in its own lane of traffic. I never saw it get out of its own lane of traffic. It was not driving in a way that made me take any special notice of it. I was directly behind it. My headlights were burning and I saw the truck. As far as I know it was always on its side of the road."

We have reached the conclusion that the motion for judgment as of nonsuit interposed by the defendant Robertson should have been allowed.

Reversed.

STATE v. HOWARD TAFT MESHAW.

(Filed 8 May, 1957.)

1. Criminal Law § 53q—

Where several defendants are tried jointly, a charge which, in effect, instructs the jury that it should convict all the defendants if any one of them was guilty, is prejudicial error.

2. Larceny § 4: Receiving Stolen Goods § 3: Indictment and Warrant § 8—

A charge of larceny of goods of the value of $3,000 and a charge of receiving the stolen property with knowledge that it had been stolen, may be joined as separate counts in a single bill, each being a felony. G.S. 14-70, G.S. 14-71, G.S. 14-72, G.S. 15-152.

3. Criminal Law § 54b—

A verdict of guilty as charged is a verdict of guilty as to each and all counts in the bill of indictment.

4. Larceny § 9: Receiving Stolen Goods § 8—

In a prosecution upon an indictment charging in one count larceny and in another count receiving the stolen goods, a verdict of guilty as charged is equivalent to a verdict of guilty as to each count, and is not merely inconsistent, but contradictory, since a defendant may be guilty of larceny or of receiving, but not both.

5. Criminal Law § 81c(4)—

The jury returned a verdict of guilty as charged to an indictment charging both larceny and receiving the stolen goods with knowledge that they had been stolen. A single judgment was entered on the verdict. There was error in the court's instruction to the jury on the count of receiving. *Held:* Since defendant could not be guilty of both larceny and receiving the same goods, and it is impossible to determine to which count the verdict related, it is impossible to determine whether the error is prejudicial or harmless, and therefore a new trial must be awarded.

APPEAL by defendant from *Burgwyn, E. J.*, October Special Term, 1956, of WAKE.

Criminal prosecution tried on a bill of indictment charging appellant and three others, jointly, in two separate counts: *first,* with the larceny of copper, copper wire, scrap iron, steel plates, beams, batteries and steel cables of the value of $3,000.00, the property of Max Bane; and *second,* with receiving said articles, knowing them to have been feloniously stolen, in violation of G.S. 14-71.

As to appellant and one codefendant, the jury's verdict was "guilty as charged." As to the other two codefendants, the record shows: as to one, a mistrial was ordered; and as to the other, a verdict of not guilty was returned.

As to appellant, the court pronounced a single judgment imposing a prison sentence; and thereupon appellant excepted and appealed.

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

George Rountree, Jr., for defendant, appellant.

BOBBITT, J. Appellant does not now challenge the sufficiency of the evidence to survive his motions for nonsuit. Moreover, the basis upon which a new trial is awarded renders unnecessary a recital of the evidence.

Herein, without repetition of the several elements thereof, the word "receiving" refers to the statutory criminal offense defined in G.S. 14-71.

The record shows that the court gave this instruction: "If the State has satisfied you beyond a reasonable doubt that the property was stolen and that Meshaw (appellant), Pate *or* either of the Pates, *or* Kueghn, later after it was stolen received the same knowing the same to have been stolen, and with a fraudulent intent to convert to their own use, then it would be your duty to find *them* guilty on the second count of receiving stolen goods, knowing the same to have been stolen." (Italics added.) Appellant's exceptive assignment of error, directed to the quoted portion of the charge, is well taken; for the gist of this instruction as recorded is that the jury should convict *all* of the defend-

ants if *any one* of them received stolen property with knowledge that it had been stolen and with felonious intent.

(Since the record shows that, as to Arnold Gordon Pate, the jury returned a verdict of "not guilty," but shows further that the court pronounced judgment, reciting that he had been convicted, doubt is cast upon the accuracy of the record in other respects. Even so, the record imports verity; and we must deal with it accordingly.)

The court explained to the jury that the two counts charged separate and distinct criminal offenses; and the instructions given were to the effect that as to each defendant the jury should return one of three possible verdicts, either guilty of larceny as charged in the first count, *or* guilty of "receiving" as charged in the second count, *or* not guilty. Even so, the record shows that as to appellant the verdict returned was "guilty as charged."

While not conceding error therein, no reason is advanced by the Attorney-General to sustain the quoted portion of the charge relating to the second count. Rather, he takes the position that there is no error in respect of the larceny count; and that, since a single sentence was pronounced, the general verdict of "guilty as charged" is sufficient to support a valid judgment and sentence on the larceny count notwithstanding error, if any, in respect of the "receiving" count.

It is first noted that each count charges a felony, punishable for a term not exceeding ten years. G.S. 14-70; G.S. 14-71; G.S. 14-72. Too, while involving separate and distinct criminal offenses, they may be joined as separate counts in a single bill. G.S. 15-152.

This Court has held that a verdict of "guilty as charged" is a verdict of guilty as to each and all counts in the bill. *S. v. Best*, 232 N.C. 575, 61 S.E. 2d 612; *S. v. Graham*, 224 N.C. 347, 30 S.E. 2d 151; *S. v. Toole*, 106 N.C. 736, 11 S.E. 168.

The verdict here involves more than mere inconsistency. Typical of cases where inconsistency alone was involved is *S. v. Sigmon*, 190 N.C. 684, 690, 130 S.E. 854, where the jury returned a verdict of guilty of unlawful transportation of intoxicating liquor but failed to find the defendant guilty of possession of intoxicating liquor. Annotation: "Necessity of consistency in verdict in criminal case," 80 A.L.R. 171 *et seq.*

The verdict here purports to establish that the appellant is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other. He may be guilty of one or of the other, not both. *S. v. Neill*, 244 N.C. 252, 93 S.E. 2d 155; *In re Powell*, 241 N.C. 288, 84 S.E. 2d 906; *S. v. Brady*, 237 N.C. 675, 75 S.E. 2d 791. Hence, the verdicts on the two counts are not only inconsistent but are contradictory.

Because of the mutually exclusive nature of the two separate and distinct criminal offenses, a defendant charged in such two-count bill, upon motion therefor, would seem entitled to have the court receive first the jury's verdict as to the larceny count, and thereafter, *but only if the verdict be not guilty as to larceny,* receive their verdict as to the "receiving" count. *S. v. Toole, supra.* Indeed, in the absence of motion therefor, this would seem the preferable procedure.

The Attorney-General relies largely upon the statement by *Clark, J.* (later *C. J.*), in *S. v. Toole, supra,* quoted with approval by *Stacy, C. J.*, in *S. v. Smith,* 226 N.C. 738, 740, 40 S.E. 2d 363, viz.:

"When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on them."

In *S. v. Smith, supra,* the prosecution was on a bill containing eight counts, each charging a separate offense in relation to intoxicating liquor. The verdict was "Guilty as charged in the bill of indictment." The basis of decision was the application of the well settled rule discussed by *Adams, J.*, in *S. v. Snipes,* 185 N.C. 743, 746, 117 S.E. 500, namely, that the verdict will be presumed to have been returned on the count or counts to which the evidence related. Hence, the contention that the judgment was erroneous because no evidence was offered to support several of the counts in the bill was rejected as without merit.

In *S. v. Toole, supra,* the prosecution was on a two-count bill charging (1) "the loud and boisterous use of a single profane sentence in a public place, etc., and its repetition for the space of ten minutes, to common nuisance, etc.," and (2) "the singing in a loud and boisterous manner on the public streets, etc., of an obscene song (setting out five lines thereof), and the repetition thereof for the space of ten minutes, in the presence of divers persons then and there present, to common nuisance, etc." The evidence relating to the first count tended to show that the alleged single profane sentence was used *once.* The evidence relating to the second count tended to establish all facts alleged therein. The jury returned a general verdict of guilty. A single judgment was pronounced.

When considering *S. v. Toole, supra,* these facts should be noted. The majority conceded error in the trial court's refusal to give a requested instruction relating to the first count. Since both counts were submitted, *Justices Shepherd* and *Avery,* dissenting, took the view that this error necessitated a new trial. Be that as it may, the point for emphasis here is that a verdict of guilty on the first count, whether based on an

erroneous instruction or otherwise, was not inconsistent with or contradictory of a verdict of guilty on the second count.

In 36 C.J., Larceny sec. 575, it is stated: "Where an indictment contains two counts, one for larceny and the other for receiving stolen goods, it has been held in jurisdictions where the offenses are of the same grade and subject accused to the same punishment that a general verdict of guilty is sufficient without specifying the count to which it relates." In support thereof, the author cites *S. v. Carter,* 113 N.C. 639, 18 S.E. 517; *S. v. Stroud,* 95 N.C. 626; *S. v. Jones,* 82 N.C. 685; *S. v. Baker,* 70 N.C. 530; *S. v. Speight,* 69 N.C. 72.

It is noteworthy that the instruction approved in *S. v. Speight, supra,* was that if the jury found "that the defendant either stole the turpentine *or* received it, knowing it to have been stolen, they must return a general verdict of guilty and nothing more." The gist of the cited North Carolina decisions is that the charges are alternative, mutually exclusive, but if the jury found the defendant guilty either of larceny, or of receiving stolen property knowing it to have been stolen, it was proper, without specifying the particular count to which the verdict related, to return a verdict of guilty. In these cases, the general verdict referred to is a verdict of guilty and no more. Too, no error was found in the conduct of the trial as to either count.

The same author (36 C.J., Larceny sec. 575) continues: "But in jurisdictions where grand larceny is a felony and receiving stolen goods is merely a misdemeanor a general verdict of guilty cannot be supported." Upon this principle, this Court held: When the punishment for stealing a horse was greater than the punishment for "receiving" the horse, a general verdict of guilty would not support a judgment. *S. v. Johnson,* 75 N.C. 123; *S. v. Goings,* 98 N.C. 766, 4 S.E. 121. See also, *S. v. Lawrence,* 81 N.C. 522.

The same author (36 C.J., Larceny sec. 575) concludes: "In no jurisdiction, it would seem, can one charged in separate counts with larceny and receiving be convicted under both counts, since the guilty receiver of stolen goods cannot himself be the thief, nor can the thief be the guilty receiver of goods which he himself has stolen." When the verdict is guilty on both counts, it is held in a number of jurisdictions that such a verdict cannot stand. 32 Am. Jur., Larceny sec. 155; Annotation: 80 A.L.R. 171, 174; 76 C.J.S., Receiving Stolen Goods sec. 22, p. 158.

Admittedly, our decisions in *S. v. Brady, supra, In re Powell, supra,* and *S. v. Neill, supra,* which recognize the contradictory character of such a verdict, might have led this Court to the result reached in the decisions cited in said texts and annotation. However, this Court has taken a different view. Our decisions are to the effect that, if there is a verdict of "guilty as charged" and the trial is free from error, or if there is a plea of guilty as charged, *a single judgment* pronounced

thereon will be upheld. *S. v. Best, supra; S. v. Warren,* 228 N.C. 22, 44 S.E. 2d 207; *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *In re Powell, supra.* In such case, it is regarded immaterial whether the verdict be considered as relating to the larceny count or to the "receiving" count. In short, since it has been established that the defendant is guilty of one *or* the other, in either case the judgment is sufficiently supported.

It is only when there is error in respect of one of the counts that it becomes imperative that the court know specifically whether the verdict relates to the count affected by the error or to the count that is free from error. In such case, when both counts are submitted, and the jury is instructed as to each, resulting in a verdict of "guilty as charged" or guilty on both counts, this Court cannot determine whether the error is prejudicial or harmless. Hence, when this situation is presented, as here, the defendant is entitled to a new trial on account of such error.

While expressions, based largely upon the quoted excerpt from *S. v. Toole, supra,* may be found in some of our decisions (*e.g., S. v. Caudle,* 208 N.C. 249, 180 S.E. 91), which would tend to support judgment, irrespective of error affecting the "receiving" count, we find none where error has been found in respect of either count and the point on which this decision rests was either raised or considered.

Since a new trial is awarded for the reason stated, it is unnecessary to discuss appellant's other assignments of error.

New trial.

ANNICE POOLE WAGGONER v. J. M. WAGGONER AND WIFE, JULIA MAY WAGGONER; GILMER Y. WAGGONER; MITCHELL WAGGONER AND WIFE, MRS. MITCHELL WAGGONER; J. E. WAGGONER AND WIFE, CORA LEE WAGGONER; MYRTLE WAGGONER KISER; MABEL WAGGONER GALVIN AND HUSBAND, ROBERT GALVIN.

(Filed 8 May, 1957.)

1. Pleadings § 28—

Motion for judgment on the pleadings cannot be allowed if the pleadings raise issues of fact for the determination of the jury and not merely issues of law.

2. Dower § 8f—

Where petitioner seeks the cash value of her dower out of the surplus after foreclosure of a mortgage on lands of which her husband died seized, and alleges her age and that the cash value of her dower was a stipulated amount, which asserted value is expressly denied by respondents, judgment is improperly entered on the pleadings, since the burden is upon the widow to establish her life expectancy upon which the cash value of the annuity

value of her dower must be ascertained, G.S. 8-47, and her life expectancy is a question of fact for the determination of the jury, the mortuary tables, G.S. 8-46, being merely evidentiary.

3. Dower § 9—

A married woman may, by conduct and false representation, estop herself from claiming dower.

4. Same—

Respondents alleged that their father owned a life estate in lands, that respondents owned the remainder, and that respondents, in reliance upon their step-mother's representation that she would not claim dower, conveyed their remainder to their father in order for him to obtain a loan to pay taxes and assessments and make repairs to the property, and that she benefited therefrom during the life of her husband. *Held:* In her proceeding for allotment of dower consummate, the facts alleged are sufficient to raise the question for the determination of the jury as to whether the step-mother was estopped to assert dower, with burden on respondents to establish the factual basis for their plea of estoppel.

APPEAL by defendants from *Preyer, J.*, Regular October Term 1956, ROWAN.

This proceeding for the allotment of dower was begun 30 June 1956. The facts stated in the petition may be summarized as follows: Petitioner is the widow of F. W. Waggoner, who died 1 July 1954; defendants are his children and heirs at law; at his death he was seized and possessed of a lot situate in Salisbury on which there was a one and one-half story dwelling house; at the time of her husband's death, petitioner was living with him, was then 68 years old, and is entitled to dower in said land; said land was encumbered by mortgage and was sold for $7,400 to satisfy the mortgage; after the debt and expenses of sale were paid, there was a surplus of $1,278.17. Petitioner further alleges: "VI. That, based on her life expectancy, petitioner would be entitled to dower in the amount of $1,169.35 on the property described in paragraph II above." She asks that the present cash value of her dower be paid to her from the surplus of the foreclosure sale.

Defendants answer, admitting that petitioner was the widow of their deceased father, that she was living with him at the time of his death, that she was then "68 years of age or more," that the land was sold and a surplus existed as alleged in the petition. They denied section VI of the petition, denied that deceased was seized and possessed of the land described, and denied, for the reasons set out in their further answer, that petitioner was entitled to dower. The amended further answer alleged that petitioner and deceased were married in 1934; at that time deceased owned a life estate in the lot, and defendants owned the remainder; between 1934 and 1945 taxes and street assessments accumulated as charges against the land; deceased was without funds

to pay the taxes and assessments or to make repairs to the property; petitioner agreed if defendants would convey the property to their father so that a loan could be obtained and the moneys used to pay taxes, street assessments, and to repair the dwelling on the lot, she would, if she survived her husband, assert no claim of dower in the property; they had confidence in her, and, relying on her representations and assurances, on 7 August 1945, conveyed the land to their father without other or further consideration; petitioner, during the life of her deceased husband, was the beneficiary of the repairs and improvements made and is estopped now to assert any right of dower in the land or proceeds of sale.

Petitioner moved for judgment on the pleadings. The motion was allowed and thereupon it was adjudged that petitioner was entitled to be paid from the surplus derived from the foreclosure sale the amount claimed by her. Defendants appealed.

Ira R. Swicegood and Max Busby for petitioner appellee.
William J. Waggoner for defendant appellants.

RODMAN, J. Did the answer raise issues of fact or merely issues of law? If material facts alleged by the petitioner are denied by the defendants, the truth must be ascertained by a jury. G.S. 1-172; *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

Petitioner alleges that she is entitled to dower, and, based on her life expectancy, the cash value of her dower is $1,169.35. Defendants expressly deny this asserted value. Upon this denial the burden of proof rests upon petitioner. Some of the factors tending to support her claim are admitted. It is admitted that the land was encumbered and sold for $7,400. If entitled to dower, she was entitled to use one-third of that property without regard to the encumbrance, that is, the use for her life of property valued at $2,466.67. *Trust Co. v. White,* 215 N.C. 565, 2 S.E. 2d 568; *Chemical Co. v. Walston,* 187 N.C. 817, 123 S.E. 196. The right to use this property was the equivalent of an annuity of $148 for life, that is, interest at six per cent on $2.466.67. G.S. 8-47.

She was, at the time of her husband's death, 68, and when she applied for dower, 70 years of age. Thus far the facts are not in controversy, but she does not ask that the annuity be paid to her as an annuity. She seeks the cash value of that annuity. She must establish her life expectancy. It may be assumed that she turned to the mortuary table, G.S. 8-46, as amended in 1955, to ascertain her probable life expectancy, and to the expectancy shown in that table for age 68, turned to the table of cash values of annuities, G.S. 8-47, and found the sum which she

claims. The defect in that process is that G.S. 8-46 does not, like G.S. 8-47, give a mathematical result which the court can apply. Petitioner's life expectancy is expressly put in issue by the answer. The table given in the statute is merely evidentiary.

Life expectancy is a question of fact and when disputed must be determined by a jury. *Starnes v. Tyson,* 226 N.C. 395, 38 S.E. 2d 211; *Trust Co. v. Greyhound Lines,* 210 N.C. 293, 186 S.E. 320; *Sledge v. Lumber Co.,* 140 N.C. 459. Because the mortuary table is only evidentiary, it has been decided that the cash value of dower inchoate depends on the ages of husband and wife, and on their health, habits, and all other circumstances tending to show the probabilities as to the length of life. *Gore v. Townsend,* 105 N.C. 228; *Blower Company v. MacKenzie,* 197 N.C. 152, 147 S.E. 829. We perceive of no reason for differing rules for determining life expectancy as between married women entitled to dower inchoate and widows entitled to dower consummate. The necessity for a jury determination of life expectancy to fix the cash value of a widow's dower has been recognized by the Bar, *Smith v. Smith,* 223 N.C. 433, 27 S.E. 2d 137.

Defendants are entitled to have a jury determine petitioner's life expectancy with the burden on petitioner.

Defendants deny that petitioner's husband was seized of the land on which the claim of dower is asserted. Had their answer stopped there, the burden would have rested on petitioner to establish her husband's ownership. But defendants, by their further answer, admit they conveyed the land to their father. They allege they were induced to convey by petitioner's assurance that she would not assert any claim of dower. They say in substance that, relying on the assurances given them by petitioner, they provided the means for petitioner and her husband to have a home during their joint lives which could have been forfeited for nonpayment of taxes, G.S. 105-410, and to permit petitioner to misuse their generosity, in violation of the assurances which she gave, would be a species of fraud which the law should not tolerate. Defendants do not predicate their defense on acts occurring subsequent to their conveyance. They do not claim a parol release of an accrued right. *Houston v. Smith,* 88 N.C. 312, and *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345, which petitioner cites in support of the judgment, have no application here. Defendants' position is that petitioner ought not to be permitted to acquire a right by false and fraudulent representation.

Undoubtedly a married woman may, by conduct and false representation, estop herself to assert a claim to dower. *Hodge v. Powell,* 96 N.C. 64; 17 Am. Jur. 734; 28 C.J.S. 117.

What is necessary to allege and establish in order to estop one from asserting an apparent right was clearly stated by *Walker, J.,* in *Boddie*

v. Bond, 154 N.C. 359, 70 S.E. 824. The test there enunciated has been repeatedly approved. *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Thomas v. Conyers,* 198 N.C. 229, 151 S.E. 270; *Scott v. Bryan,* 210 N.C. 478, 187 N.C. 756; *McNeely v. Walters,* 211 N.C. 112, 189 N.C. 114; *Martin v. Bundy,* 212 N.C. 437, 193 S.E. 831; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Long v. Trantham,* 226 N.C. 510, 39 S.E. 2d 384; *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669.

The factual allegations of the amended further answer are sufficient to invoke the doctrine of estoppel. Defendants are entitled to have a jury hear the evidence and determine the truth of the allegations, with the burden on defendants to establish the facts on which they base their plea of estoppel.

Error.

MRS. SARAH M. ALFORD, WIDOW; MICHAEL ALFORD, PATRICIA ALFORD AND VIRGINIA ALFORD, MINOR CHILDREN; MAYARD S. ALFORD, DECEASED, v. QUALITY CHEVROLET COMPANY AND LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 8 May, 1957.)

1. Master and Servant § 55d—

Whether an accident grew out of the employment within the purview of the Workmen's Compensation Act is a mixed question of law and fact, which the court has the right to review on appeal, and when the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission.

2. Master and Servant § 40c—

Findings to the effect that the deceased employee was furnished a car for transportation to and from his work, that he quit work about 7:00 p.m., met a friend for dinner, took repeated drinks throughout the evening, made several trips, on one of which he drove approximately 100 miles per hour, in search of a girl to join the party, and some five hours thereafter started for home in the employer's car, and was killed in a wreck occurring on the direct route from the employer's place of business to the employee's home, *held* to show an abandonment of employment rather than a deviation from it, and therefore the accident did not arise in the course of the employment.

APPEAL by plaintiff from *Craven, S. J.,* October, 1956 Special Term, UNION Superior Court.

This action originated before the North Carolina Industrial Commission upon a claim for death benefits under the Workmen's Compensation Act. The deputy commissioner, after hearing and appropriate findings, denied the claim. On application for review the full commis-

sion made its own findings, reversed the order of the deputy commissioner, and awarded compensation.

The deceased employee, Mayard S. Alford, lived in Hamlet. He had been employed for about six weeks at Quality Chevrolet Company in Monroe. His work hours were from 7:30 a.m. to 7:00 p.m. The employer furnished an automobile for his daily use in commuting between his home in Hamlet and his work in Monroe.

On 25 February, 1955, after the day's work, Alford and Mills (a fellow employee) met about 7:15 for a steak dinner at the Royal Cafe in Monroe. While waiting for the dinner the men took several drinks of whisky. At about 9:30 the two men and a waitress from the grill went in search of another girl to complete the party. They traveled in Mills' car. He did the driving. Being unable to find a companion for Alford, they returned to Monroe where Alford took from his employer's lot a 1953 Oldsmobile which he drove to the Cotton Patch Grill in Marshville (about 12 miles from Monroe). Mills and the waitress followed in Mills' car. While at Marshville they each took one or two drinks.

The foregoing is a summary of the commission's findings of fact Nos. 1 to 11, inclusive. The commission made these further findings:

"12. That deceased employee, Mills, and Starnes then proceeded in the Oldsmobile to the house of a friend of Starnes, about five miles south of Marshville, for the purpose of securing a companion for the deceased employee; that the deceased employee was driving the Oldsmobile and reached a speed of approximately one hundred miles per hour on a four-mile stretch of road; that there was nothing unusual about the driving of the deceased except his excessive speed.

"13. That no additional person joined the party and they returned to the Cotton Patch Grill arriving about 11:45 p.m., where the deceased employee took one more drink of whiskey.

"14. That Mills, accompanied by Starnes, left the Cotton Patch Grill in Mills' Chevrolet and did not see the deceased employee alive again.

"15. That the deceased employee left the Cotton Patch Grill in the Oldsmobile between 11:45 p.m. and 12 midnight.

"16. That at 12:30 a.m., on February 26, 1955, Gilbert M. Cameron, a State Highway Patrolman stationed in Rockingham was called to an automobile accident five miles west of Rockingham on U. S. Highway 74 and approximately 35 miles east of the Cotton Patch Grill in Marshville; that the site of the accident was on the most direct route from the employer's premises to the home of the de-

ceased; that Cameron arrived at the scene of the accident at 12:40 a.m. and found a 1953 Oldsmobile in a field on the south side of the highway; that deceased employee was dead and his body was still warm; that the body of the deceased employee was about forty feet from the Oldsmobile; that the weather was clear and the road was dry and straight; that Cameron observed fifteen foot skid marks on the south portion of said highway; that said marks ran sharply to the south side of the road; that the cause of the accident has not been determined.

"19. That the deceased employee sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death."

The defendants excepted to certain findings of fact and conclusions of law made by the full commission and failure of the commission to make certain requested findings, and assigned the commission's action as errors and appealed to the Superior Court of Union County. Judge Craven overruled certain of the defendants' exceptions, sustained others. Among those reversed was the finding that the employee's death was the result of an injury by accident arising out of and in the course of his employment. The court ordered the cause remanded to the Industrial Commission for denial of the claim. The plaintiffs excepted and appealed.

Vaughan S. Winborne, Samuel P. Winborne,
By: Vaughan S. Winborne, for plaintiffs, appellants.
Carpenter & Webb,
By: Wm. B. Webb, for defendants, appellees.

HIGGINS, J. A number of procedural questions are made the basis of exceptions. However, in the view this Court takes of the case it is not necessary to consider them. The decisive question is whether the specific findings made by the commission support the finding and conclusion that the deceased employee's death was the result of an injury by accident arising out of and in the course of his employment. Whether the accident grew out of the employment is a mixed question of law and fact which the court had the right to review on appeal. If the detailed findings of fact forced a conclusion opposite that reached by the commission, it was the duty of the court to reverse the commission. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706.

If it be conceded the course of employment included the travel home, then certainly there must be reasonable continuity between the employment and the travel. When travel is contemplated as part of the work the rule is stated in 58 Am. Jur., p. 722, Sec. 214, as follows:

". . . the employment includes not only the actual doing of the work but also a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done, when the latter is expressly or impliedly included in the terms of the employment." Citing *Brick Co. v. Giles,* 276 U.S. 154; *Guiliano v. Daniel O'Connell's Sons,* 105 Conn. 695. In the latter case the Court said: "The period of employment covers the working hours . . . and such reasonable time as is required to pass to and from the employer's premises."

"It has become axiomatic that under the Workmen's Compensation Act the words 'arising in the course of employment' relate to time, place and circumstances under which an accidental injury occurs. *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668; *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907. The converse of the rule is thus stated in *Withers v. Black:* "Manifestly, the finding that the claimant's injury arose in the course of employment was required by the evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193 S.E. 294."

The commission found the employee had left the place of his employment and had spent five hours in activities which, to say the least, were totally disassociated from both his employment and his travel home. At the time of the fatal accident the employee cannot be said in any reasonable view of the facts to have been on his way home from his employment. Actually he was on his way home from a night out. All reasonable time for travel home from work had expired before he returned to Monroe from Marshville at midnight. The record shows abandonment of employment rather than deviation from it.

The facts found show that the deceased employee did not sustain an injury by accident arising out of and in the course of his employment. The judgment of the Superior Court of Union County is

Affirmed.

STATE v. DAVID GILLYARD.

(Filed 8 May, 1957.)

Criminal Law § 52b (6)—

Where the State's evidence is ample to show defendant's commission of the criminal act as charged in the bill of indictment, the failure of the State to establish that the crime was committed on the very date specified in the indictment does not relieve defendant of criminal responsibility or justify nonsuit, time not being of the essence.

BRENDLE *v.* STAFFORD.

APPEAL by defendant from *Crissman, J.*, 10 September, 1956 Criminal Term GUILFORD Superior Court (Greensboro Division).

Defendant was charged in the bill of indictment with having, on 27 March 1956, committed the crime against nature with Clyde Colson. Three witnesses testified to the commission of the crime—Clyde Colson, a 12-year-old boy on whom the crime was committed, and two other youths, one 15, the other 18, who testified they looked in a window and saw the defendant in the commission of the act. Colson, in response to a question as to what occurred the latter part of March, told of the commission of the crime; on cross-examination he stated the act was committed between Thanksgiving and Christmas; on examination by the court he was unable to correctly name the months of the year. One of the witnesses testified the act was committed in March; he was unable to say whether the first or latter part of the month. The other witness stated the crime was committed the latter part of March but was unable to more accurately fix the date. No witness could fix the day of the week. One witness fixed the hour as "about 3:30," another, "about 3 or 4 o'clock," and the other, "about 4:30."

The jury returned a verdict of guilty as charged, whereupon prison sentence was imposed and defendant appealed.

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

Elreta Melton Alexander for defendant appellant.

PER CURIAM. Defendant's motion to nonsuit and other assignments of error revolve around the failure of the State to establish that the alleged crime was committed on the date specified in the bill of indictment. The failure of the State to establish that the crime was committed on 27 March as alleged in the bill of indictment does not relieve defendant from responsibility for his criminal act. Time was not of the essence. *S. v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340.

No error.

FRANCES HILLIARD BRENDLE, BY HER NEXT FRIEND, HOMER L. BRENDLE, V. RICHARD STAFFORD, THURMAN SMITH AND RONALD SMITH.

(Filed 8 May, 1957.)

1. Venue § 1a—

Where, in an action for personal injuries, the evidence supports the court's finding that at the time the action was instituted and summons issued and served on defendant, defendant was a resident of the county,

defendant's motion to remove as a matter of right is properly denied. G.S. 1-82.

2. Venue § 4b—

A motion to remove for the convenience of parties and witnesses is addressed to the discretion of the court.

APPEAL by defendant Thurman Smith from *Olive, J.*, 18 March, 1957 Civil Term, GUILFORD Superior Court (High Point Division).

This is a civil action to recover damages for personal injury. The defendant Thurman Smith made a motion to remove the cause to Forsyth County for trial as a matter of right upon the grounds (1) the injury occurred in Forsyth or Davidson County, (2) the plaintiff resides in Davidson County, the defendants reside in Forsyth County. The defendant also asked that the cause be removed to Forsyth County for convenience of parties and witnesses.

Upon the evidence offered by affidavit, the court found as a fact that the defendant Richard Stafford, at the time suit was brought and process served, was a resident of Guilford County. The court denied the motion to remove. From the refusal, the defendant Thurman Smith appealed, assigning errors.

J. F. Motsinger for defendant Thurman Smith, appellant.
J. W. Clontz for plaintiff, appellee.

PER CURIAM. The evidence, though conflicting, was amply sufficient to support the finding that the defendant Stafford was a resident of Guilford County at the time the action was instituted. An action such as this may be brought in the county where the plaintiffs or the defendants, or any one of them, had residence at the time summons was issued. G.S. 1-82. Removal for convenience is discretionary.

Affirmed.

STATE v. ROBERT HUGHES.

(Filed 8 May, 1957.)

APPEAL by defendant from *Rousseau, J.*, at 22 October, 1956 Criminal Term of GUILFORD.

Criminal prosecution upon a warrant issued out of Municipal County Court, Criminal Division, of Guilford, charging that defendant "did unlawfully, willfully drive a vehicle upon the highway while under the influence of intoxicating liquor and narcotic drugs," etc.

The case was first tried in said County Court when and where he was found guilty, and sentenced to 4 months on roads, suspended upon payment of $100.00 and costs. Defendant appealed therefrom to Superior Court.

Upon trial in Superior Court the State offered the testimony of an officer tending to support the charge against defendant. On the other hand, defendant testified, and offered testimony of another tending to challenge the probative force of the evidence offered by the State. The case was then submitted to the jury under charge of the court.

Verdict: Guilty as charged.

Judgment: That defendant be confined in common jail of Guilford County for a period of four months and assigned to work on the roads under supervision of the State Highway and Public Works Commission, as provided by law.

Defendant excepted thereto, and appeals therefrom to Supreme Court and assigns error.

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

Elreta Melton Alexander for Defendant Appellant.

PER CURIAM. In this Court defendant appellant does not challenge the sufficiency of the evidence offered upon trial in Superior Court to take the case to the jury on the charge made, and to support the verdict rendered. Assignment III relating to denial of motions for judgment as of nonsuit is not discussed in brief.

And while the record of case on appeal shows that defendant took many exceptions to questions asked, and remarks made by the presiding judge in the course of the trial, it is apparent that neither the questions nor the remarks cast any reflection upon defendant, or deprived him of fair representation in the trial. It is clear that the court was trying to expedite in normal way a trial pervaded with dilatoriness. The manner in which the trial was conducted fails to show prejudicial error in any respect.

Moreover, a contextual reading of the charge indicates that the case was presented to the jury in adequate and understandable language, free from harmful error.

Hence in the judgment from which appeal is taken there is

No error.

C. S. REED v. H. H. ELMORE AND WIFE, BULA T. ELMORE.

(Filed 22 May, 1957.)

1. Deeds § 11—

A deed is to be construed to ascertain the intention of grantor and grantee as expressed in the language employed, and when the meaning of the language is in doubt, resort may be had to the circumstances of the parties and the situation dealt with.

2. Same—

Doubtful language in a deed must be construed most favorably to grantee.

3. Deeds § 16b—

Restrictive covenants are to be strictly construed.

4. Same—

A reasonable restrictive covenant which does not materially impair the beneficial enjoyment of the land conveyed and which is not contrary to public policy, is valid and enforceable in the same manner as any other contractual obligation.

5. Same—

The owner of contiguous lots conveyed one lot by deed stipulating that the land therein conveyed should be subject to the restriction that no structure should be erected thereon by grantee within a stipulated distance from the public road, and that the restriction should likewise apply to the adjacent lot retained by grantor. *Held:* The deed imposed mutual restrictive servitudes on both lots in the nature of negative easements running with the land, and not mere personal obligations.

6. Same—

It is not necessary that the owner of property subject all of it to the same plan of development in order to create restrictive servitudes or easements running with the land in a designated area.

7. Same—Registered deed creating negative easement on lands retained by grantor held binding on purchasers of servient tenement.

The owner of contiguous lots conveyed one lot by deed stipulating that the land therein conveyed should be subject to the restriction that no structure should be erected thereon by grantee within a stipulated distance from the public road, and that the restriction should likewise apply to the adjacent lot retained by grantor. The owner thereafter sold the adjacent lot by deed containing no reference to the restriction. *Held:* The grantee of the second lot, as well as his subsequent transferees, is charged with notice of the servitudes imposed upon the second lot by original grantor in his deed to the first lot, since grantees take title subject to duly recorded easements which have been granted by their predecessors in title and which could be discovered by an examination of the records of the deeds or other muniments of title of their grantor. Therefore, the grantee of the first lot is entitled to enforce the restriction against the owner of the second lot by *mesne* conveyances from the common grantor.

BOBBITT, J., concurring.

DENNY, J., dissenting.

WINBORNE, C. J., and HIGGINS, J., join in dissent.

APPEAL by defendants from *Sharp, S. J.*, 22 October, 1956 Special Term of MECKLENBURG.

Plaintiff, as permitted by G.S. 1-253, seeks a judgment declaring lands of defendants, purchased from D. H. Walter in 1955, designated as lot 4 on a map prepared by J. W. Spratt in 1936, subject to a restrictive easement or covenant in favor of lot 3, shown on said map, conveyed to plaintiff by Sallie W. Shannon on 18 March 1937. Plaintiff also seeks injunctive relief against threatened violations of his asserted rights. The parties waived a jury trial. The facts as found by the court and stipulated by the parties may be stated as follows:

Mrs. Sallie Shannon, the owner of a tract of land containing 154 acres on the south side of the Pineville-Matthews Road, had it surveyed and subdivided into lots by J. W. Spratt, county surveyor, in October 1936. The property was divided into seven lots of varying acreage. Lot 2, containing 3.75 acres, is situate on the east side of the property. Its northern line is 540 feet southwardly from the Pineville Road. It has no frontage on a public highway. Lot 1, containing 3 acres, joins and is south of lot 2. It has no frontage on a public highway. Lots 1 and 2 are provided access to the public highway by a private road across lot 3.

Lot 3, adjacent to lots 1 and 2, contains 60.65 acres. The lot has a leg 100 feet wide resting on the Pineville Road, extending back or southwardly 540 feet from the road. From this point it broadens to the east, reaching the southeast corner of lot 1. South of the leg which rests on the Pineville Road the lot has a width in excess of 800 feet and a depth approximating a half mile.

Lot 4 adjoins and is to the west of lot 3. It has a frontage of 415 feet on the Pineville Road, extends southwardly from the highway half mile or more, and contains 42.32 acres.

Lot 5 adjoins lot 4. It has a frontage on the Pineville highway of 630 feet, a depth of approximately half a mile, and contains 30.9 acres. Lot 6 fronts 407 feet on the Pineville highway, has a depth of 1,084 feet, and contains 9.5 acres. Lot 7 is at the southwest corner of the subdivision, half a mile or more from the highway. It contains 3.71 acres.

Lots 1 and 2 were sold prior to March 1937. Lot 3 was sold by Mrs. Shannon to plaintiff on 18 March 1937. Plaintiff's deed was recorded 2 April 1937. The description begins in the center of the Pineville Road and proceeds to describe the land conveyed by course and distance in

conformity with the courses and distances of lot 3 shown on the Spratt map. Following the specific description are these provisions:

"The foregoing tract of land is conveyed subject to the easement of a road leading from Pineville-Matthews Road to lot designated No. 2 comprising 3.75 acres and lot designated No. 1 sold to R. L. Welch and the right is hereby reserved to the owners of said Lots 1 and 2 to the use in common of said private road as a means of ingress, regress and egress to and from said tracts of land to the Pineville-Matthews Road.

"The foregoing lands are conveyed subject to the condition or restriction that no structure shall be erected by the grantee within 550 feet of the Pineville-Matthews Road, it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for purpose of constructing any building thereon, and this restriction shall likewise apply to Lot No. 4, retained by the grantor, said lot No. 4 being adjacent to lands hereby conveyed."

On 30 April 1942 Mrs. Shannon conveyed lot 4 to Herbert S. Glenn. The description of the land conveyed begins in the center of the Pineville-Matthews Road at the corner of the land conveyed by Mrs. Shannon to plaintiff, giving reference to the book and page where plaintiff's deed is recorded. The description proceeds by course and distance, referring to plaintiff's lines where the land conveyed abuts the land of plaintiff. The courses and distances set out are those shown on the Spratt map as lot 4. The deed contains no restrictions and makes no reference to Mrs. Shannon's deed to plaintiff except as it relates to the courses and distances of the land conveyed.

Glenn, in 1946, conveyed the land he purchased from Mrs. Shannon to McCorkle, who in 1955 conveyed to H. B. Walter and wife. Walter and wife conveyed to defendant in May 1955. The deeds from Glenn, McCorkle, and Walter, all describe the land by metes and bounds as set out in the deed from Mrs. Shannon to Glenn. None of the deeds contained any restriction or made any reference to the deed to plaintiff except in the specific description.

Lots 5, 6, and 7 were conveyed by Mrs. Shannon prior to her deed for lot 4 to Glenn. The deeds for these lots contained no reference to the provision in plaintiff's deed. Mrs. Shannon now has no interest in the property which she caused to be mapped and subdivided by Spratt.

Defendants, when they purchased lot 4 in May 1955, had actual knowledge of the deed from Mrs. Shannon to plaintiff and of the provisions of said deed.

Defendants have caused the property acquired by them from H. B. Walter and wife, including the portion lying within 550 feet of the Pineville-Matthews Road, to be divided into residential building lots

and, unless restrained, will offer said lots for sale for the purpose of erecting residences thereon.

Judge Sharp concluded that the deed from Mrs. Shannon to plaintiff imposed reciprocal negative easements on lot 3 sold to plaintiff and lot 4 retained by Mrs. Shannon, that the building restriction imposed on lot 3 was for the benefit of lot 4 retained by the grantor, and the building restriction imposed on lot 4 was for the benefit of lot 3, and the registration of the deed from Mrs. Shannon to plaintiff put those who thereafter acquired any interest in lot 4 on notice of the servitude imposed on that tract. Defendants in apt time moved to nonsuit. They took exceptions to the court's conclusions of law, excepted to the judgment which was entered in conformity with the conclusions of law, and appealed.

Taliaferro, Grier, Parker & Poe for plaintiff appellee.

Sedberry, Clayton & Sanders and Gaston, Smith & Gaston for defendant appellants.

RODMAN, J. The question presented for decision is: Do the provisions of the deed from Mrs. Shannon to plaintiff impose mutual restrictive servitudes on the lands then conveyed to plaintiff and retained by Mrs. Shannon, or did the deed merely create mutual personal obligations?

The answer is to be found by ascertaining the intention of grantor and grantee when the sale and purchase was consummated. That must be done by interpreting the language which the parties chose to express that intention. *Stephens Company v. Lisk,* 240 N.C. 289, 82 S.E. 2d 99; *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458; *Spencer v. Jones,* 168 N.C. 291, 84 S.E. 261; *Killian v. Harshaw,* 29 N.C. 497.

If doubt exists as to the meaning of the language used, it is proper to consider the situation of the parties and the situation dealt with. *Monk v. Kornegay,* 224 N.C. 194, 29 S.E. 2d 754; *Carr v. Jimmerson,* 210 N.C. 570, 187 S.E. 800; *Seawell v. Hall,* 185 N.C. 80, 116 S.E. 189; *Patrick v. Ins. Co.,* 176 N.C. 660, 97 S.E. 657; 26 C.J.S. 1095.

"In passing on the intent and effect of these conveyances, which must be gotten from the four corners of the instrument, we are guided by the rule that in resolution of doubt in interpretation the instrument must be construed most favorably to the grantee; *Sheets v. Walsh,* 217 N.C. 32, 38, 6 S.E. 2d 817; *Brown v. Brown,* 168 N.C. 4, 10, 84 S.E. 25; *Krites v. Plott,* 222 N.C. 679, 681, 24 S.E. 2d 531." *Seawell, J.,* in *McKay v. Cameron,* 231 N.C. 658, 58 S.E. 2d 638.

Restrictive servitudes in derogation of the free and unfettered use of land are to be strictly construed so as not to broaden the limitation on the use. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619.

With these well-settled principles in mind we look at the deed from Mrs. Shannon to plaintiff as the gauge by which the rights and obligations of the parties are to be measured. We find that the land conveyed, that is, lot 3, is burdened with an easement for lots 1 and 2 to the Pineville-Matthews Road, which right of way is to be used in common with the owner of lot 3. An examination of the Spratt map filed with the record here would indicate this right of way has a width of less than twenty feet; hence, the grantee had an area of eighty feet or more in width adjoining lot 4, fronting on the Pineville-Matthews Road and extending back from the Pineville-Matthews Road to that width for a distance of 540 feet. This area was his to do with as he pleased unless some restriction was imposed on him or on the land itself. Without such a restriction he could build on it or leave it open as he might desire. If he elected to build, to use it for commercial or residential purposes, as suited his whim. Grantor and grantee agreed that this unrestricted right to use the property was not desirable. Hence, following the provisions providing access to the highway for the land which plaintiff had purchased, as well as for lots 1 and 2, a provision was inserted in the deed which imposes a condition or restriction. Plaintiff's right to use the property which he purchased was circumscribed by this clause: "no structure shall be erected by the grantee within 550 feet of the Pineville-Matthews Road." Had the restriction stopped there, it might be suggested the parties intended only to limit the right of the grantee but did not intend to impose any restraint on any subsequent owner of lot 3. Any such idea is, however, immediately banished by the very next clause which deals with the land itself and not the owner. It says: "it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for purpose of constructing any building thereon."

That the restriction imposed on plaintiff and on his land could be enforced is not open to debate. It is said in *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344: "The courts have generally sustained covenants restricting the use of property where reasonable, not contrary to public policy, not in restraint of trade and not for the purpose of creating a monopoly—and building restrictions have never been regarded as impolitic. So long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated such restrictions are valid. Subject to these limitations the court will enforce its restrictions and prohibitions to the same extent that it would lend judicial sanction to any other valid contractual relationship." The principle there stated has been repeatedly recognized. The factual situations in particular cases have not always called for an application of the principle. *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388;

Higdon v. Jaffa, 231 N.C. 242, 56 S.E. 2d 661; *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620; *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Eason v. Buffaloe,* 198 N.C. 520, 152 S.E. 496; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

The vast majority of the cases dealing with restrictive covenants grow out of conveyances in which restrictions are imposed on the grantee or on the property conveyed without expressly imposing in the conveyance a similar condition or restriction on the grantor. In those cases, the courts have been called upon to determine whether the grantor intended to impose a restriction for his personal benefit or whether he intended to create a benefit for all of the property that he owned. Where the grantor has, by uniformity of the conditions imposed with respect to a given area, evidenced his intention to create mutual servitudes and benefits, the restrictions are held to be covenants running with the land. Where there is absence of uniform pattern, the intention is not established; hence, the covenants or restrictions or conditions are held to be personal to the grantor. *Ingle v. Stubbins, supra; Craven County v. Trust Co., supra; Phillips v. Wearn, supra; Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Eason v. Buffaloe, supra.* Uniformity of pattern with respect to a development furnishes evidence of the intent of the grantor to impose restrictions on all of the property and when the intent is ascertained it becomes binding on and enforceable by all immediate grantees as well as subsequent owners of any part of the property; but the fact that there is an absence of uniformity in the deeds does not prevent the owner of one lot from enforcing rights expressly conferred upon him by his contract. "Contractual relations do not disappear as circumstances change." *Vernon v. Realty Co.,* 226 N.C. 58, 36 S.E. 2d 710. The absence of any reference in the deed for lot 4 to the right of way granted lots 1 and 2 does not, because of want of uniformity, destroy the rights accorded those lots.

It is said in *Turner v. Glenn, supra:* "A deed which makes reference to a map or plat incorporates such plat for purposes of a more particular description but does not bind the seller, nothing else appearing, to abide by the scheme of division laid down on that map. The purchaser has no right to understand or believe from such reference that the grantor will in his future conveyances abide by such plan of division." This is an effective if negative way of stating that the grantee who insists that there be inserted in his deed a condition or covenant that the grantor will comply has a right to enforce it. Recognition of the importance of imposing the restriction on the grantor in the deed under which grantee claims is to be found in *Stephens Company v. Binder,* 198 N.C. 295, 151 S.E. 639. *Justice George W. Connor,* holding plaintiff grantor was not bound by restrictive covenants, said: "None of the

defendants, claiming under the immediate grantee of the plaintiff, has any right to or easement in lots owned by plaintiff, at the date of its conveyance of the lot now owned by said defendant to its grantee, *by reason of any express covenant on the part of plaintiff.*" (Emphasis added.) *Justice H. G. Connor* stated the rule in the affirmative when he said, in *Milliken v. Denny*, 141 N.C. 224: "If purchasers wish to acquire a right of way or *other easement* over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance." (Emphasis added.)

Plaintiff, when he purchased, heeded the warnings of *Justice Connor* and caused to be inserted in the deed to him this provision: "This restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed." Note the restriction is not on the grantor. It is imposed on the land of grantor. It was a *creation of a servitude* on the land irrespective of ownership. There is no need to search for grantor's intent. It is clearly and distinctly expressed.

What was the restriction? Can there be any doubt that the parties (grantor and grantee) meant and said that no building or structure should be erected on either lot 3 or lot 4 within 550 feet of the Pineville-Matthews Road? So construed there would be an open, unobstructed view of the highway. It is alleged and admitted that plaintiff's home is on lot 3. He has constructed a lake and made other improvements thereon. It may be inferred that the land was purchased for a home and "a quiet and secluded place of abode." In any event, one who has only a limited view of the highway might well deem an open and unobstructed view across his neighbor's land of material benefit and hence insist on imposing a servitude on that land as a condition to its purchase, an "ancient window." *Davis v. Robinson, supra.*

It will be noted that the servitude is expressly limited to lot 4. It has no relation to lots 5 and 6 which lie to the west of lot 4 and front on the road.

We have found no case in our reports which deals with the factual situation here presented. It might have arisen under the deed referred to in *S. v. Suttle*, 115 N.C. 784, if the grantee had undertaken to harvest ice from the mill pond.

It was said in *Norfleet v. Cromwell*, 70 N.C. 634: "The principle is generally conceded, and it is certainly equitable, that when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit." Application of the rule is found in *Raby v. Reeves*, 112 N.C. 688; *Walker v. Phelps*, 202 N.C. 344, 162 S.E. 727.

Cases are not wanting, however, on factual situations closely analogous to those we are here considering. In *Coles v. Sims*, decided in

1854, reported 43 Eng. Rep. 768, the Court was called upon to deal with a deed executed in 1823 in which the parties executed mutual covenants that portions of their respective lands should be laid out as a pleasure ground and thereafter used as a flower garden on which no building should be erected. The Court held that the covenant was binding on the grantees of the respective covenantors.

In *McLean v. McKay,* decided by the Privy Council of England in 1873, reported V LRPC 327, the Court was called upon to construe a deed made in 1834. William Forbes, owner of a lot, conveyed a portion thereof to Robert McIntosh. The deed, after describing by metes and bounds the land conveyed, contained this provision: ". . . and by the true intent which was unanimously agreed upon between the parties that any distance which may remain westwardly to *Jury Street* should never be hereafter sold, but left for the common benefit of both parties and their successors." McLean, plaintiff, traced his title to McIntosh, the grantee, and McKay traced his to Forbes, the grantor. McKay had erected a building on the land adjacent to Jury Street. McLean sought injunctive relief. The Court, in announcing its opinion, said: ". . . but construing the clause in the way in which they do, simply as an agreement between the two parties that this space shall be kept open for the advantage of both proprietors, they come to the conclusion that it is one which does not contravene any rule of law, that it creates an equity which binds the present Respondent, and that the Appellant who has the estate of the original vendee is entitled to come to the Court of Equity for its assistance to remove the structure which is placed upon the land in violation of it."

Nicoll v. Fenning, decided in 1880, reported 18 Chancery Appeal Cases 258, factually like the present case, held grantees of the grantor bound by his express covenant that he would, as to land retained, "not erect thereon, or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop."

In *Mann v. Stephens,* decided in 1846, 60 Eng. Rep. 665, the Court was called upon to construe a deed made in 1838 in which the grantor had, with respect to land owned by him adjoining the land sold, provided that it "should forever thereafter remain and be used as a shrubbery or garden, and that no house or other building should be erected on any part of it, except a private house or ornamental cottage, and *that* only on a certain part of it called The Dell, and so as to be an ornament rather than otherwise, to the surrounding property." In 1845 defendant, who had acquired the land to which the covenant related, began the construction of a beer shop and a brewery outside of The Dell. Plaintiff, who traced his title to the original covenantee, sought injunctive relief. The Vice Chancellor expressed the opinion "that the

erecting of the beer-shop and brewery was a gross violation of the covenant." An injunction issued.

The annotator, 37 L.R.A. N.S., at p. 23, in speaking with respect to restrictive covenants, says: "Another, but much rarer, class of cases in which restrictive covenants may be enforced by persons not parties thereto is that in which a vendor, instead of imposing the burden on the property sold for the benefit of that retained, reverses the servitude, laying the restriction on the land retained for the benefit of the land sold. It would seem that the same reasoning ought to apply as well in the one case as the other, and that the rule should here be that such restrictions may be enforced by the grantees of the covenantee against the covenantor or his grantees, but that an action may not be maintained to enforce the restriction between grantees of the servient estate."

In *Murphy v. Ahlberg,* 97 A. 406 (Pa.), the covenant or restriction was stated thus: "It is further agreed that the said second party, his heirs or assigns, shall have the free and unobstructed right of light, air, and prospect over and across the front of any other property now owned by the parties of the first part, lying north of the above described, and includes lot 1 in said partition plan, and that no buildings shall be erected nearer to Bellefield avenue than the present building now on the same. This restriction shall apply to and bind the heirs and assigns of both parties hereto, but shall not prevent the planting of shrubbery or small trees on the front of said lots." The Court held that the covenant applied as to property retained by the grantor, and that he could be enjoined from its violation by erecting on the property which he had retained a building tending to reduce the view of his grantee.

"A covenant not to erect a building on grantor's land in front of the tract conveyed runs with the land, and passes to an assignee without any separate assignment of the covenant." Headnote, *Trustees of Watertown v. Cowen,* decided 1834, reported 4 Paige Ch. 510, 27 Am. Dec. 80.

Similar conclusions with respect to restrictions imposed by grantor on himself are to be found in *Porter v. Denny,* 156 N.Y.S. 1016, and *Feinberg v. Board of Education,* 276 S.W. 823 (Ky.); *Hutchinson v. Ulrich,* 21 L.R. A. 391 (Ill.). The easements imposed are coterminous with the estate granted and retained. *Ruffin v. R. R.,* 151 N.C. 330, 66 S.E. 317.

Lots 3 and 4 comprised 102 acres of Mrs. Shannon's 150-acre tract. The deed from Mrs. Shannon to plaintiff provided a uniform limitation on the use of these two lots. Smaller areas have repeatedly been the subject of a uniform system of development. It is not necessary that all of one's property be subject to the same plan of development, in order to create restrictive servitudes or easements running with the land in a designated area.

By whatever name described, easements, negative easements, incorporeal rights, or servitudes, the reciprocal burdens and benefits were interest in land which could not be created by parol. *Davis v. Robinson, supra; Turner v. Glenn, supra; Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541; *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892.

Being an interest in land, registration of the instrument creating the right was necessary if the owner would protect himself against subsequent purchasers for value. When plaintiff recorded his deed, anyone interested in lot 4 was bound to note, not by implication, but by express language, that Mrs. Shannon had dealt with, imposed a restriction on lot 4. "Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title." *Waldrop v. Brevard,* 233 N.C. 26, 62 S.E. 2d 512; *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134.

Since the deed from Mrs. Shannon to plaintiff, by its express language, dealt with lot 4, it was as much a link in defendant's title as any other disposition of that lot. *Turner v. Glenn, supra,* does not, as appellant contends, hold to the contrary. Properly read and understood, that case supports the conclusion here reached. There no restrictions appeared in the deeds under which plaintiff claimed. Defendants sought to impose restrictions by showing knowledge of parol statements and advertisement when the common ancestor made sale of lots other than the lots of plaintiffs. The fact that plaintiffs knew, or might have known of these parol statements made to purchasers of other lots did not fulfill the requirements of the Connor Act. *Justice Barnhill* says: "A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents. *Acer v. Westcott,* 46 N.Y. 384, 7 Am. Rep. 355; *Columbia College v. Thacher,* 87 N.Y. 311, 41 Am. Rep. 365; *McPherson v. Rollins,* 107 N.H. 362, 14 N.E. 411; Thompson, Real Property, Vol. 7, p. 106. If the restrictive covenant is contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed a purchaser, under our registration law, has no constructive notice of it.

"It follows that evidence admitted by the court as to oral statements made by officers of the Realty Company and as to advertisements published in local papers tending to show a general scheme of development of Sunset Hills was incompetent. It has no bearing upon the question presented."

A slightly different factual situation was presented to the Supreme Court of Pennsylvania, *Finley v. Glenn,* 154 A. 299. There one Mildred Rosekrans, common ancestor in title of plaintiff and defendant, sold a lot to plaintiff. Plaintiff's deed contained a covenant restricting the

kind of buildings which could be constructed on her lot. The deed contained this further covenant: ". . . that the said grantors, shall and will impose the same building restrictions as above set forth, upon all their other lots or pieces of land fronting upon both sides of Mildred Avenue as shown upon the above mentioned plan of lots . . ." The Court said: "The controlling factor in the decision of the case is that the immediate grantors of both plaintiff and defendants were the same. When the latter came to examine the title which was tendered to them, it was of primary consequence that they should know whether their grantors held title to the land which they were to convey. They could determine that question only by searching the records for grants from them. 'The rule has always been that the grantee . . . must search for conveyances . . . made by any one who has held the title.' (Citations.) 'The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor.' Note, 16 A.L.R. 1013, and cases cited; 2 Tiffany's Real Property (1920 Ed.), p. 2188. So doing, defendants would find the deed from Rosekrans and his wife to plaintiff which had been recorded. Coming upon this conveyance, it was their duty to read it, not, as argued by appellant and decided by the chancellor who heard the case, to read only the description of the property to see what was conveyed, but to read the deed in its entirety, to note anything else which might be set forth in it. The deed was notice to them of all it contained; otherwise the purpose of the recording acts would be frustrated. If they had read all of it, they would have discovered that the lots which their vendors were about to convey to them had been subjected to the building restriction which the deed disclosed. It boots nothing, so far as notice is concerned, that they did not acquaint themselves with the entire contents of the deed."

The factual difference between that case and *Turner v. Glenn* is the express covenant made by the common ancestor as to the remainder of his property and the absence of such express covenant in *Turner v. Glenn*. That fact makes the difference in the decisions in the two cases. Similar conclusions have been reached by the courts of a majority of our sister states. See 16 A.L.R. 1013, and cases there cited; also, *Harp v. Parker,* 128 S.W. 2d 211 (Ky.); *Phillips v. Lawler,* 244 N.W. 165 (Mich.); *Black v. Condon,* 58 So. 2d 93 (Miss.); *Adams v. Rowles,* 228 S.W. 2d 849 (Tex.); 17 Am. Jur. 1021.

What more could plaintiff have done to protect his rights? Defendant, when he purchased, not only had constructive, but in fact had actual knowledge of the servitude which Mrs. Shannon had imposed on the property which he was purchasing. He cannot now complain that the court does not permit him to ignore the rights which plaintiff acquired when he purchased. The judgment is

Affirmed.

BOBBITT, J., concurring: A, the owner of certain land, be it a 200-foot lot or a 10-acre tract, decides to sell a portion thereof, *e.g.*, one-half, to B. A's deed to B sets forth explicitly their agreement, to wit, the imposition of identical restrictive covenants on the portion thereof conveyed to B and on the portion thereof retained by A. The restrictive covenants do not purport to affect any land other than said 200-foot lot or 10-acre tract. Only A and B, and their respective heirs and assigns, are bound by said mutual restrictive covenants.

The deed from A to B is duly recorded. Hence, a subsequent purchaser from A of the portion of said lot or tract retained by A is charged with notice that A has imposed upon it said restrictive covenants.

As I see it, the decisions relating to a uniform plan with reference to restrictive covenants where a developer sells a large number of lots have no application. In such cases, the question ordinarily posed is the enforceability of such restrictive covenants by the purchasers *inter se*.

In one sense, when A conveys the retained portion of said lot or tract to a subsequent purchaser, A's deed to B is not in such purchaser's chain of title, that is, A's deed to B is not the source of or a link in such purchaser's title. But in another sense, A's deed to B is in the purchaser's chain of title, that is, such subsequent purchaser is charged with notice of such recorded deed in like manner as he would be charged with notice of a recorded deed of trust, judgment or other record lien imposed during the period of A's ownership. Thus, such purchaser's title, while it does not pass under A's deed to B, is limited by the terms of A's deed to B whereby the restrictive covenants are imposed. The sense in which the expression "chain of title" is used in decided cases must be considered in the light of the facts of each case and in relation to the context in which it is used.

When reasonable restrictive covenants are so imposed my view is that they may be enforced as between A and B, and their respective heirs and assigns, until such time as, by reason of changed conditions, it becomes inequitable to do so.

DENNY, J., dissenting: I do not concur in the majority opinion. I concede, however, that some jurisdictions have adopted the view set

forth therein. Even so, in my opinion, such view finds no support in the decisions of our Court.

Let us examine the nature of the provision set forth in the plaintiff's deed. "The foregoing lands are conveyed subject to the condition or restriction that no structure shall be erected by the grantee within 550 feet of the Pineville-Matthews Road, it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for purpose of constructing any building thereon, and this restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed."

It will be noted that the grantor did not covenant or agree to insert a similar restriction in her deed, if and when she conveyed Lot No. 4; she only provided that *this* restriction shall apply to Lot No. 4 retained by the grantor. What is this restriction? Simply that the grantee in the deed to Lot No. 3 shall not erect any structure within 550 feet of the Pineville-Matthews Road. The parties then defined the meaning and applicability of the restriction in the following language: ". . . it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for purpose of constructing any building thereon, . . ." Was the application to Lot No. 4 for the benefit thereof, or was it intended to be a servitude thereon? Be that as it may, we adhere to the rule in this jurisdiction that restrictive servitudes being in derogation of the free and unfettered use of the land, the covenants imposing them are to be strictly construed in favor of the unrestricted use of the property. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619; *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; 14 Am. Jur., Covenants, Conditions and Restrictions, section 212, page 621.

If it be conceded, however, that the intention of the parties was to the effect that no building shall be constructed on Lot No. 4 nearer than 550 feet of the Pineville-Matthews Road, as construed in the majority opinion, I do not think the restriction can rightfully be construed to be anything more than a personal contract or covenant between the parties to the instrument conveying Lot No. 3. *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895.

Our decisions emphasize the fact that to be effective the restrictive covenant to be enforced must be a part of a general plan or scheme of development which bears uniformly upon the area affected. *Craven County v. Trust Co., supra; Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918.

The law generally applicable to a plan or scheme for imposing restrictions upon land for particular purposes is succinctly stated in 26

C.J.S., Deeds, section 167(2), page 1143, *et seq.*, as follows: "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created." *Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38; *Craven County v. Trust Co., supra; Sedberry v. Parsons, supra; Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Vernon v. Realty Co.,* 226 N.C. 58, 36 S.E. 2d 710; *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471; *Franklin v. Elizabeth Realty Co.,* 202 N.C. 212, 162 S.E. 199; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567; *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184.

There is no contention that a general scheme or plan was ever contemplated in connection with the lands involved in this appeal. The grantor, Sallie W. Shannon (widow), conveyed tracts 1 and 2, containing 3 and 3.75 acres respectively, without imposing any restrictions whatever thereon. Moreover, these tracts lie between tract 3 and the Pineville-Matthews Road, except for the 100 foot access corridor to the highway. Furthermore, while it appears that Lot No. 4, consisting of 42.32 acres; Lot No. 5, consisting of 30.9 acres; and Lot No. 6, consisting of 9.5 acres, all fronting on the Pineville-Matthews Road, there is no suggestion that any of these lots, including Lot No. 4, when conveyed by Mrs. Sallie W. Shannon (widow), contained any restrictions whatever.

In *Phillips v. Wearn, supra,* 262 lots in 26 different blocks of a development were sold without restrictions, and 433 lots in 31 blocks were sold with restrictions. The lots sold without restrictive covenants in the deeds as well as those sold subject to restrictions were scattered throughout the development. It was held that the development had never been subject to any scheme or general plan whereby the restrictive covenants in the deeds could have been enforced by the grantees *inter se. Humphrey v. Beall, supra.* And that since the *locus in quo* had never been subject to any general plan of development the restrictive covenants in the deeds executed by the original developer or its successors, were never enforceable except as personal covenants. *DeLaney v. Hart,* 198 N.C. 96, 150 S.E. 702; *Thomas v. Rogers,* 191 N.C. 736, 133 S.E. 18; *Snyder v. Heath,* 185 N.C. 362, 117 S.E. 294.

In the case of *Ivey v. Blythe, et al.,* 193 N.C. 705, 138 S.E. 2, the plaintiff contracted to sell and the defendants to purchase Lot No. 10 of Square 5 of Piedmont Park in the City of Charlotte. The Piedmont Realty Company had subdivided a tract of land containing 83 acres. This company conveyed lots, including the lot in controversy,

to F. C. Abbott. The deed to the property contained restrictions as to the use of the lots fronting on Central Avenue and Seventh Street. Later, Abbott reconveyed Lot No. 10 in Square 5, which fronted on Central Avenue, to Piedmont Realty Company. This company thereafter sold and conveyed this lot to J. B. Ivey without restrictions, but the following appeared in the description: "Being the same lot No. 10, Square 5, conveyed by the Piedmont Realty Company to F. C. Abbott by deed, and recorded in the office of the register of deeds for Mecklenburg County, in Book 150, p. 237." The defendants refused to accept the deed which plaintiff tendered, upon the ground that the plaintiff could not convey a title free from restrictions. The court below held that plaintiff could convey a fee simple title to the property, free and clear of restrictions. Upon appeal to this Court, *Brogden, J.*, speaking for the Court, said: "In *Davis v. Robinson,* 189 N.C. 589, this Court held, upon the facts presented in that case, that Piedmont Park was not the result of a general plan or scheme of development of an exclusive residential community. . . .

"In the case at bar, the plaintiff holds a deed for the lot in controversy, which contains no restrictions whatever, but the defendants contend that the clause in plaintiff's deed from Piedmont Realty Company, 'being the same lot No. 10, Square 5, conveyed by the Piedmont Realty Company to F. C. Abbott, by deed recorded in the office of the register of deeds for Mecklenburg County, in Book 150, p. 237,' was intended to subject plaintiff's land to the restrictions contained in the original deed from Piedmont Realty Company to Abbott, bearing date of 20 October, 1900. We do not think that this clause can be enlarged so as to create a restriction. Apparently the clause is a mere reference to a former conveyance for the sole purpose of aiding the identification of the land. A restriction of the free enjoyment and use of property should be created in plain and express terms; and, while perhaps it may be possible, by implication, to create restriction and encumber the free and untrammeled flow of property from purchaser to purchaser, such implication ought to appear plainly and unmistakably."

A restriction on the use of land may be enforceable as a contract without regard to any general plan or scheme of development. However, in such instances, the enforceability of the contract rests squarely upon the terms and conditions of the contract being set out in the grantee's chain of title. *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134; *Phillips v. Wearn, supra.*

In *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197, in considering the enforceability of restrictions in a deed, *Barnhill, J.*, later *Chief Justice.* speaking for the Court, said: ". . . it is the duty of a purchaser of land to examine every recorded deed or instrument in his line of title and he is conclusively presumed to know the contents of such instruments and

is put on notice of any fact or circumstance affecting his title which either of such instruments reasonably discloses. He is not, however, required to examine collateral conveyances of other property by any one of his predecessors in title."

Likewise, in the case of *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344, *Barnhill, J.*, later *Chief Justice*, said: "Ordinarily, it is only when the subdivided property is conveyed by deeds containing uniform restrictions in accord with a general scheme and for the benefit of all within a specified area that the other grantees of the owner of the original tract may enforce the restriction."

More recently, in the case of *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892, it appears that in 1948 J. L. Sides and wife, Ophelia M. Sides, began a residential development known as Wooded Acres. The development contained 40 lots. Thirty of these lots were sold and the deeds contained uniform restrictions, including racial restrictions. Nine of the lots were sold omitting the racial restrictions but containing all the other restrictions. The first restriction inserted in all thirty-nine deeds reads as follows: "1. All lots contained in this property known as Wooded Acres shall be used for residential purposes only." J. L. Sides and wife agreed to convey Lots Nos. 10 and 11 of the subdivision to Hollis P. Allen and wife, Alma C. Allen, plaintiffs in the action, and they in turn agreed to sell these lots to the defendants C. G. Sellers and wife, Irene T. Sellers. Sides and wife conveyed to H. P. Allen and wife Lot No. 10 containing the same restrictions set out in the deeds to the thirty lots referred to above. At the request of Mr. Allen, Lot No. 11 was conveyed from Sides and wife directly to Sellers and wife without restrictions. Allen testified it was his understanding in parol with Sellers that the uniform restrictions should be inserted in the deed to Lot No. 11. Sellers testified there was no such agreement. Likewise, Sides and wife, who were also defendants, filed answer and denied any agreement with Allen and wife that restrictions should apply to Lot No. 11, the topography of it being unsuitable for a home site but could be used for something like a road. Sellers and wife were seeking to use Lot No. 11 for a street leading to other property. The court below held that the plaintiffs, among them numerous owners of lots in the subdivision, could not enforce the restrictions against Sellers and wife with respect to Lot No. 11. Upon appeal to this Court, *Higgins, J.*, speaking for the Court, said: "The remaining question is whether the defendants C. G. Sellers and wife in accepting a deed without restriction, nevertheless were charged with such notice of the plans and purposes in the development of Wooded Acres as would make the uniform restrictions applicable to Lot No. 11. As has already been pointed out, no restrictions appear in the chain of title to that lot. No notice, there-

fore, can be found in the line of title. The recorded map shows no restrictions. 'The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed.' *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. Since the effective date of the Connor Act, 1 December, 1885, in matters involving the title to land it is intended that the public registry should be the source of notice. Since then it is considered not enough to send word by the mail boy. Notice, however full and formal, cannot take the place of registered documents. *Austin v. Staten,* 126 N.C. 783, 36 S.E. 338; *Hinton v. Williams,* 170 N.C. 115, 86 S.E. 994; *Blacknall v. Hancock,* 182 N.C. 369, 109 S.E. 72."

Our Court has held that where restrictive covenants in the nature of mutual negative easements have been inserted in the deed pursuant to a general plan of development, such restrictions will remain in full force and effect even though one or more of the *mesne* conveyances may omit the restrictions. *Sedberry v. Parsons, supra; Higdon v. Jaffa, supra; Sheets v. Dillon, supra; Turner v. Glenn, supra; Bailey v. Jackson, supra.*

I know, however, of no decision in this jurisdiction that upholds a building restriction in the nature of a negative easement when such restriction appears nowhere in the grantee's chain of title, as in the instant case. Hence, I vote to reverse the judgment of the court below.

WINBORNE, C. J., and HIGGINS, J., join in the dissent.

STATE v. FRED MILLS.

(Filed 22 May, 1957.)

1. Searches and Seizures § 2—

Where the affidavit upon which a search warrant is issued describes defendant's premises with sufficient definiteness to identify it, and such description is made a part of the search warrant by proper reference, objection to the search warrant on the ground that it did not describe the premises with sufficient definiteness, is untenable. G.S. 18-13.

2. Same—

A search warrant is a mandate giving authority for the search of the premises therein described and at the same time limits the scope of the mandate to such premises. Therefore, a warrant for the search of defendant's dwelling at a certain locality, together with barn and outhouses, etc., does not authorize the officer to go into the home of another party, located on the adjoining lot, and search a room there rented by the defendant.

3. Searches and Seizures § 3—

Where an officer reads the search warrant to the owner of the premises therein designated, the mere fact that the defendant is present and stands by as the owner states to the officer that she had rented the back room to the defendant and that the officer could search all of the house except this room, is not a waiver of the right of defendant against the unlawful search by the officer of the room rented by defendant.

4. Searches and Seizures § 1: Constitutional Law § 19a—

Immunity from unreasonable search and seizure is a personal right and the question of the legality of a search can be raised only by those whose rights are thereby infringed.

5. Same—

Where a search warrant authorizes the search of a certain dwelling, the owner of the dwelling may not object to the search of a room therein rented by the owner to defendant, but the defendant who rented the room has the right to challenge the legality of the search of this room under the warrant.

6. Same—

The fundamental law protects a person from the search of his private dwelling without a warrant, which protection extends to all equally, the guilty as well as the innocent. Constitution of North Carolina, Art. I, Sec. 15. Constitution of United States, Fourth Amendment.

7. Searches and Seizures § 1—

A warrant for the search of a dwelling house does not authorize the search of a room in the dwelling rented by a person not named in the warrant.

8. Criminal Law § 43—

The admission in evidence of intoxicating liquor discovered as a result of an unlawful search of defendant's premises, is prejudicial error. G.S. 15-27.

9. Intoxicating Liquor § 9a—

A warrant charging defendant with possession of a quantity of non-tax paid liquor together with other illegal whisky and beer for the purpose of unlawful sale does not restrict the charge to non-tax paid liquor, since the possession of tax paid liquor for the purpose of sale is within the purview of the phrase "other illegal whisky."

10. Intoxicating Liquor § 9d—

Evidence of defendant's possession of 7 pints of tax paid whisky of various brands, a pint of gin and 33 cans of different kinds of beer, together with evidence that a hundred empty pint whisky bottles were found strewn under his dwelling, *is held* sufficient, unaided by any presumption, to be submitted to the jury on a charge of unlawful possession of intoxicating liquor for the purpose of sale.

11. Criminal Law § 14—

The Superior Court, on appeal from conviction in the county court, has jurisdiction to try defendant only for the specific misdemeanor upon which he had been tried and convicted in the county court.

APPEAL by defendant from *Clarkson, J.*, Regular January Term 1957 of MCDOWELL.

Criminal prosecution on the warrant of an inferior court charging that the defendant Fred Mills on 8 December 1956 "unlawfully, wilfully and feloniously did have in his possession a quantity of non-tax paid liquor, and did have in his possession a said quantity of non-tax paid liquor together with other illegal whisky and beer for the purpose of unlawful sale."

This warrant was issued on 8 December 1956 by Roy L. Griggs, a Justice of the Peace of McDowell County, and made returnable by virtue of G.S. 15-24 to the County Criminal Court of McDowell County, which was established under the authority of G.S. Ch. 7, Art. 36. The Minutes of the County Criminal Court are as follows: "December 12, 1956. STATE *v.* FRED T. MILLS #4501. Possession for sale. Defendant plead not guilty. Court finds defendant guilty." From a judgment of imprisonment the defendant appealed to the Superior Court.

In the Superior Court the defendant pleaded not guilty. It was stipulated by the Solicitor for the State and defendant's counsel that the defendant was tried in the Superior Court upon the same warrant he was tried on in the County Criminal Court. The Judge of the Superior Court in the beginning of his charge to the jury read the warrant, and immediately thereafter instructed the jury that the warrant had two counts, one charging the unlawful possession of non-tax paid whisky, and the other charging the unlawful possession of non-tax paid whisky and other illegal whisky and beer for the purpose of sale. The jury returned a verdict "guilty as charged."

From a judgment of imprisonment, defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

I. C. Crawford and Lawrence C. Stoker for Defendant, Appellant.

PARKER, J. On 8 December 1956 Roy L. Griggs, a Justice of the Peace for McDowell County, issued the warrant in this case upon the sworn complaint of Dallas Owens, a Deputy Sheriff of the County. On the same day Dallas Owens swore to and subscribed an oath before Justice of the Peace Griggs stating "that he is informed and believes that Fred Mills has in his possession intoxicating liquors for the purpose of sale located in his dwelling, garage, filling station, barn and outhouses and cars and premises, which is located on Yancey Road and near Yancey Lake which is located in Marion Township, McDowell County, N. C." Whereupon, Justice of the Peace Griggs issued a search warrant authorizing and commanding the Sheriff or any Lawful Officer to enter upon the premises of the defendant located as stated in Deputy Sheriff Owens' sworn complaint, and make search of the same, "seizing all intoxicating liquors, containers and other articles used in carrying on the illegal handling of intoxicating liquors, and arrest the person or persons having the same in possession. Herein fail not, and of this warrant make due return."

On the same day Dallas Owens swore to and subscribed before the same Justice of the Peace an identical oath in respect to Laura Lewis, and the Justice of the Peace issued an identical search warrant against her.

Deputy Sheriff Owens made his returns on the search warrants to the effect that they were executed about 2:00 p.m. on the day of their issuance. It is plain from the record that the search warrants were made returnable before the McDowell County Criminal Court.

The State's evidence—the defendant introduced none—presents these facts: Dallas Owens armed with these two search warrants on 8 December 1956, went to a small store building on the Yancey Road about a mile from Marion, which the defendant said was his residence. The defendant was there. He had been staying there about two years, and Owens had seen him there on numerous occasions. This building is a 12 by 14 one-room, one-story building with a basement under it. A counter runs across the front of the room, and in the room there was a Pepsi-Cola cooler on the right side, a television set, a bed in the back, towels, sheets, and other bed clothing. Wearing clothes were hanging on the wall. In the room was a stove and a hot-plate. There were no groceries or dry goods in the room. There is a gasoline tank in front, but the defendant sold no gas there. Owens testified that this was the only place of business or house the defendant had to his knowledge near Yancey Road and Yancey Lake, until later on in the search. Owens searched this room, and found in it 7 pints of bonded, tax paid whisky of various brands, 1 pint of Gordon's Gin and 33 cans of different kinds of beer in the Pepsi-Cola cooler. Under this building Owens found 100 dirty, empty pint whisky bottles.

After searching the one-room building, Owens went to the house about thirty feet away where Laura Lewis lived. There is only a yard between the two buildings. He read the warrant to search her dwelling to her. After he had read it, the defendant came over. Laura Lewis told Owens in the defendant's presence that she had rented the back room on the back porch of her home to the defendant, and that he could search all of her house except this room. Owens searched this back room, and found in it 7 cases of beer, 8 pints of non-tax paid whisky, 11 pints of gin, 9 pints of vodka and 41 pints of assorted brands of bonded whisky. In this back room was a bed with no cover on the mattress. Owens did not recall whether there was clothing in it or not. Owens searched the Lewis dwelling and the back room therein rented to defendant under the search warrant issued against her.

Laura Lewis testified as a witness for the State. She said the defendant rented her back room on 7 February 1955 at the time he rented the other building from her. That the defendant told her he was in the second hand car business, and he needed more sleeping room for some of the boys working for him to sleep in. Part of the time defendant paid her the rent, and sometimes the boys handed it to her. Somebody slept in the room. She testified on cross-examination, "I think it was the boys, other than Fred Mills, that slept in there, because they were the ones I saw come in there."

The defendant contends that the affidavit and search warrant against him do not describe the premises to be searched with sufficient certainty. Judging the affidavit of Deputy Sheriff Owens attached to the search warrant against the defendant, by the requirements of G.S. 18-13, and comparing it with the affidavit in *S. v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537, and the affidavit in full in the record on file in the Clerk's Office in *S. v. Brady*, 238 N.C. 404, 78 S.E. 2d 126, it appears that the description in Owens' affidavit of the premises of the defendant to be searched is sufficiently particular and definite to justify the Justice of the Peace in issuing the search warrant to search the premises of the defendant therein described. Such description is made a part of the warrant by proper reference. 47 Am. Jur., Searches and Seizures, p. 523. This contention is without merit.

The 7 pints of tax paid, bonded whisky of various brands, the 1 pint of Gordon's Gin and the 33 cans of beer of three different kinds in the Pepsi-Cola cooler found in the one-room store building occupied by the defendant were properly admitted in evidence, because the search of this building was authorized by the search warrant. The warrant charged the defendant not only with the unlawful possession of non-tax paid liquor for sale, but also with the unlawful possession of other illegal whisky and beer for the purpose of sale.

In the instant case the back room in Laura Lewis' home rented to defendant by her was not included in the oath of Deputy Sheriff Owens for a search warrant for the premises of the defendant, and it was not included in the search warrant against the defendant, which search warrant was the only mandate Deputy Sheriff Owens had to search the premises of the defendant. This mandate gave authority to the officer to search defendant's premises described therein, and at the same time limited the scope of his authority. It did not authorize him to go into the adjoining home of Laura Lewis, and search a room there rented by defendant.

In *People v. Bawiec,* 228 Mich. 32, 199 N.W. 702, the search warrant described with particularity the defendant's dwelling house, which was to be searched for intoxicating liquor. The place searched was an old log house some 18 or 20 feet away and disconnected from the dwelling house, but within the curtilage. The Supreme Court of Michigan said, "the sole question presented is whether the search warrant authorized the search of any building other than the one described in the affidavit and writ." Later on the Court said: "We have not thus far held that a search warrant made valid by a definite description pointing only to a specific building and directing a search therein justifies a search of another building not described although located in the same vicinity. Nor do we think we should so hold. It is permissible to direct in one warrant the search of the house and outbuildings within the curtilage." See *Larthet v. Forgay,* 2 La. Ann. 524, 46 Am. Dec. 554; *Robie v. State,* Crim. App. Texas, 36 S.W. 2d 175; *People v. Castree,* 311 Ill. 392, 143 N.E. 112, 32 A.L.R. 357.

In 79 C.J.S., Searches and Seizures, pp. 901-902, it is written: "While the officers executing a search warrant may search the premises described therein, or within the scope of the description, they may not, under the authority of a search warrant, search any place other than that described therein, even though such other place is owned or controlled by the same person; and, if they do so, the search is illegal and 'unreasonable' under the constitutional guaranty." See Annotation 31 A.L.R. 2d 864 *et seq.,* as to the propriety and legality of issuing only one search warrant to search more than one place or premises occupied by the same person, when the several places to be searched are described in the warrant.

The evidence does not support the State's contention that the defendant consented to the officer's search of the back room he rented in the dwelling house of Laura Lewis, and thereby waived his right against an unlawful search of this room. *S. v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501; 47 Am. Jur., Searches and Seizures, Sec. 71.

In respect to the search of the back room in Laura Lewis' dwelling under the search warrant issued to search her premises, we are con-

fronted with these questions: one, does the defendant have any standing to question the legality of the search of this room, and two, if so, did the warrant to search the dwelling house of Laura Lewis authorize the search of this room rented by him?

Immunity from unreasonable search and seizure is a personal right. The legality of a search of a room in a building can be raised only by those whose rights thereunder have been infringed. *Goldstein v. U. S.*, 316 U.S. 114, 86 L. Ed. 1312; *Steeber v. U. S.*, 198 F. 2d 615, 33 A.L.R. 2d 1425; 79 C.J.S., Searches and Seizures, Sec. 52, where many cases are cited; Annotation, U. S. Supreme Court Reports, 96 L. Ed., pp. 66 *et seq.* Interest in property as requisite of accused's standing to raise the question of constitutionality of search and seizure—federal cases.

In Blackstone's Commentaries, Vol. 4, p. 1620, Ed. William Draper Lewis, Sir William Blackstone wrote: "A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes as well as this, the mansion house of the owner. So also is a room or lodging in any private house the mansion for the time-being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. . . . But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling house. . . ."

In 79 C.J.S., Searches and Seizures, Sec. 54, it is written: "Where premises are leased or rented to another, and in the possession of such lessee or tenant, the owner may not complain of an unauthorized search made thereupon, even though the officers pass through unleased property. The lessee claiming the property seized may do so, but only as to that part of the premises over which his lease extends."

In 79 C.J.S., Searches and Seizures, p. 790, it is said: "A rooming house is also protected against unreasonable searches and seizures, as is a person's room in an apartment house, hotel, rooming or boarding house, or in a tourist camp."

The State cannot maintain that defendant rented the back room from Laura Lewis for the purpose of convicting him, and was not in possession and had no right to challenge the legality of the search of this room for the purpose of searching it. The defendant has a right to raise the question of the legality of the search of the back room in Laura Lewis' home, because he not only had possession of the back room, but had rented it from Laura Lewis. *U. S. v. De Bousi*, 32 F. 2d 902; *Coon v. U. S.*, 36 F. 2d 164; *Brown v. U. S.*, 83 F. 2d 383; *Steeber v. U. S., supra; Williamson v. State*, Texas Crim. App., 244 S.W. 2d 202; *Tarwater v. State*, Texas Crim. App., 267 S.W. 2d 410; Annotation, U. S. Supreme Court Reports, 96 L. Ed. p. 79; Cornelius, Search and Seizure, 2d Ed., pp. 56-57.

In 48 C.J.S., Intoxicating Liquors, p. 626, it is written under the heading "Description of Premises or Thing to be Searched," p. 626: ". . . and where the premises described are owned or occupied by two or more persons, a description which fails to specify the owner or occupant has been held insufficient."

In *Williams v. State,* 95 Okla. Crim. 131, 240 P. 2d 1132, 31 A.L.R. 2d 851, the 12th headnote in A.L.R. reads: "A search warrant directed against a building occupied by separate families must, by proper exception, eliminate from the search those portions occupied by persons other than the one against whom the warrant was issued, as otherwise the warrant would constitute a blanket warrant."

In *U. S. v. Innelli,* 286 F. 731, the Court said: "If the place described by street and number is used by a number of persons for different purposes, then it is not a place; but there are several places included in the one description. It is then a general, but not a 'particular,' description. The evidence upon which the warrant issued should go to all the essential features of the authority given, and the particular place to be searched is one, and an important one."

In Cornelius, Search and Seizure, 2d Ed., pp. 496-497, it is said: "Upon principle, therefore, where there is more than one business or tenant occupying separate apartments under premises designated by the same street number, merely describing the premises by such street number in the affidavit or warrant, is insufficient. Under such circumstances both the warrant and affidavit should go further and designate the particular portion of the premises located at such street number, wherein the unlawful acts, are being or have been committed, and the search warrant should be confined to that particular portion of the premises." In *S. v. Hanford,* 212 N.C. 746, 194 S.E. 481, the search warrant authorized the officer to search the premises of one Lacey Scott for intoxicating liquor. A back room in defendant's home was occupied by Scott, to whom defendant had rented it. The Court said: "There was no evidence tending to show that the officer searched the premises of the defendant Marvin Hanford, under the search warrant in his possession at the time he went to defendant's home. He searched only the premises of Lacey Scott, as he was authorized to do under a valid search warrant."

The search warrant authorizing the officer to search the dwelling house of Laura Lewis, and the affidavit of the officer upon which it was issued, have no mention of the defendant, and the search warrant did not authorize the officer to search the back room in this house rented to the defendant.

The Courts seem agreed (with exceptions not relevant here, *In re Walters,* 229 N.C. 111, 47 S.E. 2d 709; *Agnello v. U. S.* 20, 70 L. Ed. 145, 149) that the fundamental law of State and Federal Constitu-

tions, or Bill of Rights, protects the privacy of anything deemed a dwelling house, and that "the search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws." *Agnello v. U. S., supra; In re Walters, supra;* N. C. Const., Art. I, Sec. 15; U. S. Const., Amend. IV; 47 Am. Jur., Searches and Seizures, Sec. 16; 79 C.J.S., Searches and Seizures, Sec. 12. See *S. v. Shook,* 224 N.C. 728, 32 S.E. 2d 329. This protection extends to all equally: to those justly accused, as well as to the innocent.

The distinction between the search of a dwelling house and the search of open fields not within the curtilage is as old as the common law. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; *Hester v. U. S.,* 265 U.S. 57, 68 L. Ed. 898.

Laura Lewis testified for the State that the defendant rented from her the back room on the back porch of her dwelling house, and said he needed more sleeping room for the boys working for him to sleep in, and that someone slept in the room. Her testimony as to who she thought slept there is an opinion, not a fact. The State contends that defendant was in possession of this room and the intoxicating liquor found there. Can it be said from the evidence that the defendant never slept in this room? Frequently persons have two dwelling houses in which at different times they sleep. It is true there was no cover on the mattress in the back room. However, a dwelling house does not lose its character as such by the temporary absence of the occupant. *Steeber v. U. S., supra; Cola v. U. S.,* 22 F. 2d 742; Annotation, 33 A.L.R. 2d, pp. 1430-1431.

When the officer was told by Laura Lewis that the defendant rented the back room in her dwelling house, he should have procured a proper search warrant against the defendant to search it before searching it. In our opinion, the search of this back room in Laura Lewis' home rented by the defendant without a valid search warrant to search it cannot be upheld under the circumstances here disclosed. The search of such room "was made under conditions requiring the issuance of a search warrant," and the admission in evidence of the intoxicating liquor found there is prohibited by G.S. 15-27, and was prejudicial error. The testimony as to what was found there should have been excluded. Defendant's assignments of error in respect to the admission of such evidence are sustained.

The next question presented is, was the intoxicating liquor found in the small store building sufficient to carry the case to the jury, and to override defendant's motion for judgment of nonsuit?

The Deputy Sheriff testified no non-tax paid whisky was found in this building. It would seem that the taxes had been paid on the pint of Gordon's Gin and the beer. The warrant upon which the defendant was tried charged the possession of a quantity of non-tax paid liquor

together with other illegal whisky and beer for the purpose of unlawful sale. This charge is not restricted to non-tax paid liquor.

McDowell County has not elected to come under the Alcoholic Beverage Control Act. If the State has established nothing more than that this one-story building was the defendant's private dwelling, and that he had in it only 7 pints of whisky of various brands, 1 pint of Gordon's Gin and 33 cans of different kinds of beer, upon all of which the tax has been paid, while this building was occupied and used by him as his dwelling only (*S. v. Hardy*, 209 N.C. 83, 182 S.E. 831; *S. v. Carpenter*, 215 N.C. 635, 3 S.E. 2d 34), the motion for judgment of nonsuit should have been allowed. G.S. 18-11, 18-32; *S. v. Barnhardt*, 230 N.C. 223, 52 S.E. 2d 904. However, the State has offered evidence tending to show by independent evidence, unaided by any presumption, that this one-story building was used and occupied by the defendant as a place to sell intoxicating liquors as well as a residence, and that the possession of the intoxicating liquor found therein was for the purpose of sale. Deputy Sheriff Owens found under this building 100 dirty, empty pint whisky bottles. This Court said in *S. v. Libby*, 213 N.C. 662, 197 S.E. 154: "The empty bottles strewn around the store constitute evidence that whisky had been consumed upon the premises and tended to assist in establishing that the defendant possessed whisky for the purpose of sale." These 100 dirty, empty pint whisky bottles, the various brands of whisky and beer and the pint of Gordon's Gin permit the reasonable inference that the defendant had in stock many brands of alcoholic beverages to appeal to and to meet the different tastes and desires of thirsty purchasers of such liquors. There is no evidence that the defendant drinks any kind of alcoholic beverages. The evidence negatives the theory that the defendant is engaged in any lawful work, except his statement to Laura Lewis when he rented the place in February 1955 that he was in the second hand car business. There is no evidence that any such cars were there.

The evidence was sufficient to carry the case to the jury on the charge of unlawful possession of whisky and beer for the purpose of sale. Certainly, if the defendant possessed whisky for sale, it was illegal whisky.

There is no competent evidence tending to show that the defendant was guilty of the unlawful possession of non-tax paid whisky, and it was improper to submit that charge in the warrant to the jury.

The defendant contends that he was convicted in the County Criminal Court only on the charge of the unlawful possession of intoxicating liquor for the purpose of sale, and the State in its brief says such contention seems clear from the record. In the view we have taken of the case, whether such contention is true or not, is academic.

The Superior Court of McDowell County had jurisdiction on appeal to try the defendant only for the specific misdemeanor charged in the

warrant, upon which he had been tried and convicted in the inferior court. *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189.

For error in the admission of evidence there must be a

New trial.

GORDON SULLY KEENER v. LEWIS EDGAR BEAL.

(Filed 22 May, 1957.)

1. Trial § 22b—

On motion to nonsuit, defendant's evidence may be considered only in so far as it is not inconsistent with, but tends to clarify or explain, plaintiff's evidence, and defendant's evidence which tends to establish another and different state of facts or which tends to contradict or impeach plaintiff's evidence is not to be considered.

2. Automobiles § 41e—Evidence held sufficient for jury on issue of negligence in permitting car to stand on highway without lights.

Plaintiff's evidence was to the effect that he struck the rear of defendant's car, which was standing at nighttime without lights on the hard surface in his lane of travel. Defendant's evidence was to the effect that his car stalled as he was entering the highway from a private road on an uphill grade, that instead of pushing the car back off the highway, he pushed it onto the highway in an attempt to start it, that he cut off his lights to save the battery, and that when he saw plaintiff's car approaching from the rear, he got in his car and turned on the lights, just before the impact. *Held:* Plaintiff's evidence, with so much of defendant's testimony as is favorable to plaintiff, suffices to make out a case of actionable negligence against the defendant.

3. Negligence § 19c—

Nonsuit on the ground of contributory negligence will be granted only when the plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom.

4. Same—

If different inferences may be drawn on the issue of contributory negligence from plaintiff's own evidence, some favorable to plaintiff and others to the defendant, the issue is for the jury to determine, since contradictions and discrepancies in the evidence are for the jury to resolve.

5. Automobiles § 42a—

A motorist is under duty to exercise ordinary care for his own safety, and his negligence in failing to do so bars recovery by him if it contributes to his injury as a proximate cause or one of them.

6. Automobiles § 42d—Evidence held not to show contributory negligence as a matter of law in hitting unlighted vehicle standing on highway.

Plaintiff's evidence tended to show that upon meeting another vehicle traveling in the opposite direction at nighttime, he tilted the beams of his head lamps downward as required by statute, G.S. 20-131(d), that after this car passed, he saw defendant's car in front of him without lights some 25 feet away, attempted to pass to the right on the shoulder of the road, but was unable to avoid colliding with defendant's car. There was other evidence tending to show that plaintiff's car left skid marks some 27 feet in length, and that his head lights had been checked and were in good condition. *Held:* Conflicting inferences may be drawn from the evidence as to whether plaintiff was driving with lights that failed to comply with the statutory requirements, and therefore nonsuit on the ground of contributory negligence in this respect was properly denied.

7. Automobiles § 7—

It is the duty of a motorist not merely to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen.

8. Same—

A motorist is not bound to anticipate negligent acts or omissions on the part of others, but, in the absence of anything which gives notice to the contrary, is entitled to assume and act upon the assumption that every other motorist will perform his duty and obey the law and will not expose him to danger which can come to him only by the violation of duty or law by such other motorist.

9. Automobiles § 10—

A motorist has the right to assume and act upon the assumption that no other motorist will have his automobile standing upon the paved portion of a highway in the nighttime without lights in violation of statute. G.S. 20-134. G.S. 20-161.

10. Automobile § 42d—Evidence held not to show as matter of law contributory negligence in failing to keep proper lookout.

Plaintiff's evidence tended to show that defendant's car was standing on the highway in plaintiff's lane of travel a distance of some 175 feet from where plaintiff passed another car traveling in the opposite direction at nighttime, and that plaintiff had tilted the beam of his head lights downward as required by statute in passing such other car. There was conflict in the evidence as to the distance plaintiff first saw defendant's car. *Held:* Plaintiff's evidence taken in the light most favorable to him permits conflicting inferences to be drawn as to whether plaintiff was keeping the requisite lookout, and therefore nonsuit on the ground of contributory negligence in this respect was properly denied.

11. Trial § 52—

The trial court has the discretionary power to discharge a juror and order a mistrial when necessary to attain the ends of justice.

12. Trial § 48—

Defendant moved for a mistrial on the ground that during the trial an officer had talked to two of the jurors in regard to the case. The trial judge interrogated the jurors, and upon their statements that they recalled talking to the officer, but that they had no recollection of anything he had said about the case in such conversation, concluded that neither party had been prejudiced, and denied the motion in his discretion. *Held:* The record does not disclose facts requiring an order of mistrial as a matter of law, or show abuse of discretion by the trial judge in the discretionary denial of the motion.

13. Appeal and Error § 42—

Where the charge, read as a composite whole, is free from prejudicial error, an exception to the charge cannot be sustained.

14. Appeal and Error § 40—

A new trial will not be awarded for mere technical error, but the burden is upon appellant to show error which is prejudicial in amounting to the denial of some substantial right.

APPEAL by defendant from *Campbell, J.*, September Civil Term 1956 of LINCOLN.

Civil action to recover damages for alleged personal injuries and destruction of an automobile tried upon the usual issues of negligence, contributory negligence and damages, which resulted in a verdict and judgment for the plaintiff.

Defendant appeals.

Carpenter & Webb for Defendant, Appellant.

Sheldon M. Roper and John H. Small for Plaintiff, Appellee.

PARKER, J. The defendant offered evidence. He assigns as error the refusal of the court to allow his motion for judgment of nonsuit made at the close of all the evidence. G.S. 1-183; *White v. Lacey*, 245 N.C. 364, 96 S.E. 2d 1. The defendant in his brief contends that plaintiff should have been nonsuited on the ground of contributory negligence, for the reason that plaintiff failed to keep a proper lookout, and "was operating his automobile in the nighttime with headlights which were markedly below the statutory standard." The defendant says in his brief he has not argued the absence of negligence on the part of the defendant, though "that clearly appears from the record." Defendant has selected contributory negligence as the ground upon which to wage battle.

Plaintiff's evidence tends to show the following facts: About 9:40 p.m. on 17 January 1956, a clear night, he was driving his Chevrolet automobile on State Highway 27 in the direction of Lincolnton. He

had attended a meeting in Charlotte, and was returning to his home north of that town. His automobile was in good shape: its brakes were in good order. About 60 days before, his lights had been adjusted. He checked his lights, when he left Charlotte, and they were all burning. The lights were "in number one condition."

The speed limit for the part of the highway at the scene of the collision was 55 miles an hour. Plaintiff was driving 45 miles an hour on his right-hand side of the road. Just before he reached the top of a grade, he passed two automobiles. It is one-tenth of a mile from the top of the grade or hill to the scene of the accident, according to a measurement made by plaintiff's witness, Corporal Dave Houston of the State Highway Patrol. When he reached the top of the grade, he was meeting another automobile, whose driver blinked its lights. These lights made such a gleam, he blinked his lights several times to notify this driver he was still on low beam. After that automobile passed, he noticed a black automobile up in his lane of the road in the center. This automobile was "dead still" without any lights on it. He was 25 feet away from this automobile in front of him at the time he saw it. He testified: "Well, to my left, I saw the lights from another car coming from Lincolnton, coming around the curve. Well, I had to do something quick, and I made a pass for the field, on the shoulder of the road. I passed to my right and my left front wheel hooked this car's left-hind wheel. My front wheel hit this car's right-hind wheel." He also testified the distance from where he passed the last automobile to the collision was "from here to the next block."

When the automobiles collided, plaintiff was thrown into the steering wheel and windshield and out of his automobile into a side ditch. He sustained severe injuries, and his automobile was destroyed. A crowd of people soon gathered. Plaintiff called for help, and the crowd moved to where he was lying behind his automobile. He asked, "whose car was that up in the road without any lights?" The defendant Beal replied, "it was my car." He then asked the defendant what he was doing in the road without any lights. The defendant replied, "my battery was dead, and my lights would not burn, and we pushed it out, trying to get it started." Defendant did not say where he pushed it from. Plaintiff said, "don't ever do that again." Defendant replied, "I am sorry, I won't."

On cross-examination of plaintiff testimony tending to show these facts was elicited: His car was in good shape. He had had his headlights checked several times to see that they were in right focus. He could tell they were working all right as he was driving along the road from Charlotte. Defendant's automobile had two taillights on the rear, but they were not burning. These taillights had red glass, and were of the regular reflector type taillights. His headlights did not make

any reflection to his eyes. He could just see a gleam, and no lights burning. His lights were adjusted so they did not shine on the automobile until he was 25 feet away from it. About that time there was another car coming around the curve at what had been referred to as the north end of the highway. A few seconds or a minute after putting his automobile on low beam, the collision occurred.

Corporal Dave Houston had a conversation with the defendant at the scene of the collision. The defendant told Corporal Houston he and his wife had been visiting in Mrs. Jones' home, which is 150 feet off the road. Her driveway is south of the scene of the collision. He said he had a dead battery, and he pushed his automobile from the Jones' home, and had pushed it down the road about the length of a car on the paved portion of the highway. He did not have his lights on. He saw a car coming over the hill, reached in his car, turned the lights on, and just as he did the car hit him in the rear.

Corporal Houston described marks on the highway at the scene. He testified, "as to whether I found any skid marks from this point" (the point of impact) "toward Charlotte, I believe that is a 27 foot skid mark, but the last mark is right on the point of impact." He said it was possible to stop a standard width automobile on the shoulder and off the highway where the collision occurred. The shoulder of the road where plaintiff's car came to rest is 10 feet or more wide. On cross-examination Corporal Houston testified: "I went back out there and measured on that night from where my lights would shine on the automobile and where my lights would fall down on the cars where this accident happened, where the marks of the impact was 600 feet."

Defendant's evidence presents these facts: He had been visiting his sister-in-law. During the visit his car was parked in her driveway. He left about 9:30 p.m. He testified as follows:

"I went out to the car and was starting it up, it was pretty slow and sluggish, and we drove the car on up to the pavement and it stopped, it stalled. That was the distance of approximately 100 or 150 feet. It is an uphill grade to the highway.

"When the automobile stalled, the front end of the automobile was on the highway and the back end was on the road going into the driveway. It was partly on and partly off. The front of my car was just a little back from the center line, just a little east of the center line. The car was sitting on a 45 degree angle. The highway in the direction of the airport grill was slightly downgrade.

"When my car stalled, I tried to start it, two or three times, and one time when I hit the starter, the lights went completely out, so I knew the battery was pretty weak, or about gone. I released my

foot from the starter and the lights came back on. At that time my lights were on full beam. They were bright and shining approximately 200 feet."

On cross-examination defendant testified that his engine stalled, and "from then on the battery was dead, it would not turn, it would not start the car. It was so weak that I turned my lights off to save the battery." He tried to start his car two or three times without success. He knew his battery was weak or about gone. He told his wife to hold the steering wheel so he could push. He began pushing the car. His wife said she saw lights coming from the rear. He got in his car, turned on the lights and closed the door. He then looked in the rear-view mirror to see if there was an oncoming car, his wife screamed, and in about five seconds the car hit his car. Defendant testified his car was green, chrome trimmed, the taillights had chrome and were of the reflector type, and there was scotch-light on the bumper, which reflected red and yellow. He said it may have been 8 or 10 minutes from the time his car stalled until the collision.

We have not stated all of the defendant's evidence for the very simple reason that "in ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff." *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

Accepting plaintiff's evidence as true, and considering it with the liberality that we are required to do on a motion for judgment of involuntary nonsuit, it is clear that plaintiff's evidence, and so much of the defendant's testimony as is favorable to him, suffices to make out a case of actionable negligence against the defendant.

It is well settled law in this jurisdiction that a motion for judgment of nonsuit on the ground of contributory negligence will be granted only when the plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. *Mallette v. Cleaners, Inc.*, 245 N.C. 652 97 S.E. 2d 245; *Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549; *Bundy v. Powell, supra.* To allow an involuntary nonsuit on the ground of contributory negligence, the plaintiff must have proved himself out of court. *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793; *Phillips v. Nessmith*, 226 N.C. 173, 37 S.E. 2d 178; *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601.

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Barlow v. Bus Lines, supra.* If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendant, it is a case for the jury to determine. *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107.

The law charges a nocturnal motorist, as it does every other person, with the duty of exercising ordinary care for his own safety. *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. A plaintiff's negligence suffices to bar recovery, if it contributes to his injury as a proximate cause, or one of them. *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396.

G.S. 20-141(e) provides that "the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered . . . contributory negligence *per se* in any civil action, etc." Defendant says in his brief his position is, this statute has nothing to do with the determination of the case, because he does not contend plaintiff was travelling at a speed which made it impossible for him to stop his automobile within the radius of proper headlights. Defendant states he does contend that plaintiff failed to keep a proper lookout and was driving with improper lights.

Plaintiff testified: "When I was on the top of the grade, I was meeting another car and he blinked his lights and the lights made such a gleam that I blinked my lights several times to let him know I was still on low beam and after that car passed, I noticed a black car up in my lane of the road in the center." G.S. 20-181 provides: "Any person operating a motor vehicle on the highways of this State, who shall fail to shift, depress, deflect, tilt or dim the beams of the head lamps thereon whenever another vehicle is met on such highway . . . shall, upon conviction thereof," be fined or imprisoned. Plaintiff in driving his car with his lights on low beam, when he was meeting this car, was acting in obedience to this statute.

G.S. 20-131(a) provides: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that . . . (the exception set forth in subsection (c) is not applicable here) they will at all times mentioned in Section 20-129 (period from a half hour after sunset to a half hour before sunrise, etc.), and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but any person operating a motor vehicle upon the highways, when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting, depressing, deflecting, tilting, or dimming the headlight beams

in such manner as shall not project a glaring or dazzling light to persons within a distance of 500 feet in front of such head lamp."

G.S. 20-131(d) provides: "Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the head lamps downward . . . subject to the requirement that the tilted head lamps . . . shall give a sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person seventy-five feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle."

Defendant contends that plaintiff testified that his lights were so adjusted that they did not shine on defendant's automobile until he was 25 feet away from it, and that this is an admission on his part that he was driving his automobile with lights which did not comply with the statutory requirements.

Plaintiff also testified his lights had been adjusted about 60 days before. He checked his lights, when he left Charlotte, and they were all burning. His lights were "in number one condition." On cross-examination he said he had had his headlights checked several times to see that they were in right focus. He could tell they were all right as he was driving along the road from Charlotte. The 27 feet skid mark, testified to by Corporal Houston, would seem to permit the inference that it was made by plaintiff's automobile and that plaintiff had seen defendant's car 27 feet or more away. It is reasonable to infer that the skid marks were made by plaintiff's application of his brakes, and that his seeing defendant's car, when he was travelling 45 miles an hour, and his application of brakes were not instantaneous.

Different inferences may be drawn from plaintiff's testimony as to his lights, some favorable to plaintiff and others to the defendant. Therefore, it was a matter for the jury to determine whether or not plaintiff was driving his automobile with lights, which did not comply with the statutory requirements.

In *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330, this Court said: "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."

This Court said in *Chaffin v. Brame, supra:* "It is a well established principle in the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others; but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Gaskins v. Kelly*, 228 N.C. 697, 47 S.E. 2d 34; *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11; *Hobbs*

v. Coach Co., 225 N.C. 323, 34 S.E. 2d 211; *Cab Co. v. Sanders*, 223 N.C. 626, 27 S.E. 2d 631; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565; *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631; *Jones v. Bagwell*, 207 N.C. 378, 177 S.E. 170; *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840; *Wilkinson v. R. R.*, 174 N.C. 761, 94 S.E. 521; *Wyatt v. R. R.*, 156 N.C. 307, 72 S.E. 383."

As plaintiff was driving his automobile on the highway at night, he had the right to act upon the following assumption, until he saw, or in the exercise of due care should have seen defendant's automobile, that no motorist would have his automobile standing upon the paved portion of a highway in the nighttime without lights showing, where the speed limit was 55 miles an hour, in violation of G.S. 20-134 and G.S. 20-161. *White v. Lacey, supra; Weavil v. Myers*, 243 N.C. 386, 90 S.E. 2d 733.

Defendant testified that when his automobile stalled, the front end of the automobile was on the highway and the back end was on the road going into the driveway: it was an uphill grade to the highway. It is plain that it was practicable for defendant to have pushed his car off the highway and back down the driveway of Mrs. Jones, but instead of doing so, he began pushing it in the highway.

Plaintiff said the distance from where he passed the last driver to the scene of the collision was "from here to the next block." It seems clear that the words "from here" refer to the chair where he was sitting. He later testified this distance was 175 feet. When a motorist at night is meeting and passing automobiles, it is not easy in the first few seconds after passing an automobile to see an unlighted vehicle some distance ahead standing still. When plaintiff's evidence is taken in the light most favorable to him, different inferences may be drawn from it as to whether he was keeping the requisite lookout, and, therefore, it was for the determination of the jury and not the judge.

In *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251, and in *McClamrock v. Packing Co.*, 238 N.C. 648, 78 S.E. 2d 749, will be found a list of cases of this type in which contributory negligence was held as a matter of law to bar recovery, and a second list in which contributory negligence has been held to be an issue for a jury. In *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637, a similar type case, the Court said: "Practically every case must 'stand on its own bottom.'" In this case the plaintiff's own evidence does not establish the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. The trial judge properly submitted the case to the jury.

During the trial and before plaintiff had finished testifying, Corporal Dave Houston informed the judge and counsel for both parties that prior to the convening of court one day, he made a remark in the presence of two people, who, as he found out later, were on the jury, that

"this is just a fight between two insurance companies." The judge talked with jurors Wilborn and Cook. Each of them, according to the record dictated by the trial judge, said: "They remembered seeing Corporal Houston prior to the convening of court, and had kidded with him about one or two matters, but that they did not recall anything had been stated pertaining to the case which was being tried, and that they had no independent recollection of anything being said about the case at all, other than what they had heard from witnesses."

The defendant in apt time requested the court to withdraw a juror and declare a mistrial. The court being of the opinion that neither side has been prejudiced by the remark made by Corporal Houston, which may or may not have been heard by the two jurors, denied the motion in its discretion. Defendant excepted, and assigns this as error.

It is well settled that in all civil cases the court may discharge a juror and order a mistrial when it is necessary to attain the ends of justice. Ordinarily, it is a matter resting in the sound discretion of the Trial Judge. *S. v. Tyson,* 138 N.C. 627, 50 S.E. 456.

In McIntosh North Carolina Practice and Procedure, 2d Ed., Vol. 2, p. 67, it is said: "Any misconduct of the jurors or of others which may influence them in finding a verdict may be considered as operating to cause a mistrial or to set aside the verdict; but the rule is the same as stated above in regard to separation. Where the circumstances are such as merely to give rise to a suspicion that there may have been improper influence, the Judge may in his discretion order a mistrial or set aside the verdict, and where there was such influence he should do so as a matter of law. What is such misconduct must depend to a great extent upon the circumstances of each case." The text is supported by our cited cases beginning with *S. v. Tilghman,* 33 N.C. 513, and including *Lewis v. Fountain,* 168 N.C. 277, 84 S.E. 278; *Baker v. Brown,* 151 N.C. 12, 65 S.E. 520, and other cases cited in the opinions in those cases.

The Trial Judge is clothed with this power of discretion, "because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere." *Moore v. Edmiston,* 70 N.C. 471.

Upon the facts in the record it is our opinion that the Judge was not required as a matter of law to order a mistrial, and that no abuse of discretion on his part appears. This assignment of error is overruled.

A charge to a jury must be read and considered in its entirety and not in detached fragments. *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356. When the charge here is read as a composite whole, it clearly

appears that the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto. The assignments of error to the charge present no new questions of law, and it would serve no useful purpose to discuss them *seriatim*, and repeat what we have said in many decisions.

Technical error is not sufficient to disturb a verdict and judgment. The burden is on appellant to show prejudicial error amounting to the denial of some substantial right. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657. This he has not done. All defendant's assignments of error have been considered, and are overruled.

No error.

ROBERT BELL v. CHARLES K. MAXWELL AND JAMES B. HAMMOND.

(Filed 22 May, 1957.)

1. Negligence § 11—

Contributory negligence presupposes negligence on the part of defendant.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only if plaintiff's own evidence establishes facts sufficient to show contributory negligence on his part so clearly that no other conclusion may be reasonably drawn therefrom.

3. Trial § 22b—

On motion to nonsuit, defendant's evidence may be considered in so far as it is favorable to plaintiff or tends to clarify or explain plaintiff's evidence, but defendant's evidence which is inconsistent with or tends to establish another and different state of facts or which tends to contradict or impeach plaintiff's evidence is not to be considered.

4. Negligence § 19c—

If different inferences may be drawn on the issue of contributory negligence from plaintiff's own evidence, some favorable to plaintiff and others to the defendant, the issue is for the jury to determine, since contradictions and discrepancies in the evidence are for the jury to resolve.

5. Automobiles § 49—

Whether a passenger in a car is guilty of contributory negligence as a matter of law in continuing to ride in a car driven at excessive speed and in a reckless manner must be determined upon the facts and circumstances of each case.

6. Same—

A passenger in a car is required to exercise for his own safety that care which a reasonably prudent person would employ under the same or similar circumstances.

7. Negligence § 11—

Plaintiff's contributory negligence suffices to bar recovery if it contributes to his injury as a proximate cause or one of them.

8. Automobiles § 49—Evidence held not to show as matter of law contributory negligence of passenger in resuming trip after assurance that driver would not continue to drive recklessly.

Plaintiff's evidence tended to show that he was riding as a passenger in a car driven by one defendant, with the encouragement or acquiescence of defendant owner, who was also a passenger in the car, and that plaintiff was injured in a wreck resulting from the excessive speed and reckless manner in which it was driven. Plaintiff's testimony and testimony elicited from defendant's witness on cross-examination tended to show further that plaintiff repeatedly remonstrated in regard to the speed, got out of the car on account of it, and resumed his status as a passenger only after being assured that the "horse-playing" or speeding was over. *Held:* Taking plaintiff's evidence as true and giving him every reasonable inference to be drawn therefrom and considering so much of defendant's evidence as is favorable to plaintiff, conflicting inferences may be drawn from the facts as to whether plaintiff measured up to the standard of care required of him for his own safety, and therefore nonsuit on the ground of contributory negligence was improperly entered.

BOBBITT, J., concurring in result.

APPEAL by plaintiff from *Rudisill, J.*, 1 October 1956 Civil B Term of MECKLENBURG.

Civil action for damages for personal injuries resulting from the overturning of an automobile owned by the defendant James B. Hammond and driven by the defendant Charles K. Maxwell at the request of the owner, who was riding in the automobile.

From a judgment of involuntary nonsuit entered at the close of all the evidence, plaintiff appeals.

Carswell & Justice and J. Edward Stukes for Plaintiff, Appellant.

Carpenter & Webb for Defendants, Appellees.

PARKER, J. Plaintiff was severely injured by the overturning of a practically new Lincoln Capri automobile owned by the defendant James B. Hammond and driven by the defendant Charles K. Maxwell. The defendants filed a joint answer in which they admitted that at the time Maxwell was driving the automobile with the permission and at the request of Hammond, who was present in the automobile before and at the time it overturned.

Plaintiff's evidence tends to show these facts: After midnight on 13 September 1953 Fred Teeter, a police officer of the city of Charlotte, went to the intersection of Harris and Providence Roads within the city

limits. He saw Hammond's Lincoln automobile lying on its side on the right hand side of Providence Road coming into the city. He testified: "It was off the hard-surface down a bank, a ditch; the skidmarks with reference to the car were on the paved street, paved surface of Providence Road, and skidmarks in the grass as it came off of the road too, skidmarks scraping across the road and grass; the skidmarks were toward the city limits out of town; that would be east of where the automobile was lying." He saw plaintiff lying on his back unconscious out from the automobile.

Teeter talked with Maxwell going to the hospital and at the Police Station. In his opinion, Maxwell was not intoxicated. This is the substance of what Maxwell told him: They were all in Hammond's automobile and went out Providence Road, where there was some fast driving encouraged by Hammond. Zeke Johnson and plaintiff got out of the automobile on Providence Road a few miles beyond the city limits. He told Johnson and plaintiff to get back in the automobile, the horse playing or speeding was over, and they would go back into town to the Stork Drive-In or somewhere. Plaintiff got back in the automobile, Johnson did not. The automobile had been stopped twice before it overturned. The automobile had been stopped when Johnson got out. He was going 85 miles an hour at the time he first noticed danger which was 100 yards before the impact. At the time of the impact he was going 65 miles an hour. At the time the car overturned he was driving it, Hammond and plaintiff were in the front seat with him, and one Ligon on the back seat. On cross-examination Teeter said he found beer cans around the car.

Plaintiff testified that the last thing he remembered that night was leaving home around 8:30 p.m., and the next time he remembered anything was about three weeks later in the hospital. He and Maxwell had been at the University at the same time. Plaintiff graduated at the University of North Carolina in 1953, and at the time of his injuries was 22 years of age.

Defendants pleaded contributory negligence of the plaintiff as a defense, and in such defense alleged that Hammond's Lincoln automobile was being driven on Providence Road near the point of overturning at a speed in excess of 100 miles an hour, and was being driven at a speed in excess of 80 miles an hour at the time it overturned.

At the close of plaintiff's evidence the court denied a motion for judgment of nonsuit. Whereupon, the defendants called one witness, Zeke Johnson. His testimony tends to show the following facts: About 8:00 o'clock that night he, with Stan Ligon, went to the Stork Drive-In in his car. Plaintiff and Dave Allen joined him there, and later the defendants joined the party. He and plaintiff were drinking beer. He stayed at the Stork Drive-In one or two hours, and then went to

the Panda Grille four or five miles from the Stork Drive-In. There he met again plaintiff and Allen and Ligon and the two defendants. At the Panda Grille he, plaintiff and Maxwell drank some beer. When the Panda Grille quit serving beer he left the Panda Grille in his car, and plaintiff left at the same time in Maxwell's car. He next saw plaintiff and Maxwell at the Stork Drive-In about midnight. He saw Maxwell's car at the Stork Drive-In. Plaintiff was driving it, and the muffler had been knocked loose. When they arrived, the Stork Drive-In was closed. He, plaintiff, Ligon and the two defendants left in Maxwell's car with plaintiff driving it. He didn't remember where they were going, but while riding the car ran off the curbing one time. They went to Maxwell's home, and changed cars. They left there in Hammond's 1953 Lincoln Capri with plaintiff driving, and went out Providence Road to the Ming Tree Restaurant. There Maxwell took over the driving of the Lincoln car. Plaintiff was on the front seat, Hammond on the front seat between plaintiff and Maxwell, and he and Ligon on the back seat. Maxwell drove through the park, through town into Queens Road, and came back to Providence Road. Maxwell drove through the intersection of Queens and Providence Roads within the city limits at a speed between 80 and 90 miles an hour. The car was stopped in front of the Myers Park Presbyterian Church. There plaintiff got out of the car, but got back in it. Maxwell then drove the car out on Providence Road a distance of 2½ to 3 miles beyond the city limits at a speed of over 100 miles an hour. Maxwell then turned the car around and started back to the city. He argued with Maxwell to slow down and not drive fast. Maxwell did not slow down, though he did not know what speed Maxwell was driving. He asked plaintiff to grab the steering wheel and slug Maxwell. Plaintiff refused, saying they were going too fast and would surely have a wreck if they did anything like that. Johnson testified: "I got Maxwell to stop by choking him. I got out of the car as it stopped. I got out of the car. The car, I think, was either at a standstill or barely moving but it was slow enough for me to get out. The car was going slow enough for me to get out."

On cross-examination this in substance is his testimony: The Lincoln car belonged to Hammond. Plaintiff asked Maxwell to stop the car, and he did in front of Myers Park Presbyterian Church. Plaintiff got out, saying he was not going to ride with him at any such speed. Maxwell said he wouldn't drive fast anymore, and plaintiff got back in the car. Maxwell began to drive fast again. He, plaintiff and Ligon told Maxwell a number of times to slow down, but Hammond did not tell him to slow down.

This is in substance his testimony on re-direct examination. When they stopped at the Ming Tree Restaurant, Hammond said if there was

going to be any fast driving, he wanted Maxwell to do it. Maxwell said he would drive. Plaintiff said he wouldn't ride fast in the car. Maxwell said he would not do it, and all got in the car. When they left the Panda Grille the last time, he drove his car up behind the car Maxwell was driving, in which plaintiff was riding, and bumped it at a speed of around 70 miles an hour.

At the close of all the evidence the court allowed defendants' motion for judgment of nonsuit, and the plaintiff excepted and assigns this as error.

The evidence of the greatly excessive speed at which Maxwell was driving the Lincoln Capri automobile, which belonged to Hammond, in violation of the Speed Restrictions of G.S. 20-141, and of reckless driving of this automobile by Maxwell in violation of G.S. 20-140, and the evidence that Hammond was encouraging the fast driving, and the admissions in the joint answer that at the time Maxwell was driving Hammond's Lincoln automobile with the permission and at the request of Hammond, who was present in his automobile before and at the time it overturned, is sufficient to make out a case of actionable negligence against both defendants. The defendants in their brief make no contention that the evidence does not make out a case of actionable negligence against both of them. Their contention is that plaintiff was properly nonsuited by virtue of his contributory negligence.

Contributory negligence implies or presupposes negligence on the part of the defendant. *Garrenton v. Maryland,* 243 N.C. 614, 91 S.E. 2d 596.

The defendants have pleaded contributory negligence as a defense. The question presented is this: Does the plaintiff's own evidence establish the facts necessary to show contributory negligence on his part so clearly that no other conclusion may be reasonably drawn therefrom? If so, the judgment of nonsuit below should be affirmed, if not, reversed. *Mallette v. Cleaners, Inc.,* 245 N.C. 652, 97 S.E. 2d 245; *Blevins v. France,* 244 N.C. 334, 93 S.E. 2d 549; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. On this question the parties join battle.

This Court said in *Bundy v. Powell, supra:* "In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff."

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793. If different inferences may be drawn from the

evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendant, it is a case for the jury to determine. *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107. To sustain a nonsuit on the ground of contributory negligence, the plaintiff must have proved himself out of court. *Barlow v. Bus Lines, supra; Phillips v. Nessmith,* 226 N.C. 173, 37 S.E. 2d 178; *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

The question of contributory negligence of a gratuitous passenger in a privately owned and operated automobile has been considered by this Court in a number of cases. In *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787, the Court said:

> "The principle is generally recognized that when a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven at an excessive and dangerous speed, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded and speed unaltered, to request that the automobile be stopped and he be permitted to leave the car. *Bogen v. Bogen, supra;* 4 Blashfield Cyc. Auto Law, sec. 2415; 5 Am. Jur. 772. He may not acquiesce in a continued course of negligent conduct on the part of the driver and then claim damages from him for injury proximately resulting therefrom. But this duty is not absolute and is dependent on circumstances. 4 Blashfield, pg. 568; *O'Neal v. Caffarello,* 303 Ill. App. 574. Where conflicting inferences may be drawn from the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury.
>
> "In 4 Blashfield, pg. 578, the law on this point is stated as follows: 'Even so, however, it is not the duty of a guest, under all circumstances of negligent or reckless driving, to ask to be let out, nor is it necessarily contributory negligence as a matter of law for a passenger not to insist upon being permitted to leave an automobile driven at excessive speed. . . . A guest who feels himself endangered by the excessive speed of the vehicle cannot ordinarily be expected to leap from the car while it is still in rapid motion. . . . And even if there is a reasonable opportunity to leave the car, failure to leave is not negligence unless a person in the exercise of ordinary care would have done so under the circumstances.' "

Nettles v. Rea, 200 N.C. 44, 156 S.E. 159, was an action to recover damages for personal injuries tried upon the issues of negligence, contributory negligence and damages, which resulted in a verdict and judgment for the plaintiff. Plaintiff's evidence tended to show—the

defendant offered none—that defendant invited plaintiff and two young ladies to go with him from Sylva to Asheville, a distance of between 50 and 60 miles in his new Chrysler automobile. Defendant had driven from Asheville that morning in 50 minutes, and said he intended to drive back in 30 minutes. He had taken at least 2 drinks during the day, which plaintiff knew as he had been drinking with him. Defendant showed no signs of intoxication at the time they left Sylva. The road was crooked and rough with numerous curves. Defendant was driving 70 and 80 miles an hour. Defendant wouldn't listen to his passengers, but said he could drive all right. Defendant approached a curve at about 70 miles an hour, so fast he could not make it, ran over an embankment, and turned over. The Court said:

> "Conceding, without deciding, that plaintiff may have been negligent in entering defendant's car under the circumstances disclosed by the record, nevertheless there is evidence of wilful or wanton conduct on the part of the defendant in persisting in his reckless driving over the protests of his guests which resulted in plaintiff's injury. This, if nothing else, saves the case from a nonsuit. Notes, N. C. Law Review, December, 1930, p. 98; 61 A.L.R., 1253; 1 R.C.L. Sup., 674. See, also, *Teasley v. Burwell,* 199 N.C. 18, 153 S.E. 607; *Albritton v. Hill,* 190 N.C. 429, 130 S.E. 5."

In the following cases where there was evidence of excessive speed, the question of whether a guest passenger was guilty of contributory negligence was held properly submitted to the jury for determination: *King v. Pope,* 202 N.C. 554, 163 S.E. 447; *Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446. In the following cases of a guest passenger, where there was evidence of excessive speed, no issue of contributory negligence was submitted to the jury, and this Court found no error in the trial: *Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143; *York v. York,* 212 N.C. 695, 194 S.E. 486. In *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d 379, plaintiff was guest passenger on a motorcycle driven at a high rate of speed without protest. The Court ordered a new trial holding that it was error for the trial court to refuse to submit the issue of contributory negligence to the jury. In *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771, it was held the failure of a guest passenger in an automobile driven 65 to 70 miles an hour to remonstrate would not constitute contributory negligence as a matter of law but was a question for the jury, and a judgment of nonsuit below was reversed. In *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374, it was held that where there is evidence that a guest in an automobile saw the taillights of a vehicle travelling along the highway in front, but no evidence of anything which should have put her on notice that the driver of the automobile had not seen

the preceding vehicle, her failure to warn the driver until it was too late for him to avoid a collision with the rear of the vehicle is not contributory negligence on her part as a matter of law. See, also, *Hill v. Lopez*, 228 N.C. 433, 45 S.E. 2d 539, where it was held that a guest passenger was not guilty of contributory negligence as a matter of law.

In *Bogen v. Bogen*, 220 N.C. 648, 18 S.E. 2d 162, which is cited and relied upon by the defendants, a guest passenger in an automobile was held barred from recovery of damages for personal injuries as a matter of law. That case is distinguishable from the instant case in that the defendant in the *Bogen Case* did not tell his wife, the plaintiff, to get back in the car his reckless driving and excessive speeding was over.

Whether or not the conduct of the plaintiff constituted contributory negligence must be determined from the facts and circumstances of the instant case. Plaintiff's evidence tends to show that Maxwell was drinking beer, but was not intoxicated. Plaintiff testified on direct examination:

> "Yes, I had known King Maxwell before this time. He had been to school when I was at school at the University. I think I have ridden back from college with him. He had always been a sane driver. By that, I mean normal. While I was with him, I don't recall his having had any trouble with his driving before except in an old green '46 Dodge he had that wouldn't go very fast. He always complained about it going slow at lights in town—people blowing the horn at him."

Except on the night plaintiff was injured, there is no evidence that Maxwell was a reckless and extremely fast driver, nor is there any evidence that he bore a reputation as such. The automobile was a practically new Lincoln Capri, and there is no evidence of inclement weather conditions.

It is well settled law in this jurisdiction that the court may consider so much of the defendants' evidence as is favorable to the plaintiff. *Bundy v. Powell, supra.* On cross-examination Zeke Johnson, defendants' sole witness, said:

> "Bobby Bell asked Maxwell to stop the car when it was stopped about in front of the Myers Park Presbyterian Church and that was after it had been running ninety miles an hour after it had crossed that intersection at the Methodist Church where Providence Road and Myers Park Road touch each other. And Bell told him that he was not going to ride with him at any such speed as that. Then Maxwell said he wouldn't drive fast any more and it was after that that Bobby Bell got back in the car, and then King Maxwell began to drive fast again. I don't know the num-

ber of times that Bobby Bell told him to slow down and not drive so fast after he got back in the car."

Plaintiff's evidence shows that Maxwell made this statement to Teeter, the police officer:

"King Maxwell stated to me that they were all in the automobile; they went out Providence Road and that there was some fast driving, encouraged by Mr. Hammond, and that Zeke Johnson and Bobby Bell got out of the automobile out Providence Road a few miles beyond the City limits and that Bell got back in the automobile and Johnson refused to get back in the automobile. With reference to what King Maxwell told me he said to Bell about getting back in the car, he said that he told Johnson and Bell to get back in the automobile, the horse-playing was over or the speeding of the automobile was over and they would go back into town, I believe to the Stork Drive-In or somewhere; that is the way I understood it. After that he said Bell got back in the automobile."

"The passenger is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances." *Samuels v. Bowers, supra.* A plaintiff's negligence suffices to bar recovery, if it contributes to his injury as a proximate cause, or one of them. *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396.

When plaintiff got back into the automobile on Providence Road to continue riding in it, after Maxwell had told Zeke Johnson and himself "the horse-playing was over or the speeding of the automobile was over, and they would go back into town," and rode in it until it overturned, did he, considering the facts and circumstances of the case, measure up to the standard of care required of him for his own safety?

Taking the plaintiff's evidence as true and giving to him every reasonable inference legitimately to be drawn therefrom, as we are required to do in passing on a judgment of nonsuit (*Polansky v. Insurance Asso.,* 238 N.C. 427, 78 S.E. 2d 213), and considering so much of defendants' evidence as is favorable to him, we are of opinion that conflicting inferences may be drawn from the facts as to whether plaintiff measured up to the standard of care required of him for his own safety, and that the question of whether or not plaintiff is guilty of contributory negligence is a matter for the jury. *Gilreath v. Silverman, supra; Samuels v. Bowers, supra.*

This is a close case, but it seems to us that plaintiff's own evidence does not establish the facts necessary to show contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom.

The judgment of nonsuit entered below is
Reversed.

BOBBITT, J., concurring in result: In my opinion, the testimony of Johnson, defendants' witness, that on Providence Road, outside the city limits, he forced the driver of the Lincoln to stop the car, and that *he* then got out but plaintiff didn't, is *new matter*, appearing only in the defendants' evidence. This evidence, in my view, does more than make clear or explain the evidence offered by the plaintiff, and should not be considered in passing on defendants' motion for judgment of involuntary nonsuit. With this explanation, I concur in the result.

R. L. BURNS v. GULF OIL CORPORATION, H. Q. DRAUGHN, R. I. HICKS, E. L. MARTIN AND CHARLIE JOHNSTON.

(Filed 22 May, 1957.)

1. Pleadings § 10—

Facts alleged by defendant as the basis for its counterclaims must be taken as true in determining whether the counterclaims are permissible under the statute. G.S. 1-137.

2. Same—

Defendant may set up a counterclaim which is permissible to any one of the causes of action alleged by plaintiff without regard to whether plaintiff separately alleges such cause. G.S. 1-138.

3. Same—Counterclaims in tort arising from contractual relationship may be asserted in plaintiff's action in tort arising upon the same contract.

Plaintiff alleged that he was a distributor of defendant corporation's goods under contract, that defendant corporation and certain of its named employees entered a conspiracy to injure plaintiff in his reputation and interfere with plaintiff's business under the contract, and that pursuant thereto false statements were made to plaintiff's customers in regard to the business, and plaintiff's customers coerced into signing new contracts with the corporate defendant, and that plaintiff's employees were harassed and interfered with, and plaintiff's contract terminated, all in furtherance of the conspiracy. Defendant corporation filed counterclaims, alleging: first, that plaintiff wrongfully interfered with the contractual relationship between the corporate defendant and its retail customers, thus diverting from the corporate defendant to another oil company said established business; second, that plaintiff wrongfully and carelessly removed equipment owned by the corporate defendant from the premises of its customers, whereby it was damaged; and third, that plaintiff wrongfully converted to its own use certain underground storage tanks belonging to the corporate defendant. *Held:* While plaintiff's action is in tort, the respective

rights and obligations of plaintiff and the corporate defendant in regard to the action and counterclaims arise from and are determined by the contractual relationship subsisting between them, and therefore, the counterclaims were permissible under G.S. 1-137.

4. Conspiracy § 1—

In order to recover in a civil action for conspiracy it is required that there be some overt act committed by one or more of the alleged conspirators pursuant to the common design.

5. Same—

The civil liability of conspirators is joint and several, and an action for civil conspiracy may be maintained against any one or all of the alleged conspirators.

6. Pleadings § 10—

When a cause of action is brought against several defendants jointly, but the liability of the defendants to plaintiff is both joint and several, any one of the defendants may allege a counterclaim, otherwise permissible, solely in its favor, since if such defendant recovers on any or all of its counterclaims, a several judgment between it and plaintiff may be entered, adjudicating their rights and liabilities *inter se*. G.S. 1-222.

APPEAL by defendant Gulf Oil Corporation from *Craven, Special Judge,* January-February Term, 1957, of LEE.

This appeal is from a judgment sustaining plaintiff's demurrer *ore tenus* to three causes of action alleged as counterclaims by defendant Gulf Oil Corporation, hereinafter called Gulf. The individual defendants, who answered but did not counterclaim, are not parties to this appeal.

The complaint and said counterclaims are the pleadings to be considered.

These facts, alleged by plaintiff, are not in dispute, viz.: On or about 30 June, 1930, plaintiff and Gulf Refining Company, then a subsidiary of Gulf, entered into an agreement for the distribution by plaintiff of Gulf's petroleum products in the Sanford area. Under this and subsequent contracts between plaintiff and Gulf's said subsidiary, and later between plaintiff and Gulf, plaintiff continued as the distributor of Gulf's products through 30 April, 1955. Exhibit A, attached to and made a part of the complaint, is a copy of the last contract between plaintiff and Gulf. Dated 1 May, 1947, it was continued in effect to and including 30 April, 1955. Therein Gulf is designated "Consignor" and plaintiff is designated "Consignee." As to duration, it provides: "This agreement is for a period of one year from the date hereof but shall be automatically extended and renewed for successive periods of one year each, unless one of the parties hereto notifies the other in writing at least thirty (30) days in advance of the end of any such year

that it does not desire to renew or extend the same." By letter dated 22 March, 1955, Gulf notified plaintiff that it would not extend or renew said contract beyond 30 April, 1955. While said contract subsisted, plaintiff, as Gulf's lessee, was in possession of Gulf's bulk plant in Sanford.

The defendants are Gulf, Draughn, formerly plaintiff's employee, and Hicks, Martin and Johnston, employees and agents of Gulf.

To avoid repetition, it should be understood that plaintiff alleged repeatedly, in respect of conspiracy and of overt acts, that defendants' alleged wrongful conduct was "wilful," "wicked," "malicious," "fraudulent" and "corrupt."

Prior to 22 March, 1955, so plaintiff alleged, defendants entered into a conspiracy "to destroy the plaintiff's reputation and to interfere with and destroy the plaintiff's business"; and all alleged acts and statements, before and after 22 March, 1955, were pursuant to and in furtherance of said conspiracy.

The overt acts, so plaintiff alleged, included the following: Defendants undertook to persuade plaintiff's dealers to sever and discontinue their contractual relations with plaintiff by false and defamatory statements. These statements, *inter alia,* were (1) that plaintiff was going out of business; (2) that he was voluntarily discontinuing the distribution of Gulf's products in order to handle the products of another oil company; (3) that he was installing the pumps of another oil company in place of Gulf's pumps; (4) that he was in bad health and otherwise unable properly to manage his business; and (5) that plaintiff was stealing certain of Gulf's equipment. Also, the defendants, by special inducements, *e.g.,* increased commissions, and by intimidation, *e.g.,* threatening to remove the underground tanks at their places of business, coerced plaintiff's dealers into signing new contracts with Gulf. Also, the defendants, by special inducements, *e.g.,* increased salaries, endeavored to get plaintiff's employees to quit plaintiff and work for Gulf, and in general harassed, interfered with and demoralized plaintiff's employees and business. Except for two instances, one on 22 March, 1955, involving alleged statements by Johnston to a farm customer of plaintiff, and the other on 21 March, 1955, involving alleged statements by Hicks and Martin to a service station dealer of plaintiff, the said allegations are indefinite as to the time, place and individuals involved. The termination by Gulf of said contract of 1 May, 1947, is alleged as an act done in furtherance of the alleged conspiracy.

Plaintiff alleged that he sustained compensatory damages of $200,000.00 and punitive damages of $50,000.00 on account of loss of time, interference with and demoralization of his employees and customers, and "loss of customers, trade and business."

Plaintiff alleged further that he sustained separate and additional compensatory damages of $300,000.00, and separate and additional punitive damages of $100,000.00, on account of the humiliation, shock, etc., and injury to his "business name, fame, credit and reputation," caused by defendants' alleged slanderous statements.

The three causes of action alleged by Gulf include the allegations set out below.

First cause of action: The contract of 1 May, 1947, and plaintiff's lease of Gulf's bulk plant, were terminated by both plaintiff and Gulf effective at midnight 30 April, 1955. As contemplated by the contract of 1 May, 1947, and with plaintiff's knowledge, Gulf had contracts with operators of service stations and consumers, providing, *inter alia*, "for the purchase by said customers of their requirements of Gulf petroleum products from this defendant, and providing also for the loan and installation by this defendant of Gulf equipment, including pumps, tanks, air compressors, etc., at the places of business or on the premises of said customers, to facilitate their handling, resale and use of Gulf petroleum products." Plaintiff, while Gulf's distributor, and notwithstanding denials of such intention, secretly planned and schemed to discontinue his relationship with Gulf and to enter into an agreement with another oil company for the distribution of its products, and in furtherance of his said plan and scheme, wrongfully induced Gulf's said customers to cancel and fail to perform their said contracts, thus diverting from Gulf to another oil company Gulf's said established business with its said customers. By reason of plaintiff's wrongful interference with the contractual relations between Gulf and its said customers, Gulf was damaged by loss of revenue and of profits to the extent of $75,000.00.

Second cause of action: In March and April, 1955, while Gulf's distributor, plaintiff wrongfully removed equipment owned by Gulf from the premises of Gulf's customers, installing other equipment in its place. After first disclaiming any knowledge thereof, plaintiff delivered to Gulf said equipment, consisting of "gasoline dispensing pumps, electric wiring, meters, neon signs, steel plates, computors, etc." Gulf's said equipment was so removed by plaintiff in a careless and reckless manner whereby Gulf has been damaged to the extent of $3,439.90.

Third cause of action: While plaintiff was Gulf's distributor, Gulf loaned and installed on service station premises for the distribution of its products certain underground storage tanks, lifts, and other property. Notwithstanding the termination of plaintiff's said contract with Gulf, plaintiff "has been and still is, directly or indirectly, wrongfully using, and has converted to his own use, thirteen 1,000-gallon underground storage tanks, fifty-four 500-gallon underground storage tanks, ten 280-gallon underground storage tanks, two lifts, and other miscel-

laneous property," whereby Gulf has been damaged to the extent of $10,290.00.

Gulf's sole assignment of error is to the judgment referred to above.

Pittman & Staton, Lowry M. Betts, Douglass & McMillan, P. H. Wilson, and H. F. Seawell, Jr., for plaintiff, appellee.

Gavin, Jackson & Gavin, Basil M. Watkins, and Smith, Leach, Anderson & Dorsett for defendant Gulf Oil Corporation, appellant.

BOBBITT, J. The record does not disclose the ground on which plaintiff's demurrer *ore tenus* was interposed or sustained. So far as appears, it was directed to Gulf's three causes of action, collectively. The question debated here, and presumably in the court below, is whether Gulf's causes of action are permissible counterclaims under G.S. 1-137. This opinion deals solely with that question.

Under G.S. 1-137, "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," in favor of a defendant and against a plaintiff "between whom a several judgment might be had in the action," is a permissible counterclaim.

In determining whether Gulf's alleged counterclaims are permissible, we must accept as true the facts alleged therein.

Whether Gulf wrongfully terminated the contract of 1 May, 1947, as an overt act in furtherance of the alleged conspiracy, as asserted by plaintiff, or whether plaintiff terminated said contract and also his lease of Gulf's bulk plant in furtherance of a scheme to discontinue his relationship with Gulf and to engage in business as a distributor for another oil company, as asserted by Gulf, this is clear: Determination of the respective rights and obligations of plaintiff and Gulf (1) with reference to the termination of their contract of 1 May, 1947, (2) with reference to their relationships with dealers in and customers for Gulf products, and (3) with reference to installations made to facilitate the handling of Gulf's products, while their contract was in effect and also upon termination thereof, *lies at the center of this controversy.*

While plaintiff's action is in tort, the respective rights and obligations of plaintiff and Gulf arise from and are determined by the contractual relationship subsisting between them. *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893. The defamatory statements and the acts of interference with plaintiff's business, dealers and employees, alleged by plaintiff, and the wrongful acts of plaintiff alleged in Gulf's counterclaims, all must be considered in relation to the respective rights and obligations of the parties under said contract of 1 May, 1947.

As stated by *Stacy, J.* (later *C. J.*), in *Construction Co. v. Ice Co.,* 190 N.C. 580, 130 S.E. 165: "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." *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. The cases cited present factual situations relating to a single contract, each party alleging a breach thereof by the other. Moreover, they relate to pleas in abatement and support the view that if Gulf had not alleged its said counterclaims herein it would be precluded from doing so in an independent action. Here, we are concerned only with whether Gulf's alleged causes of action are *permissible* counterclaims.

If it be conceded that certain of the alleged defamatory statements would constitute a cause of action, apart from the contractual relationship between plaintiff and Gulf, the answer is that in such case plaintiff has compounded in his complaint, although not separately stated, at least two alleged causes of action. *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104. It appears plainly that, independent of alleged defamatory statements, plaintiff has included in his complaint an alleged cause of action for wrongful interference with and damage to his business by defendants' alleged violations of plaintiff's rights under his contract with Gulf. The intermixture of these causes of action makes it somewhat more difficult to deal with the questions presented. But if Gulf's causes of action are permissible counterclaims to *any* cause of action alleged by plaintiff, it makes no difference that plaintiff did not see fit to allege such cause of action separately. G.S. 1-138.

The conclusion reached thus far is that, if plaintiff's action were against Gulf alone for the alleged wrongful conduct of its agents, Gulf's counterclaims are permissible. There remains for consideration the effect, if any, of plaintiff's allegations as to conspiracy and his joinder of the individual defendants.

Whether the allegations of the complaint are sufficient to support a recovery on account of the alleged wrongful acts of Gulf if plaintiff should fail to establish the alleged conspiracy, is a question we need not decide. See *Manley v. News Co.,* 241 N.C. 455, 85 S.E. 2d 672. Whether restricted thereto, plaintiff does allege conspiracy and overt acts in furtherance thereof.

"Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pur-

suance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable." 11 Am. Jur. 577, Conspiracy sec. 45. To create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to the scheme and in furtherance of the objective. 15 C.J.S. 1000, Conspiracy sec. 5. These principles have been recognized and applied by this Court. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783; *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448.

"It would seem that, as to a conspirator who committed no overt act resulting in damage, the basis of his liability for the conduct of his co-conspirators bears close resemblance to the basis of liability of a principal under the doctrine of *respondeat superior* for the torts of his agent." *Reid v. Holden,* 242 N.C. 408, 415, 88 S.E. 2d 125.

Thus, a plaintiff's right to recover must be based on overt acts. Whether such overt acts, if established, were committed in furtherance of an alleged conspiracy entered into between two or more persons determines *from whom* the plaintiff may recover, *i.e.,* the identity of the parties who are legally liable for damages resulting from such overt acts. So considered, the alleged overt acts, rather than the existence or nonexistence of the conspiracy, constitutes the foundation of plaintiff's alleged cause of action.

"All conspirators may be joined as parties defendant in an action for the damages caused by their wrongful act, although it is not necessary that all be joined; an action may be maintained against only one." 11 Am. Jur., Conspiracy sec. 54. The liability of Gulf is to be determined on the same basis as if it were the sole defendant, either originally or by reason of voluntary nonsuit as to the individual defendants.

Moreover, the liability of conspirators is joint and several. *Muse v. Morrison, supra;* 11 Am. Jur., Conspiracy sec. 45; 15 C.J.S., Conspiracy sec. 18. Indeed, plaintiff's prayer is for "judgment against the defendants with joint and several liability" in the amounts set forth above.

This question arises: Where the action is joint in form, is it permissible for one of several defendants to allege a counterclaim solely in its favor? The answer is "Yes," if the liability of such defendant, in respect of plaintiff's claim, is several, or joint and several.

Decisions in other jurisdictions are collected in two annotations: 10 A.L.R. 1252; 81 A.L.R. 781.

In 80 C.J.S., Set-Off and Counterclaim sec. 51f, this statement appears: ". . . as a general rule, where action is brought against two or more defendants on a joint and several demand, or on a several demand, a set-off or counterclaim consisting of a demand in favor of one of them against plaintiff may, if otherwise without objection, be inter-

posed; and it is immaterial in such case that the action is joint in form, . . ."

In 47 Am. Jur., Setoff and Counterclaim sec. 56, this statement appears: "In many jurisdictions, the availability as a setoff or counterclaim of a demand against the plaintiff, in an action at law, in favor of less than the whole number of defendants depends on whether the defendant or defendants having such claim are severally liable to the plaintiff, or are liable jointly with the other defendant or defendants to the suit. If a several judgment may be entered against such defendant or defendants, then, in these jurisdictions, a claim in his or their favor against the plaintiff or plaintiffs is available as a setoff or counterclaim. This rule has been made statutory in a number of states. A common form of statute provides that a counterclaim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment may be had in the action." It is noted that G.S. 1-137 so provides.

If the counterclaim is otherwise permissible, and the liability of the defendant who asserts it is several, or joint and several, the mere form of plaintiff's action should not and does not operate to deprive such defendant of the statutory right to interpose such counterclaim. We approve the rule stated in the foregoing quotations from Corpus Juris Secundum and American Jurisprudence. It appears that this rule was applied in *Shell v. Aiken,* 155 N.C. 212, 71 S.E. 230, where, in plaintiff's action against two defendants, jointly and severally liable on a promissory note, a counterclaim in favor of one of the defendants was upheld.

If Gulf is liable as a conspirator for wrongful acts in furtherance of the alleged conspiracy, its liability is several as well as joint, that is, Gulf is liable *to plaintiff* for the full amount of plaintiff's recovery. If Gulf prevails on all or any of its counterclaims, a several judgment as between plaintiff and Gulf, may be entered, adjudicating their rights and liabilities *inter se.* G.S. 1-222.

For the reasons stated, we conclude that the causes of action alleged by Gulf are permissible counterclaims; and that the judgment from which this appeal was taken must be reversed.

This disposition of the appeal makes unnecessary a consideration of appellant's contentions: (1) that plaintiff, having replied thereto, could not thereafter challenge by demurrer *ore tenus* Gulf's right to allege said causes of action as counterclaims; and (2) that Judge Craven had no jurisdiction, by reason of a prior ruling by Judge Seawell on plaintiff's motion to strike, to pass upon the question presented by plaintiff's demurrer *ore tenus.*

Reversed.

BAXTER HENSLEY, EMPLOYEE, v. FARMERS FEDERATION COOPERATIVE, EMPLOYER; NATION-WIDE INSURANCE COMPANIES, CARRIER.

(Filed 22 May, 1957.)

1. Master and Servant § 55d—

While the findings of fact of the Industrial Commission are conclusive on appeal when supported by any evidence, and claimant is entitled to every reasonable inference which can be drawn from the testimony, when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review.

2. Same—

The evidence tended to show that claimant, in the course of his employment, was required to turn to his left, pick up a loaded tray, bend over and place the tray in a drum of hot water in front of him, and then place the tray on scales to his right. The findings were to the effect that claimant's duties required him to "twist" to his left, return to the "normal" position facing straight ahead, bend over and dip the basket, then straighten up to a "normal" standing position and then "twist" to his right . . . *Held:* The findings are in accord with the testimony when the word "twist" is construed as "turn," and the word "normal" is construed as "usual."

3. Master and Servant § 40g—

In order for a hernia to be compensable under the Compensation Act it is required that there be an injury resulting in hernia or rupture, that it appear suddenly, that it be accompanied by pain, and that it immediately follow an accident.

4. Master and Servant § 40b—

The mere fact that an employee suffers an injury does not establish the fact of accident, and it is required by the Workmen's Compensation Act that an injury, in order to be compensable, result from an accident, which is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.

5. Master and Servant § 40g—

The evidence disclosed that claimant in performing his duties in lifting a loaded basket from his left, bending down and placing it in hot water in front of him and then placing it on scales to his right, suddenly suffered a hernia accompanied by pain. The evidence further tended to show that the hernia occurred while the employee was performing his work in the customary and usual manner, and there was no evidence of any unusual condition or any slipping or falling by the employee. *Held:* There was no evidence to justify a finding that the hernia resulted from an accident, and an award of compensation must be reversed.

6. Constitutional Law § 10c—

It is the duty of the courts to declare the law as written and to give to statutes the same interpretation theretofore given in former decisions, the duty to make the law being the exclusive province of the General Assembly.

APPEAL by defendants from *Sink, E. J.*, September "A" 1956 Civil Term of BUNCOMBE.

Plaintiff claims compensation and surgical expenses for hernia as provided by the Workmen's Compensation Act, G.S. 97-2. At the time of his injury he had been employed by defendant Farmers Federation for a period of two and one-half years to "turn chickens." The Commission, after a hearing, found: "1. . . . his duties required him to work in a standing position; that he turned and twisted to his left and using both hands picked up a wire basket containing six chickens weighing 26½ to 48 pounds from a table approximately three feet high; that after claimant picked up the basket of chickens he would then return to the normal position facing straight ahead, bend over, and dip the basket of chickens in a 30-gallon oil drum containing hot water; that claimant would then straighten up to a normal standing position and would then turn and twist to his right and place the basket of chickens on a scale approximately 3 feet from the ground.

"2. That at 5:00 P.M. on August 26, 1955, while working for defendant employer and while performing the operation above described, claimant turned and twisted to his left and picked up a wire basket containing six chickens weighing 26½ to 48 pounds from the table; that as claimant lifted the chickens, he felt a pain in his left side; that he immediately reported the occurrence to his supervisor, Gordon Barnwell, and told Barnwell that he could not do any more lifting and would have to quit and go home."

Plaintiff was not scheduled to work on Saturday, 27 August, or Sunday, 28 August. He returned to work on Monday morning, 29 August, and worked that day and 30 August. On the morning of 31 August he first noticed that he had a bulge or protrusion on his left side. He reported that morning to his employer and was directed to see a doctor. He continued with his work on 1 and 2 September. On 3 September he saw a surgeon who informed him he was suffering with a hernia. The surgeon, not understanding the nature of plaintiff's work, directed him to continue with his work until 10 September. He did so notwithstanding the pain he suffered. He was hospitalized on 12 September for herniorrhaphy. He returned to work 24 October 1955.

The Commission further found: "4. That as above described, claimant had an injury by accident arising out of and in the course of his employment with defendant employer resulting in a left inguinal hernia.

"5. That the hernia or rupture appeared suddenly, was accompanied by pain, immediately followed an accident, and did not exist prior to August 26, 1955."

Based on its findings of fact, the Commission, citing *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592, concluded as a matter of law that plaintiff had sustained an injury by accident, that the result-

ing hernia met the statutory requirements, and made an award for compensation and surgical expenses.

Defendants excepted to the use of the words "twisted," "normal," and "twist" in the findings; to the finding that plaintiff sustained an injury by accident arising out of and in the course of his employment, and to the finding that the hernia immediately followed an accident. Appropriate exceptions were noted to the conclusions of law; an appeal was taken from the award made by the Commission to the Superior Court. Defendants' exceptions were overruled and judgment was entered affirming the award. Defendants, preserving the exceptions taken, appealed.

Williams & Williams for defendant appellants.
No counsel contra.

RODMAN, J. The crucial question presented by the exceptions is: Does the evidence suffice to show that plaintiff, in the course of his employment, sustained a compensable hernia?

Defendants' exceptions necessitate a review of the evidence. We do so in conformity with the well-settled rule that findings of fact made by the Commission are, when supported by any evidence, conclusive on appeal. Plaintiff is entitled to urge, in support of the findings, every reasonable inference which can be drawn from the testimony; but when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706; *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730.

If the Commission in its findings of fact used the words "twisted," "normal," and "twist" in the sense that there was something abnormal in plaintiff's movement when he felt the pain, the finding is not supported by the evidence. We understand the Commission used the words "twisted" and "twist" as meaning "turned" and "turn" and the word "normal" as the equivalent of "usual." When so understood, they accord with plaintiff's testimony. He did not use any of the quoted words.

He described his work in this manner: "I was dipping chickens in barrels of water, six chickens at a time, pick them up off a table and dipping them in a barrel of water and picking them back up and put them on a scale. I would turn to my left and get the chickens off a table about three feet high. The table was about equal height all the way around. I was standing up, and turned to my left and got six chickens off a table about three feet high. I then turned them around and dipped them and into a barrel of water, to the right. I had to stoop

down to do that. The tub was on the floor. I brought them back out of the barrel and placed them on the scales to get weighed. . . . When I got the chickens out of the barrel of water, I turned around and put them on the scales to my right. . . . I had been doing that kind of work for the Federation for about two and a half years at that time."

With respect to the moment of injury he said: "I was dipping those chickens in that barrel of water when the pain first started. . . . I had come off the table with a basket of chickens to take them and dip them in a barrel of water. I had turned to my left to get the chickens off the table when I first felt it and it was from that on the more I dipped the chickens the worse it got." On cross-examination he said: "I handled every one of them essentially, exactly alike. I picked them up off the table as I have described, to my left, dipped them in a tub of water straight in front of me. Then I put them on the scales to my right. . . . I was doing them the same way on this day that I felt the pain. On the particular one, when I felt the pain, I hadn't handled it any different from any of the others. I didn't slip or fall or turn or anything of that sort."

The normal manner of operation at the moment he felt the pain is emphasized by questions asked later in the testimony. "Q Now, I want to be sure I understand. At the time you first experienced this pain, you hadn't done anything, slipped, twisted, turned or anything, fallen down, or anything different than you had been doing for two years. A No, sir, I hadn't. Q And the weight you were lifting wasn't any heavier than the weight you had been lifting for the last two years? A That's right."

Dr. Chapman, who treated plaintiff, found the hernia when he first examined him on 3 September. He expressed the opinion that work of the kind and done in the manner described by plaintiff could have caused the hernia.

A hernia, to be compensable, must, by the express language of our statute, G.S. 97-2, meet five conditions:

"First. That there was an injury resulting in hernia or rupture."

Injury is defined as "Damage or hurt done to or suffered by a person or thing." Webster's Int. Dic.

The evidence is sufficient to justify a finding that plaintiff had an injury resulting in hernia. The first requirement is met.

"Second. That the hernia or rupture appeared suddenly." For the purpose of this case it may be conceded that the second requirement is established.

"Third. That it was accompanied by pain." Plaintiff so testified. The Commission accepted his testimony. The third requirement is met.

"Fourth. That the hernia or rupture immediately followed an accident."

Where is the evidence to support an affirmative finding to this condition? What is an accident? The mere fact that plaintiff suffered an injury does not establish the fact of accident.

The Workmen's Compensation Act was enacted in 1929. At the Spring Term 1930 the word "accident," as used in the Act, was defined. *Justice Adams* said: "The word 'accident,' as used here, has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Conrad v. Foundry Company,* 198 N.C. 723, 153 S.E. 266.

The distinction between and necessity of both injury and accident was emphasized in *Slade v. Hosiery Mills,* 209 N.C. 823, 184 S.E. 844, decided Spring Term 1936. There an employee, performing his work in the usual and customary manner, got wet and contracted pneumonia. *Stacy, C. J.,* said: "Death from injury by accident implies a result produced by a fortuitous cause. *Scott v. Ins. Co.,* 208 N.C. 160, 179 S.E. 434. A compensable death, then, is one which results to an employee from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute."

The rule enunciated in the Slade case that death or injury sustained as a result of work by the employee in his usual, customary manner and without some fortuitous event is not compensable was reiterated the following year in *Neely v. Statesville,* 212 N.C. 365, 193 S.E. 664. There a fireman died from a heart attack while engaged in fighting a fire. The Court said: "The work in which the deceased was engaged was the usual work incident to his employment. The surrounding conditions might be expected at a fire. The falling in of the roof is a natural result of fire burning there. Heat and smoke are expected. Physical exertion is required in handling hose and fire-fighting equipment. The firemen, of necessity, act hurriedly. We find no evidence of an accident."

Moore v. Sales Co., 214 N.C. 424, 199 S.E. 605, was decided at the Fall Term 1938. Plaintiff claimed compensation for hernia. He was injured while helping in the lifting of heavy pipes. The Commission found the hernia compensable and awarded compensation. The award was affirmed. The defendants there insisted that compensation was forbidden by the decisions in the *Slade* and *Neely cases, supra. Justice Seawell,* responding to this argument, said: "This could be so only to the extent that the cases were on all-fours. Since the *Neely case, supra,* and the *Slade case, supra,* merely applied well-known principles of law to the circumstances peculiar to those cases." He then points to the difference, viz., the injured employee was not accustomed to do that kind and character of heavy work. He said: "In the case at bar, there

is in the foregoing sufficient evidence of the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences, and these were of such a character as to justify the Industrial Commission in finding that plaintiff's injury was the result of an accident."

A similar result was reached in *Gabriel v. Newton,* 227 N.C. 314, 42 S.E. 2d 96, where there was unusual and unexpected exertion and straining in the performance of duties, thus producing the heart attack which resulted in death.

Smith v. Creamery Co., 217 N.C. 468, 8 S.E. 2d 231, was decided in 1940. The Court was again called upon to determine liability in hernia cases. Factually the case came within the rule announced by the Court in *Moore v. Sales Co., supra,* and hence outside of the rule laid down in the *Slade* and *Neely cases, supra.* This was frankly recognized by *Justice Seawell,* who wrote the opinion. Having announced the fact, he uses language which lends support to the argument that the Court intended to adopt a new rule and hold that injury and accident were equivalent, at least in hernia and similar cases involving bodily infirmities. That the Court did not intend to abandon the rule announced in previous decisions that compensation could not be awarded unless the injury was produced by an accident seems apparent. *Buchanan v. Highway Commission,* 217 N.C. 173, 7 S.E. 2d 382, was decided shortly prior to *Smith v. Creamery Co., supra.* There an employee "while lifting the scoop in the usual manner without anything unusual happening turned sick and blind and was unable to work for several days . . ." In sustaining the Commission's finding that there was no injury by accident, *Devin, J.,* said: ". . . we conclude that this was not an injury by accident arising out of and in the course of plaintiff's employment, so as to bring the case within the purview of the Workmen's Compensation Act." He cites as authority *Neely v. Statesville, supra,* and *Slade v. Hosiery Mills, supra.*

The Court was next called upon to consider this question in the case of *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592. There the Commission found that the injury was produced by the twisted and unusual position of the body when claimant had to handle the weight. The receiving of the weight in this abnormal position was the fortuitous event or accident which sufficed to meet the terms of the statute. That the Court so understood and that *Justice Seawell,* who wrote the opinion in the case of *Smith v. Creamery Co.,* so understood, is emphasized by his separate opinion concurring in the result but vigorously dissenting from the reasoning of the Court. In the course of his opinion, he says: "I do not question the right of the Court to overrule or disregard *Smith v. Creamery Co., supra,* without assigning any reason for it. It cannot be distinguished." He overlooks the fact he had, in the *Smith case,*

pointed out the very facts which justified the affirmance of the award made by the Commission.

The necessity of establishing both accident and injury has been recognized by the Commission; and its awards denying compensation have been affirmed because the evidence demonstrated the death or injury occurred when the work was performed in the customary and usual manner. *West v. Dept. of Conservation,* 229 N.C. 232, 49 S.E. 2d 398; *Johnson v. Cotton Mills,* 232 N.C. 321, 59 S.E. 2d 828.

Procedural defects prevented the correction of another award where the work was done in the usual and customary manner. *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113.

We are aware that the interpretation given to our statute does not harmonize with the interpretation given by a majority of the courts to the compensation statutes of their States. Differing results are in some cases due to varying provisions of the different statutes. *Williams v. National Cash Register Co.,* 262 N.W. 306 (Mich.); *Travelers Ins. Co. v. Shepard,* 20 So. 2d 903 (Fla.); *Beadle v. Bethlehem Steel Co.,* 193 A. 240 (Md.); *Kendrick v. Sheffield Steel Corporation,* 166 S.W. 2d 590 (Mo.); *Screeton v. F. W. Woolworth Co.,* 166 S.W. 2d 589 (Mo.), and *Higbee v. Fire Brick Co.,* 191 S.W. 2d 257 (Mo.), are illustrative of cases from other jurisdictions in accord with the conclusions we have reached.

Layton v. Hammond-Brown-Jennings Co., 3 S.E. 2d 492 (S.C.); *Maryland Casualty Co. v. Robinson,* 141 S.E. 225 (Va.); *Hardware Mut. Casualty Co. v. Sprayberry,* 25 S.E. 2d 74 (Ga.); *St. John v. U. Piccolo & Co.,* 25 A. 2d 54 (Conn.) illustrate the opposite view. The difference in viewpoints is noted in the opinion of *Justice Parker* in *Lewter v. Enterprises, Inc.,* 240 N.C. 399, 82 S.E. 2d 410. The question of what is compensable hernia is considered in the annotations to 98 A.L.R. 205; 58 Am. Jur. 756; Larson Workmen's Comp., V. 1, sec. 39.70 *et seq.*

If the question was now presented for the first time, we would feel at liberty to give more consideration to the reasoning of the cases which reach conclusions differing from our own, but we are not dealing with a new question. Twenty years and more ago the Court placed its interpretation on the Act. Except for the *dicta* to be found in the opinion by *Justice Seawell* in the case of *Smith v. Creamery Co.,* the language used as well as the conclusions reached have supported the interpretation that injury and accident are separate and that there must be an accident which produces the injury before the employee can be awarded compensation.

The legislative history strengthens the view here expressed as to the meaning of the word "accident" as used in the original Act. In 1935, when the Act was amended to provide compensation for occupational diseases, no change was made in the provisions relating to hernia. But

it was expressly provided: "The word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer . . ." G.S. 97-52.

The interpretation so consistently given to the statute is as much a part of the statute as if expressly written in it. We have no right to change or ignore it. If it is to be changed, it must be done by the Legislature, the law-making power. If, in its wisdom, a change is desirable, it can readily do so.

There was evidence to justify the finding that plaintiff had not suffered from hernia prior to 26 August 1955. The fifth requirement is met.

Since there is no evidence to support the finding that plaintiff's hernia or rupture immediately followed an accident, the award lacks the requisite fourth pillar for its support.

The judgment is

Reversed.

ACCOUNTS SUPERVISION COMPANY, TRADING AS TIME FINANCE COMPANY, v. WILLIAM M. THOMAS, JR., AND L. GILMER LANIER, DOING BUSINESS AS LANIER MOTORS; WILLIAM WILSON.

(Filed 22 May, 1957.)

1. Chattel Mortgages and Conditional Sales § 10b—

Where the holder of a chattel mortgage introduces in evidence the registered mortgage, a defendant asserting that he had purchased the chattel from the mortgagor prior to the registration of the instrument, has the burden of proving such affirmative defense, and where the evidence is sufficient to support a finding to the effect that his purchase was made subsequent to the registration of the chattel mortgage, nonsuit in claim and delivery for the chattel is erroneously entered.

2. Actions § 5—

Where plaintiff's cause of action is based on facts occurring prior to an illegal agreement, exists independent of such agreement, and the maintenance of the action does not involve an affirmance of an illegal act, such illegal agreement does not impair plaintiff's right to maintain the action.

APPEAL by plaintiff from *Phillips, J.*, at 19 March, 1956 Term of FORSYTH, as Number 387 at Fall Term 1956, carried over to Spring Term 1957.

Civil action to recover on contract for money borrowed, and in claim and delivery of Oldsmobile automobile security therefor, resulting in

judgment as of nonsuit as to defendant Lanier on issue arising on claim and delivery at close of all the evidence.

Plaintiff, a corporation created and existing under the laws of the State of Delaware, engaged in business of lending money on automobiles in Forsyth County, North Carolina, instituted this action on 7 May, 1955, against defendants William M. Thomas, Jr., hereinafter referred to as Thomas, and L. Gilmer Lanier, doing business under the name of Lanier Motors, hereinafter referred to as Lanier, all residents of said county, and to which action William Wilson was made party defendant and later by stipulation removed as a party.

In complaint filed plaintiff alleges substantially the following:

(1) That on or about 4 January, 1955, defendant Thomas became indebted to Time Finance Company in the amount of $2,011.00 for money borrowed, evidenced by written obligation, and secured by his chattel mortgage of even date on a 1954 Oldsmobile Super 88, four-door sedan, Motor No. V-1299, duly recorded on 6 January, 1955, in chattel mortgage Book 529 at page 176, in Forsyth County, the then residence of Thomas, and location of the car at the time of registration.

(2) That there remains an unpaid balance on said indebtedness of $1,811.00 with accrued interest, which Thomas has failed and refused to pay and which is due and owing to plaintiff.

(3) That, as plaintiff is informed and believes and alleges, sometime on or about 6 May, 1955, Lanier disposed of said above described Oldsmobile by delivering possession thereof to William Wilson; that at the time of such change of possession Lanier knew, or should have known of the chattel mortgage above described, and that plaintiff had already, or was about to take steps to recover the car; and that Lanier surrendered possession, or otherwise disposed of physical possession of said car with intention of hampering or otherwise interfering with plaintiff's rights in and to same, and has thereby placed plaintiff in jeopardy of losing its lien, or being unable to effectively enforce same, all to plaintiff's loss.

(4) That the above described car is presently in possession of William Wilson, who obtained same from Lanier, and who has no right, title or interest in or to same superior to the rights of plaintiff herein; and that Wilson knew, or should have known of the existence of said chattel mortgage in favor of plaintiff at time he took possession of said car, and has failed and refused to deliver and surrender possession thereof to plaintiff.

Wherefore, plaintiff prays that it recover of Thomas the sum of $1,811.00, together with interest; that, alternately, it recover of Lanier the sum of $1,811.00, together with interest; that it have the ancillary process of claim and delivery with respect to Wilson; and that the automobile described in the complaint be taken by Sheriff of Forsyth

County and delivered to plaintiff in order that it may be sold for the purpose of foreclosing the chattel mortgage above described, etc.

Defendants Lanier and Wilson, answering, deny in material part all of the allegations of complaint, as set forth above, except they admit that the car is presently in the possession of Wilson, "who purchased it from the defendant Lanier."

And for a further answer for the defense, these answering defendants say:

"1. That on December 30, 1954, . . . Thomas did bargain, sell and convey the 1954 Oldsmobile . . . described in the complaint to . . . Lanier . . . That a bill of sale for said automobile was executed on the 30th day of December, 1954. That at the time the automobile was conveyed to . . . Lanier, no lien or other encumbrance was against said automobile, and . . . Lanier obtained a good and sufficient title to the said automobile. That the defendant did sell and convey the said automobile to the defendant Wilson on or about the 5th day of May, 1955, and did give a good and sufficient title to said car." Wherefore the answering defendants pray that plaintiff recover nothing of them, and that the action be dismissed, etc.

Plaintiff, replying to new matter set forth in defendant's further answer, denies same. And by way of further reply, plaintiff alleges:

I. That defendant Lanier sold the automobile here involved to Thomas on or about 17 November, 1954, and cooperated with the said Thomas in obtaining a North Carolina Certificate of Title No. 3528851A dated 19 November, 1954. At the time Lanier knew that no previous North Carolina title had been obtained for the Oldsmobile. On or about 9 December, 1954, Thomas applied for a new North Carolina Title Certificate, swearing that the "A" title certificate was lost, and at the same time assigned his interest in the Oldsmobile to his wife, Alice Royals Thomas. On 10 December, 1954, North Carolina title 3528851B on the Oldsmobile was issued to Alice Royals Thomas. On or about 4 January, 1955, Thomas after receiving title and possession of the Oldsmobile from his wife, applied for and obtained a loan from plaintiff in the amount of $2,011.00 and duly executed a chattel mortgage as more fully described in the complaint. On the same date Thomas applied for a new certificate of title by sworn application showing a lien in favor of plaintiff in the amount of $2,011.00.

II. That, as plaintiff is informed and believes, and therefore alleges, Lanier dealt with Thomas with respect to said Oldsmobile on the strength of a certain North Carolina Certificate of Title No. 3528851C, dated 29 December, 1954.

III. That plaintiff is informed and believes and, therefore, alleges that on or about 15 January, 1955, Lanier sold Thomas a 1954 Cadillac, the purchase of which was financed through State Finance Company,—

a loan of $3,000.00 to Thomas on said Cadillac, and that the sale of the Oldsmobile, if any, by Thomas to Lanier was made a part of the trade for said Cadillac on or about 15 January, 1955.

IV. That Thomas had possession of said Oldsmobile on 4 January, 1955, at the time he borrowed money from plaintiff, and if he had previously sold said Oldsmobile to Lanier, all of which is denied, the said Lanier is estopped by his conduct in trading with Thomas, and in surrendering possession of said Oldsmobile to Thomas from asserting title therein as against plaintiff, and said estoppel is specifically pleaded as against Lanier and Wilson.

The case on appeal shows that default judgment final was entered against Thomas.

And upon trial in Superior Court the following stipulations were read into the record:

"It is stipulated and agreed between counsel for plaintiff and counsel for defendant Lanier that defendant Thomas borrowed the sum of $2,011.00 on or about the 4th day of January, 1955, from plaintiff; that the sum of $220.00 has been paid on said debt leaving a balance of $1,791.00 presently due and owing; that on or about January 4, 1955, Thomas executed and delivered to plaintiff a chattel mortgage on the Oldsmobile here involved to secure the said loan; that on or about January 6, 1955, the said chattel mortgage was duly probated and recorded in the office of the Register of Deeds of Forsyth County, North Carolina, in Chattel Mortgage Book 529, at page 176," and

"It is hereby agreed and stipulated between the plaintiff and . . . Lanier, and . . . Wilson,

"That whereas . . . Wilson has given possession of the 1954 Oldsmobile automobile, set out in the plaintiff's complaint, back to . . . Lanier, and the said . . . Lanier now having possession of the said automobile, and

"That whereas . . . Lanier agrees to execute a replevin bond in the sum of $4,000.00, payable to the plaintiff, in lieu of the replevin bond heretofore executed by the defendant Wilson

"Now, therefore, it is hereby agreed and stipulated between the plaintiff and the defendants, Lanier and Wilson, that the defendant Wilson be removed from the above entitled action as a party defendant, subject to the approval of the court." The court approved.

The plaintiff introduced in evidence, by consent of both parties, the chattel mortgage from William M. Thomas, Jr., to Time Finance Company of Forsyth County, dated 4 January, 1955, showing date of recordation to be 6 January, 1955. Plaintiff's Exhibit 1.

The plaintiff offered, for identification only, the certification of the N. C. Department of Motor Vehicles to a 17-page record of title in this

affair, it being stipulated by counsel and introduced as separate portions by either counsel at the time. Plaintiff rested.

Thereupon Lanier offered evidence, and plaintiff offered evidence in rebuttal.

Defendant Lanier offered evidence centering around his contention that on 30 December, 1954, he purchased from Thomas the Oldsmobile in question, prior to the date, 4 January, 1955, Thomas executed the chattel mortgage above described and before its registration 6 January, 1955.

In this connection, without narrating in detail the evidence so offered by Lanier, plaintiff, in brief filed here, points to the following portions thereof it contends tend to show that the sale was not completed on 30 December, 1954.

"1. On December 30, 1954, there was an unpaid conditional sales contract on the Oldsmobile owned by State Finance Company and of which defendant had full knowledge (R. pp. 10 and 11).

"2. On December 31, 1954, Lanier called State Finance '. . . because Mr. Thomas owed on the Olds . . .' (R. p. 11)

"3. 'The reason the deal wasn't completed on that date . . .' (R. p. 12).

"4. Lanier didn't get the certificate of title from State Finance until December 31, 1954, and told them '. . . I would settle up with him . . .' (R. p. 12)

"5. Thomas did not have the certificate of title '. . . with him at the time I dealt with him with respect to making a trade for the Cadillac.' (R. p. 15)

"6. Jones, manager of State Finance, in speaking of the telephone call which Lanier placed on December 31, 1954 (R. p. 12) stated: 'Mr. Lanier said at that time that he was trying to trade automobiles with Thomas; he had not traded at that time.' (R. pp. 19, 20)

"7. The conditional sales contract owned by State Finance was not paid off until January 15, 1955. (R. pp. 21, 22)

"8. The assignment of title was not made until January 15, 1955. (Defendant's Ex. 2. Reverse Block A).

"9. Defendant's wife, acting as his employee and as notary public, took an assignment of title and bill of sale on January 15, 1955, from Thomas in these words '. . . the undersigned hereby sells, assigns or transfers the vehicle . . .' to Lanier. (Defendant's Ex. 2).

"10. Thereafter, Lanier relied upon the January 15, 1955, assignment: 'In dealing with this car in the future, after I had obtained it from Mr. Thomas, I dealt upon the strength of this title.' (R. p. 17)."

Other evidence offered by Lanier pertinent to questions of law presented will be set forth in course of the opinion.

At the close of all the evidence the plaintiff renewed its motion for judgment on the evidence. Denied—plaintiff excepted.

At the close of all the evidence Lanier demurred to the evidence and moved for dismissal as to him. Motion allowed. Plaintiff excepted.

Thereupon the court entered judgment on 20 March, 1956, in which after reciting among other things that the parties "by stipulation, agreed that the defendant Wilson no longer had possession of the vehicle involved, but had delivered the same into the possession of defendant Lanier, who in turn agreed to file a substitute bond in replevy . . . and . . . further agreed that the defendant Wilson be removed as a party defendant, and . . . agreed in open court that the sole remaining issues involved concerned the right of possession of said vehicle, estoppel, and what amount of damages, if any, were due for detention and deterioration" . . . "ordered, adjudged and decreed that: 1. The defendant Wilson be and he is hereby removed as party defendant. 2. That the demurrer to the evidence by defendant Lanier be and it is hereby sustained, and that the defendant Lanier recover of the plaintiff the costs to be taxed by the clerk."

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

Deal, Hutchins & Minor for Plaintiff Appellant.

Robert M. Bryant for Defendant Appellee.

WINBORNE, C. J. In the light of the stipulation of the parties as to issues involved in this case, this is the pivotal question on this appeal: Plaintiff, having offered in evidence the recorded chattel mortgage on the automobile in question, and defendant Lanier having set up affirmative defense of a sale of the automobile to him prior to registration of the chattel mortgage, is the evidence offered upon the trial in Superior Court, taken in the light most favorable to plaintiff, of sufficient probative force to take the case to the jury on the issue as to right of possession of the automobile?

Under such circumstances, defendant Lanier had the burden of going forward with the evidence and of proving the affirmative defense set up by him. And the evidence offered, as pointed out in brief of plaintiff appellant as hereinabove recited, is sufficient to support a negative finding by the jury as to such affirmative defense. Hence in granting nonsuit there is error.

So holding, further discussion now of the evidence and the law arising thereon, in this respect, seems unnecessary.

Moreover, if the jury should find from the evidence, and by its greater weight, that defendant Lanier had not purchased the automobile in

question from Thomas, as he alleges, the issue of estoppel by conduct would not arise.

Hence elaboration on the law relating to subject of estoppel *in pais* is not now deemed to be expedient. For statement of principle see *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669, and cases cited.

Lastly, the case on appeal reveals an alleged illegal agreement, which is not the basis of the present action. This action was instituted 7 May, 1955, and the agreement bears date 30 January, 1956. Thus it is patent that plaintiff is not here seeking to enforce it. Plaintiff is doing nothing which must be regarded as a necessary affirmance of an illegal act. See *Herring v. Lumber Co.*, 159 N.C. 382, 74 S.E. 1011.

Indeed, in 12 Am. Jur. 719, Contracts 211, the author declares that "An illegal agreement made by a plaintiff will not defeat him unless his cause of action is founded upon, or arises out of, such agreement. His right to recover upon a ground of action that exists independently of the agreement is not affected thereby." Such is the case in hand. Therefore this Court holds that the agreement does not impair plaintiff's right to maintain this action.

For error in granting nonsuit, the judgment pursuant thereto is

Reversed.

ANNIE LEA v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 22 May, 1957.)

1. Negligence § 3½—

Where injury results from a thing under the exclusive management and control of defendant and the accident is one which does not happen in the ordinary course of things if those in control use proper care, the circumstance of injury affords some evidence of negligence and is a sufficient mode of proof, in the absence of explanation by defendant, to carry the case to the jury on the issue of negligence under the doctrine of *res ipsa loquitur*, without affecting the burden of proof upon the issue.

2. Same—

The doctrine of *res ipsa loquitur* does not apply when the facts causing the accident are known and testified to, where more than one inference may be drawn from the evidence as to the cause of injury, where the existence of negligent default is not the more reasonable probability, where it appears that the accident was due to a cause beyond the control of defendant, where the instrumentality causing the injury is not under the exclusive control of defendant, or where the injury results from an accident as defined by law.

3. Same: Electricity § 7—

Where the evidence discloses that the electrifying of a water pipe causing injury to plaintiff was due to the fact that a third person felled a tree, which struck and broke a power line, the doctrine of *res ipsa loquitur* does not apply in an action against the power company.

4. Electricity § 7—

The law imposes the duty upon a power company to exercise the utmost care and prudence consistent with the practical operation of its business to avoid injury from its high tension lines.

5. Same—

A right of way agreement empowering a utility to cut away all trees and obstructions that might in any way endanger the proper maintenance and operation of its power line does not impose the duty upon the power company to cut down a sound tree on or near its line which in no way interferes with its operation and maintenance thereof, solely because the tree is of sufficient height to strike the power line if cut down and felled in that direction, and the power company may not be held liable for injuries resulting from such action by a stranger, since it is not required to anticipate negligence on the part of others.

APPEAL by plaintiff from *Sink, E. J.*, November Term 1956 of CASWELL.

This is a civil action instituted by the plaintiff to recover for injuries allegedly sustained as a result of the defendant's negligence.

The plaintiff, Annie Lea, with her husband and family, on 13 December 1955, and for two years prior thereto, lived in a tenant house on the farm of C. V. McKinney as agricultural tenants. The first story of the house, designated as the basement, was constructed of cinder blocks and the floor was of concrete, laid directly on the ground. The plaintiff did her cooking in the basement and the family also used it for a dining room. Water was piped into the basement by an electric pump from a well about 40 feet deep, located approximately 40 yards from the house. The pipe ran underground from the well until it reached the basement, it then ran around the top of the basement on one side and around one end about half way, then directly down the wall to where a spigot was attached from which the plaintiff and the family obtained water. There was no sink or lavatory under the spigot. The living room and sleeping quarters were upstairs in the second story frame structure of the house.

The plaintiff, her husband and family, had lived in the house about two years in the same condition as to the water pipes and the electric wiring as existed on 13 December 1955, the date of plaintiff's injury. On that date, about 12:30 p.m., the plaintiff, who was alone in the house, had a pail in one hand and placed her other hand on the spigot for the purpose of running water into the pail—she was standing on the

concrete floor—and upon touching the spigot she was hurled to the floor in an unconscious condition where she remained in such condition for about two hours.

On the same day and about the same time plaintiff sustained her injury, Jesse Moorefield, son of Arthur W. Moorefield, Sr., cut down a tall poplar tree, about 75 feet in height and about 22 inches in diameter at the stump, which fell across the power line and broke or otherwise damaged the wires leading through the Moorefield farm to the McKinney house and farm.

Plaintiff's evidence tends to show that shortly after her injury it was observed that the transformer on the pole located about 150 feet from plaintiff's house was upside down; the wires were down, either laying on or near the ground. The house was wired in 1949 by a licensed electrician employed by the owner of the house. The defendant's connection was made on the outside of the house near the gable on the west end of the residence. No member of plaintiff's family had been shocked by any electric current in the use of the lights or fixtures in the house prior to the time of plaintiff's injury. The water was not piped into the house until a year or two after the house was built and wired for electricity. The electrician who wired the house testified "If the water pipe had been there, I would have grounded for that, every time; it is the better practice."

Allen Smith testified that between 12:00 and 12:30 p.m. on 13 December 1955 he was traveling on the Bigelow Road, proceeding toward Yanceyville from the direction of the residence of A. W. Moorefield, Sr. ". . . I was driving about 35 or 40, maybe 45, and all at once a wire popped in my face; just before I hit the wire I laid over in the seat and the wire stopped me . . . the wire hooked under the two headlights and broke those and the windshield and the Chevrolet designs on the front and bent the hood of the car and scratched it all the way back." This was the line that led from the defendant's main line across the Moorefield property to the house where the plaintiff lived.

The defendant had a right of way across the Moorefield land which, among other things, gives it the right "at all times to cut away and keep clear of said line all trees and other obstructions that may in any way endanger the proper maintenance and operation of the same."

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

D. Emerson Scarborough for plaintiff appellant.

Upchurch, Gwyn & Gwyn and A. Y. Arledge for defendant appellee.

DENNY, J. The appellant assigns as error the ruling of the court below in sustaining the defendant's motion for judgment as of nonsuit. She insists (1) that the case should have been submitted to the jury under the doctrine of *res ipsa loquitur*, and (2) if the doctrine of *res ipsa loquitur* does not apply, then the case should have been submitted to the jury on the ground that defendant was negligent in permitting the poplar tree to exist within the reach of its wires.

The rule with respect to the doctrine of *res ipsa loquitur*, as laid down in *Scott v. The London Docks Co.*, 159 Eng. Rep. 665, has been quoted with approval by this Court in many of our decisions as follows: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Saunders v. R. R.*, 185 N.C. 289, 117 S.E. 4, 29 A.L.R. 1258; *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477; *Boone v. Matheny*, 224 N.C. 250, 29 S.E. 2d 687; *Wyrick v. Ballard*, 224 N.C. 301, 29 S.E. 2d 900; *Edwards v. Cross*, 233 N.C. 354, 64 S.E. 2d 6; *Nance v. Hitch*, 238 N.C. 1, 76 S.E. 2d 461, 41 A.L.R. 2d 318; 38 Am. Jur., Negligence, section 295, page 989, *et seq.*

The doctrine of *res ipsa loquitur* is merely a mode of proof and when applicable it is sufficient to carry the case to the jury on the issue of negligence. However, the burden of proof on such issue remains upon the plaintiff. *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285; *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785.

This Court, in discussing the doctrine of *res ipsa loquitur* in the case of *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251, pointed out that "The principle does not apply: (1) when all the facts causing the accident are known and testified to by the witnesses at the trial, *Baldwin v. Smitherman*, 171 N.C. 772, 88 S.E. 854; *Orr v. Rumbough*, 172 N.C. 754, 90 S.E. 911; *Enloe v. R. R.*, 179 N.C. 83, 101 S.E. 556; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, *Lamb v. Boyles*, 192 N.C. 542, 135 S.E. 464; (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence without more, leaves the matter resting only in conjecture, *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger, *Heffter v. Northern States Power Co.*, 217 N.W. 102 . . .; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Saunders v. R. R.*, 185 N.C. 289, 117 S.E. 4; (6) where the injury results from accident as defined and contemplated by law." *Smith v. McClung*,

201 N.C. 648, 161 S.E. 91; *Taylor v. Bd. of Education,* 206 N.C. 263, 173 S.E. 608; *Etheridge v. Etheridge, supra.*

In the last cited case it is said the doctrine of *res ipsa loquitur* "does not apply where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons, or that the accident might have happened as a result of one or more causes, or where the facts will permit an inference that it was due to a cause other than defendant's negligence as reasonably as that it was due to the negligence of the defendant, or where the supervening cause is disclosed as a positive fact—and skidding, *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251, Anno. 64 A.L.R. 261, or a puncture or blowout, *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11; *Giddings v. Honan,* 79 A.L.R. 1215; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562, is such fact. Blashfield, *supra* (9, part 2), sec. 6046. When the supervening cause appears as an affirmative fact it never applies. No inference of negligence then arises from the fact of accident or injury." *Edwards v. Cross, supra; Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Austin v. R. R.,* 197 N.C. 319, 148 S.E. 446.

In the trial below the evidence offered in behalf of the plaintiff was to the effect that her injury was caused by the action of Jesse Moorefield in cutting down a tall poplar tree about 75 feet in height and 22 inches in diameter at the stump, which fell across the defendant's power line and broke or otherwise damaged the wires leading through the Moorefield farm to the McKinney house where the plaintiff lived. This evidence makes the doctrine of *res ipsa loquitur* inapplicable. *Springs v. Doll, supra.*

The cases of *Turner v. Power Co.,* 154 N.C. 131, 69 S.E. 767, 32 L.R.A. (N.S.) 848, and *McAllister v. Pryor,* 187 N.C. 832, 123 S.E. 92, 34 A.L.R. 25, and similar cases cited and relied upon by the appellant, are not controlling on the facts revealed by this record.

On the plaintiff's second contention, she insists that the defendant could have foreseen that a tree 22 inches in diameter and 75 feet high, near its power line, would some day fall, either from the woodsman's axe or from natural causes and that it would fall on its power line and likely cause damage to some person.

This Court declared in *Helms v. Power Co.,* 192 N.C. 784, 136 S.E. 9, that: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury

to those likely to come in contact with the wires." *Ellis v. Power Co.*, 193 N.C. 357, 137 S.E. 163; *Small v. Utilities Co.*, 200 N.C. 719, 158 S.E. 385; *Alford v. Washington*, 238 N.C. 694, 78 S.E. 2d 915.

We know of no law or decision, however, in this jurisdiction that requires a power company to cut down and remove every tree on or near its right of way, regardless of whether such tree is sound or decayed, which if cut down might possibly fall across its line. On the contrary, the right of way agreement which the plaintiff contends is applicable to the line under consideration only provides for the power company "to cut away all trees and other obstructions that might in any way endanger the proper maintenance and operation of same."

Certainly this agreement does not impose upon the power company the duty to cut down a sound tree near its line, which in no way interferes with the operation or maintenance thereof, simply because it is possible that at some future time the owner of the land, or his agent or a stranger, might cut down such tree and cause it to fall across its line. This is purely speculative.

In the case of *Deese v. Light Co.*, 234 N.C. 558, 67 S.E. 2d 751, the plaintiff's intestate, a staff sergeant in the United States Army, was home on furlough visiting his father. The defendant light company, by authority of a written easement, maintained across plaintiff's land an uninsulated tap line 18 feet or more above the ground, which line was energized with approximately 2300 volts of electric current. Plaintiff's intestate felled a tree across defendant's line and while attempting to disengage the tree from the line, he came in contact, directly or indirectly, with the line and was electrocuted. This Court sustained a judgment as of nonsuit on the ground that the action of plaintiff's intestate in cutting down a tree across the defendant's line did not constitute actionable negligence on the part of the defendant.

A power company is not required to anticipate negligence on the part of others. *Alford v. Washington, supra; Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717; *Montgomery v. Blades*, 222 N.C. 463, 23 S.E. 2d 844.

In our opinion the plaintiff has failed to establish actionable negligence on the part of defendant, and we so hold. The judgment as of nonsuit is

Affirmed.

STATE v. MARY REDFERN AND JOHN HENRY REDFERN.

(Filed 22 May, 1957.)

1. **Homicide § 25—**

Testimony of a confession by defendant that he shot the deceased, together with testimony that deceased died as a result of the bullet wound thus inflicted, raises the presumption of an unlawful killing with malice, placing the burden upon defendant to satisfy the jury of facts mitigating the homicide to manslaughter, or justifying it on the ground of self-defense, and is sufficient to take the case to the jury on a charge of second degree murder and support a verdict of guilty of manslaughter upon defendant's evidence in mitigation.

2. **Criminal Law § 8b—**

While mere presence alone at the time of the commission of a crime is insufficient to constitute a person an aider or abettor, a person who is present, either actually or constructively, and who shares the criminal intent of the actual perpetrator and renders assistance or encouragement to him in the perpetration of the crime, is an aider or abettor, and is equally guilty with the actual perpetrator.

3. **Same—**

The guilt of an accused as an aider or abettor may be established by circumstantial evidence.

4. **Criminal Law § 32a—**

Conflicting statements voluntarily made by the accused at the scene of the homicide as to the manner in which the fatal injury was inflicted, is substantive evidence of guilt as tending to show the mental processes of accused in seeking to divert suspicion and to exculpate himself.

5. **Homicide § 25—Evidence held sufficient to be submitted to the jury on the question of femme defendant's guilt of murder in second degree.**

Testimony tending to show that husband and wife had been fighting for some hour and a half, with numerous blows struck on both sides, that the wife then called her son and told him "to get the rifle," and that he picked up the rifle and fired the shot resulting in the husband's death, together with voluntary conflicting statements made by the wife at the scene of the crime tending to show consciousness of guilt by attempting to divert suspicion and to exculpate herself, *is held* sufficient to be submitted to the jury as to her guilt of murder in the second degree as an aider and abettor, notwithstanding her testimony at the trial, at variance with the extrajudicial confessions made at the scene, that she told her son to get the rifle only for the purpose of returning it to their landlord.

APPEAL by defendants from *Crissman, J.*, and a jury, August Term, 1956, of UNION.

Criminal prosecution on indictment charging the defendants with the murder of A. J. Redfern.

When the case was called for trial, the solicitor announced he would not prosecute the defendants for first degree murder, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose.

The evidence on which the State relies may be summarized as follows: The deceased A. J. Redfern was the husband of the defendant Mary Redfern. The defendant John Henry Redfern is their 17-year-old son. All three lived together just outside the corporate limits of Marshville on a place belonging to Pless Hargett. The house sits back from the road in a field. On the night of 29 July, 1956, Dr. J. P. U. McLeod, coroner of Union County, was called to the Redfern home and arrived about midnight. Both defendants were at the house when he arrived. He saw A. J. Redfern lying on the ground about 17 yards from the steps of the house. He was lying face down and was dead. The part of his body next to the ground was still warm. He had a bullet hole in the center of his chest at the level of the nipples. There was a ragged hole in his left wrist about an inch in diameter. He had a strong odor of alcohol on him. The only clothes he had on was a pair of pants and a piece of undershirt wrapped around his right arm. The rest of the undershirt was lying on the front porch. The undershirt was bloody in front. The bullet hole was in the piece that was wrapped around his arm. There was a slight powder burn on the undershirt, but none on the skin. Dr. McLeod testified that in his opinion death was caused by the bullet wound in the chest—made by a .22 caliber bullet; that there was no blood on the pants or feet of the deceased, but when he examined inside the house, "there was blood all over the house. . . . Most of the blood was in the bedroom, the living room, and the door between them." Blood was scattered all over the floor of the front bedroom, mostly on the floor and on objects that were lying on the floor. In the adjoining living room there was blood on the floor, on the sofa and on the chair. There was a pair of shoes that belonged to the deceased. They were bloody, both inside and out. The blood was coagulated but not dry. Dr. McLeod further testified: "Mary Redfern . . . had a cut on one finger . . . there was some blood on her clothing but not much. She told me the place on Coot's (deceased's) wrist she gouged with the scissors . . . but that . . . all the blood came from her finger. . . . She told me she made the place on the left wrist when they were fighting, . . . that night. She said that they had one fight right after another, there was no let-up between them; . . . She told three or four different tales; she first said she was fighting with Coot and that they were struggling for the gun, the gun went off and she thought it went into the ceiling, but it must have went out the door and he walked out, she hadn't seen him since; she stated . . . that if he was shot he shot himself; she said the rifle was fired

only one time. Her second statement was that she was struggling with him and that he had hold of the gun and shot the gun and the bullet went out the front door. . . . The third statement was that he hit her and knocked her out; she was lying on the sofa and didn't know anything more about it until she heard the gun fire; . . . she said he hit her and she was lying on the sofa unconscious; . . . She said she did not touch the gun. Her fourth statement was practically the same as the third. . . . She was pretty high. . . . She . . . had on regular clothes . . . one piece of cloth . . . was torn off . . . the front of her dress. . . . She complained about her finger hurting. . . . John Henry Redfern . . . told me that he was asleep and didn't know anything about it; he was in another room on the bed asleep, and when he heard the gun go off he came out into the room; . . ." Later, he admitted to Coroner McLeod that "he was not in bed when the shot went off."

Chief of Police W. E. Ashcraft testified that he went to the Redfern house about 1:30 o'clock; that John Henry and Mary were sitting on the front porch; that Mary had a strong odor of some intoxicant on her breath; that he detected no such odor on John Henry and he appeared to be sober. "John Henry said that if his father was shot, he accidentally shot himself. Mary Redfern said that she did not have hold of the gun; she heard it fired and thought the bullet went out the front door. . . . She said that A. J. (deceased) was in the living room when the gun fired . . . if he was shot he accidentally shot himself. . . . When we got to the jail John Henry said 'Well, I was the one that shot him.' Mary was present. That was about 30 minutes after he made the other statement. . . . I saw a .22 rifle there that night; it was unloaded: . . . it is the rifle that John Henry said he shot his father with."

Deputy Sheriff H. C. Dutton testified he had a conversation with John Henry the day following the shooting in which he said "He shot his father with a .22 rifle standing in the front door of the house and that his father was standing just inside of the door leading into the kitchen. . . . He was standing just outside of the front door and had the screen pushed partially open, and pointed the rifle in the direction of the kitchen which (where) he stated that his father and mother were standing just inside of the kitchen door. He said he was just far enough on the porch (so) he could stand on the porch and push the screen door open and point the rifle back. He said he fired once, and he said that he ran up to Mrs. Pless Hargett's, white neighbors of theirs, . . . and left the rifle at Mr. Hargett's home, about 300 yards away." Officer Dutton also testified that he had a conversation with Mary Redfern the same morning; that she said "she had come from up in New Town (a colored residential section of Marshville) at about 9:30 and that

her husband was drinking, and they got into an argument because her husband accused her of being with the wrong company that night; . . . that after the argument started A. J. got the rifle and she ordered him to lay the rifle down, which he did immediately . . . and that she told the boy to get the rifle and the boy did as she directed. . . . John Henry told me that he didn't know which door his father went out; that when he fired, he ran."

Mary Redfern pleaded not guilty and, testifying as a witness in her own behalf, stated that before the shooting occurred she and her husband had engaged in a continuous fight for an hour and a half, during which time numerous blows were passed between them; that finally the deceased hit her over the head with a fireplace shovel; that this lick knocked her unconscious and she knew nothing of the shooting; that when she regained consciousness she was lying on the sofa and the shooting was over.

The defendant John Henry Redfern went upon the stand and testified that his father, after knocking his mother unconscious, proceeded to advance on him with the shovel in hand, threatening to kill him; and that thereupon he, the defendant John Henry Redfern, shot his father in self-defense.

There was a jury verdict of guilty of manslaughter as to each defendant. From judgment imposing prison sentences, both defendants appeal.

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

E. Osborne Ayscue for the defendants.

JOHNSON, J. Was the evidence sufficient to overcome the defendants' motions for nonsuit and carry the case to the jury as to each defendant? These are the only questions presented for decision.

The evidence that John Henry Redfern confessed that he shot his father, when considered with the coroner's testimony that the deceased died as a result of the bullet wound in his chest, was sufficient to raise the presumption of an unlawful killing with malice and carry the case to the jury as against John Henry Redfern on the issue of second degree murder. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Robinson,* 226 N.C. 95, 36 S.E. 2d 655. It was incumbent on this defendant to satisfy the jury of the truth of facts showing absence of malice and mitigating the homicide to manslaughter, or justifying it on the ground of self-defense. *S. v. Gordon, supra.* The jury by returning a verdict of guilty of manslaughter resolved the question of mitigation in favor of the defendant but rejected his plea of justification. In the absence of the judge's charge to the jury, which was not included in the record,

it is assumed that the views of this defendant respecting his plea of self-defense were adequately presented to the jury.

As to the defendant Mary Redfern, the theory of the trial was that John Henry Redfern fired the fatal shot and that Mary Redfern was guilty as a principal in the second degree, she being present aiding, abetting, or encouraging her son in the perpetration of the unlawful act. *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844.

Where two persons aid or abet each other in the commission of a crime, both being present (either actually or constructively), both are principals and are equally guilty. *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

"A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator (*S. v. Oxendine,* 187 N.C. 658, 122 S.E. 568), and renders assistance or encouragement to him in the perpetration of the crime." *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5.

True, "Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him; but if one does something that will incite, encourage, or assist the actual perpetration of a crime, this is sufficient to constitute aiding and abetting." *S. v. Hoffman,* 199 N.C. 328, 333, 154 S.E. 314.

It is elemental that the guilt of an accused as an aider and abettor may be established by circumstantial evidence. *S. v. Holland, supra; S. v. McKinnon,* 197 N.C. 576, 150 S.E. 25.

In considering whether the evidence tending to implicate Mary Redfern was sufficient for submission to the jury, these facts and circumstances developed by the testimony come into focus:

Mary Redfern and her deceased husband were engaged in a fight. The 17-year-old son, John Henry, who was in another room, took no part in the fight until he was called by his mother. The fight had been going on for about an hour and a half. The deceased husband had bit Mary Redfern's finger, causing it to bleed profusely, so she said. She testified on cross-examination that he had slapped her in the face, had hit her on the head with a shovel, and was threatening her with a rifle. It is inferable that she was tiring of the fight and had had enough. She said she was mad. She called her son and told him "to get the rifle." He picked it up and according to his statement proceeded to fire the fatal shot. When interviewed by the officers a short while after the shooting, Mary Redfern made various conflicting statements about how the deceased met his death. These conflicting statements voluntarily made at the scene of the homicide, tend to reflect the mental processes of a person possessed of a guilty conscience seeking to divert

suspicion and to exculpate herself. This line of testimony was substantive evidence of substantial probative force, tending to show consciousness of guilt. *S. v. Yearwood,* 178 N.C. 813, 101 S.E. 513; *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; *S. v. Rowe,* 98 N.C. 629, 4 S.E. 506; *S. v. Broughton,* 29 N.C. 96; *S. v. Swink,* 19 N.C. 9; Wigmore on Evidence, Third Ed., Sections 173, 273, and 277.

The series of events and circumstances disclosed by the evidence was sufficient to sustain the inference that Mary Redfern incited, or at least encouraged, her son to commit the homicide under circumstances making her guilty as a principal in the second degree.

We have not overlooked the testimony of Mary Redfern to the effect that when she called her son and told him to get the rifle, she did not tell him to shoot the deceased but to take the rifle back to the home of their landlord, Mr. Hargett, where it belonged. However, it is noted that this exculpatory statement of Mary Redfern was made by her as a witness in her own defense. It is no part of her previous extrajudicial statement made to the officers and related by them as witnesses for the State.

The case was properly submitted to the jury as to both defendants.

No error.

ELIJAH SCOTT, GEORGE SCOTT, JANIE BRYANT AND BERTHA SCOTT v. MERIWEATHER LEWIS AND J. T. TAYLOR.

(Filed 22 May, 1957.)

1. Ejectment § 15—

In an action for the recovery of land and for trespass thereon by defendant, defendant's denial of plaintiff's title and defendant's trespass ordinarily raises issues of fact, with the burden on each upon plaintiff.

2. Ejectment § 10—

In an action for the recovery of possession of land, plaintiff must rely upon the strength of his own title.

3. Same—

In all actions involving title to realty title is presumed conclusively to be out of the State, unless it be a party to the action, G.S. 1-36, but there is no presumption in favor of either party, and plaintiff remains under the burden of showing title in himself by some approved method, one of which is by showing title by adverse possession.

4. Adverse Possession § 1—

Adverse possession, without color of title, of lands within the bounds of another's deed is limited to the area actually possessed, and evidence of acts of ownership without identity of the lines and boundaries claimed is unavailing.

5. Adverse Possession § 6—

Successive adverse possessions may be tacked for the purpose of showing a continuous adverse possession where there is a privity of estate or connection of title between the several successive occupants.

6. Same—

Where parties bring action for the recovery of land as heirs at law of their ancestor and judgment is rendered in the action adverse to them, such judgment adjudicates want of title in their ancestor and is binding upon them, and they may not in a subsequent action, in which they assert title by adverse possession, tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under the known and definite boundaries.

APPEAL by plaintiffs from *Morris, J.*, at October 1956 Term, of CRAVEN.

Civil action to recover land, and for trespass thereon.

Plaintiffs in amended complaint allege that they seek to maintain this action in behalf of themselves and of all other tenants in common, the children and grandchildren, as their interest may respectively be, of Stephen and Sophie Scott; that they and their co-tenants aforesaid are the owners in fee simple, and in actual, peaceful and notorious possession, adverse to the world, of the parcel of land in Craven County, on the eastern side of Dry Mourner Road, between Jasper and Rhem in said county, bounded by and enclosed within the very visible and commonly known natural boundaries set forth; and that defendants, their agents, servants and employees have entered upon a portion of said land and commenced to cut some of the timber thereon, and to trespass thereon after being forbidden to do so by these plaintiffs to plaintiffs' damage, etc.

Defendants, in separate answers, deny the title of plaintiffs, and for a further answer and defense and as a cross-action against plaintiffs aver that they are owners of certain lands therein described, on which plaintiffs have trespassed, and pray judgment against plaintiffs.

Upon the call of the case for trial in Superior Court, counsel for plaintiffs and counsel for defendants in open court stipulated and agreed to waive jury trial, and that the court should hear the evidence, find the facts and render judgment thereupon to the same extent and as conclusively as if a jury had been duly sworn and impaneled to try the issues involved.

I. Thereupon plaintiff offered in evidence the full judgment roll in the case of Sophie Scott, *et al.*, against Blades Lumber Company, in Superior Court of Craven County, North Carolina, and heard in Supreme Court (1907) 144 N.C. 44, 56 S.E. 548. The full caption of the case appearing in complaint names "Sophie Scott, Sylvester Scott, Mary Scott, Delzora Dew, Sam Dew, Frank Scott, Gravie Scott, Sarah Gris-

well, Charlie Griswell, Stephen Scott, James Scott, Henrietta Scott, John Scott, George Scott, Joanna Scott, as plaintiffs, and Blades Lumber Company, as defendant. And in the complaint it is alleged: (2) That Stephen Scott, late of the County of Craven, from the dates of the respective deeds hereinafter named entered upon the tracts of land therein described and remained in the actual possession thereof until the date of his death, which said deeds are recorded in the office of the Register of Deeds of the County of Craven in the books and pages hereinafter given from Civils, Book 77, page 465; Book 99, page 69; Book 115, page 192, which three tracts of land lie in the County of Craven and together form one body of land; (3) that Stephen Scott died on or about 189–, leaving him surviving a widow, Sophie Scott and the other plaintiffs, his heirs at law, the husbands Sam Dew and Charlie Griswell, being joined as plaintiffs with their wives; (4) that from and after the death of the said Stephen Scott as aforesaid the plaintiffs, above named, his widow and heirs at law, have remained in possession of the said lands and continued to hold and occupy them as their own; and (5) that defendants have cut large quantities of timber logs to plaintiffs' damage.

The answer of defendant Blades Lumber Company denies all of these allegations of the complaint; and for a further defense defendant avers: That Stephen Scott was the tenant of defendant as to those several tracts of land described in the complaint from the date of defendant's deeds to the same, which are duly recorded in office of Register of Deeds of Craven County, to which reference is made as a part of this allegation; and that the tenancy so existing has not been severed nor the possession of said land delivered to defendant; and that any title or possession of said land by plaintiffs is under and through the possession of said Stephen Scott, the tenant of defendant as aforesaid.

And the judgment roll shows that at Fall Term 1906 of Superior Court of Craven County the cause came on for hearing before judge and jury, and the judge, having intimated that he would charge the jury that if they believe the evidence they should answer the first issue No, and the second issue No, upon which intimation plaintiffs submitted to a nonsuit, and from judgment signed appealed to Supreme Court. And the case on appeal shows that the issues were these: "1. Are plaintiffs the owners and entitled to the possession of the land described in Book 99, page 69, described in the complaint?" "2. Are plaintiffs the owners and entitled to the possession of the land described in Book 115, page 192, described in the complaint?" And the Supreme Court, in opinion reported in 144 N.C. 44, as above set forth, held that "in instructing the jury to answer the issues in favor of the defendant, there was No Error."

II. Plaintiff next offered as a witness a surveyor, who described a map captioned "Land Claimed by Stephen Scott Heirs" made by him in May 1955, the boundaries being shown to him by George Scott, Lamb Farrell, Elijah Scott and others. On this there appear locations of houses of George Scott, the old Stephen Scott homeplace, Leroy Scott, Lamb Farrell and Marvin Scott, the Virgil Hill Chapel, a cemetery and several fields of small area.

III. Plaintiff next offered the testimony of Elijah Scott, Janie Bryant and George Scott, by whom it was proposed to describe their several acts of cutting timber and pulpwood, and cultivating of soil here and there over the entire boundary. At the conclusion of testimony of each of these witnesses defendant made motion that all testimony elicited from or by this witness relating to acts over this land and generally described as he or she described it be stricken on the basis that he or she has not designated the portion of this land claimed by him or by her,—he or she not having separated any claim of his or hers that he or she is bringing suit to recover; and has not plead any title in an ancestor from which they all claim in common. The motion in each instance was allowed, and plaintiffs excepted. These constitute exceptions 1, 2 and 3. Assignment as error.

IV. The court having so ruled, and plaintiffs having stated in open court that the further evidence they had to offer was to like effect and extent as theretofore offered, and the court having intimated that upon such further evidence so limited as above the court would rule as it had on the evidence offered, and upon such intimation plaintiffs having announced that they would submit to a nonsuit, judgment of nonsuit was entered, but the restraining order theretofore issued was continued in full force and effect until decision on appeal shall be rendered by the Supreme Court.

To so much of the foregoing judgment by which the plaintiffs are nonsuited, plaintiffs excepted and appeal to Supreme Court and assign error.

L. T. Grantham, Cecil D. May, and Lee & Hancock for Plaintiffs Appellants.

Ward & Tucker and R. E. Whitehurst for Defendants Appellees.

WINBORNE, C. J. Appellants in brief filed here on this appeal state that "at the trial of the present case in the Superior Court the plaintiffs did not rely on any paper title, but sought to show that they, and their tenants in common, the children and grandchildren of Stephen and Sophie Scott, had remained in open, notorious and continuous adverse possession under known and visible lines and boundaries since 1907 despite the outcome of the earlier case."

This position is untenable.

When 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 title of plaintiff and as to trespass by defendant, the burden as to each being on plaintiff. *Mortgage Corp. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673.

In such action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. See also *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra; Locklear v. Oxendine, supra,* and many other cases.

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller, supra; Smith v. Benson, supra; Locklear v. Oxendine, supra.*

In the light of such presumption, it appears that plaintiffs in present action, assuming the burden of proof, have elected to show title in themselves by adverse possession, under known and visible lines and boundaries without color of title for twenty years, which is one of the methods by which title may be shown. *Locklear v. Oxendine, supra; Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692.

In this connection it is pertinently stated in *Wallin v. Rice,* 232 N.C. 371, 61 S.E. 2d 82, in opinion by *Devin, J.,* later *C. J.,* "One may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries (G.S. 1-40), but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner." See *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3; *Davis v. Land Bank,* 219 N.C. 248, 13 S.E. 2d 417; *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748; *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851; *Lindsay v. Carswell,* 240 N.C. 45, 81 S.E. 2d 168.

In the instant case the evidence offered is insufficient to identify the lines and boundaries of any particular portion in actual possession.

The principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several successive occupants. *Ramsey v. Ramsey,* 224 N.C. 110, 39 S.E. 2d 340; *Locklear v. Oxendine, supra; Williams v. Robertson, supra.*

But here the possession of Stephen Scott and his wife, Sophia Scott, is unavailing to the Scott children and grandchildren, plaintiffs in this action. Whatever rights Stephen Scott acquired by alleged adverse possession, in the absence of evidence to the contrary, descended to his heirs at law, subject to the dower right of Sophia Scott, his widow. And his heirs at law, with the joinder of Sophia Scott, undertook to assert ownership of the lands in the action against Blades Lumber Company, as hereinabove set forth, and failed as indicated by the judgment affirmed on appeal to this Court as reported in 144 N.C. 44. The heirs at law, and Sophia Scott, parties to the action, are bound by the judgment therein. And "possession of defendant (plaintiff there) in a suit for ejectment or quieting of title, after judgment against him, is deemed subordinate to the title of the successful plaintiff in the absence of clear notice of hostility." 2 C.J.S., Adverse Possession 120, p. 672.

Whatever rights plaintiffs may have in respect to the lands, or portions thereof, here involved, they are not sufficiently identified to be successfully asserted on this record.

Hence, judgment from which appeal is taken must be, and it is

Affirmed.

JAMES A. COLLINS, E. B. COLLINS AND COLLINS AUTO SUPPLY COMPANY, A CORPORATION, v. ALICE C. COVERT.

(Filed 22 May, 1957.)

1. Evidence § 32—

A party or person interested in the event is incompetent to testify in his own behalf or interest as to a personal transaction or communication with a deceased person in an action against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased. G.S. 8-51.

2. Same—

In an action by a corporation and the surviving principal stockholders against the widow of a deceased principal stockholder, involving the liability of the corporation under its contract for the purchase of the stock of the deceased stockholder, the surviving partners are incompetent to testify as to conversations between the partners modifying the stock purchase agreement in favor of the corporation or the surviving partners.

3. Corporations § 15—Construction of contract for the purchase of stock of a deceased stockholder by the corporation.

The stockholders of a close corporation entered into an agreement whereby, in the event of the death of a stockholder, the surviving stockholders obligated themselves to have the corporation purchase the stock of the deceased stockholder. The corporation was to pay for such stock

first out of the proceeds of insurance carried on the life of each respectively by the corporation, and the balance from funds of the corporation when the surviving stockholders deem the withdrawal of such funds advisable, with further provision that until the final payment for such stock "the widow" of the deceased stockholder should receive monthly a stipulated sum per share of the stock. *Held:* Under the unambiguous language of the agreement, the word "widow" referred to the person and not the *status* of the surviving wife of a stockholder, and her subsequent remarriage has no bearing upon her right to receive the stipulated sums monthly until the full purchase price of the stock had been paid.

4. Money Received § 1—

A payment voluntarily made with full knowledge of all the facts cannot be recovered although there was no debt.

APPEAL by plaintiffs from *Gwyn, J.*, November Civil Term 1956 of GUILFORD (High Point Division).

This is a civil action tried without a jury on an agreed statement of facts. The pertinent parts of the facts necessary to an understanding of the questions presented for determination on this appeal, are stated below.

1. In June 1951 the plaintiff appellants, James A. Collins and E. B. Collins, and Charles W. Collins, now deceased, all brothers, owned and operated the Collins Auto Supply Company in High Point, North Carolina. On 30 June 1951 the three brothers entered into an agreement whereby, in the event of the death of any of the said brothers, the surviving stockholders obligated themselves to have the corporation purchase the stock of the deceased stockholders out of funds of the corporation.

2. It was set out in the agreement that the corporation carried three policies of insurance upon the parties to the agreement, each in the amount of $15,000.

3. It was provided that the purchase price of the stock was to be determined by the value placed upon said stock at the last annual meeting of the stockholders preceding the death of any stockholder.

4. That the surviving parties should cause to be paid on the purchase price of the stock the sum of $15,000 to the estate of the deceased stockholder immediately upon payment of said sum to the corporation by the insurance company.

5. The surviving parties further agreed to pay the balance of the purchase price of said stock whenever in the opinion of a majority of the board of directors, at a duly convened regular or special meeting, it should be deemed advisable for funds to be withdrawn from the corporation to pay said balance. The agreement contained the further provision: "Prior to the payment of the balance of the purchase price, the widow of the deceased stockholder shall be paid by the corporation

a monthly salary of $5.00 per share of stock held by her deceased husband at the time of his death."

6. Charles W. Collins died on 28 March 1952 leaving surviving him his widow, Alice C. Collins, age 33, and three children: Charles, Jr., 12 years of age, and Alice A., 4 years of age, born of his union to Alice C. Collins, and a grown daughter by a former marriage, Mary Love Collins, who had lived with her relatives since she was 13 months old. At the time of his death Charles W. Collins owned 40 of the 100 shares of the capital stock of Collins Auto Supply Company, the value of which was duly determined to be $1,000 per share.

7. In accord with the terms of the agreement, the corporation paid certain sums on the agreed purchase price for the stock, in addition to the proceeds received from the insurance company on the life of Charles W. Collins, deceased. It likewise paid the widow of Charles W. Collins $5.00 per share per month, or $200.00 per month, while she remained unmarried, and for eleven months after she remarried on 23 July 1954.

8. After extended negotiations, an agreement was reached on 12 July 1956 for the payment of the balance due on the purchase price of the stock, except that plaintiffs demanded credit for the sum of $2,200 paid to Alice C. Covert after her remarriage. Alice C. Covert waived her claim to any additional payments under the terms of the agreement but refused to repay the $2,200. This amount was placed in escrow pending the determination of the rights of the parties.

The court below held the defendant was entitled to the payments made after her remarriage, and judgment was accordingly entered.

Plaintiffs appeal, assigning error.

J. V. Morgan and Edward N. Post for appellants.

James B. Lovelace for appellee.

DENNY, J. The plaintiffs' first assignment of error is based on the exceptions to the refusal of the court below to permit James A. Collins and E. B. Collins to testify in support of an allegation in their complaint as to a conversation between them and Charles W. Collins, now deceased, to the effect that after the agreement was signed on 30 June 1951, it was "agreed that the payments to be made to the 'widow' of either of them would terminate upon that 'widow's' remarriage and they agreed not to have the contract rewritten because of added attorney's fees for having that done."

Upon objection of defendant's counsel to the admission of the proffered evidence, the court below sustained the objection.

The pertinent provisions of G.S. 8-51 read as follows: "Upon the trial of an action, . . . a party or a person interested in the event, . . . shall not be examined in his own behalf or interest, . . . against

. . . a person deriving his title or interest from, through or under a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . ."

The testimony of a witness is incompetent under the provisions of the above statute when it appears (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest. *Sanderson v. Paul,* 235 N.C. 56, 69 S.E. 2d 156; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043.

These plaintiffs are not only parties to this action but they are directly and primarily interested in the event of the action. *Peek v. Shook, supra; Cartwright v. Coppersmith,* 222 N.C. 573, 24 S.E. 2d 246; *Bunn v. Todd, supra;* Stansbury on North Carolina Law of Evidence, section 66. This assignment of error is without merit and is, therefore, overruled.

Assignments of error Nos. 2 and 3 are based on exceptions to the construction the court below put upon the word "widow" as it appeared in the context of the contract executed on 30 June 1951.

The court held that the word "widow" as used in the buy and sell agreement referred to in the statement of facts, meant the person rather than the status of the surviving wife of any deceased party to said contract and in this cause meant Alice C. Covert, formerly Alice C. Collins, and that it was the intent of the parties for the word "widow" to have such meaning.

We think the construction placed on the word "widow" by the court below is correct. A careful consideration of the applicable provisions of the contract leads us to the conclusion that the parties to the contract intended at the time of its execution to place no limitation as to the length of time the $5.00 per share per month should be paid to the widow of any one of the three parties, except the time from the date of the death of her husband and the date final payment was made to the personal representative of her husband's estate for the purchase of his stock. The contract so provides in unequivocal and unambiguous language. Therefore, whether or not Alice C. Collins ceased to be the widow of Charles W. Collins when she remarried has no material bearing on the decision in this case.

These plaintiffs, with full knowledge of all the facts, continued to pay the defendant the sum of $200.00 per month for eleven months after her remarriage. A payment voluntarily made, with a knowledge of all the facts, cannot be recovered although there was no debt. *Guerry v. Trust Co.,* 234 N.C. 644, 68 S.E. 2d 272; *Williams v. McLean,* 220 N.C.

504, 17 S.E. 2d 644; *Jones v. Assurance Society,* 147 N.C. 540, 61 S.E. 388; *Bernhardt v. R. R.,* 135 N.C. 258, 47 S.E. 427; *Bank v. Taylor,* 122 N.C. 569, 29 S.E. 831; *Brummitt v. McGuire,* 107 N.C. 351, 12 S.E. 191; *Devereux v. Insurance Co.,* 98 N.C. 6, 3 S.E. 639; *Commissioners v. Commissioners,* 75 N.C. 240. Even so, in our opinion, the defendant was entitled to these payments notwithstanding her remarriage, and we so hold.

The judgment of the court below is

Affirmed.

VAN K. DAVIS AND JEAN D. ADAMS v. WILLIAM DAVIS AND J. BOYD DAVIS AS EXECUTORS AND INDIVIDUALLY.

(Filed 22 May, 1957.)

1. Tenants in Common § 4—

Tenants in common may not maintain a joint action against their cotenants for an accounting of rents and profits.

2. Executors and Administrators § 31—

An action to compel executors to account and make settlement is a suit in the nature of a creditor's bill, and the executors are jointly liable and each is a necessary party defendant, and all persons interested in the settlement of the estate, creditors as well as beneficiaries, are at least proper parties, and in some instances may be necessary parties.

3. Pleadings § 19b—

Plaintiffs, heirs at law, instituted action against defendants for an accounting of rents and profits of lands in which both plaintiffs and defendants were tenants in common; against defendants as executors of the estate of plaintiffs' grandfather for accounting and settlement of that estate; and against one defendant as executor of the estate of plaintiffs' grandmother, without the joinder of the other executor of that estate, for an accounting of the estate of plaintiffs' grandmother. *Held:* Demurrer for misjoinder of parties and causes should have been allowed and the action dismissed.

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

APPEAL by defendants from *Carr, J.,* October 1956 Term of WARREN.

Defendants demurred to the complaint for misjoinder of parties and causes of action. The court, being of the opinion that there was a misjoinder of causes but not a misjoinder of both causes and parties, entered judgment directing a reframing of the complaint and a separation of the differing causes of action. Defendants appealed.

Blackburn & Blackburn and Kerr & Kerr for plaintiff appellees.

William W. Taylor, Jr., and Charles T. Johnson, Jr., for defendant appellants.

RODMAN, J. The complaint does not contain that plain and concise statement of fact contemplated by the statute, G.S. 1-122(2).

The complaint is not divided into causes of action. By rearrangement it states facts set out below as the basis for the relief sought.

First cause of action.

(1) Plaintiffs are grandchildren of Bennie K. Davis, who died testate 3 January 1950. Sallie Davis Burton and John Boyd Davis are named as executors of her will. (The will is not attached to nor made part of the complaint. Neither the date of probate nor qualification of executors is shown.)

(2) Bennie K. Davis owned a farm of 2,420 acres which she devised to her husband for his life. He died 25 October 1951. Upon the death of their grandfather, plaintiffs were the owners by inheritance of an undivided one-fourth in this farm and entitled to possession. The defendants farmed the land in 1952 to the exclusion of plaintiffs.

Plaintiffs seek to recover of defendants as individuals and not as executors the sum of $2,631.75, the asserted fair rental value of their share of the farm.

Second cause of action.

(1) Plaintiffs are, by inheritance, entitled to one-fourth of the estate of their grandfather J. B. Davis, who died testate 25 October 1951. Defendants are executors of his will. (The will is not attached. Its provisions are not disclosed. The date of probate is not shown nor is the date when defendants qualified.)

(2) J. B. Davis, at his death, owned valuable farming implements, harvested crops consisting of hay and corn, which the defendants, as executors, have refused to account for.

(3) Defendants, as executors, have collected rent from W. R. Drake and Carolina Telephone & Telegraph Company for the use of lands of their testator. Defendant William Davis has occupied land of his testator for which he owes rent and for which he is accountable to the executors. Defendants, as executors, have failed to exercise diligence in renting other properties of their testator. None of the rents collected or which should have been collected have been accounted for by the executors of J. B. Davis.

(4) A penalty was imposed on the estate of J. B. Davis because of the failure of the executors to file inheritance tax returns in due time.

(5) Payments have been made from the estate to William Davis, one of the executors, to which he is not entitled.

(6) More than four years has elapsed since the death of J. B. Davis. No accounts have been filed by the defendants as executors of his estate.

Plaintiffs pray for an accounting and settlement of the estate of J. B. Davis.

Third cause of action.

(1) Bennie K. Davis died testate 3 January 1950. Plaintiffs, as her heirs, are entitled to a share in her estate.

(2) The executors named in the will of Bennie K. Davis are defendant J. Boyd Davis and Sallie Davis Burton, who is not a party.

(3) More than four years has elapsed since the death of Bennie K. Davis. No accounts have been filed by the executors. Plaintiffs seek an accounting and settlement of the estate of Bennie K. Davis.

It is manifest that plaintiffs have stated separate and unrelated causes of action which ought not to have been joined in a single action. *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420; *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

Is there also a misjoinder of parties? When we consider who are proper parties, it is, we think, apparent that there is likewise a misjoinder of parties.

The first cause of action is by tenants in common against other tenants in common for an accounting. The claim is based on concerted action by the defendants. Hence, it was proper to sue the defendants individually to seek an accounting, but the right of Van K. Davis to an accounting by his cotenants is in nowise related to the right of Jean D. Adams to an accounting. *McPherson v. McPherson,* 33 N.C. 391, is decisive. As to this cause of action there is a misjoinder of parties plaintiff.

The second cause of action is for an accounting and settlement of the estate of J. B. Davis. Executors are required to file annual accounts. G.S. 28-117. They may be required to file their final account at the expiration of two years from their qualification. G.S. 28-121.

Proceedings to compel a settlement may be begun before the clerk or an action may be instituted in the Superior Court. G.S. 28-147. An action to compel the executors to account may be instituted by a legatee or heir. *S. v. Griggs,* 223 N.C. 279, 25 S.E. 2d 862; *Johnson v. Hardy,* 216 N.C. 558, 5 S.E. 2d 853; *Leach v. Page,* 211 N.C. 622, 191 S.E. 349; *Thigpen v. Trust Co.,* 203 N.C. 291, 165 S.E. 720; *Fisher v. Trust Co.,* 138 N.C. 90; *Neal v. Becknell,* 85 N.C. 299.

An action to compel an executor to account and make settlement is necessarily a suit in the nature of a creditor's action. *Dobson v. Simonton,* 93 N.C. 268; *Pegram v. Armstrong,* 82 N.C. 326; *Ballard v. Kilpatrick,* 71 N.C. 281. Executors are jointly liable for maladministration. They are necessary parties. All others interested in the settle-

ment of the estate—creditors of the testator, as well as his legatees and other beneficiaries of the estate—are at least proper parties and in some instances may be necessary parties.

It is apparent that creditors of the estate of J. B. Davis are not connected with or interested in the claims asserted by plaintiffs against defendants individually for an accounting for the rents of properties held by them as cotenants nor are they interested in the settlement of the estate of Bennie K. Davis.

One of the executors of the will of Bennie K. Davis is not a party. She is a necessary party. William Davis is not an executor of the will of Bennie K. Davis. He cannot be required to account for the administration of her estate. What interest, if any, he may take under her will is not made to appear. The creditors, if any, of the estate of Bennie K. Davis are entitled to be heard with respect to the settlement of that estate. They are proper parties and may become necessary parties. The parties interested in the settlement of the estate of Bennie K. Davis have no interest in or connection with the first or second causes of action.

There is misjoinder of parties and causes of action. *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Vollers Co. v. Todd,* 212 N.C. 677; *Williams v. Gooch,* 206 N.C. 330, 173 S.E. 342; *Bickley v. Green,* 187 N.C. 772, 122 S.E. 847.

The court should have sustained the demurrer and dismissed the action for misjoinder of parties and causes.

Reversed.

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

BILLIE B. JOHNSON v. THE MEYER'S COMPANY.

(Filed 22 May, 1957.)

1. Evidence § 42b—

Plaintiff was injured when an advertising sign, maintained by a store on its adjacent parking lot, was struck by a car in the parking lot and knocked down, falling against and over plaintiff. Testimony of plaintiff that as she was lying on the sidewalk one of three men who picked the sign up off her, made statements to the effect that he was not responsible, that he had paid his parking fee and that a parking attendant had left his car in reverse, *held* properly excluded, since the statements were a narrative of past occurrence and were not, therefore, a part of the *res gestae.*

2. Evidence § 25—

Plaintiff, while walking on the sidewalk, was struck by an advertising sign which had been knocked down by an automobile. Testimony by an officer that when he visited the scene some five hours after its occurrence the sign was not anchored, was properly excluded.

3. Negligence § 3½—

Plaintiff was injured while walking on the sidewalk when an advertising sign, maintained by a store on its adjacent parking lot, fell against her. There was evidence that the advertising sign fell because it was struck by a car in the parking lot. *Held:* The doctrine of *res ipsa loquitur* does not apply since the facts were known and testified to at the trial.

4. Negligence § 9—

The only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation, and foreseeability of injury is an essential element of actionable negligence.

5. Negligence § 4f—Act of motorist in striking advertising sign maintained by store on parking lot held not reasonably foreseeable.

Plaintiff's evidence tended to show that she was injured while walking on the sidewalk when an advertising sign, maintained by a store on its adjacent parking lot, was struck and knocked down by a car on the parking lot, and fell against her. There was no evidence that the driver of the car was an agent or employee of the store or in any way connected with it, or that the automobile was under the exclusive control and management of the store. *Held:* Nonsuit in an action against the store was proper, since it could not have reasonably foreseen that a person in no way connected with it and using its parking lot would start or operate his automobile in such a way as to collide violently with its advertising sign.

APPEAL by plaintiff from *Olive, J.*, January Term 1957 of GUILFORD.

Action to recover damages for personal injuries suffered when a large advertising sign erected immediately adjacent to a public street fell to the street striking plaintiff, who was walking on the street.

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

E. L. Alston, Jr., for Plaintiff, Appellant.

Armistead W. Sapp for Defendant, Appellee.

PARKER, J. The defendant owns a large department store in the city of Greensboro, fronting on South Elm and South Greene Streets. It also maintains on South Greene Street, adjacent to the entrance of its store on that street, a parking lot for automobiles for the use and convenience of its customers. On this parking lot, and immediately adjacent to South Greene Street, the defendant had erected a large advertising sign.

The allegations of negligence in the complaint are in essence these: The defendant failed to exercise due care in the erection, securing and maintenance of the large sign in a manner so as to prevent the same from falling, and that the defendant knew, or in the exercise of due care should have known, that the sign as erected and maintained was unsafe and a danger to persons using the adjacent street. As plaintiff was walking on the street she heard a loud noise, and the sign fell over and upon her covering the entire sidewalk. That she is informed, believes and so alleges that the cause of the sign falling was due to a customer of defendant on the parking lot backing his automobile into and against the sign, which was totally unprotected against such an act. That defendant knew, or in the exercise of due care should have known, that such an act was likely to occur, by reason of the insecure anchorage of the sign and the defendant permitting and directing its employees to park automobiles near the sign. That plaintiff further alleges on information and belief that an employee of defendant, whose name is unknown to her, backed a car up to the sign, left it in reverse gear, failed to inform the owner thereof, and the owner of the car, whose name is unknown to her, proceeded to knock over the sign.

Plaintiff's evidence shows these facts: On the night of 17 July 1954 she had been shopping in the defendant's store. It closed at 9:00 p.m. About three minutes to 9:00 p.m. she was walking on the sidewalk on South Greene Street in front of the defendant's parking lot. She saw an attendant on the platform therein. When she was beside defendant's advertising sign on the parking lot, she heard a loud noise, and the sign began falling. The sign fell upon her, knocking her to the sidewalk, and covering her and the sidewalk completely. While she was lying under the sign, three men came, lifted the sign off of her, and then picked her up. One of these men made the following statement to her, which upon defendant's objection was excluded: "Lady, you know I am not responsible for this. The parking attendant just left my car in reverse. Lady, are you hurt? What is your name? Where do you live? Now, you realize this is not my responsibility. I paid for my parking lot." Plaintiff assigns the exclusion of this statement as error. On cross-examination plaintiff said: "The noise that I heard was not the breaking off of the post of the sign that embedded in the ground; it was the crash when the automobile hit the sign. . . . I said the next day I saw where the car had hit the four-by-four that was framing the sign, and I saw the split in the plywood sign itself, it was broken. The upright standard (four-by-four) which the car struck was the one toward the Meyer's building."

About midnight plaintiff's husband, his father and a police officer went to the scene. This is the substance of her husband's testimony: He saw where the sign had been standing prior to its being hit by an

automobile. He examined the sign for fresh marks. The left four-by-four running up the side, as one faced the sign, had been hit by a bumper toward the bottom. He found marks where it had been splintered. The sign was cracked in front 4 or 5 feet up. It had the appearance of being a fresh cut. The sign was framed by four-by-fours with plywood in the center. The sign was 8½ or 9 feet long and 4 to 4½ feet wide. The framing of the sign extended below the sign for about 2 feet, and there was another four-by-four running straight across the curb and a leg running down for 8 or 10 inches. The leg in front was anchored to a stob with a small piece of metal wrapped around the stob and attached to the leg. There was a stob on each front leg attached in this manner. There were four-by-fours directly back of the sign in the parking lot area. The sign had pulled loose from the stob in front. There was nothing to prevent an automobile from backing and striking the sign.

The only other witness for plaintiff was the police officer. He testified that from all indications the sign had been hit, and knocked over.

Plaintiff has two assignments of error as to the exclusion of evidence. The first is to the exclusion of the statement of one of the men who helped lift the sign off of her. Plaintiff contends that this statement is competent as part of the *res gestae* on the ground that it was a spontaneous utterance. This Court said in *Batchelor v. R. R.*, 196 N.C. 84, 144 S.E. 542: "The test as to whether a declaration is a part of the *res gestae* depends upon whether the declaration was the facts talking through the party or the party talking about the facts." The subject is discussed in the following cases: *Bumgardner v. R. R.*, 132 N.C. 438, 43 S.E. 948; *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93; *Staley v. Park*, 202 N.C. 155, 162 S.E. 202; *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 8 S.E. 2d 199; *Lee v. R. R.*, 237 N.C. 357, 75 S.E. 2d 143. It is our opinion under the well defined principles of law recognized in this jurisdiction, that the statement of this unknown person of an exculpatory nature was the narrative by him of a past occurrence, and therefore not a part of the *res gestae*.

The police officer arrived at the scene around midnight. Plaintiff's counsel asked him this question: "Was the sign anchored at all when you got there?" The answer was excluded upon objection. The witness, if he had been permitted to answer, would have replied No. There was no error in the exclusion of this evidence.

There is no evidence that the sign fell because of any negligence in its construction or maintenance. It fell because it was struck a heavy blow by an automobile on the parking lot operated by an unknown person. There is no evidence that such person was an agent or employee of defendant, or in any way connected with it. There is no evidence that this automobile was under the exclusive control or man-

agement of the defendant. These facts were known, and testified to at the trial. The principle of *res ipsa loquitur* does not apply. *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251; *Smith v. Oil Corp.*, 239 N.C. 360, 79 S.E. 2d 880.

"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." *McNair v. Richardson*, 244 N.C. 65, 92 S.E. 2d 459. It is well settled by our decisions that foreseeability of injury is an essential element of actionable negligence. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796; *Davis v. Light Co.*, 238 N.C. 106, 76 S.E. 2d 378; *McNair v. Richardson, supra.*

All the evidence discloses that plaintiff's injuries were solely attributable to an automobile knocking the sign down. Under the facts of this case to require the defendant to foresee that a person, in no way connected with it and using its parking lot, would start or operate his automobile in such a way as to collide violently with its advertising sign with the bumper of his automobile, splintering, cracking and breaking the sign and knocking it onto the sidewalk, "would practically stretch foresight into omniscience." *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34. No such omniscience is required by the law of negligence.

The judgment of nonsuit below is

Affirmed.

PHYLLIS LEE MORRIS, INDIVIDUALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF RICHARD MORRIS, v. RICHARD LEE MORRIS.

(Filed 22 May, 1957.)

1. Wills § 31—

The dominant and controlling objective of testamentary construction is to ascertain the intent of testator as gathered from the language of the instrument and the circumstances attendant, and therefore each case must be decided largely upon its own particular facts.

2. Same—

The intent of testator need not be declared in express terms, and regard is to be given to his dominant purpose rather than the use of any particular words.

3. Same—

In construing a will every word and phrase should be given effect if possible by any reasonable construction.

4. Same—

The purpose of G.S. 31-38 is to change the common law rule requiring words of perpetuity for a conveyance in fee so that a devise will be con-

strued to carry the fee unless it appears from the will that the testator intended to convey an estate of less dignity.

5. Wills § 33d—

No particular words are necessary to create a trust if the purpose is evident.

6. Same—

The will in question consisted of one sentence devising all of testator's property to his wife "to provide for" testator's only child "and herself." *Held:* The wife takes an estate in trust for the benefit of the son and herself for the purpose of providing for their joint support. Therefore, there is no merger of the legal and equitable estate in the wife which would defeat the trust even as to her, and she has no power to sell the realty except as authorized by the court upon a showing that the personal estate and rents are insufficient to support the son and herself.

APPEAL by defendant from *Gwyn, J.*, February, 1957 Term, RANDOLPH Superior Court.

Civil action for declaratory judgment to determine the rights of the parties under the following will: "Being of sound mind I hereby bequeath to my wife Phyllis Lee Morris all of property both real and personal to provide for my son Richard Lee Morris and herself S/ Richard Morris, Dec. 30/1954."

The testator died 15 January, 1956, leaving him surviving Phyllis Lee Morris, wife, and Richard Lee Morris, age 14, his only child. The inventory disclosed that the personal estate consisted of $5,490.87. The record does not disclose what real estate passed under the will. The Superior Court adjudged that Phyllis Lee Morris took a fee simple estate in all property owned by the testator "and the phrase 'to provide for my son Richard Lee Morris and herself' was merely an expression of his desire and did not constitute or establish a valid testamentary trust." From the judgment, the defendant appealed, assigning as error the failure of the judge to hold the will created a trust in favor of the son, Richard Lee Morris.

J. Harvey Luck, Guardian Ad Litem for Richard Lee Morris, defendant, appellant.

Archie L. Smith,

Hammond & Walker,

By: L. C. Hammond, for plaintiff, appellee.

HIGGINS, J. The courts approach with apprehension and misgivings the task of construing wills—of saying what one now deceased meant by the words he used during his lifetime in the disposition of his property to take effect at his death. Holograph wills especially are like

the men who make them—individual. Two wills of exactly the same wording may be differently construed by reason of the different circumstances surrounding the testator at the time he made the will—differences in the number and ages of relatives, the amount and character of his property, his legal and moral obligations, and, above all, the purpose he sought to accomplish. At best, therefore, the courts can make use of previously decided cases only as meager aid in the ascertainment of the testator's intent. "The discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator, as so expressed, is his will." *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. "The intent of the testator need not be declared in express terms." *Trust Co. v. Schneider, supra; Efird v. Efird,* 234 N.C. 607, 68 S.E. 2d 279; *Trust Co. v. Miller,* 223 N.C. 1, 25 S.E. 2d 177. "And greater regard is to be given to the dominant purpose of the testator than to the use of any particular words." *Trust Co. v. Schneider, supra; Heyer v. Bulluck, supra; Allen v. Cameron,* 181 N.C. 120, 106 S.E. 484.

In discovering and giving effect to the testator's intent the will must be examined from its four corners, and in the process consideration must be given to every word and expression used. This rule of construction came to us from the mother country. In 1725 the English Chancery Court held: "It is a certain rule in the exposition of wills especially that every word shall have its effect and not be rejected if any construction can possibly be put upon it." *Baker v. Giles,* 2 Peere Williams, 280, English Chancery Reports, 24 Reprint 730. "The testator's meaning must be collected from the will itself by attending to the different parts of it and comparing and considering them together." *Strong v. Cummin* (1759), 2 Burrus 770, King's Bench Reports, 97 Reprint 552. "Every part of a will is to be considered in its construction and no words ought to be rejected if any meaning can be possibly put upon them. Every string should give its sound." *Edens v. Williams,* 7 N.C. 27; *Hinson v. Hinson,* 176 N.C. 613, 97 S.E. 465; *Snow v. Boylston,* 185 N.C. 321, 117 S.E. 14; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613; *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *Voncannon v. Hudson Belk Co.,* 236 N.C. 709, 73 S.E. 2d 875.

The will before us for construction consists of one sentence—30 words. The only question is whether the testator intended to give all his property to his wife in fee or whether the clause "to provide for my son Richard Lee Morris and herself," impressed the devised property with a trust for the purpose indicated. The trial court held the wife

took in fee. She called to her aid G.S. 31-38: "When real estate shall be devised to any person the same shall be held and construed to be a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." The foregoing statute has been with us since 1784. Its purpose was to change the common law rule that a devise of lands without words of perpetuity conveyed a life estate only unless there was a manifest intention to convey the fee. Since the statute no words of perpetuity are required and a devise without them will carry the fee unless it appears from the will the testator intended to convey an estate less than the fee. *Henderson v. Power Co.*, 200 N.C. 443, 157 S.E. 425.

In the case at bar, although words of perpetuity are lacking, nevertheless under G.S. 31-38 the plaintiff takes a fee unless the clause, "to provide for my son Richard Lee Morris and herself," shows the testator intended to create a trust. In all cases herein cited except the two from the English courts, the decisions were rendered since the passage of the statute now G.S. 31-38. All the authorities are to the effect that the testator's intent, to be gathered from the words he used, is his will. Simply stated then, did the testator intend that the widow take the property in fee or did he intend that she be required to use it to provide for his son and herself? If the former, all is hers absolutely after payment of debts; if the latter, she must use it for the benefit of the son (12 when the will was written) and herself. If the former, the clause "to provide," etc., must be disregarded; if the latter, it must be given effect. The decisions are uniform that effect must be given to every expression the testator used if possible to do so. *Allen v. Cameron, supra; Ralston v. Telfair*, 17 N.C. 255. "No particular words are necessary to create a trust if the purpose is evident." *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191.

In the case of *Young v. Young*, 68 N.C. 309, this Court construed the following testamentary disposition: "To my beloved wife I give all my estate, real, personal, and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in the manner she may think best for their good and for her own happiness." The Court said: "Our conclusion is that the gift is to the wife *in trust*, not for herself, and not for the children, but for both, to be managed at her discretion for the benefit of herself and children."

In the case of *Crudup v. Holding*, 118 N.C. 222, 24 S.E. 7, the Court construed the following testamentary disposition: "I give to my beloved wife, Columbia Crudup, all of my property of every description to keep and to hold together for her use and the use of my children after all my just debts are paid." This Court said: ". . . the testator

intended that his wife should take and hold his entire estate after the debts were paid and use it to the best advantage for the benefit of herself and his children, and this we declare to be his meaning."

In the case of *Jarrell v. Dyer*, 170 N.C. 177, 86 S.E. 1031, this Court construed the following testamentary disposition: "I, Emma J. Simmons, being of sound mind, do hereby will and bequeath to my mother, Pauline E. Jarrell, all the property recently deeded to me by her, also all my other property that she may administer it to the use of my children." The Court held the conveyance "was in trust that the mother may use, control and administer it for the benefit of the testator's children. This confers on the mother no power of disposition by will or otherwise except as may be conferred by legal proceedings instituted for the purpose," citing *Young v. Young, supra;* and *Crudup v. Holding, supra.* See also *Brinn v. Brinn*, 213 N.C. 282, 195 S.E. 793; *In re Estate of Bulis*, 240 N.C. 529, 82 S.E. 2d 750; *Finch v. Honeycutt, ante*, 91. Under the holding in *Young v. Young, Crudup v. Holding*, and *Jarrell v. Dyer*, there is no merger of the legal and equitable estate in Phyllis Lee Morris which would defeat the trust even as to her.

In writing the will before us, the testator was frugal in his use of words. We do not feel at liberty to strike any part of the will, especially the words which appear to state his dominant purpose in making the devise: "to provide for my son Richard Lee Morris and herself."

We hold that Phyllis Lee Morris takes the estate in trust for the benefit of the son and herself. She is entitled, as trustee, to the personalty after the estate is settled, and to the rents from the realty, and it is her duty to use both for the support of the son and herself. The will gives her no power to sell realty except as authorized by the court upon a showing that the personal estate and rents are insufficient to support the son and herself.

Reversed.

CARL STEPHENS, TRADING AND DOING BUSINESS AS SERVICE OIL COMPANY, v. SAM C. CARTER.

(Filed 22 May, 1957.)

1. Fixtures §§ 1, 3—

Ordinarily, when a chattel is affixed to the realty, it becomes realty and may thereafter be conveyed only by deed, and whether it becomes a part of the freehold depends upon the understanding or agreement of the parties, express or implied, at the time the chattel is affixed, with the right of removal ordinarily existing only in favor of a tenant in regard to trade fixtures placed upon the land for the better temporary use of the premises for trade or agriculture.

2. Same—

A filling station, which had two storage tanks buried in the ground, was sold by deed containing no reservations. The purchaser sold certain fixtures by parol and thereafter conveyed the realty to defendant by deed containing no reservations. The purchaser of the fixtures thereafter instituted this action to recover the storage tanks. *Held:* The tanks were a part of the realty and could be conveyed only by a written instrument, and the attempt to transfer them by parol was ineffectual, and therefore nonsuit should have been allowed.

APPEAL by defendant from *Williams, J.*, October, 1956 Term, COLUMBUS Superior Court.

Civil action to recover two gasoline tanks of the value of $500.00. The ancillary writ of claim and delivery was issued at the time the action was instituted. The jury found for the plaintiff. From judgment accordingly, the defendant appealed. Facts are discussed in the opinion.

Powell & Powell for defendant, appellant.

Powell, Lee & Lee for plaintiff, appellee.

HIGGINS, J. The facts controlling decision in this case are not in dispute. Prior to 1930 George W. Dove erected a filling station on a lot owned by him in the town of Chadbourn. In connection with the filling station the Standard Oil Company installed a 550-gallon storage tank. This tank was buried underground and was attached to a pump used in dispensing gasoline. About the year 1938 Mr. Dove installed a 5,000-gallon tank, also underground and similarly connected with the pumps. The "fill pipes" and the "vent pipes" were exposed above the ground.

In 1941 Mr. Dove sold the lot and filling station to the defendant, Sam Carter, and executed and delivered a fee simple deed therefor. Dove testified without objection: "Both of these tanks remained underground until the time I sold to Sam Carter. I used both of them in connection with the filling station. I considered the tanks a part of the real estate and sold them as a part of the real estate the way I figured. There was no exception made in my deed to Mr. Carter about any tanks or anything else. . . ." Sam Carter sold the filling station and conveyed it by deed on 1 November, 1946, to W. J. Rabon. Carter's deed contained no exceptions.

While Rabon owned the property he sold some of the station equipment to the plaintiff, Carl Stephens. Stephens testified: "I have never owned the filling station. I bought the equipment at the station from Rabon in 1949. I did not get any bill of sale. I just taken the check

which I gave him which called for the equipment. I didn't get any deed from him, no paper writing at all, except the stub on this check that called for equipment. The check and my personal recollection is the only evidence I have got of the transaction. That was February 23, 1949. The tanks were buried in the ground when I purchased them and they continued to be buried until I attempted to move them." The attempt was made about April, 1955.

On 1 November, 1952, the defendant Carter re-purchased the filling station from Rabon and received a deed therefor which contained no exceptions. Rabon testified: ". . . I sold the property, the real estate back to Mr. Sam and there were no exceptions about any gas pumps or tanks because the pumps had been removed and the air compressors. . . . I sold him an air compressor, two pumps, and two tanks in the ground."

Thus it appears there is no dispute over the fact the smaller tank was installed by the Standard Oil Company between 1920 and 1930, while Mr. Dove owned the property. The larger tank was installed by Mr. Dove also while he owned it. So far as the record discloses, neither the Standard Oil Company nor Mr. Dove has ever made any claim to either tank. Both have remained content to let the tanks pass by deed and go with the land.

The case was tried by the plaintiff in the Superior Court and he has sought to sustain the trial here upon the theory the tanks were trade fixtures which could be treated as personalty and removed as such. The rule with respect to the right to remove trade fixtures which have been attached to the land is intended to cover those cases in which a tenant installs such fixtures for use during his occupancy with the understanding, express or implied, that they may be removed. "The general rule is that any erection, even by the tenant, for the better enjoyment of the land becomes part of the land; but if it be purely for the exercise of a trade, or for the mixed purpose of trade and agriculture, it belongs to the tenant, and may be severed during the term, or after its expiration, . . . But until it is parted from the soil, such fixture loses its distinctive character of personalty." *Pemberton v. King*, 13 N.C. 376.

"Whatever things the tenant has a right to remove ought to be removed within the term; for, if the tenant leave the premises without removing them, they then become the property of the reversioner." *Smithwick v. Ellison*, 24 N.C. 326; *Springs v. Refining Co.*, 205 N.C. 444, 171 S.E. 635. "Whether a thing attached to land be a fixture or a chattel personal depends upon the agreement of the parties, express or implied." *Springs v. Refining Co., supra; Feimster v. Johnson*, 64 N.C. 259.

"If the tenant yields possession and leaves the structure standing, this fact may be evidence that it was not used or intended only for the purpose of trade or manufacture, or of abandonment of it, but it could not change the established character of the property.

"The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all be considered in determining whether it became a part of the freehold or not." *R. R. v. Deal,* 90 N.C. 110; *Ingold v. Assurance Co.,* 230 N.C. 142, 52 S.E. 2d 366.

"As between landlord and tenant, the intent with which fixtures are attached to the freehold becomes material, and if it appear that they were for the better temporary use of the premises, they may be treated as 'trade fixtures,' and hence removable. *Causey v. Plaid Mills,* 119 N.C. 180, 25 S.E. 863. The liberality extended a tenant, in favor of trade and to encourage industry, may not apply as between vendor and vendee or mortgagor and mortgagee. *Pritchard v. Steamboat Co.,* 169 N.C. 457, 86 S.E. 171; *Overman v. Sasser,* 107 N.C. 432, 12 S.E. 64; *Foote v. Gooch,* 96 N.C. 265, 1 S.E. 525; *Bond v. Coke,* 71 N.C. 97; *Latham v. Blakely,* 70 N.C. 368. The reason for the rigid enforcement of the rule in the one case and its relaxation in the other is clearly pointed out by *Pearson, C. J.,* in *Moore v. Vallentine,* 77 N.C. 188. When fixtures are annexed to the land by the owner, actual or potential, the purpose is to enhance the value of the freehold, and to be permanent. But with the tenant a different purpose is to be served, hence for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what has apparently become affixed to the land, if affixed for the purposes of trade, and not merely for the better enjoyment of the premises." *Springs v. Refining Co., supra; Basnight v. Small,* 163 N.C. 15, 79 S.E. 269.

"It is a well settled principle of common law that everything which is annexed to the freehold becomes a 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." *Fleishel v. Jessup,* 244 N.C. 451, 94 S.E. 2d 308; *Horne v. Smith,* 105 N.C. 322, 11 S.E. 373; *Bryan v. Lawrence,* 50 N.C. (5 Jones) 337. Equitable estoppel is not involved here.

In the instant case the small tank was affixed to the soil by the Standard Oil Company 30 years ago. No attempt was ever made by Standard to remove or to assign any right to remove. The plaintiff

does not allege this tank was installed with the intent or by agreement, either express or implied, that it ever be removed. The owner himself installed the larger tank 18 years ago. The owner conveyed in 1941 by deed to the defendant. The defendant conveyed by deed to Rabon in 1946. Rabon reconveyed to the defendant in 1951. All the deeds conveyed the fee without any exceptions as to fixtures. Neither Rabon who attempted to convey by parol, nor the plaintiff who attempted to buy by parol, ever occupied the land as tenant. The court attempted to extend to a former owner (Rabon) and to a stranger (the plaintiff) a right to remove a trade fixture which is reserved only to a tenant.

Defendant's assignment of error No. 8 relates to the refusal of the court to grant the motion for nonsuit at the close of all the evidence. The evidence in this case shows the tanks were a part of the realty. They could be conveyed only by a written instrument. The attempt of Rabon to transfer them to the plaintiff by parol was ineffectual. Upon the authority of the cases heretofore cited, we conclude that the defendant's assignment of error No. 8 must be sustained. The motion for nonsuit should have been allowed.

Reversed.

IN THE MATTER OF THE WILL OF ELLEN J. CRAWFORD.

(Filed 22 May, 1957.)

1. Appeal and Error § 41—

While it is error to admit in a caveat proceeding propounder's evidence of the probate of the instrument in common form, where the caveators incorporate by reference and attachment to their pleading the record of probate and the will itself, they cannot be heard to complain.

2. Trial § 32—

Where the court gives equal stress to the evidence and contentions of the parties, a party desiring correction, amplification or additional instructions should aptly tender request therefor, and failure to do so waives the right to object.

3. Wills § 25—

An instruction in a caveat proceeding that a caveat is a caution entered in the court of probate to stop probate from being granted without the knowledge of the parties in interest, *held* not prejudicial.

4. Wills § 24—

Testimony of two witnesses to the formal execution of a paper writing and that they, in the presence of testatrix and at her request, signed as subscribing witnesses, and testimony of three witnesses that the paper writing was entirely in the handwriting of deceased, with testimony that

it was delivered to a named person for safekeeping as the will of testatrix, is sufficient to sustain the instrument both as an attested and as a holograph will.

5. Wills § 8—

A beneficiary under a holograph will is not disqualified to testify as to the handwriting of testatrix. G.S. 31-10(b).

6. Wills § 12—

Evidence of the preparation of a later dispositive instrument, without evidence that it was ever executed according to the formalities necessary to make it a valid will and without evidence that it contained any words of revocation or provisions contrary to a prior will, duly executed, is insufficient evidence of revocation of the will to justify the submission of the question of revocation to the jury. G.S. 31-5.1.

7. Trial § 31b—

A charge is sufficient if, when read contextually, the law of the case is presented to the jury in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.

APPEAL by caveators from *Froneberger, J.*, October, 1956 Term, MCDOWELL Superior Court.

Issue of *devisavit vel non* raised by caveat to the will of Ellen J. Crawford upon the ground the paper writing dated 26 April, 1955, (1) was not attested in the manner required by law, (2) was not wholly and entirely in the handwriting of Ellen J. Crawford, (3) was revoked by a will subsequently executed, and (4) was never re-executed after the revocation. Attached to the caveat and made a part of it were the will and the clerk's order of probate.

The propounder introduced the evidence of the two subscribing witnesses to the will and three witnesses to the handwriting of the testatrix. One of the witnesses to the handwriting was the principal beneficiary under the will. The propounder also offered evidence that the will was left with Mrs. Eva Lewis for safekeeping.

The caveators offered evidence that subsequent to 26 April, 1955, the testatrix wrote a second will which Mrs. R. I. Corbett witnessed on 18 August, 1955, that this second will was in the handwriting of Ellen J. Crawford who stated that she was dissatisfied with her former will and that she was making some changes in it.

The jury answered the issue in favor of the propounder and from judgment accordingly, the caveators appealed.

Paul J. Story, for caveators, appellants.

Proctor & Dameron,

George Pennell, for propounder, appellee.

HIGGINS, J. Upon the trial the propounder, over objection, offered in evidence the probate proceeding before the clerk, including the will. There is no question but that the probate of a will in common form before the clerk is inadmissible as evidence on an issue of *devisavit vel non* raised by a caveat. *In re Will of Etheridge,* 231 N.C. 502, 57 S.E. 2d 768; *Wells v. Odum,* 205 N.C. 110, 170 S.E. 145. Probate in common form is *ex parte.* Caveators are not before the court and hence not bound by the proceeding. *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769. "It is well settled that the probate of a will in common form is incompetent as evidence of its validity on an issue of *devisavit vel non* raised by a caveat filed to said will." *In re Will of Williams,* 215 N.C. 259, 1 S.E. 2d 857.

The caveat filed in this case contains the following:

"The caveators (naming them) respectfully show unto the court:

"2. That on the 23rd day of September 1955, one Nancy Ellen Stoner Pumphrey presented to the Court a paper writing purporting to be the Last Will and Testament of the said Ellen J. Crawford, the same being in words and figures as set out in the paper writing *hereto attached, marked Exhibit A, and asked to be taken as a part hereof.* (emphasis added)

"3. That the said Nancy Ellen Stoner Pumphrey alleged that the said paper writing was the Last Will and Testament of the said Ellen J. Crawford, deceased, and procured the same to be admitted to probate in common form as such Last Will and Testament, *copy of the order of probate being attached to Exhibit A, and being a part thereof.*" (emphasis added)

The caveators thus identified and placed before the court the record of probate and the will itself. The identity and content of the documents became a judicial admission on the part of the caveators. Having asked the court to take notice of them, the caveators cannot be heard to complain that they were placed before the jury. "The reception of incompetent evidence to prove an admitted fact is not cause for disturbing the result of a trial." *Rudd v. Casualty Co.,* 202 N.C. 779, 164 S.E. 345; *Lumber Co. v. Elizabeth City,* 181 N.C. 442, 107 S.E. 449; *Bag Co. v. Grocery Co.,* 171 N.C. 764, 88 S.E. 512; *Fisher v. Brown,* 135 N.C. 198, 47 S.E. 398; *Brown v. McKee,* 108 N.C. 387, 13 S.E. 8; see also *Redd v. Nurseries,* 241 N.C. 385, 85 S.E. 2d 311; *McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102; *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801.

The appellants' assignments of error based on exceptions to the court's review of the evidence and statement of contentions cannot be

sustained. Equal stress was given to the evidence and the contentions of the parties. They had opportunity to request correction, amplification, or additional instruction if deemed desirable. Failure to make the request waived the right to object. *Ellis v. Wellons,* 224 N.C. 269, 29 S.E. 2d 884; *Davis v. Keen,* 142 N.C. 496, 55 S.E. 359; *Simmons v. Davenport,* 140 N.C. 407, 53 S.E. 225.

By assignment of error No. 6 the appellants challenge the following definition in the court's charge to the jury: "A caveat is a caution entered in the court of probate to stop probate from being granted without the knowledge of the parties at interest." Black's Law Dictionary, 4th Ed., defines caveat: "Let him beware. This process may be used in the probate courts to prevent (temporarily or provisionally) the probate of a will." Whether the court's definition is entirely accurate is immaterial. The caveat challenges the validity of the will and placed upon the propounder the burden of proving its formal execution in conformity with statutory requirements. Thus arose the issue *devisavit vel non.* That is, did the testatrix devise, and is the paper offered her will?

The right to bequeath and to devise property by will is statutory. In order to be valid a will must be attested by at least two competent witnesses, G.S. 31-3.3; or it must be entirely in the handwriting of the testator and found among his valuable papers, or placed in the possession of some person or depository for safekeeping. G.S. 31-3.4. The propounder offered as witnesses Barbara Jean Harris and Mrs. Eva Lewis who testified to the formal execution of the will and that they, in the presence of the testatrix and at her request, signed as the subscribing witnesses. They also testified that the will, in its entirety, is in the handwriting of Ellen J. Crawford and that it was delivered to Mrs. Lewis by the testatrix three days before her death with instructions that it be delivered to Mrs. Pumphrey; and that these instructions were carried out.

The evidence offered by the propounder was sufficient to go to the jury and to sustain the will both as an attested and as a holograph will. Mrs. Pumphrey, though a beneficiary under the will, was not disqualified to testify as to the handwriting of the testatrix. G.S. 31-10(b); *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531; *Cornelius v. Brawley,* 109 N.C. 542, 14 S.E. 78; *Hampton v. Hardin,* 88 N.C. 592.

The appellants urgently contend, however, that the paper writing offered for probate and which bears date 26 April, 1955, was revoked by a subsequent will. In support, they offered as a witness Mrs. R. I. Corbett who testified that on 18 August, 1955, the testatrix called the witness to the former's home and the following took place: "When I got there Miss Ellen told me that she had been working on her will and that she had been dissatisfied with some things and that she had her will

ready and she wanted me to witness it and go over it with her. She had a paper with her then that she said was her will. Her name appeared in it. . . . It was written in Miss Ellen's handwriting. . . . The will was written on a long white paper, written on one page, . . . The original paper writing which you now show me . . . is not the paper writing which I witnessed on August 18, 1955." The witness remembered that Miss Ellen had misspelled a word and had drawn a line through it, and misspelled it again and drew another line through it. She remembered also that in the writing she witnessed, an article of furniture was given to Laura Ellen Lowe; and that request was made that the Crawford place be bought by some member of the family. In the will offered for probate Laura Ellen Carson Lowe was given, among other things, "Mama's rocking chair"; and further provided: "It is my wish that the home place is sold to no one outside the C. W. Crawford family."

On cross-examination, the witness testified: "I have read the paper twice that has been offered in evidence here. What she told me about it was substantially the same as what is in this paper."

What became of the paper witnessed by Mrs. Corbett does not appear. There is no evidence that any other attesting witness signed it. While the evidence of Mrs. Corbett indicated the document was in the handwriting of Ellen J. Crawford, there was no evidence it was found among her valuable papers, or that it was "lodged" by the maker with some person or depository for safekeeping. Therefore, evidence is lacking that the paper writing witnessed by Mrs. Corbett was executed according to the formalities necessary to make it a valid will. It was, therefore, ineffective as a revocatory instrument. "A written will or any part thereof may be revoked only (1) by a subsequent will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills, or (2) by being burnt, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator himself or by another person in his presence and by his direction." G.S. 31-5.1. Evidence of revocation, therefore, was insufficient to justify the submission of that phase of the case to the jury. *In re Will of Evans*, 223 N.C. 206, 25 S.E. 2d 556. The caveators had the benefit of having the question of revocation considered by the jury, notwithstanding there was no evidence to support the contention. The paper writing witnessed by Mrs. Corbett contained no words of revocation. Its provisions were not in conflict with the will offered for probate. *In re Wolfe*, 185 N.C. 563, 117 S.E. 804; *In re Venable's Will*, 127 N.C. 344, 37 S.E. 465. As she was leaving for the hospital three days before her death, the testatrix placed the will in the hands of Mrs. Lewis for safekeeping. This act was wholly inconsistent with any idea of revocation.

The court instructed the jury fully with respect to the principles of law applicable to the evidence offered and properly placed the burden of proof. "The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe it was misled or misinformed with respect thereto." *Barnes v. Caulbourne*, 240 N.C. 721, 83 S.E. 2d 898; *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356. We have examined carefully all assignments of error brought forward and discussed in the excellent brief filed by the caveators. The record, however, discloses

No error.

EDMOND BURR v. MRS. M. M. EVERHART.

(Filed 22 May, 1957.)

1. Negligence § 17—

There is no presumption of negligence from the mere fact that there has been an accident and an injury has resulted.

2. Negligence § 19b(1)—

In order to make out a case of actionable negligence, plaintiff must show that defendant failed to exercise proper care in the performance of a duty owed plaintiff, that the negligent breach of such duty was the proximate cause of plaintiff's injury, and that a person of ordinary prudence should have foreseen such result was probable under the conditions as they existed. If the evidence fails to establish any one of these essential elements, nonsuit is proper.

3. Master and Servant § 15—Nonsuit held proper in this action by carpenter for fall when rotten condition of eave causing fall was not apparent.

Plaintiff's evidence tended to show that he was ordered to begin the work of repairing a roof without a scaffold, that after having done part of the work, he was descending to the ground to await the scaffolding and was attempting to step from the plate at the eave of the roof to the ladder when the plate gave way, causing him to fall. He further testified that the plate was rotten and crumbled, which caused him to fall, but that he, an experienced carpenter, could not tell there was anything wrong with it. *Held:* Nothing in the evidence indicates that defendant employer could anticipate that an experienced carpenter would step on a plate of insufficient strength to support his weight, or that a fall was less likely if plaintiff had attempted to step from the plate to a scaffold rather than from the plate to a ladder, and nonsuit should have been entered.

APPEAL by defendant from *Preyer, J.*, October, 1956 Term, ROWAN Superior Court.

Civil action to recover damages for personal injury sustained by the plaintiff in a fall while making repairs to the roof on one of defend-

ant's tenant houses. Issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. From the judgment on the verdict, the defendant appealed. The controlling facts are discussed in the opinion.

Robert M. Davis, George R. Uzzell, for defendant, appellant.
Clarence Kluttz, Lewis P. Hamlin, Jr., for plaintiff, appellee.

HIGGINS, J. The defendant's assignment of error No. 5 is determinative of this appeal. The assignment is based on the court's refusal to allow defendant's motion for judgment of nonsuit, renewed at the close of all the evidence.

At the time of the plaintiff's accident and injury he was a carpenter 60 years of age with 35 years experience in his trade. The defendant, a lady 76 years of age, was the owner of a number of tenant houses, experienced in having them repaired. The evidence is in conflict as to whether the terms of the agreement were such as made the plaintiff an independent contractor or a regular employee at an hourly wage. For the purpose of this motion, we must resolve the conflict in favor of the plaintiff's claim that he was a regular employee.

As a basis of his cause of action the plaintiff alleged that a scaffold was necessary before he could undertake the work in safety. The defendant insisted that he begin work and that scaffolding material would be furnished later. "After plaintiff had been so engaged for several hours tearing off the old roof, assisted by a fellow employee, some of the timbers near the edge of the roof, which were defective, deteriorated, and not properly fastened, gave way under the weight of the plaintiff, due to such giving way and the absence of a scaffolding to stop his fall, he was thrown 12 to 15 feet into the yard," gravely and permanently injured. The plaintiff testified: ". . . Mrs. Everhart said she wanted me to cover the house . . . and I said I would have to have some scaffolding . . . she told me to take the short ladder. I said, 'Well, there aint no scaffolding down there yet,' and she said, 'Go ahead and be a-tearing it off, tearing the roof off, I'll have you a scaffold down there just as quick as you'd want it.' . . . She told Mr. Hilton, (her son-in-law) to go up to Grove Supply and get the scaffold. I went to taking it (roof) off just like I was directed. I was thinking I'd be careful and not get hurt till the scaffolding stuff did get there." After tearing off the roof "we started back at the top and tore all the lathes off down to the plate— . . . The ladder was there and I stepped down on the plate right beside the ladder, going to go down. There wasn't no scaffold stuff out there, and I said, 'Well, we'll get us a Coca-Cola, Otis, and wait till the scaffold comes,' and when I stepped on the

plate it just crumbled off; it was rotten. . . . I fell to the ground. . . . If there had been any scaffold there, I would never have hit the ground."

On cross-examination the plaintiff testified: "Otis Overcash and I went up on the house together and he was up there when I fell. I had one foot on the ladder, fixing to go down, when the plate crumbled (it was rotten but didn't look like it). You couldn't see the plate from the outside; I couldn't tell it was rotten. Mrs. Everhart could not have observed the rotten part without taking the roof off. I have been a carpenter for 35 years and I could not tell there was anything wrong with it."

There was abundant evidence of the serious and permanent character of plaintiff's injuries. But negligence is not presumed from the mere fact that there has been an accident and an injury has resulted. *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762; *Harward v. General Motors Corp.,* 235 N.C. 88, 68 S.E. 2d 855; *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 make out a case of actionable negligence the plaintiff must show (1) the defendant has failed to exercise proper care in the performance of a duty owed to the plaintiff; (2) that the negligent breach of that duty was the proximate cause of the plaintiff's injury; (3) that a person of ordinary prudence should have foreseen such result was probable under the conditions as they existed. "If the evidence fails to establish either one of the essentials the judgment of nonsuit is proper." *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Petty v. Print Works,* 243 N.C. 292, 90 S.E. 2d 717; *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621. "There must be legal evidence of every material fact necessary to support a verdict and the verdict must be grounded on 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; *Mitchell v. Melts, supra.* "If the evidence fails to establish any one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed." *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

In this case the plaintiff was injured while he was in the act of leaving the roof to get a Coca-Cola and to wait for the scaffolding material. While one foot was on the "plate" and one on the ladder, the plate crumbled and gave way. The plaintiff's fall caused serious injury. There is nothing in the evidence to indicate a scaffold would have supported the defective plate or that a fall was less likely if the plaintiff attempted to step from the plate to a scaffold rather than from the plate to the ladder. The defective plate caused the fall. The plaintiff, a carpenter of 35 years experience, could not detect its rotten condition. He testified there was no way by which the defendant could have de-

tected the danger until the roof was removed and the plate examined. Nothing in the evidence indicates the defendant could anticipate that a carpenter with long years of experience would step on a plate of insufficient strength to support his weight. Ordinarily a defendant is not charged with the responsibility of foreseeing freakish or unusual accidents. Whether there is evidence of other elements of actionable negligence is a debatable question; however, evidence is lacking to charge the defendant with notice that without a scaffold the plaintiff would step on a rotten plate and fall to his injury. The assignment of error No. 5 must be sustained. The motion for judgment of nonsuit should have been allowed.

Reversed.

JENNIE E. BEESON v. ELMER BEESON.

(Filed 22 May, 1957.)

1. Divorce and Alimony § 14—

The 1955 amendment to G.S. 50-16 merely gives a wife the right to set up a cross-action for alimony without divorce in the husband's suit for divorce, either absolute or from bed and board, without disturbing the right of the wife to bring an independent action under the statute for alimony without divorce, the alternate procedure being permissive but not mandatory.

2. Abatement and Revival § 8—

The pendency of the husband's action for absolute divorce under G.S. 50-6 is not ground for abatement of the wife's subsequent action for alimony without divorce under G.S. 50-16.

APPEAL by plaintiff from *Rousseau, J.*, at March 1957 Term of GUILFORD (Greensboro Division).

Civil action instituted 15 December, 1956, in High Point Municipal Court for alimony without divorce under provisions of G.S. 50-16.

Defendant, answering, admits allegations of the complaint as to residence and marriage, and that no children were born of the marriage. And for a further defense defendant pleads in bar of this action the pendency at the time of its institution of an action brought by him in Superior Court of Randolph County on 25 October, 1956, for absolute divorce on the ground of two years separation.

Upon hearing on 29 December, 1956, the Judge of the Municipal Court of the city of High Point found as facts:

That on 25 October, 1956, defendant, Elmer Beeson, instituted a civil action for divorce under G.S. 50-6 against plaintiff herein, Jennie E. Beeson, in Superior Court of Randolph County, and summons and copy of complaint therein were served upon Jennie E. Beeson on 29

October, 1956, and that on 3 November, 1956, she filed an answer in said divorce action, and that said action was instituted prior to the commencement of this action brought under G.S. 50-16, and is still pending. And thereupon said judge being of opinion that the civil action for divorce instituted in Randolph County does not abate this action for alimony filed by the plaintiff, ordered that defendant's plea in abatement "be not allowed."

Defendant excepted thereto and appealed to Superior Court of Guilford County.

Thereafter the cause coming on for hearing on such appeal, and being heard before judge holding the courts of the Eighteenth Judicial District, the judge found facts in the main substantially as found by the judge of the Municipal Court, but, being of opinion that the action pending in Randolph County abates this action, the judge, by order, so adjudged, and dismissed this action.

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

J. V. Morgan and Edward N. Post for Plaintiff Appellant.
Coltrane & Gavin for Defendant Appellee.

WINBORNE, C. J. This is the question determinative of this appeal: Where a husband has instituted an action against his wife for absolute divorce on legal ground, under G.S. 50-6, is an action thereafter instituted by the wife against the husband for alimony without divorce under provisions of G.S. 50-16 abatable by reason of the pendency of the prior action by the husband?

A negative answer is found in the language of G.S. 50-16, as amended by Chapter 814 of 1955 Session Laws of North Carolina. Prior to the enactment of the amendment G.S. 50-16, formerly C.S. 1667, provided in pertinent part that "if any husband shall separate himself from his wife and fail to provide her . . . with the necessary subsistence according to his means and condition in life . . . the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of the husband . . ."

As so worded this Court uniformly held that alimony without divorce under the statute, G.S. 50-16, formerly C.S. 1667, could be granted only in an independent suit. See among other cases *Silver v. Silver* (1941), 220 N.C. 191, 16 S.E. 2d 834; *Shore v. Shore* (1942), 220 N.C. 802, 18 S.E. 2d 353.

In the *Shore case, supra*, this Court concluded with this declaration: "Here we are dealing with an act of Assembly complete within itself, which is not to be set at naught by simple device of pleading."

And the amendment of 1955, inserted in the statute G.S. 50-16, after the quoted portion recited, this clause: "Or she may set up such action as a cross-action in any suit for divorce, either absolute or from bed and board . . . and the husband may seek a decree for divorce, either absolute or from bed and board, in any action brought by his wife under this section."

It seems clear from the language used in this amendment that the General Assembly intended, without disturbing the right of the wife to an independent action, to give to her an alternative method of procedure which she might use at her election. The alternate is permissive, but not mandatory. And the statute is still complete in itself and is not to be set at naught by simple device of pleading.

The judgment abating the action is

Reversed.

STATE v. ERNEST ROBBINS, ALIAS ERNEST KIMES.

(Filed 22 May, 1957.)

1. Criminal Law § 81c(2)—

Any error in the instructions of the court relating to a higher degree of the offense cannot be prejudicial to defendant upon his conviction of a lesser degree of the crime.

2. Rape § 25—

In a prosecution for assault on a female with intent to commit rape, reference in the court's instruction to the sixteen year old prosecutrix as a "child" could create no more prejudice against defendant than her appearance on the stand and her testimony as to her age.

3. Criminal Law § 53g: Assault and Battery § 16—

In a prosecution for assault on a female with intent to commit rape, the court is not required to submit to the jury the question of defendant's guilt of simple assault when there is no evidence of this lesser degree of the crime.

4. Assault and Battery § 15—

The court's definitions of assault and assault upon a female *held* correct and sufficiently full in this case in the absence of request for further elaboration.

APPEAL by defendant from *Sink, Emergency J.*, at 27 August, 1956 Criminal Term of GUILFORD, Greensboro Division.

Criminal prosecution upon a bill of indictment charging that Ernest Robbins, *alias* Ernest Kimes, with force and arms "unlawfully, willfully and feloniously did assault one Ruth Wells, a female, with intent

her the said Ruth Wells unlawfully, feloniously, by force and against her will to ravish and carnally know, against the form of the statute," etc.—consolidated with the case of *State v. Carl Maness* for purpose of trial.

Upon trial in Superior Court the State offered evidence tending to support the charge against defendants, and defendants in turn testified, and offered testimony of others tending to controvert the evidence offered by the State, and to exculpate them. The court instructed the jury that any one of three verdicts, guilty of an assault with intent to commit rape, guilty of assault upon a female, or not guilty, could be rendered by the jury as to each defendant.

Verdict: Guilty of assault upon a female as to each of the defendants.

Judgment: As to Ernest Robbins: That he be confined in the common jail of Guilford County for a period of two years, to be assigned to work on the roads as provided by the law under the State Highway and Public Works Commission.

Defendant Ernest Robbins, *alias* Ernest Kimes, excepted to the judgment and appeals to Supreme Court, and assigns error.

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

George W. Gordon and Lawrence Egerton, Jr., for Defendant Appellant.

WINBORNE, C. J. The record of case on appeal reveals that there were no objections and exceptions to any evidence offered upon the trial below. And while defendant took exception to denial of motion for judgment as of nonsuit at the close of all the evidence no assignment of error is based thereon, and no attempt is made to present it to this Court. Indeed all assignments of error, other than formal ones, are based upon exceptions to portions of the charge as given, and exceptions to the failure of the trial court to comply with G.S. 1-180.

The Court will now consider such of the assignments of error set forth in brief of appellant as seem to merit express treatment.

Assignment of Error No. 3. Exception No. 3.

This exception is directed to this language used in the charge: "There can be no assent in the crime of an 'assault with intent to commit rape.'" Turning to the record of case on appeal it is seen that this sentence is the concluding part of a paragraph in which the court instructed the jury: "In order to convict a defendant of the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion upon the person of the woman and that he intended to do so at all event, notwithstanding any resistance on her part." So read, the meaning of the instruction seems clear. But in any event, the defendant was only

convicted of assault upon a female. Hence, if error there be in the instruction, it is not prejudicial. See *S. v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474, and *S. v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39, cited in brief of the Attorney-General.

Assignment of Error No. 9. Exception No. 9.

This assignment of error is based upon exception to the court, in stating contentions, referring to the prosecutrix Ruth Wells as the Wells "child." She testified that she was sixteen years old. Such a person in the ordinary language of laymen is understood to be a child. To refer to her as such creates no more prejudice against defendant than does her appearance upon the witness stand testifying that she is sixteen years of age. The exception is without merit.

Assignments of Error Nos. 24 and 25. Exceptions Nos. 24 and 25.

These assignments of error are based upon exceptions to alleged failure of the trial judge to state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon in respect to "assault" and "assault upon a female."

The court did not submit an issue of simple assault for there was no evidence of this lesser offense. When there is no evidence of guilt of such less crime, the court is not required to charge the jury as to a lesser degree of the crime. *S. v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853.

The definitions of assault and assault upon a female as given by the trial court appear to be correct and sufficient. *S. v. Williams,* 186 N.C. 627, 120 S.E. 224. In absence of request for further elaboration, defendant may not now complain. *S. v. McLean,* 234 N.C. 283, 67 S.E. 2d 75.

Moreover all other assignments of error presented on this appeal have been given careful consideration, and prejudicial error is not made to appear. The jury has accepted the evidence offered by the State, and the verdict rendered is supported by the evidence.

Hence in the judgment from which appeal is taken, there is

No error.

JUNIUS MARVIN TEMPLE v. ELSIE MAE TEMPLE.

(Filed 22 May, 1957.)

1. Trial § 48½—

After verdict the trial judge may not dismiss an action as in case of nonsuit for insufficiency of the evidence.

2. Same—

The trial judge may dismiss an action after verdict only on the ground of want of jurisdiction or failure of the complaint to state a cause of action.

3. Process § 6—

Affidavit that after due diligence personal service cannot be had on defendant within the State is requisite and jurisdictional to service outside the State, G.S. 1-98.4(a)(3), and where the record on appeal does not disclose such affidavit, service must be held ineffectual.

4. Appeal and Error § 1—

The jurisdiction of the Supreme Court is derivative, and where it appears that the court below had no jurisdiction, the Supreme Court can acquire none by appeal.

5. Appeal and Error § 2—

Where it appears on the face of the record that the court below had no jurisdiction, the Supreme Court will so declare *ex mero motu.*

6. Appeal and Error § 40—

Where the court below erroneously dismisses an action after verdict for insufficiency of the evidence, but it appears on the face of the record that the court had no jurisdiction of the parties, the correct result is reached, and the judgment will not be disturbed.

APPEAL by plaintiff from *Hobgood, J.,* and a jury, at November Civil Term, 1956, of JOHNSTON.

E. Reamuel Temple, Jr., for plaintiff, appellant.
No counsel contra.

JOHNSON, J. Civil action by husband for absolute divorce on the ground of natural impotency of the wife. G.S. 50-5(2).

The jury returned a verdict finding all the crucial issues in favor of the plaintiff. After verdict, the trial judge, being of the opinion that the plaintiff's evidence was insufficient as a matter of law to justify a decree of absolute divorce on the ground of impotency, entered judgment nonsuiting and dismissing the action. From the judgment so entered, the plaintiff appeals.

Under our decisions the question of the sufficiency of the evidence to carry a case to the jury must be decided by the judge before verdict. The rule is that after verdict the judge may not dismiss an action as in case of nonsuit for insufficiency of the evidence. *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373; *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257; *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219; *Batson v. Laundry,* 202 N.C. 560, 163 S.E. 600; *Mewborn v. Smith,* 200 N.C. 532, 157 S.E. 795. The trial judge may dismiss an action after verdict on only two grounds: (1) want of jurisdiction, and (2) failure of the complaint to state a cause of action. *Ward v. Cruse, supra.*

It thus appears that the trial judge erred in dismissing the action after verdict on the ground of insufficiency of the evidence to support

the verdict. However, the error seems to be immaterial. This is so because of a fatal defect of jurisdiction appearing on the face of the record. The complaint alleges that the defendant is a resident of Lewistown, Pennsylvania. The transcript discloses purported service of summons upon the defendant by the Sheriff of Mifflin County, Pennsylvania. However, nowhere in the record is there a sworn statement or affidavit "That, after due diligence, personal service cannot be had within the state," as required by Chapter 919, Section 1, Session Laws of 1953, now codified in pertinent part as G.S. 1-98.4(a)(3). Compliance with this statute is mandatory. The affidavit or sworn statement is jurisdictional. Without it, service outside the State is ineffectual to bring the defendant into court. See *Nash County v. Allen*, 241 N.C. 543, 85 S.E. 2d 921; *Groce v. Groce*, 214 N.C. 398, 199 S.E. 388; *Denton v. Vassiliades*, 212 N.C. 513, 193 S.E. 737.

Jurisdiction of the Supreme Court is derivative, and where it appears that the court below had no jurisdiction, the Supreme Court can acquire none by appeal. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748. Also, where it appears on the face of the record, as here, that the court below had no jurisdiction, this Court will so declare *ex mero motu*. *Ridenhour v. Ridenhour*, 225 N.C. 508, 35 S.E. 2d 617; *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E. 2d 644.

Since the court below was without jurisdiction, its ruling in dismissing the case, though for an erroneous reason, will be upheld. The rule is that a correct decision of the lower court will not be disturbed because the court gave a wrong or insufficient reason therefor. *Bank v. McCullers*, 201 N.C. 440, 160 S.E. 494; *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32; *Scott v. Life Association*, 137 N.C. 515, top p. 521, 50 S.E. 221, mid. p. 223; *Bell v. Cunningham*, 81 N.C. 83.

The results, then, are: the ruling of the Superior Court in dismissing the plaintiff's action is sustained and the appeal to this Court is dismissed.

Appeal dismissed.

F. D. WEDDLE v. OLLIE EVERHART WEDDLE.

(Filed 22 May, 1957.)

1. Appeal and Error § 22—

Exceptions and assignments of error to the refusal of the court to sign judgment tendered and to the findings of fact contained in the judgment entered, are broadside in form and present nothing for review.

2. Appeal and Error § 19—

An assignment of error must be supported by an exception duly taken.

3. Appeal and Error § 21—

An appeal is in itself an exception to the judgment and supports for purposes of review an assignment of error to the judgment, but such assignment presents only the questions whether the facts found support the judgment and whether error of law appears upon the face of the record, and does not present for review the findings of fact or the evidence upon which they are based.

APPEAL by respondent Sadie M. Weddle from *Olive, J.*, 7 November, 1956, Term of SURRY.

Motion in the cause by defendant wife to set aside decree of absolute divorce.

The decree of divorce was entered on the ground of two years separation at the June, 1950, term of court, dissolving a marriage contracted in 1923. The purported service of process was by publication. The defendant did not appear. The plaintiff and the respondent Sadie M. Weddle were married in June, 1950, following the decree of divorcement. The plaintiff died on 27 February, 1956. The defendant movant alleged and offered evidence tending to show that the decree of divorce is void for the reason that the plaintiff perpetrated a fraud upon the court in furnishing information as to residence of the defendant and in purportedly obtaining service of process upon her by publication, and that therefore the court was without jurisdiction.

The court below found facts and entered judgment allowing the motion and setting aside the decree of divorce. The respondent excepted and appealed.

Buford T. Henderson for respondent, appellant.

Hayes & Wilson for defendant, appellee.

PER CURIAM. The respondent's only exception is found in the appeal entries. It embraces (1) the refusal of the court to sign the judgment tendered by the respondent, (2) the findings of fact contained in the judgment entered by the court, and (3) the judgment as entered. The exception is broadside and is ineffectual to support an assignment of error to the judgment tendered and refused or to the findings of fact. *Suits v. Insurance Co.*, 241 N.C. 483, 85 S.E. 2d 602. Similarly, the assignments of error to the judgment tendered and to the findings of fact are broadside in form. These assignments present nothing for review. This is so both because of their broadside form and for the further reason that they are unsupported by valid exceptions. *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445; *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222; *S. v. Worley, ante*, 202, 97 S.E. 2d 837. However, the respondent's appeal itself constitutes an exception to the

judgment and supports for review purposes the assignment of error based thereon. But this assignment presents only the questions whether the facts found support the judgment and whether error of law appears upon the face of the record. *Goldsboro v. R. R., ante,* 101, 97 S.E. 2d 486; *Muilenburg v. Blevins,* 242 N.C. 271, 87 S.E. 2d 493. This assignment of error does not present for review the findings of fact or the evidence upon which they are based. *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242.

A careful examination of the record discloses that the findings of fact made by the court below support the judgment. No error appears upon the face of the record. The appeal presents no new question of law requiring discussion.

The judgment of the Superior Court will be upheld.

Affirmed.

THE CITY OF REIDSVILLE, A MUNICIPAL CORPORATION, v. CHARLES M. TURNER AND WIFE, CATHERINE LEWIS TURNER, BRUCE H. TURNER AND WIFE, EDNA G. TURNER, W. O. McGIBBONY, TRUSTEE, AND FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA.

(Filed 22 May, 1957.)

Appeal by petitioner from *Olive, J.,* 12 September, 1956, Term, of ROCKINGHAM.

Proceeding under G.S. Ch. 40 to condemn the fee in 101.18 acres, the bottom land on the 323-acre dairy farm of respondents Turner, for use, together with other lands, in the construction and maintenance of a reservoir in connection with plaintiff's water system. The other respondents were joined because of their respective interests under a deed of trust on the Turner land.

The court submitted, and the jury answered, the sole issue raised by the pleadings, viz.: "What amount are respondents entitled to recover of petitioner, City of Reidsville? Answer: $32,100.00."

The judgment entered adjudged that respondents Turner recover from petitioner the sum of $32,100.00 and costs, and that "the full fee simple title" to the land described and condemned in the proceeding vested in petitioner. Petitioner excepted and appealed.

Jule McMichael for petitioner, appellant.

Frazier & Frazier and Price & Osborne for respondents, appellees.

PER CURIAM. The trial was conducted in accordance with the law as established by the decisions of this Court. While appellant brings forward thirty-one assignments of error, they relate to incidents of the trial rather than to basic principles of law.

Upon conflicting evidence, the amount of compensation to which respondents Turner were entitled was determined by the jury. Careful consideration fails to disclose error sufficiently prejudicial to petitioner to require a new trial. Having reached this conclusion, it would serve no useful purpose to discuss in detail the background and particulars of the several assignments.

No error.

UTICA FIRE INSURANCE COMPANY v. J. ROMIE SUTTON AND AZILE SUTTON.

(Filed 22 May, 1957.)

APPEAL by plaintiff from *Nimocks, J.*, October Term 1956 of DURHAM.

This is a civil action instituted by the plaintiff to recover for damages growing out of an automobile collision which occurred on South Duke Street in the City of Durham, North Carolina, about 2:50 p.m. on 14 June 1952.

An automobile belonging to the plaintiff's insured, Thomas G. Shepherd, was parked on the west side of Duke Street near the curb, headed south, and was struck by the car of the defendant J. Romie Sutton while being driven south on Duke Street by his daughter, Azile Sutton.

Azile Sutton is a minor and no guardian *ad litem* having been appointed to represent her, only J. Romie Sutton filed answer.

The plaintiff's evidence tends to show that at the time of the collision, Azile Sutton was driving said automobile with the permission of her father, and just before the collision she was talking to her mother, who was a passenger in the car she was driving, and looked up too late to avoid hitting the Shepherd car.

The parties stipulated that the damages to the automobile owned by the plaintiff's insured resulting from the collision were $373.74 and the plaintiff paid its insured therefor the sum of $323.74 under the provisions of its collision policy of insurance and seeks recovery in the amount it paid out under its right of subrogation.

At the close of plaintiff's evidence the defendant J. Romie Sutton moved for judgment as of nonsuit, and the motion was allowed.

Plaintiff appeals, assigning error.

E. K. Powe for plaintiff appellant.
No counsel contra.

PER CURIAM. The plaintiff excepts to and assigns as error the ruling of the court below in sustaining the motion for judgment as of nonsuit.

A review of the evidence revealed by the record on appeal, including the stipulations entered into by the parties, leads us to the conclusion that the case should have been submitted to the jury. Hence, the judgment below is

Reversed.

W. H. DAVIS, VIRGINIA G. DAVIS AND EDWARD B. HOPE, TRUSTEE, v. R. T. WALKER.

(Filed 22 May, 1957.)

APPEAL by defendant from *McKeithen, S. J.*, and a jury, October Term, 1956, of CUMBERLAND.

Civil action in trespass.

The plaintiffs alleged that the defendant sawmill operator in cutting timber on lands adjoining theirs wrongfully crossed the boundary line and cut and removed valuable timber from their lands. The defendant denied the material allegations of the complaint and pleaded the statute of limitations and estoppel. All issues raised by the pleadings were submitted to the jury and answered in favor of the plaintiffs. From judgment on the verdict awarding the plaintiffs damages in the sum of $3,116.00, the defendant appeals.

Robert H. Dye for defendant, appellant.
Oates, Quillin & Russ for plaintiffs, appellees.

PER CURIAM. The defendant has brought forward eight assignments of error. They relate to the reception and exclusion of evidence and to the charge of the court. All of them have been carefully examined, and when tested by settled principles of law, no prejudicial error is revealed. None of the assignments presents any new question of law requiring discussion.

The defendant moved in this Court for a new trial on the ground of newly discovered evidence. The motion and supporting affidavits have been examined. The facts presented, when tested by the controlling principles of law, fail to disclose sufficient merit to justify a new trial. The motion is denied.

In the trial below we find

No error.

SAMUEL H. JOHNSON, ANCILLARY ADMINISTRATOR OF THE ESTATE OF ERNEST L. WILBORN, PLAINTIFF, v. SANFORD W. CATLETT, ORIGINAL DEFENDANT, AND J. P. STEVENS & COMPANY, INC., AND JAMES A. PATTERSON, ADDITIONAL DEFENDANTS.

(Filed 7 June, 1957.)

1. Evidence § 3—

Our courts are required to take notice of the law of the United States or any other State or Territory of the United States, or of the District of Columbia, or of any foreign country, when any question arises as to such law in an action instituted in this State. G.S. 8-4.

2. Constitutional Law § 28—

An award of the Industrial Commission of another State is binding on claimant and is *res judicata* as to liabilities under the Act, and must be given full faith and credit in this jurisdiction. Constitution of the United States, Article 4, section 1.

3. Master and Servant § 41—

Under the Virginia Compensation Act an employee may not maintain a suit against a fellow employee for injuries cognizable under the Act.

4. Torts § 6—

In order for a defendant in a tort action to have a third party joined for contribution under G.S. 1-240, it is necessary that plaintiff, had he desired to do so, could have joined such additional party.

5. Same: Master and Servant § 41—Third person tort-feasor sued by personal representative of deceased employee may not join employer and fellow employee for contribution.

The personal representative of a deceased employee sued the third person tort-feasor in an action instituted in this State. Such defendant had the employer and a fellow employee of the deceased employee joined for contribution. The additional defendants filed written motions and answers to the cross-action alleging that the deceased was employed in another State, that the injury came within the purview of the Compensation Act of such State, and that award had been entered therein adjudicating the liabilities of the additional defendants for the death. *Held:* Since an employee cannot sue a fellow employee for injuries cognizable under the Compensation Act of the Sister State, plaintiff could not have maintained the action against either of the additional defendants at the time the action was instituted, and motions of the additional defendants to strike the cross-action was properly allowed.

APPEAL by defendant Sanford W. Catlett from *Seawell, J.*, October Term 1956 of WAKE.

Civil action instituted on 9 May 1956 against Sanford W. Catlett to recover for the wrongful death of plaintiff's intestate, Ernest L. Wilborn.

The defendant Catlett filed an answer and set up a cross-action against J. P. Stevens & Company, Inc. and James A. Patterson and

procured an order on 25 July 1956 making them additional parties defendant pursuant to the provisions of G.S. 1-240.

These additional defendants filed written motions to strike the cross-action from the answer of Catlett and to dismiss as to the additional defendants on the ground that the defendant J. P. Stevens & Company, Inc. had settled its liability to plaintiff's intestate under the provisions of the Virginia Workmen's Compensation Act and, therefore, neither it nor its employee, James A. Patterson, can be sued as a joint tort-feasor of the original defendant. The additional defendants likewise filed answers to the cross-action and set up the provisions of the Virginia Workmen's Compensation Act and the final award thereunder as a plea in bar of any recovery in this action against these additional parties on the cross-action on the ground that there is no common liability on these additional defendants with the original defendant to the plaintiff.

Counsel for the original defendant and counsel for the additional defendants entered into the following stipulations:

"1. That on the 6th day of December 1954 James A. Patterson was an employee of J. P. Stevens & Company, Inc. in the capacity of Superintendent of its plant at South Boston, Virginia, and Ernest L. Wilborn was likewise an employee of said J. P. Stevens & Company, Inc. in the capacity of a departmental Supervisor in said South Boston, Virginia plant.

"2. That on said date, said James A. Patterson and Ernest L. Wilborn, accompanied by two other employees of J. P. Stevens & Company, Inc., left South Boston, Virginia, in an automobile owned and operated by James A. Patterson, for the purpose of visiting the plant of J. P. Stevens & Company, Inc. at Wallace, N. C. on matters arising out of and in the scope of their employment.

"3. That while traveling along Highway 15A between Creedmoor and Raleigh, N. C., the said automobile of the said James A. Patterson was in a collision with an automobile owned and operated by Sanford W. Catlett. As a result of the collision, Ernest L. Wilborn received injuries from which he died.

"4. That at the time of said collision, the said J. P. Stevens & Company, Inc. and its employees, James A. Patterson and Ernest L. Wilborn, had accepted and were operating under the Virginia Workmen's Compensation Act.

"5. That subsequent to the death of said Ernest L. Wilborn, an agreement was entered into between J. P. Stevens & Company, Inc. and Anna D. Wilborn, the widow and principal dependent of Ernest L. Wilborn, providing that upon approval of the agreement by the Industrial Commission of Virginia, J. P. Stevens & Company, Inc. would pay or cause to be paid, and the dependents would accept compensation at

the rate of $27.00 per week for a period of three hundred weeks, and burial expenses in the sum of $300.00, as benefits due the dependents of said Ernest L. Wilborn, pursuant to the terms of said Workmen's Compensation Act of Virginia; that said agreement was approved by the Industrial Commission of Virginia on December 30, 1954, prior to the institution of this suit and benefits are now being paid pursuant thereto; that the recipients of such benefits are the same as are those who would receive any recovery in this lawsuit."

The court below held that, "neither the additional defendant J. P. Stevens & Company, Inc., nor the additional defendant James A. Patterson is liable to the plaintiff, the Ancillary Administrator of Ernest L. Wilborn, for the wrongful death of Ernest L. Wilborn; and that there exists no common liability as joint tort-feasors between the said Sanford W. Catlett and either J. P. Stevens & Company, Inc. or James A. Patterson; and that neither J. P. Stevens & Company, Inc., the employer of plaintiff's intestate, nor James A. Patterson, fellow employee of said Wilborn, can be held liable for contribution as a joint tort-feasor to the original defendant, Sanford W. Catlett."

The motion to strike the cross-action from the answer of Sanford W. Catlett was allowed, and the order making the movants parties to the action was vacated.

Judgment was accordingly entered. The defendant Sanford W. Catlett appeals, assigning error.

Joyner & Howison and Roland C. Braswell for appellant.

Armistead J. Maupin for J. P. Stevens & Company, Inc., appellee.

Battle, Winslow & Merrell for James A. Patterson, appellee.

DENNY, J. The question posed for determination is this: Where plaintiff's intestate, a resident of Virginia, employed and working in that State under its Workmen's Compensation Laws, was killed while a passenger in a North Carolina automobile accident while temporarily in North Carolina in the course and scope of his Virginia employment, and an award is made to his beneficiaries by his employer pursuant to the Virginia Workmen's Compensation Act, and thereafter an action is begun in North Carolina for wrongful death against the alleged third party tort-feasor, may such defendant pursuant to G.S. 1-240 cause the driver of the automobile in which plaintiff's intestate was riding and the employer of such driver be joined as joint tort-feasors and seek contribution against them when such other driver was a fellow-servant of plaintiff's intestate and the employer was also the employer of plaintiff's intestate?

Section 65-37 of the Virginia Workmen's Compensation Act, codified in Volume 9 of the 1950 Code of Virginia, reads as follows: "The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common-law or otherwise, on account of such injury, loss of service or death."

The Supreme Court of Appeals of Virginia, in the case of *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E. 2d 530, held that the above statute "deprives the employee or his personal representative of a common-law right of action for damages against the employer in a particular class of cases, that is, where the injury or death is from an accident arising out of and in the course of the employment, because the Act gives to the employee or his dependents in lieu thereof the right to an award of compensation."

In the case of *Feitig v. Chalkley*, 185 Va. 96, 38 S.E. 2d 73, it is said: "It seems clear that it was the legislative intent to make the act exclusive in the industrial field so that, in the event of an industrial accident, the rights of all those engaged in the business would be governed solely thereby. The remedies afforded the employee under the act are exclusive of all his former remedies within the field of the particular business, but the act does not extend to accidents caused by strangers to the business. If the employee is performing the duties of his employer and is injured by a stranger to the business, the compensation prescribed by the act is available to him, but that does not relieve the stranger of his full liability for the loss, and, if he is financially responsible, there is no reason to cast this loss as an expense upon the business. . . .

"By analogy, loss by damage to an employee caused by the act of another employee is a loss within the field of industrial accidents intended by the act to be borne by industry as an industrial loss without opportunity for recoupment. What other meaning can be given to the phrase in section 11, 'those conducting his business'?"

Section 11, referred to in the above case, is now codified as section 65-99 in the 1950 Code of Virginia, and reads as follows: "Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified." The employer in this case was so insured.

The Virginia Court pointed out in the *Feitig case* that the North Carolina Workmen's Compensation Act contains a provision similar to section 11 of the Virginia Code, and a provision on subrogation similar to section 12 (now codified as section 65-38 in the 1950 Code of Virginia). The Court observed, however, that in the interpretation of provisions similar to those contained in section 11 of the Virginia Act, we had not followed the usual construction given to such provisions, citing *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623. Even so, we have now adopted the majority view in this respect. See *Essick v. Lexington*, 232 N.C. 200, 60 S.E. 2d 106; *Bass v. Ingold*, 232 N.C. 295, 60 S.E. 2d 114; *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6.

The Virginia Workmen's Compensation Act provides that the payment of a claim for injury or death by the employer, shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person might have against a third party. It further provides that any amount collected by the employer in excess of the amount paid by the employer, or for which he is liable, shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less such amounts as are paid by the employer for reasonable expenses and attorney fees. Section 65-38, 1950 Code of Virginia. It is likewise provided that these rights shall inure to like extent to an insurance carrier when it has paid an employer's obligation under the Act. Section 65-108, 1950 Code of Virginia.

Even so, it has been held in Virginia that, notwithstanding the assignment provisions in the Compensation Act, the employee or his personal representative may sue a third party. *Fauver v. Bell*, 192 Va. 518, 65 S.E. 2d 575.

In the last cited case the Virginia Court said: "The Act does not deny an injured employee the right to pursue his action at law against a negligent third party. The rights and remedies granted under section 65-37 are exclusive only as to an employee and his employer, and only his right to sue his employer for damages is barred by the acceptance of compensation under the Act. *Smith v. Virginia Ry. Co.*, 144 Va. 169, 131 S.E. 440; *Chesapeake & O. Ry. Co. v. Palmer*, 149 Va. 560, 140 S.E. 831; *Noblin v. Randolph Corp.*, 180 Va. 345, 23 S.E. 2d 209."

When any question arises as to the law of the United States, or of any other State or Territory of the United States, or of the District of Columbia, or of any foreign country, this Court is required by statute to take notice of such law in the same manner as if the question arose under the law of this State. G.S. 8-4. See also 28 U.S.C.A., section 1738, adopted by the Congress of the United States on 25 June 1948.

It would seem that the question posed on this appeal requires an answer to these questions: (1) At the time this action was instituted, could it have been maintained against these additional parties? (2) Since the plaintiff's intestate and the additional parties were bound by the exclusive provisions of the Virginia Workmen's Compensation Act, and the claim resulting from the death of plaintiff's intestate having been adjudicated thereunder, can these additional defendants be held as joint tort-feasors in this action? It appears that each of these questions must be answered in the negative.

In *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 88 L. Ed. 149, the employer employed Hunt in Louisiana as a laborer in connection with its business of drilling oil wells. In the course of his employment Hunt, a Louisiana resident, was sent to Texas and while working there for his employer on an oil well he was injured. He sought and procured in Texas an award of compensation for his injury under the provisions of its Workmen's Compensation Law, and the employer's insurance carrier made the payments as required by the award. Hunt then brought a claim for his injury under the Louisiana Workmen's Compensation Law which was more liberal than the Texas law. The employer pleaded the Texas award as being *res judicata.* Hunt, however, obtained a judgment pursuant to the provisions of the Louisiana statute, after deducting the amount of the Texas payments. The Louisiana Court of Appeals affirmed and the Supreme Court of Louisiana refused writs of *certiorari* and review. The Supreme Court of the United States granted *certiorari. Chief Justice Stone,* speaking for the Court, held that Hunt was free to pursue his remedy in either State but, having chosen to seek it in Texas where the award was *res judicata,* the full faith and credit clause precluded him from again seeking a remedy in Louisiana upon the same grounds. It is also stated in the opinion, "A compensation award which has become final 'is entitled to the same faith and credit as a judgment of the court.' See *Ocean Acci. & G. Corp. v. Pruitt* (Tex. Com. App.), 58 S.W. (2d) 41, 44, 45, holding that an award is *res judicata,* not only as to all matters litigated, but as to all matters which could have been litigated in the proceeding with respect to the right to compensation for the injury." *Cf. Industrial Commission v. McCartin,* 330 U.S. 622, 91 L. Ed. 1140, and *Carroll v. Lanza,* 349 U.S. 408, 99 L. Ed. 1183.

We hold that the award made by the Industrial Commission of Virginia is binding on the plaintiff in this action and is *res judicata* as to all claims against these additional defendants. Therefore, such award must be given full faith and credit in this jurisdiction. Constitution of the United States, Article 4, section 1, 28 U.S.C.A., section 1738. Furthermore, the Supreme Court of Appeals of Virginia has expressly

held that an employee of a business covered by the Virginia Workmen's Compensation Act cannot maintain a suit against a fellow-servant for injuries caused by the latter's negligence. *Coker v. Gunter,* 191 Va. 747, 63 S.E. 2d 15; *Phillips v. Brinkley,* 194 Va. 62, 72 S.E. 2d 339. We have likewise so held in *Essick v. Lexington, supra; Bass v. Ingold, supra; Warner v. Leder, supra.*

As to the second question, it is settled law with us that to entitle the original defendant in a tort action to have a third party made an additional party defendant under the provisions of G.S. 1-240 to enforce contribution, the facts must be such that the plaintiff, had he desired so to do, could have joined such additional party or parties as defendants in the action. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768; *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183.

It was pointed out in the last cited case by *Stacy, C. J.,* that, "a contingent or inchoate right to enforce contribution arises to each defendant tort-feasor at the time of the institution of the action to recover on the joint tort. As long then as the plaintiff's right to recover in such suit remains undetermined, the contingent or inchoate right of each defendant tort-feasor to enforce contribution continues, and, on rendition of judgment in favor of the plaintiff, this right matures into a cause of action. 13 Am. Jur. 51. Thus it is rooted in and springs from the plaintiff's suit and projects itself beyond that suit, but it is not dependent on the plaintiff's continued right to sue all the joint tort-feasors."

In the instant case, however, the plaintiff had no right to bring an action at common-law or otherwise against these additional defendants at the time this action was instituted.

In *Wilson v. Massagee, supra,* Mrs. Verna L. Wilson, administratrix of Arthur E. Wilson, brought an action for the wrongful death of her intestate who was killed while engaged in his duties as an engineer of the Southern Railway Company, against Shirley Massagee and the Sinclair Refining Company. The Shell Oil Company and the Southern Railway Company were made parties defendant on motion of the original defendants, pursuant to the provisions of G.S. 1-240. The Southern Railway Company moved to dismiss as to it on the ground that the rights and obligations of the plaintiff's intestate to the Southern Railway Company arose out of and are exclusively controlled and defined by the Federal Employers' Liability Act, the said Act being exclusive of all other rights and remedies between said parties in the premises. *Winborne, J.,* now *C. J.,* in speaking for the Court, said: ". . . the right of plaintiff to sue the original defendants for damages for the

death of her intestate arose upon an entirely separate and distinct statute from that under which her right to sue the railway company arose. The plaintiff has no right, under the Federal Employers' Liability Act, to sue and maintain an action against the original defendants, nor does she have any right, under the State statute giving right of action for wrongful death, to sue and maintain an action against the railway company. Hence, plaintiff did not have a common legal right of action against the original defendants and the Railway Company."

This Court has expressly held that an employer who has discharged his obligation to his injured employee or his personal representative, under the provisions of our Workmen's Compensation Act, is not liable as a joint tort-feasor to such employee or his personal representative. That where such employee or his personal representative brings an action at common-law for the employee's injury or death against a third party, a motion of the defendant that the employer of the injured or deceased employee be made a party as joint tort-feasor with them, should be denied. *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613; *Hoover v. Indemnity Co.*, 202 N.C. 655, 163 S.E. 758; *Eledge v. Light Co.*, 230 N.C. 584, 55 S.E. 2d 179; *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886; *Hunsucker v. Chair Co., supra.* Since we are required by statute to take notice of the provisions of the Virginia Workmen's Compensation Act, we know of no reason why these provisions, which are substantially like those in our own Compensation Act, should not be given a similar construction as to its bearing on the right to bring in additional parties as joint tort-feasors, where the employer of plaintiff's intestate has discharged its liability under the Virginia Act.

The cases of *Farr v. Lumber Co.*, 182 N.C. 725, 109 S.E. 833; *Johnson v. R. R.*, 191 N.C. 75, 131 S.E. 390, and *Lee v. Construction Co.*, 200 N.C. 319, 156 S.E. 848, cited by the original defendant, are distinguishable and not controlling on the facts revealed on the present record.

The ruling of the court below is

Affirmed.

LUMBEE RIVER CONFERENCE OF THE HOLINESS METHODIST CHURCH, JULIAN RANSOM, BELTON BULLARD, M. L. LOWRY, TRUSTEES, CONSTITUTING THE BOARD OF ANNUAL CONFERENCE TRUSTEES OF LUMBEE RIVER CONFERENCE OF THE HOLINESS METHODIST CHURCH; J. R. LOWRY, AS BISHOP AND SUPERINTENDENT OF LUMBEE RIVER CONFERENCE OF THE HOLINESS METHODIST CHURCH; C. W. OXENDINE, AS PASTOR OF UNION CIRCUIT OF LUMBEE RIVER CONFERENCE OF THE HOLINESS METHODIST CHURCH, AND BRACY LOCKLEAR, TOMMIE CHAVIS AND RUSSELL OXENDINE, ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF UNION CHAPEL HOLINESS METHODIST CHURCH, v. FULLER LOCKLEAR, A. A. MAYNOR, J. W. JONES, LEONARD JACOBS, AND A. B. LOCKLEAR.

(Filed 7 June, 1957.)

1. Religious Societies § 2—Where evidence discloses that church was member of Conference and bound by its Book of Discipline, instruction as to right to control property based on congregational organization, is error.

In an action to restrain defendants from interfering with plaintiffs' use of church property for the benefit of the ministry and membership of plaintiff Church Conference, it is error for the court to charge the rights of the parties to the control of the property predicated upon a finding that the Church was a sovereign and independent body, had reserved the right to withdraw from the Conference, and had exercised such right, and upon whether the deed to the Conference was executed without due authority of the congregation of the Church, when all of the evidence, including the stipulations of the parties, is to the effect that the Church was a member of the Conference and bound by its Book of Discipline, and there is no evidence that the Church had reserved the right to withdraw from the Conference or, if it had reserved such right, that it had exercised it, and it further appearing that the question of the ownership of the legal title of the church property had no bearing upon the use of the property under the rules and regulations laid down in the Book of Discipline.

2. Trial § 5½—

A stipulation entered into by counsel for plaintiffs and defendants during the progress of the trial is conclusive and puts to an end any contention to the contrary.

3. Religious Societies § 2—

Where trustees holding title to property for the benefit of a particular church convey the property to the conference of the church, ordinarily the conference must hold such title for the use and benefit of the church and not the conference.

4. Trial § 29—

If all the evidence upon the trial tends to support plaintiffs' right to relief, plaintiffs are entitled to a peremptory instruction in their favor.

APPEAL by plaintiffs from *Mallard, J.*, January Civil Term 1957 of ROBESON.

This is an action in which the plaintiffs seek injunctive relief against the defendants, to restrain them from interfering with the plaintiffs' use of the Union Chapel Holiness Methodist Church property for the benefit of the ministry and membership of the Lumbee River Conference of the Holiness Methodist Church.

On 30 April 1860, Jesse Oxendine conveyed a 4-acre tract of land in Robeson County, on which the Union Chapel Holiness Methodist Church is located, to James Oxendine, Hugh Oxendine and Robert Chavis and their successors in office, in trust, for the use and benefit of the Union Chapel Church, a religious society.

Thereafter, a church building was constructed on the 4-acre tract of land, and in 1900 the Lumbee River Conference of the Holiness Methodist Church, hereinafter called Conference, was organized. The organization was perfected by three churches, to wit, Union Chapel, Hopewell and New Prospect. The meeting was held in the Union Chapel Church, which is called the "mother church" of the Conference. Additional churches, to wit, Cherokee Chapel, New Bethel, Macedonia and Riverside have been formed since. At present the Conference consists of the seven above-named churches, with a total membership of approximately six hundred.

Some time later, the building on the Union Chapel Church land was burned and the congregation proceeded to construct at another site, some one-half mile therefrom, another house of worship which was used until about 1923, and the church at the new site was known as Union Grove Church. The congregation that built the Union Grove Church was the congregation of the Union Chapel Church, and the same congregation rebuilt at the old site and moved into the present Union Chapel Church in 1923. During the period when the Union Chapel Church congregation was meeting at a different site, it remained a member of the Conference.

When the trustees of the Union Chapel Church began cutting timber on the original 4-acre site for the purpose of constructing a house of worship thereon, by reason of an affiliation of that church with a Conference of the regular Methodist-Episcopal Church prior to 1900, certain parties purporting to be trustees of the Union Chapel Methodist-Episcopal Church, brought an action in 1921 in the Superior Court of Robeson County against nine defendants, all members of the Union Chapel Church, to restrain them from trespassing upon the 4-acre tract of land conveyed to the trustees for the use and benefit of the Union Chapel Church, a religious society. The court held "that Paisley Locklear, George F. Spaulding and Duckery Jones, trustees of Union Chapel Church, a religious society, are the owners in fee simple and are entitled to the immediate possession of the following described land and premises, to wit (describing by metes and bounds the 4-acre tract of land

conveyed by Jesse Oxendine to trustees for the use of the Union Chapel Church)."

The Conference operates in accordance with what is called the Discipline of the Holiness Methodist Church, hereinafter referred to as the Book of Discipline. The Book of Discipline was admitted in evidence without objection as plaintiffs' Exhibit No. 1 and it was stipulated by counsel that ten copies of the Book of Discipline were to be filed with the Clerk of the Supreme Court for the use of the Court in lieu of printing the same in the record on appeal.

The plaintiffs introduced in evidence, without objection, the official journals or minutes of the annual sessions of the Conference for the years, 1923, 1924, 1926, 1937, 1947, 1954, 1955 and 1956. Counsel stipulated that such journals shall be made a part of the record and forwarded to the Clerk of the Supreme Court in lieu of printing the contents thereof in the record.

The plaintiffs likewise introduced in evidence a deed dated 24 November 1922 and recorded in the office of the Register of Deeds of Robeson County on the same date, executed by Paisley Locklear, George F. Spaulding, and Duckery Jones, trustees of the Union Chapel Church, a religious congregation, to Z. R. Jacobs, C. C. Lowry and J. R. Lowry, as trustees of Lumbee Conference of the Holiness Methodist Church, a religious society or association, for "the use and benefit of the ministry and membership of the Holiness Methodist Church, subject to the discipline, usage and ministerial appointments of said church as from time to time authorized and declared."

The Book of Discipline provides: "There shall be a Board of Annual Conference Trustees of the Holiness Methodist Church composed of three members. This board shall be elected at each Annual Session and must be members of the Annual Conference. Vacancies shall be filled by the Bishop. DUTIES: The Annual Conference Trustees shall receive, collect, and hold in trust for the benefit of the Conference any donations, grants of land, or other Conference property or bequeaths (*sic*), etc. They shall constitute the Conference Building Committee. The Board of Conference Trustees shall dispose of Conference property by order of the Conference."

Likewise, it provides: "The Church Board of Trustees shall look after the Church and Property and protect religious gatherings. Trustees of our churches have no right, by virtue of their office, to permit them to be used for other than religious purposes.

"Each church shall have a Board of Trustees composed of three members elected annually by the Quarterly Conference through the recommendation of the Pastor."

The Book of Discipline provides for a Cabinet composed of the Bishop, or presiding officer of the annual sessions, and the Conference

delegates, which appoints the preachers to the pastoral charges. The Conference divides the churches into Circuits. The Union Chapel Church and New Prospect compose Union Circuit. Under the plan of the Conference, the delegates to the annual sessions are elected by the Fourth Quarterly Conference of the local church, rather than by the congregation of such church.

The evidence tends to show that at the annual session of the Conference, 8-11 November 1956, Reverend C. W. Oxendine was appointed pastor of the churches composing the Union Circuit. According to the evidence, the appointment was made in the usual and customary manner which had been followed since 1900. The evidence further tends to show that the defendants prevented the duly appointed pastor from occupying the pulpit on Sunday morning, 18 November 1956, and since that time, not because of any irregularity in his appointment or because the membership of Union Chapel Church did not want him as pastor, but because of a controversy that arose prior to the meeting of the Annual Conference in 1956 over the deed that was executed by the trustees of the Union Chapel Church to the trustees of the Conference in 1922. The defendants contend that they did not discover that such deed had been executed until some time in 1955, and they want the title to the property to be put in the name of the trustees of the Union Chapel Church; and for the further reason that the defendant Fuller Locklear had entered into an agreement with the Bishop that the title to the property might be left in the name of the Conference trustees if the Bishop would admit a certain minister of another denomination, to wit, Howard Oxendine, to the Conference and assign him to the Union Circuit as an assistant pastor under the Reverend C. W. Oxendine, who was then pastor of that Circuit. The minister under consideration joined the Union Chapel Church, but, according to the testimony of the defendant Fuller Locklear, the Bishop had broken the agreement and had not given the new minister the assignment promised.

It is alleged in the defendants' answer that on 22 September 1956, the membership of the Union Chapel Church met in a business session and voted by a substantial majority to set up its own church program, conduct its own affairs, including calling a pastor and affiliating with such groups as it might thereafter desire, and that at said meeting it elected A. A. Maynor, J. W. Jones and Leonard Jacobs as trustees of the Union Chapel Church.

The defendant A. A. Maynor testified, "That deed had its place in the controversy. Come to be dissatisfactory when it was learned that the church had the deed. The preacher had something to do with the dissatisfaction; wound up by objecting to the deed when the preacher they wanted didn't go in. Some agreed to buy an automobile for the pastor and wanted the church to pay for it; and that is the way the row

started. The beginning place with me was the deed. The beginning place with the controversy was paying for the automobile for the fellow they wanted to be the preacher. The preacher they wanted and paying for the automobile for was Howard Oxendine. They wanted Howard Oxendine as assistant pastor; they did not want him for full-time pastor."

At the close of all the evidence, counsel for the plaintiffs and the defendants stipulated "that Union Chapel Holiness Methodist Church is a member of the Lumbee River Conference of the Holiness Methodist Church." Issues were submitted and answered as follows:

"1. Is Union Chapel Holiness Methodist Church a connectional form of church within the Lumbee River Conference of the Holiness Methodist Church? Answer: No.

"2. Are the plaintiffs, and those united with them, entitled to the use and occupancy of the premises of Union Chapel Holiness Methodist Church for the benefit of the ministry and membership of the Lumbee River Conference of the Holiness Methodist Church without interference from the defendants? Answer: No."

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

Varser, McIntyre, Henry & Hedgpeth and McKinnon & McKinnon for plaintiffs appellant.

Britt, Campbell & Britt for defendants appellee.

DENNY, J. It is not contended that the title to the property on which the Union Chapel Holiness Methodist Church, hereinafter called Union Chapel Church, is located has been put in issue in this case so as to require an adjudication thereof. *Simmons v. Allison,* 118 N.C. 763, 24 S.E. 716. It is apparent, however, that the defendants' refusal to permit the pastor assigned to the Union Circuit, which is composed of the Union Chapel and New Prospect Churches, to hold services in the Union Chapel Church, is bottomed on a deliberate and planned course of conduct on the part of the defendants to force the Conference to put the title to the 4-acre tract of land, on which the Union Chapel Church is located, in the trustees of the Union Chapel Church rather than to permit the title to remain in the trustees of the Conference, or in lieu of such change, to force the Bishop of the Conference to approve and designate Howard Oxendine as assistant pastor of the Union Chapel Church. Some of the defendants so testified.

The defendants contend that the Union Chapel Church is a sovereign, independent, congregational church. Even so, it was stipulated in the trial below that such church is a member of the Conference. And it appears from the evidence disclosed by the record, including the Book

of Discipline, pursuant to which the Union Chapel Church has been governed since 1900, that such church is not independent or congregational in its form of government, but that it is an integral part of the connectional system adopted by the Conference to which it belongs. *Simmons v. Allison, supra.*

According to the undisputed evidence in the trial below, this church has continuously, since 1900, been subject to assessment by the Conference for payment of certain obligations of the Conference; that under the rules and regulations as laid down in the Book of Discipline for the conduct of the Conference and its member churches, the trustees of the local church must be elected not by the local congregation but by the Quarterly Conference. The Cabinet of the Conference appoints the pastors; the pastor of a Circuit appoints the Class leaders in the local church or churches. In fact, the church government of the Conference makes no provision for the congregations of the member churches to take any official action on any matter affecting the pastors, officers, or the local leaders thereof. The officers of the local church are elected upon recommendation of the pastor by the Quarterly Conference of such church, which Conference is composed of designated officials of that church. Such procedure is in no sense in accord with the customs and practices of a congregational church. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; *Dix v. Pruitt,* 194 N.C. 64, 138 S.E. 412; *Windley v. McCliney,* 161 N.C. 318, 77 S.E. 226.

While as pointed out in the statement of facts herein, the defendants allege in their answer, "That on 22 September 1956 the membership of Union Chapel Church met in a business session and after due consideration voted by a substantial majority to thereafter set up its own church program, conduct its own affairs, including the calling of its pastor and affiliating with such groups as it may desire," and that at said meeting it elected A. A. Maynor, J. W. Jones and Leonard Jacobs as trustees of the Union Chapel Church, the defendants offered no evidence whatsoever in support of any of these allegations.

The plaintiffs except to and assign as error the following portion of the charge to the jury: "Gentlemen of the jury, if the congregation of, and the Union Chapel Church, or Union Chapel Holiness Methodist Church is a sovereign, independent body, that is, if it has a congregational type of church government, that is, that it is an independent body, one within which the individual congregation selects its officers and establishes its rules and regulations, and if it were voluntarily and temporarily acting within a larger body, with the reserved right to withdraw therefrom, and if the deed dated November 24, 1922, was executed by the Trustees of the Union Chapel Church to the Trustees of the Lumbee River Conference of the Union Chapel Holiness Methodist Church, and was executed and delivered without due authority

of the congregation of the said Union Chapel Church, and if the congregation of the Union Chapel Church has exercised such reserved right and withdrawn from the Lumbee River Conference of the Holiness Methodist Church, then you will answer this issue NO."

We think this assignment of error is well taken and must be upheld for the following reasons: (1) There was no evidence adduced in the trial below sufficient to support a finding that the Union Chapel Church is a sovereign, independent body. (2) Irrespective of who is entitled to hold the legal title to the land on which its house of worship is located, such controversy does not affect or change the rules and regulations laid down in the Book of Discipline for the government of the Conference and the member churches composing the Conference. (3) There is no evidence on this record tending to show that the Union Chapel Church reserved the right to withdraw from the Conference, or if it did reserve such right that it has exercised that right and withdrawn from the Conference.

The stipulation entered into by counsel for plaintiffs and the defendants, set out hereinabove, with respect to the membership of the Union Chapel Church in the Conference, is binding on the defendants and conclusively puts to an end any contention on their part that such church had theretofore withdrawn from the Conference. *Clapp v. Clapp,* 241 N.C. 281, 85 S.E. 2d 153; *Turner v. Livestock Co.,* 179 N.C. 457, 102 S.E. 849; Stansbury, N. C. Law of Evidence, section 166.

While under the present state of the pleadings the question of title is not before us for adjudication, it would seem that if the trustees of the Union Chapel Church executed the deed referred to in the statement of facts, in 1922, to the Conference trustees without the knowledge or approval of the Union Chapel Church, the Conference, unless there is some ground by which the Union Chapel Church is estopped, would have no right to hold such property for the use and benefit of the Conference but would be required to hold it for the use and benefit of the Union Chapel Church, for whose benefit it was originally conveyed. *Wheeless v. Barrett,* 229 N.C. 282, 49 S.E. 2d 629; *Western N. C. Conference v. Tally,* 229 N.C. 1, 47 S.E. 2d 467.

There is no evidence revealed on the record before us which, in our opinion, is sufficient to justify a denial of the relief sought by the plaintiffs. Therefore, the judgment entered below will be vacated and the cause remanded for another hearing. Furthermore, if upon such hearing, upon the pleadings and issues as now cast, the evidence is substantially in accord with that adduced in the trial below, the plaintiffs will be entitled to have the court give a peremptory instruction on each issue. *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904; *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757; McIntosh, N. C. Practice and Procedure (2nd Ed.), section 1516.

The plaintiffs are entitled to a new trial and it is so ordered.
New trial.

MARTHA E. GREGG v. MILDRED B. WILLIAMSON, B. W. WILLIAMSON AND JOHN SAMUEL WILLIAMSON.

(Filed 7 June, 1957.)

1. Mortgages § 17—

Mortgagees take the legal title to the property only as security for payment of the debt.

2. Same—

After default, mortgagees are entitled to possession solely for the purpose of assuring payment of the debt or performance of the other conditions of the mortgage, and the estate of the mortgagees is a determinable fee terminating the instant the debt is paid or other condition of the mortgage performed.

3. Mortgages § 30b—

Upon the death of the mortgagee the right to exercise the power of sale passes to his personal representative and not his heirs. G.S. 45-4.

4. Mortgages § 21—

Where two of the three mortgagees assign the mortgage to the third mortgagee, the assignment transfers the debt only and does not pass any title to the land.

5. Mortgages § 30b—

Where there are three mortgagees named in the instrument, the power of sale can be exercised only by all of the surviving mortgagees, and, nothing else appearing, deed of one of the mortgagees can have no validity as a foreclosure deed even if it purports to be such.

6. Mortgages § 25—

Where a mortgagee conveys the legal title, the grantee is a mere trustee of the title conveyed, chargeable with a duty to both the owner of the equity and the owner of the debt secured by the instrument, and he has no authority *sua sponte* to sell or demand possession even upon default.

7. Mortgages § 16—

The mortgagor is the owner of the land subject to the debt and the right of foreclosure to satisfy same, and even after default, he is entitled to the rents and profits until the mortgagee takes possession, and may convey the equity of redemption.

8. Limitation of Actions § 3—

The General Assembly may make a statute of limitations applicable to pre-existing contractual obligations provided a reasonable time is allowed for the enforcement of such rights prior to the bar.

9. Mortgages § 30i(2)—

The 1945 amendment to G.S. 45-37(5) providing that the statute should apply to pre-existing mortgages, but allowing one year from the ratification of the Act during which the owners of the debts might proceed to foreclosure or make marginal entry on the instrument that the debt is still outstanding, is constitutional.

10. Same: Appeal and Error § 4—

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under G.S. 45-37(5) the right to possession and the right to foreclose were barred. G.S. 1-271.

JOHNSON, J., concurring.

APPEAL by plaintiff from *McKeithen, S. J.*, November 1956 Special Term of RICHMOND.

The complaint alleges that plaintiff is the owner of a lot in Hamlet which she specifically describes, that the defendants are also asserting title thereto, that plaintiff and defendants trace title to a common source, that plaintiff's chain of title which is detailed in the complaint is superior to defendants' chain of title which is likewise detailed in the complaint. She prays that she be adjudged the owner in fee simple, and the claim asserted by defendants be declared a cloud on her title.

Defendants answered, admitting that they claim title to the lands described in the complaint, basing their claim on the deeds referred to; that they purchased the property in good faith and for value; that plaintiff's claim is based on a mortgage conclusively presumed by G.S. 45-37(5), as amended in 1945, to have been paid prior to their purchase. They pray that they be adjudged the owners and plaintiff's claim adjudged a cloud on their title.

A jury trial was waived. The court found the following facts: On 16 August 1921, Minnie Mae Pate was the owner of the land in controversy. On that date she executed a mortgage in usual form conveying said lot to W. H. H. Bagwell, J. R. Gordon, and E. L. Sanford to secure an indebtedness of $800 payable in installments, the last of which became due 16 December 1928. The mortgage was duly recorded in December 1922. On 11 May 1923 Bagwell and Sanford made a marginal entry on the recorded mortgage reading: "For value received we hereby transfer and assign the within mortgage deed from N. J. Pate and wife, to J. R. Gordon without recourse." The mortgage has never been foreclosed. On 25 April 1925, J. R. Gordon individually executed a warranty deed in regular form to S. Alexander Gregg purporting to convey the lot in controversy. This deed was recorded 25 May 1926.

On 21 December 1927, S. Alexander Gregg executed a deed to plaintiff purporting to convey this lot. The deed to plaintiff was recorded 23 February 1927 (*sic*). On 3 June 1950, Minnie Mae Pate conveyed the land in controversy by regular warranty deed to Glyde M. Pate. The deed was recorded 7 June 1950. Revenue stamps on the record indicate the consideration was $1,000. On 4 May 1951, Glyde M. Pate and wife, by general warranty deed, conveyed the land to defendants who paid $1,500 therefor. The lot is unimproved. No one has actual possession. Taxes have been paid thereon by plaintiff and those under whom she claims and taxes have likewise been paid by defendants and those under whom they claim. No affidavit by the holder of any of the notes secured by the mortgage from Minnie Mae Pate to Bagwell, Gordon, and Sanford has ever been filed for record in Richmond County nor has any marginal entry ever been made on the record of said mortgage indicating that any part of the debt originally secured remains unpaid. Glyde M. Pate and defendants employed counsel to examine the title to the property before they made their respective purchases, and they were furnished by their counsel certificates that the property was free and clear of all encumbrances.

Based on his findings of fact, the court concluded as a matter of law that the notes secured by the mortgage of 16 August 1921 were, as to the defendants, presumed to have been paid and that the defendants had good title to the land. Thereupon judgment was entered adjudging the defendants the owners of the lands in controversy and directing the register of deeds to make marginal entry on the record of the mortgage from Minnie Mae Pate to Bagwell and others that it was canceled by the judgment rendered. Plaintiff excepted to the judgment and appealed.

Sanford, Phillips, McCoy & Weaver for plaintiff appellant.
A. A. Reaves and Jones & Jones for defendant appellees.

RODMAN, J. No exceptions are taken to the findings of fact. Indeed, they substantially conform with the allegations of the complaint. Do these findings suffice to support the judgment? Plaintiff insists that to apply G.S. 45-37(5), as amended in 1945, would impair the obligation of the Pate mortgage given in 1921, in violation of Art. I, sec. 10(1) of the Constitution of the United States. This assertion necessitates an understanding of the rights which plaintiff could assert without regard to the statute, what the statute does, and its effect, if any, on plaintiff's rights.

When Minnie Mae Pate executed her mortgage in August 1921 to W. H. H. Bagwell, J. R. Gordon, and E. L. Sanford to secure the payment of her note, the legal title to the land vested in the mortgagees, but

this title vested in them only as security for the payment of the debt. *Bank v. Lumber Co.*, 193 N.C. 757, 138 S.E. 125; *Stevens v. Turlington*, 186 N.C. 191, 119 S.E. 210; *Killebrew v. Hines*, 104 N.C. 182; *Fraser v. Bean*, 96 N.C. 327.

A mortgagee after default is entitled to possession of the mortgaged premises, and, to secure possession, may maintain an action against the mortgagor. *Bank v. Jones*, 211 N.C. 317, 190 S.E. 479; *Stevens v. Turlington, supra; Wittkowski v. Watkins*, 84 N.C. 456; *Hemphill v. Ross*, 66 N.C. 477; *Fuller v. Wadsworth*, 24 N.C. 263; 37 Am. Jur. 211. But mortgagee's right to possession is only for the better security of the debt owing to him. When he takes possession he becomes liable "to keep such premises in usual repair and to account for the rents and profits received, in a settlement of the mortgage debts." *Hemphill v. Ross, supra; Anderson v. Moore*, 233 N.C. 299, 63 S.E. 2d 641; *Morrison v. McLeod*, 37 N.C. 108. The rents with which a mortgagee or trustee in possession is chargeable are applicable as credits on the debt secured by the mortgage. *Mills v. Building & Loan Assn.*, 216 N.C. 664, 6 S.E. 2d 549; *Fleming v. Land Bank*, 215 N.C. 414, 2 S.E. 2d 3. A mortgagee has no right to possession except to assure payment of the debt or performance of other conditions of the mortgage.

The estate of a mortgagee is a determinable fee terminating the instant the debt is paid or other condition of the mortgage is performed. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E. 2d 646; *Mfg. Co. v. Malloy*, 217 N.C. 666, 9 S.E. 2d 403; *Blake v. Broughton*, 107 N.C. 220.

Upon the death of the mortgagee the right to exercise the power and convey the land does not descend to his heirs but passes to his personal representative. G.S. 45-4. Transfer of a note secured by a mortgage does not pass title to the land nor the power of sale nor the right to cancel or release the mortgage. The assignment by Bagwell and Sanford to Gordon sufficed to transfer the debt only. It did not pass any title to the land. *Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865; *Williams v. Teachey*, 85 N.C. 402.

The mortgage from Pate to Bagwell, Gordon, and Sanford created a joint tenancy. *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332; 48 C.J.S. 914; 59 C.J.S. 255; 14 Am. Jur. 79; G.S. 45-8. The power of sale given by the mortgage could only be exercised by all of the surviving mortgagees. *Combs v. Porter*, 231 N.C. 585, 58 S.E. 2d 100; *Cawfield v. Owens*, 129 N.C. 286. It is not alleged and there is no finding that any of the mortgagees are dead. Hence the deed from Gordon, one of the mortgagees, to plaintiff cannot have any validity as a foreclosure deed even if it purported to be such. We need not now determine if one of several mortgagees holding as joint tenants may terminate the joint estate and create a tenancy in common. Conceding that one of the joint tenants had the right to convey his interest in the land which was held merely

as security for the debt, his grantee becomes a mere trustee chargeable with a duty and responsibility to both the owner of the equity of redemption and the owner of the debt secured by the instrument.

The trustee must be impartial in the performance of his duties. He cannot exercise the power given to him to sell nor the title he holds in such manner as to give an unfair advantage to one to the detriment of the other. *Hatcher v. Williams,* 225 N.C. 112, 33 S.E. 2d 617; *Mills v. Building & Loan Association, supra; Council v. Land Bank,* 213 N.C. 329, 196 S.E. 483. If default exists, he has no authority *sua sponte* to sell or demand possession or otherwise proceed to collect the debt. He can only act when authorized by the creditor. *Monteith v. Welch,* 244 N.C. 415, 94 S.E. 2d 345; *Wynn v. Grant,* 166 N.C. 39, 81 S.E. 949.

Subject to the right of the creditor to have the mortgaged property used for the payment of the debt owing to him, the mortgagor is "considered as the owner of the land, with an estate therein which 'may be devised, granted or entailed with remainders' (*Lord Hardwicke*) and which is subject to . . . sale under execution." *Stevens v. Turlington, supra; McKinney v. Sutphin,* 196 N.C. 318, 145 S.E. 621; *Fraser v. Bean, supra.* He is not a mere tenant of the mortgagee who can be dispossessed after default by a summary proceeding in ejectment. *Culbreth v. Hall,* 159 N.C. 588, 75 S.E. 1096. Even after default a mortgagee who has not taken possession is not entitled to the rents and profits. *Kistler v. Development Co.,* 205 N.C. 755, 172 S.E. 413; *Parker Co. v. Bank,* 204 N.C. 432, 168 S.E. 681; *Collins v. Bass,* 198 N.C. 99, 150 S.E. 706.

We now inquire as to what the statute does.

The cloud created by paid but not released mortgages has called for repeated legislative action to facilitate the marketability of land so beclouded. Prior to 1870 a release executed by the mortgagee and duly recorded was necessary to clear the record. The Legislature of 1870-71, by the enactment of c. 217, now in substance G.S. 45-37(1), permitted the mortgagee to enter satisfaction of the mortgage on the recorded instrument. That of course necessitated a trip to the courthouse by the mortgagee or his representative. Twenty years elapsed before authority was given to the register of deeds to cancel upon presentation of the mortgage and notes. What is now G.S. 45-37(2) is in substance the provisions of c. 180, P.L. 1891. G.S. 45-37(3) is in substance the provision of c. 50, P.L. 1917.

The Legislature of 1923 deemed it necessary to make further provision with respect to old and uncancelled mortgages and to protect those who purchased long after the debt had matured. C. 192, P.L. 1923, furnished the basic provision of G.S. 45-37(5), by creating in favor of creditors and purchasers for value from a mortgagor a presumption of payment if the purchase was made more than fifteen years

after the last installment of the debt was due, unless the person secured by the mortgage filed the affidavit or made the marginal entry showing that the debt was alive.

The Act was first construed in *Hicks v. Kearney,* 189 N.C. 316, 127 S.E. 205. Defendant sought to apply the Act not only to a mortgage given prior to the enactment but to a purchase made prior thereto. It was there held that the statute was prospective in its operation and had no application to the facts of that case. The interpretation given to the Act, that it did not apply to mortgages antedating the ratification of that Act has been adhered to. *Humphrey v. Stephens,* 191 N.C. 101, 131 S.E. 383; *Roberson v. Matthews,* 200 N.C. 241, 156 S.E. 496; *Grocery Co. v. Hoyle,* 204 N.C. 109, 167 S.E. 469; *Thomas v. Myers,* 229 N.C. 234, 49 S.E. 2d 478. Likewise it has been held that that statute was not intended to and did not protect those who purchased within fifteen years from the maturity of the debt. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51.

The Legislature of 1945 deemed it wise to make G.S. 45-37(5) apply to mortgages given prior to the 1923 statute. That the Legislature regarded the 1923 statute as in effect a statute of limitation is, we think, clear from the language of the 1945 statute. It provides that the 1923 Act shall apply to pre-existing mortgages but allows mortgagees one year from the ratification of that statute in which to exercise their rights. No violence is done to a contractual right by prescribing a period of time in which the right must be exercised, if a reasonable time is provided in which the right may be exercised. It is not suggested that a period of one year is unreasonably short. The 1945 statute in effect said to the owners of debts secured by subsisting mortgages or deeds of trust: (1) You may within one year proceed to collect your debt by foreclosing by judicial process or under power of sale, or (2) you may make marginal entry that your debt is alive and thus avoid the effect of the statute; if you fail to do either of these things in the time prescribed, any purchaser for value from the mortgagor can assert the presumption created against your right to proceed to his detriment. The power of the Legislature to prescribe a reasonable time in which a creditor may exercise his rights has been repeatedly recognized in our decisions. *Graves v. Howard,* 159 N.C. 594, 75 S.E. 998; *Building & Loan Assn. v. Jones,* 214 N.C. 30, 197 S.E. 618; *Strickland v. Draughan,* 91 N.C. 103.

The power of the Legislature to require recordation or rerecordation of mortgages to protect the mortgagor's right against claim of purchasers for value has been consistently recognized. *Vance v. Vance,* 108 U.S. 514, 27 L. Ed. 808, upheld the constitutionality of a Louisiana statute which required the registration of a mortgage in order to have validity as against creditors or purchasers from the mortgagor. Exist-

ing mortgagees were given less than a year in which to record their mortgages. The owner of a mortgage antedating the enactment asserted that as to him the application of the statute was unconstitutional as impairing the obligation of the contract. The Supreme Court of Louisiana rejected the contention. The Supreme Court of the United States affirmed. We think the language of *Mr. Justice Miller* appropriate to this case. He said: "We think that the law, in requiring of the owner of this tacit mortgage for the protection of innocent persons dealing with the obligor, to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required and what was eminently just to everybody. The authorities in support of this view are ample." *Conley v. Barton,* 260 U.S. 677, 67 L. Ed. 456; *Turner v. New York,* 168 U.S. 90, 42 L. Ed. 392; *Evans v. Finley,* 133 A.L.R. 1318 (Ore.); *Realty Corp. v. Kirtley,* 74 So. 2d 876 (Fla.); *Shanks v. Blaine's Heirs,* 206 P. 2d 978 (Okla.); *Hill v. Gregory,* 42 S.W. 408 (Ark.); *Rombotis v. Fink,* 201 P. 2d 588 (Cal.); Anno. 121 A.L.R. 909; Anno. 158 A.L.R. 1043; 45 Am. Jur. 437; 16A C.J.S. 63 *et seq.*

G.S. 45-37(5), as originally enacted and as amended in 1945, is of no moment or concern to the plaintiff. The statute applies only to the holder of the debt evidenced by the notes given by Mrs. Pate in 1921. Plaintiff does not claim to be the owner of those notes or assert any right thereto; at least no such claim is disclosed by this record. Plaintiff's right, as we have noted, to demand possession accrues only when the owner of the debt so directs. Having no interest in the debt and being without authority to act until requested so to do by a party secured, plaintiff is not a party aggrieved. The right to appeal is given only to a party aggrieved, G.S. 1-271. The appeal is

Dismissed.

JOHNSON, J., concurring: I concur in the result on the ground that the dismissal of plaintiff's appeal leaves the judgment below in force precisely as entered.

The findings and judgment below effectively and correctly dispose of all the issues raised by the pleadings. My vote is to uphold the proceedings below and affirm the judgment.

HENRY B. SHEARIN v. DR. JOHN T. LLOYD.

(Filed 7 June, 1957.)

1. Appeal and Error § 51—

On exception to judgment of involuntary nonsuit in a trial by the court under agreement of the parties, G.S. 1-184, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover.

2. Physicians and Surgeons § 20—

Evidence to the effect that a surgeon left a foreign substance in the patient's body at the conclusion of an operation, is sufficient to raise an inference of negligence and to sustain a finding to that effect.

3. Physicians and Surgeons § 18—

An action for malpractice based on negligence must be instituted within three years from the accrual of the cause of action. G.S. 1-15, G.S. 1-46, G.S. 1-52(5).

4. Limitation of Actions § 16—

Where defendant aptly pleads a statute of limitations, the burden is on plaintiff to show that the action was instituted within the prescribed period.

5. Limitation of Actions § 15a—

Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong is committed giving rise to the right to bring suit, even though the damages at that time be nominal and consequential injuries are not and could not be discovered until a much later date.

6. Physicians and Surgeons § 18—

A cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrues immediately upon the closing of the incision, and such action may not be maintained more than three years thereafter even though the consequential damage from such negligence is not discovered until sometime after the operation.

7. Same—

Where there is no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in the patient's body at the conclusion of the operation, but to the contrary that the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit is properly entered in an action for malpractice instituted more than three years after the operation, there being no evidence of fraudulent concealment.

8. Limitation of Actions § 1—

Statutes of limitation are inflexible and unyielding, and operate without reference to the merits of the cause of action.

9. Same: Constitutional Law § 10c—

Even though the purpose of statutes of limitation is to afford security against stale demands and not to deprive anyone of his just rights by lapse of time, the making of law is the province of the General Assembly, and the courts do not have the power to write into a statute of limitations exceptions not therein appearing to prevent the bar of a meritorious cause of action.

APPEAL by plaintiff from *Carr, J.*, November-December Civil Term, 1956, of FRANKLIN.

Civil action instituted 14 November, 1955, to recover damages for alleged malpractice, wherein defendant, answering, denied negligence and in addition pleaded the three year statute of limitations. Upon waiver of jury trial, the court, at the close of plaintiff's evidence, entered judgment of involuntary nonsuit.

Plaintiff, in support of his allegations, offered evidence, which, in summary, tends to establish the facts stated below.

Defendant is a duly licensed and registered physician and surgeon, engaged in the practice of his profession in Louisburg, N. C.

On 20 July, 1951, plaintiff, then in pain, consulted a doctor in Youngsville, who sent him to defendant. After examination and diagnosis, defendant, on that date, at Franklin Memorial Hospital, operated, removing plaintiff's appendix.

At defendant's request, the hospital radiologist made X-ray films before the operation and also a few days thereafter.

Plaintiff was in the hospital some 13 days. During this period, he was treated by defendant. Thereafter, as directed by defendant, plaintiff returned to defendant for checkups. At first, defendant examined plaintiff each week, thereafter less frequently, the last examinations being a six-months checkup and a twelve-months checkup. On these occasions, plaintiff's symptoms were discussed; and the examination by defendant was by manipulation in the area of the incision. No additional X-ray pictures were taken until the occasion mentioned below.

At the time of the six-months checkup, plaintiff felt pain in the area of his operation, something "kind of scratching, rubbing" in him; but he did not tell defendant "about that right then." His then complaint was to the effect that his side was feeling uncomfortable. At the time of the twelve-months checkup, plaintiff complained to defendant that "it was getting sore, a little knot coming in there in my side, right in that incision." At each checkup, defendant advised plaintiff in effect that he thought plaintiff was going to be all right, that it took some time for a man of his age (plaintiff was 59 at the time of the trial) "to heal up and get tough."

Plaintiff next saw defendant on Saturday, 15 November, 1952. Then plaintiff complained to defendant that "the knot had got kind of red

and . . . larger," and that it throbbed and pained him at night to such extent that he could not sleep. Defendant, after examining plaintiff, told him: "It is something wrong."

As instructed by defendant, plaintiff returned on Monday, 17 November, 1952, when the hospital radiologist, at defendant's request, made additional X-ray films. Plaintiff was advised to return the next day, thus allowing time for the X-ray films to dry.

The X-ray films then made, included, for the first time, lateral as well as anterior-posterior films. These X-ray films, particularly the lateral films, disclosed in plaintiff's abdominal area a twisted opaque marker, of the kind put in a lap-pack so that the presence of a lap-pack in the body would show on an X-ray film.

Upon plaintiff's return on Tuesday, 18 November, 1952, he expressed to defendant his fear that he had a cancer. In plaintiff's words: ". . . when I went back he showed the x-ray to me, and he said it was to his sorrow and my goodness it won't a cancer. He showed the x-ray to me and he said it is that gauze or sponge or something that was left in there."

On Wednesday, 19 November, 1952, defendant operated on plaintiff, removing the lap-pack. Plaintiff stayed in the hospital six days. Upon leaving, defendant gave plaintiff some medicine to ease him and told him to come back. On the night of 25 December, 1952, a knot "right in the incision . . . rose up and bursted." This released pus and temporarily eased plaintiff's pain. This development was reported to defendant. He dressed plaintiff's side and instructed him that, if such a knot should form again, plaintiff should come to defendant, if possible, before it burst.

Another such knot did occur on or about 17 January, 1953, and plaintiff went to defendant. Defendant "lanced or slit it open and put a tube in it, . . ." Later, the tube "worked itself back out . . ."

On 9 May, 1953, after another such knot had formed, plaintiff went again to defendant. Plaintiff testified: ". . . Dr. Lloyd said there is just one more thing I am going to try, and if that don't work I am going to send you somewhere else to another hospital, so he operated on me again and taken out a round plug out of my side where that incision was, under the incision; he said it was about the size of a silver dollar."

In the fall of 1953, defendant stated to plaintiff that "all he was doing was killing that infection," and that plaintiff "needed another operation." Plaintiff did not accede to this suggestion by defendant and their relations ended.

Plaintiff paid defendant for his services in connection with the operation of 20 July, 1951. It does not appear that there was any payment or charge thereafter. Plaintiff was in the hospital on four occasions.

He paid in full the hospital bill incurred in connection with the operation of 20 July, 1951. He paid $140.00 on the hospital bill incurred in connection with the operation of 19 November, 1952. At the time of the trial, he had not paid the hospital bills in connection with his third and fourth visits, these apparently being of short duration. Defendant's answer refers to "the abscess being drained on January 17 and May 9, 1953."

A statement of the evidence bearing upon plaintiff's suffering, disability, loss of wages, etc., from time to time, subsequent to the operation of 20 June, 1951, is not relevant to decision.

Plaintiff's sole assignment of error is to the entry of said judgment of involuntary nonsuit.

Hill Yarborough and Thomas F. East for plaintiff, appellant.

Smith, Leach, Anderson & Dorsett and Charles P. Green for defendant, appellee.

BOBBITT, J. Where, upon waiver of jury trial in accordance with G.S. 1-184, the court makes no specific findings of fact but enters judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *Harrison v. Brown,* 222 N.C. 610, 24 S.E. 2d 470; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13.

The legal obligations of a physician or surgeon who undertakes to treat a patient are well established. *Nash v. Royster,* 189 N.C. 408, 414, 127 S.E. 356; *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Hazelwood v. Adams,* 245 N.C. 398, 95 S.E. 2d 917; and cases cited.

The evidence was sufficient to support these findings of fact: (1) that defendant, in performing the operation of 20 July, 1951, introduced the lap-pack into plaintiff's body; (2) that he closed the incision without first removing the lap-pack; (3) that this was a breach of defendant's legal duty to exercise reasonable care and diligence in the application of his knowledge and skill to plaintiff's case; and (4) that injury to plaintiff proximately resulted therefrom.

It has been established by this Court, and generally, that the leaving of such a foreign substance in the patient's body at the conclusion of an operation "is so inconsistent with due care as to raise an inference of negligence." *Mitchell v. Saunders,* 219 N.C. 178, 13 S.E. 2d 242; *Pendergraft v. Royster,* 203 N.C. 384, 166 S.E. 285; *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480; Annotations: 162 A.L.R. 1299, 13 A.L.R. 2d 84.

The crucial question is this: Was the evidence sufficient to support a finding of fact that this action was commenced within three years from the time plaintiff's cause of action accrued?

The period prescribed for the commencement of an action for malpractice based on negligence is three years from the time the cause of action accrues. G.S. 1-15; G.S. 1-46; G.S. 1-52(5); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320. The burden was on plaintiff to show that he instituted his action within this prescribed period. *Lewis v. Shaver, supra; Hooper v. Lumber Co.*, 215 N.C. 308, 1 S.E. 2d 818.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises, . . ." 54 C.J.S., Limitation of Actions sec. 109; 34 Am. Jur., Limitation of Actions sec. 113; *Aydlett v. Major & Loomis Co.*, 211 N.C. 548, 551, 191 S.E. 31; *Peal v. Martin*, 207 N.C. 106, 176 S.E. 282. Where the aggrieved party is under disability at the time the cause of action accrues, the action must be commenced "within three years next after the removal of the disability, and at no time thereafter." G.S. 1-17; G.S. 1-20; *White v. Scott*, 178 N.C. 637, 101 S.E. 369. The "disabilities" are defined in G.S. 1-17.

"It is a firmly established rule that with certain exceptions, such as in the cases of covenants and indemnity contracts, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action. It is sufficient if nominal damages are recoverable for the breach or for the wrong, and it is unimportant that the actual or substantial damage is not discovered or does not occur until later. However, it is well settled that where an act is not necessarily injurious or is not an invasion of the rights of another, and the act itself affords no cause of action, the statute of limitations begins to run against an action for consequential injuries resulting therefrom only from the time actual damage ensues." 34 Am. Jur., Limitation of Actions sec. 115.

Our decisions support this general statement. Thus, where the defendant dug ditches on its land, the cause of action accrued when surface water was actually diverted by these ditches from its natural course so as to flood and damage plaintiff's crop and land. Until then there had been no invasion of plaintiff's rights. *Hocutt v. R. R.*, 124 N.C. 214, 32 S.E. 681. But, as stated by *Walker, J.*, in *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350: "When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete." (See *Sloan v. Hart*, 150 N.C. 269, 63 S.E. 1037.) In such case, as stated by *Walker, J.*: "When a cause of action once accrues there is a right, as of the time of the accrual, to all the direct

and consequential damages which will ever ensue, that is, all damages not resulting from a continuing fault which may be the foundation of a new action or of successive actions, and the law will in such a case take into consideration not only damage already suffered, but that which will naturally and probably be produced by the wrongful act, . . ." *Mast v. Sapp, supra;* see *Webb v. Chemical Co.,* 170 N.C. 662, 664, 87 S.E. 633.

"It is well settled that in an action for damages, resulting from negligent breach of duty, the statute of limitations begins to run from the breach, from the wrongful act or omission complained of, without regard for the time when the harmful consequences were discovered. (Citations omitted.)" *Devin, J.* (later *C. J.*), in *Powers v. Trust Co.,* 219 N.C. 254, 256, 13 S.E. 2d 431. In the *Powers case,* the alleged negligence was the failure of the defendant to inform the plaintiff that the property leased and conveyed to the plaintiff had been used by one infected with the germs of pulmonary tuberculosis, plaintiff alleging that in consequence of such negligent failure he contracted tuberculosis and suffered substantial injury to his health.

This rule, well settled in this jurisdiction, has been expressly applied to malpractice cases based on the alleged negligence of the defendant. *Lewis v. Shaver, supra; Connor v. Schenck,* 240 N.C. 794, 84 S.E. 2d 175.

It is inescapable that plaintiff's cause of action accrued on 20 July, 1951, when defendant closed the incision without first removing the lap-pack from plaintiff's body. Defendant's failure thereafter to detect or discover his own negligence in this respect did not affect the basis of his liability therefor. Earlier discovery and removal of the lap-pack would bear upon the extent of the injury proximately caused by defendant's negligent conduct.

It is noted that, apart from allowing the lap-pack to remain in plaintiff's body, there is no allegation or evidence as to any negligence of defendant in the performance of the operation on 20 July, 1951. It is noted further that there was no evidence sufficient to warrant a finding in support of plaintiff's allegations that, in relation to plaintiff's condition as of November, 1952, defendant failed to exercise due care either in the performance of the operation of 19 November, 1952, or in his subsequent treatment of plaintiff.

Moreover, plaintiff did not base his cause of action upon allegations that defendant negligently failed to discover the fact or results of his original negligence prior to 17 November, 1952, but alleged that defendant "fraudulently concealed from the plaintiff . . . his act and deed in leaving within the body of the plaintiff" the said lap-pack. Suffice to say, plaintiff's evidence was not sufficient to warrant a finding in support of his allegations as to defendant's alleged fraudu-

lent concealment of material facts. Hence, we need not consider the circumstances under which a defendant's fraudulent concealment of material facts would toll the running of the statute of limitations. For cases pertinent to this subject, see 74 A.L.R. 1320 *et seq.*, 144 A.L.R. 215 *et seq.*

In malpractice actions, it is generally held that the cause of action accrues from the date of the wrongful act or omission. 74 A.L.R. 1318; 144 A.L.R. 210.

In *Cappuci v. Barone,* 266 Mass. 578, 165 N.E. 653, where the defendant, in performing the operation, left a piece of gauze and a gauze sponge in the wound, the Court said: "Upon this branch of the defense the single question is, When did the cause of action accrue? The defendant as a surgeon, on May 11, 1924, impliedly undertook to use care in the operation which he was about to perform. Any act of misconduct or negligence on his part in the service undertaken was a breach of his contract, which gave rise to a right of action in contract or tort, and the statutory period began to run at that time, and not when the actual damage results or is ascertained, as the plaintiff contends. The damage sustained by the wrong done is not the cause of action; and the statute is a bar to the original cause of action although the damages may be nominal, and, to all the consequential damages resulting from it though such damages may be substantial and not foreseen."

In Missouri, *by statute,* a different rule applies. It is expressly provided, in relation to the statute of limitations, that "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, . . ." Rev. St. Mo. 1939, sec. 1012.

Unless superseded by statute, the rule stated in *Cappuci v. Barone, supra,* is generally recognized. However, in some jurisdictions, its application to specific factual situations has been modified. These modifications are indicated by the decisions cited below.

In *Hotelling v. Walther,* 169 Or. 559, 130 P. 2d 944, 144 A.L.R. 205, where the alleged negligence related to a continuing course of treatment, it was held that the cause of action did not accrue until the treatment terminated; but the same Court in *Wilder v. Haworth,* 187 Or. 688, 213 P. 2d 797, held that this rule had no application when the action was based on a specific negligent act or omission occurring at an identifiable time and place. 74 A.L.R. 1322; 144 A.L.R. 227.

The Supreme Court of California, overruling its prior decision in *Gum v. Allen,* 119 Cal. App. 293, 6 P. 2d 311, adopted in *Huysman v. Kirsch,* 6 Cal. 2d 302, 57 P. 2d 908, the rule that the statute of limitations does not commence to run during the continuance of the relationship of physician and patient unless and until the patient discovers or by the

exercise of due care should have discovered the facts upon which his cause of action is based. As pointed out in *Wilder v. Haworth, supra,* the California Court applied, by analogy, the rule of the California statute of limitations in industrial accident cases.

In *Lindquist v. Mullen,* 45 Wash. 2d 675, 277 P. 2d 724, the majority view, in accord with *Cappuci v. Barone, supra,* is set forth in the opinion, while the California rule is discussed with approval in the dissenting opinion.

Our decisions impel the conclusion that plaintiff's cause of action accrued 20 July, 1951, immediately upon the closing of the incision. To hold otherwise would be to say that plaintiff did not then have a cause of action against defendant. This Court has rejected the view that the cause of action accrues when the injurious consequences are or should have been discovered. *Lewis v. Shaver, supra; Connor v. Schenck, supra; Powers v. Trust Co., supra,* and cases cited. The statute of limitations begins to run from the time the cause of action accrues. The only exception, as pointed out in *Lewis v. Shaver, supra,* relates to actions grounded on allegations of fraud and mistake. G.S. 1-52(9).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.

It is not for us to justify the limitation period prescribed for actions such as this. See *Albert v. Sherman,* 167 Tenn. 133, 67 S.W. 2d 140. Suffice to say, this is a matter within the province of the General Assembly. Even so, it is noted that the California statute prescribes a one-year period; and no statute has come to our attention prescribing a longer period than three years.

These facts are noteworthy. Whether plaintiff may be considered as under defendant's professional care and treatment up to and including the twelve-months checkup, the twelve-months checkup, occurring more than three years before the institution of this action, appears to have marked the termination of their relationship; and, if their relationship terminated then, it would appear that, both under the rule of *Hotelling v. Walther, supra,* relating to a continuing course of treatment, and under the California rule, plaintiff's cause of action then accrued.

It is noted further that on 17 November, 1952, plaintiff was fully and frankly advised by defendant of the facts constituting the alleged negligence on which plaintiff based his cause of action. Even so, the cause of action was not commenced until 14 November, 1955, nearly three years from 15 November, 1952, the date on which plaintiff returned to defendant for further professional treatment.

Decision is based on the ground that plaintiff's cause of action accrued 20 July, 1951.

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Butler v. Bell,* 181 N.C. 85, 106 S.E. 217. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind *Lord Campbell's* caution: "Hard cases must not make bad laws." (Quoted by *Walker, J.,* in *Mast v. Sapp, supra.*)

The judgment of involuntary nonsuit is sustained on the ground that plaintiff's action was not commenced within three years from the date his cause of action accrued.

Affirmed.

MAGGIE BRIDGES, ADMINISTRATRIX OF THE ESTATE OF ALEX BRIDGES, DECEASED, v. MAGGIE J. GRAHAM, ADMINISTRATRIX OF THE ESTATE OF WILLIAM GRAHAM, DECEASED.

(Filed 7 June, 1957.)

1. Appeal and Error § 23—

Assignments of error to the admission of evidence should state with particularity the alleged incompetent evidence and definitely present the question for review without the necessity of a search through the record to find the challenged evidence. Rules of Practice in the Supreme Court Nos. 19(3) and 27½.

2. Evidence § 18—

Signed statements of witnesses are competent upon the trial for the purpose of corroborating their testimony consistent therewith, and the trial court has the discretion to permit the introduction of such statements for this restricted purpose prior to the cross-examination of the witnesses.

3. Trial § 22a—

Upon motion to nonsuit, plaintiff is entitled to have his evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

4. Trial § 22b—

So much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear that which has been offered by the plaintiff may be considered, but that which tends to establish another and a different state of facts, or which tends to contradict or impeach plaintiff's evidence is to be disregarded.

5. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

6. Automobiles § 41p—

The question of fact as to which occupant of an automobile was the driver at the time of the fatal accident may be proved by circumstantial evidence, either alone or in combination with direct evidence.

7. Same—Circumstantial evidence that defendant's intestate was driving at time of fatal accident held sufficient to be submitted to jury.

Evidence to the effect that defendant's intestate kept the car in question at his house, had driven it and claimed ownership for two or three months, was seen driving it about an hour prior to the fatal wreck, with plaintiff's intestate a passenger, riding in the back with his shoes off, and that both intestates were killed in the accident resulting from the driving of the car at excessive speed and in a reckless manner in violation of statutes, with further evidence that the body of plaintiff's intestate was found without shoes after the wreck, *is held* sufficient to be submitted to the jury upon the ultimate fact of whether defendant's intestate was driving the automobile at the time of the accident.

APPEAL by defendant from *Hall, J.*, December Term 1956 of SCOTLAND.

Civil action for damages for the death of plaintiff's intestate.

Plaintiff alleges in her complaint that on Sunday morning, 18 December 1955, her intestate was riding as a guest passenger in a Tudor 1950 Ford automobile owned by Pres Johnson, and driven by William Graham, defendant's intestate. That about 8:00 a.m. on this morning defendant's intestate was driving this automobile eastwardly along U. S. Highway 15 and entering the corporate limits of the Town of Laurinburg at a speed of 80 miles an hour. That as he approached a curve in the highway he lost control of the automobile, and it turned over several times instantly killing plaintiff's intestate. That the death of her intestate was proximately caused by the negligence of defendant's intestate in driving the automobile at an excessive and unlawful speed and in a reckless and careless manner.

Defendant in her answer denied that her intestate was driving the automobile, and alleged that it was being driven by plaintiff's intestate at the time it overturned. Her allegations as to the speed of this automobile when it entered the corporate limits of Laurinburg and its overturning in the curve of the highway are identical with the complaint's allegations, and she alleges that the overturning of the automobile instantly killed her intestate. Defendant in her answer alleged a counter-claim that plaintiff's intestate was driving this automobile at the time it overturned instantly killing her intestate, and that her intestate's death was proximately caused by negligence of plaintiff's intes-

tate in the driving of the automobile: such allegations of negligence against plaintiff's intestate being identical with the allegations of negligence in the complaint against her intestate.

The court submitted four issues to the jury: one, was the death of plaintiff's intestate caused by the negligence of defendant's intestate, two, an issue of damages, three, was the death of defendant's intestate caused by the negligence of plaintiff's intestate, and four, an issue of damages. The jury answered the first issue Yes, the second issue $5,000.00, and the third issue No.

From judgment entered upon the verdict, defendant appeals.

Joe M. Cox and Jennings G. King for Plaintiff, Appellee.

Mason & Williamson for Defendant, Appellant.

PARKER, J. Defendant has seven assignments of error: five as to the admission of evidence, and two as to the failure of the court to allow her motion for judgment of nonsuit, first made at the close of plaintiff's case, and renewed at the close of all the evidence.

The five assignments of error as to the admission of evidence all relate to the admission in evidence of prior consistent signed statements of certain of plaintiff's witnesses for the purpose of corroborating these witnesses, which statements were marked as Exhibits. Four times the court instructed the jury that these statements were offered and admitted in evidence only for the purpose of corroboration, if the jury found the statement corroborated the witness who made the statement: that the statements were not substantive evidence.

Each of these five assignments of error are phrased in identical words, except for the numbers of the Exhibit, the Exception and the record page. The first assignment of error reads: "For that the Court erred in overruling the defendant's objection to the introduction of Plaintiff's Exhibit No. 1; As set forth in Exception #2 (R. p. 12)." Nothing else appears in this assignment of error, and in the other four relating to the admission of evidence. These five assignments of error do nothing more than refer to the pages of the record where the statements are set forth.

An assignment of error as to the admission of evidence should be definitely and clearly presented, and the Court not required to go beyond the assignment itself to learn what the question is. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. In *McDowell v. Kent,* 153 N.C. 555, 69 S.E. 626, the Court said: ". . . the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record." In *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286, the Court quoted this language from 2 Pleadings and Practice, p. 943: " '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.' "

The purported assignments of error as to the admission of evidence do not throw the slightest light upon the questions of evidence we are asked to pass on, and do not comply with Rule 19(3) and Rule 27½ of our Rules of Practice in this Court. *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735; *Ellis v. R. R.*, 241 N.C. 747, 86 S.E. 2d 406; *S. v. Mills*, 244 N.C. 487, 94 S.E. 2d 324; *Tillis v. Cotton Mills*, 244 N.C. 587, 94 S.E. 2d 600. What the Court desires, and it would seem the least that an appellate court requires, is that assignments of error as to the admission of evidence shall state with particularity the alleged incompetent evidence, and not require a search through the record to find the challenged evidence.

While the assignments of error as to the admission of evidence are insufficient, we have examined the statements admitted in evidence, and no prejudicial error appears in their admission in evidence for the sole purpose of corroboration. The admission of these prior consistent statements by the witnesses before they were cross-examined was within the discretion of the trial judge. *Gregg v. Mallett*, 111 N.C. 74, 15 S.E. 936; *Burnett v. R. R.*, 120 N.C. 517, 26 S.E. 819; *S. v. Smith*, 218 N.C. 334, 11 S.E. 2d 165; *S. v. Sutton*, 225 N.C. 332, 34 S.E. 2d 195; Stansbury's North Carolina Evidence, p. 82 and note 27 on that page.

This is a summary of plaintiff's evidence: Plaintiff is the administratrix of Alex Bridges, and defendant the administratrix of William Graham. When the Ford automobile overturned and wrecked on Sunday morning, 18 December 1955, about 8:15 a.m., Alex Bridges, William Graham and his uncle, John Graham, were riding in it, and Alex Bridges and William Graham were instantly killed and John Graham was injured. About 5:00 p.m. on the Saturday before his death William Graham and his brother, Hardy, came to John Graham's home in a Ford automobile. William Graham was driving the automobile when he came, and was driving it when he left. When William Graham was told John Graham was not at home, he left. About 6:30 a.m. the next day William Graham drove the Ford automobile again to John Graham's home. Alex Bridges came with him. In about 30 minutes William Graham, Alex Bridges and John Graham left in the Ford automobile, with William Graham driving. John Graham's home is about 12 miles from Laurinburg.

Webster McCall's home is 3 or 4 miles from John Graham's home. On this Sunday morning William Graham, Alex Bridges and John Graham came to Webster McCall's home in a grey Ford automobile. Webster McCall testified: They arrived about 6:30 a.m.; "I am estimating the time about ten months after it happened." William Graham said to McCall: "Let me show you what I have under the hood of my

car, want you to hear it sound off." William Graham got in the car, cranked it up, and McCall said: "Boy, it sounds good." There was a new motor under the hood. McCall had seen William Graham drive this automobile before: he always saw William Graham with this automobile. In 25 or 30 minutes after their arrival the three persons who came in the automobile, left in it. McCall was in his house when they arrived and left, and does not know who was driving.

Louise McCall, wife of Webster McCall, was at home this Sunday morning. She does not know who was driving the automobile. On cross-examination she testified: "Alex Bridges told me that he drove the car up there, and guessed he would drive it off. They all looked like they had been drinking."

Ernest Monroe operates a store and a Purol Service Station on U. S. Highway 15 about 10 or 12 miles from Laurinburg. On this Sunday morning between 7:00 and 8:00 a.m. William Graham drove a grey Ford automobile up to Monroe's gas tank, and stopped. Monroe testified: "He (William Graham) had bought gas from me several times; he was driving at these times; I never saw anybody else driving his car." When the automobile came up, John Graham was sitting beside William Graham on the front seat, and Alex Bridges was lying on the back seat with his shoes off. William Graham bought and paid for 5 gallons of gas. Alex Bridges bought a package of cigarettes. After these purchases were made William Graham drove the automobile away. A little after 8:00 a.m. Monroe heard William Graham and Alex Bridges had been killed.

On this Sunday morning about 8:00 o'clock Jesse Snead was driving an automobile on U. S. Highway 15 in the direction of Laurinburg. A grey Ford automobile passed him going toward Laurinburg at a speed of 70 to 75 miles an hour. Snead testified three colored men were in the front seat, and he also testified, "it was my presumption that three were on the front seat." Less than a minute later and about a mile down the road from where this grey Ford automobile passed him, Snead saw this grey Ford automobile turned over on the left hand side of the highway and three bodies scattered 25 to 30 feet apart—one on the shoulder of the highway near the automobile and two on the hard-surfaced part of the highway. William Graham and Alex Bridges were dead. John Graham, a large man of some 260 pounds in weight, was unconscious and "bleeding awful bad." One of the dead men was barefooted. Shoes were at the scene of the wreck. The automobile and three bodies were lying in the residential section of Laurinburg in front of J. E. King's home. At that place is a curve in the highway.

Between 8:00 and 8:15 o'clock this Sunday morning J. E. King was in his kitchen reading the morning paper. He heard a noise, looked and saw an automobile with both ends four feet off the ground. He testi-

fied: "It (the automobile) started leaving the highway between me and Mr. Ned McRae's, then it came on the curve and when it started back across the road, turning over." King went out to the wreck. He saw two men dead, and one unconscious, bleeding mighty bad, and gasping for breath. King saw tracks on the right hand shoulder for about 100 feet, and clear markings on the highway, when the automobile got back on the highway. One of the dead men was barefooted. A pair of shoes was on the highway.

H. C. Gardner, a police officer of Laurinburg, arrived at the scene of the wreck on U. S. Highway 15 at 8:25 a.m. It occurred about 100 yards within the town's corporate limits. He saw lying on the road and shoulder three men: two dead, one unconscious. One of the men was barefooted. He called an ambulance. He testified: "There were marks from the center of the curve down the right hand shoulder of the road where the car had traveled in a skid. The marks 138 feet from the center of the curve lead diagonally to the left side of the highway, and then marks for 60 feet down the left shoulder of the highway of a car in a skid and marks, 75 feet, where there was debris from the car where it had overturned. The car was on the left shoulder of the road, the front end pointing south and the rear north, lying on its left side. There was debris all along."

The bodies of William Graham and Alex Bridges were carried to the Morris Funeral Home. When the bodies arrived there, William Graham had on parachute boots, and Alex Bridges had on socks, but no shoes.

The wrecked automobile was put at the forks of a road as a warning to people during the Christmas season. Maggie Bridges, the plaintiff and widow of Alex Bridges, went to the automobile so placed, and found both of her husband's shoes in the back seat.

Defendant's evidence tended to show that plaintiff's intestate had been seen driving this Ford automobile on the night before the wreck, and on two occasions between 5:30 a.m. and 7:30 a.m. on 18 December 1955. Pres Johnson was William Graham's father-in-law. Tommy Lee Roper, a witness for defendant, said on cross-examination William Graham drove this grey Ford automobile like it was his, he had had it 2 or 3 months, he drove it to work. Dan Graham, uncle of William Graham, testified on cross-examination, William Graham kept this Ford automobile at his home, and had been driving it 2 or 3 months.

The evidence shows that John Graham was in the courtroom during the trial. Neither party saw fit to call him as a witness.

All the evidence tends to show that Alex Bridges was killed by the actionable negligence of the driver of the Ford automobile in driving it at an excessive speed in violation of G.S. 20-141, sub-sec. (b)4, and in a reckless manner in violation of G.S. 20-140.

The question for decision is whether plaintiff has sufficient evidence to carry the case to the jury that the automobile at the time it overturned was being driven by defendant's intestate William Graham.

It is familiar learning that when a motion for judgment of nonsuit is made, plaintiff is entitled to have his evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209. So much of defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by the plaintiff may be considered, but that which tends to establish another and a different state of facts, or which tends to contradict or impeach plaintiff's evidence is to be disregarded. *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793, and do not justify a nonsuit. *Keaton v. Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93.

Plaintiff did not offer any direct evidence showing that William Graham was driving the automobile at the time it overturned. She was not required to do so. Circumstantial evidence, either alone or in combination with direct evidence, is sufficient to establish this crucial fact. *Lane v. Bryan*, 246 N.C. 108, 97 S.E. 2d 411; *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879; *Kelly v. Willis*, 238 N.C. 637, 78 S.E. 2d 711; *S. v. Sawyer*, 230 N.C. 713, 55 S.E. 2d 464; *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477; *S. v. King*, 219 N.C. 667, 14 S.E. 2d 803; *Hensley v. Helvenston*, 189 N.C. 636, 127 S.E. 625; *Limes v. Keller*, 365 Pa. 258, 74 A. 2d 131; *Huestis v. Lapham's Estate*, 113 Vt. 191, 32 A. 2d 115; *Shaughnessy v. Morrison*, 116 Conn. 661, 165 A. 553; *Shirley v. Shirley*, 261 Ala. 100, 73 So. 2d 77; 65 C.J.S., Negligence, pp. 1067-1071.

Plaintiff's evidence, and defendant's evidence favorable to her, considered in the light most favorable to her establishes these facts by clear and direct evidence: William Graham kept the Ford automobile that overturned killing him and Alex Bridges at his house, and had been driving it 2 or 3 months. He drove this automobile like it was his, he had had it 2 or 3 months, and drove it to work. About 5:00 p.m. on Saturday before the fatal wreck the next morning he drove it to John Graham's house, and drove it away. About 6:30 a.m. the day of the wreck he drove it again to John Graham's house. Alex Bridges was riding with him. He got John Graham and drove it away. A new motor had been put in the automobile. About 6:30 a.m. the morning of his death, he showed Webster McCall at his home how this motor

sounded off saying, "let me show you what I have under the hood of my car, want you to hear it sound off." Bridges and John Graham came to the McCall home with him and left with him. Between 7:00 and 8:00 a.m., and shortly before his death, he drove this automobile up to Ernest Monroe's filling station on U. S. Highway 15, stopped at the gas tank and bought 5 gallons of gas. When the automobile came up to this filling station, John Graham was in the front seat with him and Alex Bridges was lying on the back seat with his shoes off. He drove it away. This filling station was about 10 or 12 miles from Laurinburg. He had bought gas from Monroe several times. Monroe never saw anyone else driving this automobile. This automobile overturned on U. S. Highway 15 in the corporate limits of Laurinburg a short time thereafter. The dead body of Alex Bridges had no shoes on the feet. Later his widow found his shoes in the back seat of this automobile. The dead body of William Graham had on its feet parachute boots. The ultimate fact that William Graham was driving the automobile at the time it overturned can be reasonably inferred from these facts shown by direct evidence.

The court below properly overruled the defendant's motions for judgment of nonsuit, and submitted the case to the jury. In the trial below we find

No error.

MRS. THOMAS T. GAULDEN v. PILOT LIFE INSURANCE COMPANY.

(Filed 7 June, 1957.)

1. Insurance § 36c(1)—Terminal leave held not cessation of employment within provision of group policy.

The group policy sued on provided increased amount of insurance over that provided in the group policy which it superseded during continuance of employment as to each employee who made apt application therefor, and who was actively engaged at work on the date the new policy became effective, with further provision to the effect that cessation of active work should constitute termination of employment unless absence from active work was due to leave or temporary lay-off. Deceased filed his application in apt time, and upon the effective date of the policy was on terminal leave at full pay for the period equal to his unused vacation and unused sick leave, which he had earned under the terms of his employment. Deceased died during his terminal leave. *Held:* The terminal leave did not terminate the employment and was a leave of absence of the identical type of "leave of absence or temporary lay-off," which was not to be deemed "cessation of active work," and the beneficiary is entitled to the increased amount under the terms of the new policy.

2. Insurance § 13a—

An insurance policy is only a contract between the parties, and the intention of the parties is the controlling guide in its interpretation.

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

APPEAL by plaintiff from *Rousseau, J.*, January Regular Civil Term 1957 of GUILFORD (Greensboro Division).

This is an action upon a policy of group life insurance issued by the Pilot Life Insurance Company, defendant, to the City of Greensboro, covering the lives of employees of the City. It succeeded a prior policy, replacing it as of 1 July 1955. Thomas T. Gaulden, the deceased insured, of whom the plaintiff is the beneficiary, was insured under the old policy for $2,000. Under the new policy, coverage for his class of employee was to be increased to $4,000.

The facts were stipulated and the matter heard without a jury. The facts considered pertinent to an understanding of this appeal are as follows:

"5. . . . Thomas T. Gaulden, prior to his death, had been for a continuous period of 28 years in the employ of the City of Greensboro, having been employed in and for the Fire Department . . . His death occurred while said policy of insurance was still in full force and effect, and all premiums called for under the terms of said policy of insurance had been paid in full according to the terms thereof; and said Thomas T. Gaulden was on terminal leave at the time of his death as hereinafter shown.

"6. Upon the death of . . . Thomas T. Gaulden, the plaintiff . . . duly notified the defendant insurance company of the death of Thomas T. Gaulden, her husband, and duly made out and filed with the defendant insurance company the usual forms and proofs of death required by the defendant insurance company. Thereafter, the defendant insurance company declined and refused to pay to the plaintiff . . . the sum of $4,000.00, but, instead, the defendant insurance company denied that it was liable for the sum of $4,000.00, and tendered to the plaintiff the sum of $2,000.00 in payment of her claims against the defendant insurance company, which tender the plaintiff refused to accept, and has so notified the defendant insurance company. The plaintiff . . . made due demand upon the defendant insurance company for the full sum of $4,000.00. The defendant refuses to pay that sum to her.

"7. Attached hereto and made a part hereof is a certificate of insurance prepared and signed by the defendant . . . with reference to the assured Thomas T. Gaulden and the said contract and policy of insurance #2157A with an effective date of July 1, 1955, which certificate was never delivered to the City or Thomas T. Gaulden. No certificate

was delivered with respect to any employee until August 1, 1955, because of time required to prepare and deliver them.

"8. Under the old group policy which was also numbered 2157A and is referred to in the policy in suit, and on June 30, 1955, said Thomas T. Gaulden was covered and insured for the sum of $2,000.00.

"9. During the year 1955, employees of the City of Greensboro, including the said Thomas T. Gaulden, were entitled to a specified number of days of annual leave and of sick leave with pay. Employees having 20 years or more continuous service with the City, such as and including the said Thomas T. Gaulden, could, when they became eligible for retirement, obtain leave of absence with pay from their job for the number of days equal to their unused annual leave and sick leave, pay during such period of leave to be at the employee's regular salary rate. Such leave was called 'terminal leave.'

"10. Prior to May 9, 1955, the insured, Thomas T. Gaulden, applied for such terminal leave and retirement. It was determined that he was eligible for both, and he was granted such terminal leave, at full pay, for the period May 10, 1955, through July 31, 1955, a period equal to his unused annual leave and sick leave. At the end of that period of terminal leave, and beginning August 1, 1955, he was thereafter to receive pay as a retired employee at a rate substantially less than his regular salary.

"11. On June 6, 1955, Thomas T. Gaulden executed an application for coverage and insurance under the new policy of insurance sued upon herein, which policy was to and did become effective as of July 1, 1955, said application was duly delivered to and received by the defendant insurance company.

"12. Thereafter, and prior to July 16, 1955, said new policy and the certificate under said policy referring to said Thomas T. Gaulden were prepared and signed by the defendant insurance company and the policy only was delivered to the City, and premiums thereunder were paid for Thomas T. Gaulden and received by the defendant insurance company in the amount provided to be paid for an employee of the City, at his regular salary, who would be entitled to have and receive under said policy $4,000.00 in life insurance coverage.

"13. Beginning May 10, 1955, Thomas T. Gaulden accepted and went on terminal leave as described above, at his full regular salary, said leave to extend through July 31, 1955. On no day after May 9, 1955, did he report to work. He worked on his last scheduled working day prior to the beginning of his terminal leave May 9, 1955. He died on July 16, 1955. At the time of his death . . . and until July 31, 1955, he was carried on the personnel records of the City of Greensboro as a full-time employee at his regular salary, and as being on terminal leave.

His full-time regular salary was paid to him and to his widow up to and through July 31, 1955. . . .

"14. . . .

"15. Thomas T. Gaulden contributed toward the cost of his insurance under the policy sued upon at the rate of not less than $2.00 per month and not less than one-half of the actual then current average cost of the insurance, whichever was greater, being deducted by the City from his paycheck.

"16. The policyholder, the City of Greensboro, North Carolina, under the policy sued upon herein, made, and the defendant accepted, contributions to the cost of insurance for Thomas T. Gaulden.

"17. Upon the defendant being informed of the facts of the terminal leave of Thomas T. Gaulden, and after the plaintiff claimed $4,000.00 death benefit from the defendant, the aforesaid Gaulden premium, except for the portion applicable to $2,000.00 coverage, was refunded to the City of Greensboro."

The pertinent provisions in the policy of insurance referred to hereinabove will be set forth and discussed in the opinion.

From the judgment entered to the effect that under the terms and provisions of the policy of insurance sued upon the plaintiff is entitled to recover only $2,000, the plaintiff appeals, assigning error.

S. Bernard Weinstein and Robert S. Cahoon for plaintiff appellant.

Wharton & Wharton for defendant appellee.

DENNY, J. The sole question posed for decision on this appeal is whether or not the court below committed error in concluding as a matter of law, upon the facts stipulated and the terms and provisions of the policy of insurance involved, that the plaintiff is entitled to recover only $2,000, rather than $4,000 for which she brought her action.

The provisions in the group policy bearing on the question under consideration are as follows:

"All persons directly employed on a full-time basis and compensated for services by the Policyholder may be insured under this policy.

ELIGIBILITY

"Each person described in the preceding provision shall be eligible for insurance hereunder on July 1, 1955, . . .

EFFECTIVE DATES

"The insurance hereunder of any person shall become effective on:

1. the date of such person's eligibility, if he makes written application for such insurance on or before the date of his eligibility, or

2. the date of receipt by the Policyholder of such person's written application for insurance, if such written application is made after the date of his eligibility and on or before the thirty-first day following the date of his eligibility.

provided, in either case, such person is actively at work on that date.

"The insurance on any person not actively at work on the date when his insurance hereunder would otherwise become effective shall become effective on the date such person begins or returns to active work. For the purpose of insurance hereunder, if the effective date of insurance with respect to any person falls on a day which is not a scheduled working day for such person, and if such person was actively at work on the last preceding scheduled working date, the insurance shall become effective as if the person were actively at work on such effective date.

ENDORSEMENT

"Notwithstanding any provision herein to the contrary, if any person eligible for insurance hereunder on July 1, 1955 was not actively at work on that date, the amount of insurance in force on his life, if any, on June 30, 1955 under the Group Policy which this policy replaces shall continue in force under this policy until the earliest of the following dates:

(a) the date of the termination of his employment with the Policyholder,

(b) the date of the expiration of the period for which he last makes the required contribution to the cost of his insurance, if he fails to make any such contribution when due,

(c) the first date on which he is both actively at work and enrolled for insurance under this policy, and

(d) the thirty-first day following his return to active work.

. . .

INDIVIDUAL TERMINATIONS OF INSURANCE

"The insurance on any person insured hereunder shall automatically cease on the date of the termination of employment of such person in the class or classes eligible for insurance hereunder.

"Cessation of active work shall be deemed to constitute termination of employment except as provided in the following paragraphs.

"If any person is absent from active work as a result of injury, sickness or retirement, his employment may be deemed to continue,

for the purposes of insurance hereunder, until terminated by the Policyholder.

"If any person is absent from active work on account of leave of absence or temporary lay-off, his employment may be deemed to continue, for the purposes of insurance hereunder, but not for longer than twelve months during such absence, following which, unless he returns to active work with the Policyholder, his insurance hereunder shall terminate automatically."

With respect to the effective date of the insured's eligibility, the facts disclose that he made written application on 6 June 1955 for coverage under the new policy of insurance, which became effective on 1 July 1955, and that such application was duly delivered to and received by the defendant insurance company, and the City of Greensboro deducted from his salary the amount required to pay the insured's part of the increased premium for the month of July 1955, and remitted it to the defendant.

The endorsement set out above simply provides that if any person eligible for insurance under the terms of the policy on 1 July 1955 was not actively at work on that date, the amount of insurance in force, if any, on 30 June 1955, under the old group policy, would be continued in force under the new policy until the earliest of the dates enumerated thereunder. The facts applicable to the provisions under the above subsections (a), (b), and (c) reveal that, (a) the policy was never terminated by the policyholder; (b) the date of the expiration of the period for which the insured made his last contribution for the cost of his insurance was 31 July 1955; (c) the insured was enrolled for insurance under the new policy on the date it became effective, to wit, 1 July 1955; and, if the insured was actively at work on that date within the meaning of the provisions of the policy, we think the plaintiff is entitled to recover the $4,000 provided thereunder.

It will be noted that under the provisions prescribing what shall constitute individual termination of insurance under the new policy, it is expressly provided that "cessation of active work shall be deemed to constitute termination of employment except as provided in the following paragraphs."

One of the paragraphs referred to above provides, "If any person is absent from active work on account of leave of absence or temporary lay-off, his employment may be deemed to continue, for the purposes of insurance hereunder, but not for longer than twelve months during such absence, following which, unless he returns to active work with the Policyholder, his insurance hereunder shall terminate automatically."

The appellee does not contend that the terminal leave granted to the insured terminated his employment. In our opinion, the leave of absence granted to the insured, which began on 10 May 1955 and was to continue until 31 July 1955, at which time the insured was to be retired, beginning 1 August 1955, is the identical type of "leave of absence or temporary lay-off" which was not to be deemed "cessation of active work," so as to affect the status of the insurance held under the policy, and we so hold.

Here we have an insured who had been an employee of the City of Greensboro for 28 years. He was 64 years of age on 29 June 1955. He applied for terminal leave and retirement prior to 9 May 1955. He was eligible for both. Under the terms of his employment he was entitled to terminal leave at full pay for the period from 10 May 1955 through 31 July 1955, a period which was equal to the total of his unused annual leave or vacation and his unused sick leave. He was entitled to full pay during this period, since, under the terms of his employment, he had already earned the right thereto.

An insurance policy is only a contract and the intention of the parties is the controlling guide in its interpretation. *Stanback v. Insurance Co.*, 220 N.C. 494, 17 S.E. 2d 666; *Bailey v. Life Insurance Co. of Virginia*, 222 N.C. 716, 24 S.E. 2d 614.

If an insured, under the policy involved herein, is absent from active work on account of an earned leave of absence under the terms of his employment, and the employment under such circumstances, according to the provisions of the policy of insurance, may be deemed to continue, for the purposes of insurance, during such leave, we see no reason why the increased insurance coverage provided in the policy should not apply.

The judgment of the court below is

Reversed.

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

COYT IRBY v. SOUTHERN RAILWAY COMPANY, A CORPORATION, AND F. E. ROSS.

(Filed 7 June, 1957.)

1. Railroads § 4—

In approaching a grade crossing both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident.

2. Same—

While a railroad company is under duty to give timely warning of the approaching of its train to a public crossing, its failure to do so does not relieve a traveler of the duty to exercise due care for his own safety, which includes the duty not only to look and listen before entering upon the track, but also to look and listen at a place where and a time when his precaution will be effective.

3. Negligence § 10—

The doctrine of last clear chance does not arise until it appears that the injured person has been guilty of contributory negligence, and no issue with respect thereto must be submitted to the jury unless there is evidence to support it.

4. Railroads § 4—

In order to recover on the doctrine of last clear chance, plaintiff has the burden of showing that at the time he was struck by defendant's train he was in an apparently helpless condition on the track, that the engineer saw or by the exercise of ordinary care should have seen him and appreciated his danger and helpless condition in time to have stopped the train before striking plaintiff, and that the engineer failed to exercise such care, which proximately resulted in the injury.

5. Same—

The doctrine of last clear chance does not apply if at the time plaintiff is in apparent possession of his strength and faculties, and the engineer has no information to the contrary, since under such circumstances the engineer is not required to stop the train or even slacken its speed for the reason that he may assume even up until the very moment of impact that the plaintiff will use his faculties for his own protection and leave the track in time to avoid injury.

6. Same—

In this action by a motorist to recover for damages to his car and injury to his person received in a crossing accident, the evidence *is held* to require nonsuit on the ground of contributory negligence and not to warrant the submission of the issue of last clear chance to the jury.

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

APPEAL by plaintiff from *Rudisill, J.*, at 23 April, 1956, Schedule "A" Regular Civil Term of MECKLENBURG, as No. 237 at Fall Term, 1956, carried over to Spring Term, 1957.

Civil action to recover for personal injuries and property damage allegedly caused by negligence of defendants arising out of a collision between plaintiff's automobile and a train of corporate defendant at a public railroad crossing.

These facts appear to be uncontroverted: The collision occurred at the East 36th Street intersection with main line railroad tracks within the city of Charlotte, N. C.

Plaintiff alleges in his complaint and upon trial offered in evidence Chapter 4, entitled "Railroad Companies," of the Code of Charlotte, of which these sections, here specifically pleaded, were in full force and effect:

"Section 2. Speed Limit of Trains. The speed of railway trains in the city of Charlotte shall not exceed twenty-five (25) miles per hour, provided that such speed shall not exceed fifteen (15) miles per hour at any crossing, and such speed shall be further reduced at certain crossings as provided herein.

"Section 3. Speed of Trains at Certain Crossings. Watchmen, Flagmen, Gates, Signal System, Stopping of trains required at certain crossings: (a) Southern Railway—Atlanta to Washington—Double Track: All railway companies operating a train across the following streets where the double tracks of the Southern Railway Company now cross said streets shall comply with the following: 'Electric signal systems shall be maintained at the Dowd Road, 36th Street and West Ninth Street crossing.' "

Plaintiff alleges that defendant Ross, while so operating the diesel locomotive engine and train, was negligent in that he failed (a) to observe the plaintiff's automobile; (b) to keep a proper lookout; (c) to properly blow his whistle or horn or sound other proper warning that the train was going across the said crossing; (d) to keep the train under control; (f) to yield the right of way to plaintiff, and (g) to avoid colliding with the plaintiff's vehicle; and in that (e) he operated said diesel and train at a high, excessive and unlawful rate of speed and at a speed that was greater than was prudent under the circumstances and conditions then and there existing; and that (h) he otherwise operated the diesel and train in a reckless, careless and negligent manner which they knew or, in the exercise of due care, should have known would be likely to endanger the lives and property of persons lawfully using said street and crossing.

Plaintiff also alleges that defendants, and each of them, were further negligent on the occasion in question in that:

(a) They negligently and carelessly failed to keep the right of way clear and unobstructed of grass and weeds along the easterly side of said tracks at said crossing, in direct violation of ordinance in Chapter 4, entitled "Railroad Companies" of the Code of the city of Charlotte, here specifically pleaded, and which was in full force and effect: "Section 9. Ditches, Etc., Along Tracks must be kept clear of grass, etc. Every railroad company whose tracks extend with the limits of this city, shall keep the ditches or gutters on both sides of and between said tracks on its right of way clear of grass, weeds, trash, garbage and filth of every kind . . ."

(b) "They negligently and carelessly failed to maintain a proper electrical signal system at said crossing . . . to give the plaintiff adequate warning and notice that the gates were about to be lowered . . . to give the plaintiff an adequate and reasonable opportunity to bring his vehicle to a stop outside of the gates and crossing subsequent to the signal and prior to the closing of said gates, and crossing of the train," and (c) to "provide and maintain a watchman and flagman at said crossing . . ." etc.

And plaintiff further alleges that as a direct and proximate cause and result of the negligence of defendants as set forth above, he was injured in person, and his automobile was damaged, in large amounts.

Defendants, answering complaint of plaintiff, deny each and all the allegations of negligence so alleged, and for a further answer and defense say: That if they were guilty of any negligence, plaintiff was guilty of negligence which directly caused and contributed to any injury or damage he may have sustained in that:

"(a) He failed to stop his automobile a safe distance from said track in obedience to the automatic signals at said crossing.

"(b) He stopped his automobile in close proximity to said track and allowed it to remain in such position.

"(c) He failed to get out of said automobile and into a place of safety, although he had sufficient time within which to do so after the said automobile was stopped and before it was struck by said train. And said contributory negligence is hereby expressly pleaded in bar of any recovery herein."

Plaintiff, replying to defendants' answer, denies each of the averments of the further answer and defense, and, by way of further reply, pleads in substance that even if plaintiff were guilty of any negligence, defendants by the exercise of due care should have avoided the injury and damage to the plaintiff, in manner specifically set forth.

As revealed by the pleadings and evidence offered upon trial in Superior Court, this case involves a grade crossing collision on E. 36th Street in Charlotte, N. C., between automobile of plaintiff and train of corporate defendant operated by individual defendant. It occurred on 15 October, 1954, around 7:00 o'clock p.m. It was dark. Plaintiff had headlights of his automobile burning. "The weather was nice and dry." There was a street light at the crossing.

The street runs in general east-west direction. The tracks of the railway run in general north-south direction. The street is forty-five feet wide. It has four lanes of travel, two in each direction. Plaintiff was traveling west, in the most northern lane of travel. The train of defendants was being operated in northern direction, that is, from south to north. There was an electric signal gate at the northeast corner of the intersection, and another at the southwest corner,—each fifteen feet

from the edge of the tracks. Each gate comes down one halfway across the street blocking traffic moving toward the crossing on the right-hand side—the left being open. There were two main line tracks of the railroad eight feet apart and five feet inside rails, curving to the left of northbound trains. And there were three other tracks beside the main tracks, a switch track that branched off the easternmost main line track some distance south of the crossing, and two side tracks more distant from the main line over next to the building.

There was a small house 8′ by 8′ wide and 8½ feet high, estimated to be 35 feet south from the south edge of the street pavement. And the New England Waste Company warehouse fronts on the south side of the street, the western edge of the warehouse being approximatly 100 feet from the first main line track.

Plaintiff was driving a 1954 Ford, two-door coach, brand new, had it four or five weeks. He testified: "I had driven it 900 miles and knew how it operated. It had good brakes. The gears were in good condition. The motor would not cut off with you in traffic. It had an automatic transmission. When you were going forward you did not have to change gears with your hands. It had a drive range on there. It had two forward gears . . . I had my foot off the gas pedal. It was on the brakes. If I had put my foot on the gas pedal at same rate of speed it would have gone across . . ."

Plaintiff was asked this question: Q. "Now, as you came down to the track you were going about 20 miles an hour, is that right?" to which he answered, "Yes, sir." And again plaintiff testified: "I knew I was about 20 feet from the track. I figured I was 20 feet from the signal and 30 feet from the track . . . I did not stop until I got on the track." And to this question, "And you drove over 30 feet, didn't you?" he answered: "I drove about 35 feet, yes, sir. That's the distance it took me to stop." Again, "I stopped as quickly as I could. That put me on the rail . . . I knew I was going to stop. I thought I was going to stop before I got to it, but I didn't; I misjudged . . ."

Plaintiff testified that traveling west he stopped at a traffic control signal for vehicles about a block and a half from the crossing in question. Quoting him, "I was the first car to pull away from the light. There were several cars behind me back there. I went ahead and drove westerly on 36th Street. I proceeded on from the stop light at about 20 to 25 miles an hour. I came down to this corner of New England Waste Company. I looked to the left and right and didn't see anything. I continued on about 50 feet and looked to the left and right again. I didn't see anything. As I got about 20 feet approximately from this signal it gave its signal. It started flashing. There is a bell there that rings. So I immediately applied my brakes. I knew a train was coming and stopped. I didn't see the train until I came to a complete stop.

At the same time I was shifting into reverse gear to get off the tracks. My car went back about three feet and hit some object which was possibly another car. I continued to try to back up but the train hit me before I could do anything."

Again plaintiff testified: "Yes, I said when I did see the train it had flashing lights. The first time I saw it, it was about 250 feet down the track . . . I was doing about 20 miles an hour the last 100 feet to the track. I was not slowing down to a stop. I was just what you might say coasting along. I didn't have my foot on the gas. I went 20 miles an hour until about 35 feet from the track and in the last 35 feet I slowed up to a stop. I estimate the train was 250 feet away from me when I observed it after I got in a stopped position."

Plaintiff also testified that the front of his car was hanging about two feet over the first rail on the eastern line,—that the right front of the engine collided with the left front of his car.

The speed of the train is variously estimated at from 40 to 65 miles per hour.

Plaintiff testified that while he had only been over that crossing twice prior to the time in question, and was not familiar with the type of electric automatic railroad signal, he had crossed other intersections with that same type equipment when the bell starts ringing.

Plaintiff further testified that with the exception of the sidetrack and except for the shrubbery and grass which was about 5 feet high along the bank, "You have a clear view from the street down the track for the last 48 feet," and that "it might be I was a little more than 5 feet high sitting in the car."

And plaintiff repeated that the first time he looked, to the left and right, was when he was approximately 100 feet back, just as he got to the edge of that New England Waste house, and the second time when he was about 80 feet from the crossing.

The engineer testified under adverse examination: "I did sound a warning prior to reaching the crossing. I had the bell ringing and I blew the whistle twice—first when in about 400 or 500 feet of the crossing, and the second time in 200 or 300 feet of the crossing."

Plaintiff's witness Deaton testified that he was traveling in opposite direction to plaintiff; that he was approximately 175 feet from the crossing when he first observed Irby's car; that he observed Irby's vehicle and then immediately the train; that in his estimate the train was five to six hundred feet south of the crossing at the time he first observed it; that the headlight was burning on the engine, and that he did not see Irby make any effort to get out of the automobile. "After I saw him it is my opinion that he had 7 to 9 seconds before the collision." The plaintiff testified: "From the time I came to a stop until the time of the impact I would estimate 3 seconds elapsed."

At the close of plaintiff's evidence motion of defendants for judgment as of nonsuit was allowed, and from judgment in accordance therewith plaintiff appeals to Supreme Court, and assigns error.

William H. Booe for Plaintiff Appellant.

W. T. Joyner and Robinson, Jones & Hewson for Defendants Appellees.

WINBORNE, C. J. If it be conceded that the evidence shown in the case on appeal is sufficient to support a finding by the jury that defendants were negligent at least in operating the train at a speed in excess of the city ordinance, the evidence offered by plaintiff, as shown in the case on appeal, establishes as a matter of law that plaintiff, by his own negligence, as a proximate cause, contributed to his injury. *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *McCrimmon v. Powell*, 221 N.C. 216, 19 S.E. 2d 880; *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833; *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Boone v. R. R.*, 240 N.C. 152, 81 S.E. 2d 380.

In approaching a grade crossing both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident. Thus a railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing. Yet its failure to do so does not relieve the traveler of the duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery, when such failure is a proximate cause of the injury. *Godwin v. R. R., supra.*

In the instant case plaintiff knew that he was approaching a railroad, and he knew he was entering a zone of danger. He was required before entering upon the track to look and listen to ascertain whether a train was approaching. *Bailey v. R. R., supra.*

Hence as stated in *Parker v. R. R., supra,* opinion by *Barnhill, J.,* later *C. J.,* "It does not suffice to say that plaintiff stopped, looked and listened. His looking and listening must be timely, so that his precaution will be effective."

The doctrine of last clear chance does not arise until it appears that the injured person has been guilty of contributory negligence, and no issue with respect thereto must be submitted to the jury unless there is evidence to support it. *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829; *Cummings v. R. R.*, 217 N.C. 127, 6 S.E. 2d 837; *Mercer v. Powell*, 218 N.C. 642, 12 S.E. 2d 227.

And when the doctrine of last clear chance is relied upon, the burden is on the plaintiff to show by proper evidence: (1) That at the time

the injured party was struck by a train of defendant he was down, or in an apparently helpless condition on the track; (2) that the engineer saw, or, by the exercise of ordinary care in keeping a proper lookout could have seen the injured person in such condition in time to have stopped the train before striking him; and (3) that the engineer failed to exercise such care, as the proximate result of which the injury occurred. See *Cummings v. R. R., supra; Mercer v. Powell, supra,* and cases cited.

Indeed the doctrine of last clear chance does not apply in cases where the person upon the track of a railroad, at the time, is in apparent possession of his strength and faculties, the engineer of the train that produces the injury having no information to the contrary. Under such circumstances the engineer is not required to stop the train, or to even slacken its speed, for the reason he may assume until the very moment of impact that such person will use his faculties for his own protection and leave the track in time to avoid injury. *Cummings v. R. R., supra; Mercer v. Powell, supra,* and cases cited.

Moreover, the principle is restated by *Barnhill, J.*, later *C. J.*, in *Ingram v. Smoky Mountain Stages,* 225 N.C. 444, 35 S.E. 2d 337, in this manner: "To sustain the plea (of last clear chance) it must be made to appear that (1) the plaintiff by his own negligence places himself in a dangerous situation, (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him, and (4) notwithstanding such notice and imminent peril negligently failed or refused to use every reasonable means at his command to avoid impending injury, (5) as a result of which plaintiff was in fact injured," citing cases. To like effect is *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109, opinion by *Denny, J.* See also *Mfg. Co. v. R. R.*, 233 N.C. 661, 65 S.E. 2d 379.

The discovery of the danger, or duty to discover it, as basis for a charge of negligence on the part of defendant after the peril arose, involves something more than a mere discovery of, or duty to discover, the presence of the injured person, it includes a duty, in the exercise of ordinary care under the circumstances, to appreciate the danger in time to take the steps necessary to avert the accident.

"Peril and the discovery of such peril in time to avoid injury constitute the backlog of the doctrine of last clear chance," so wrote *Brogden, J.*, for the Court in *Miller v. R. R.*, 205 N.C. 17, 169 S.E. 811. See also *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833; *Ingram v. Smoky Mountain Stages, supra.*

"The last clear chance does not mean the last possible chance to avoid the accident." *Lee v. R. R.*, 237 N.C. 357, 75 S.E. 2d 143.

Testing the evidence offered by plaintiff in the light of the principle here invoked, it is apparent that the trial court did not err in sustaining defendant's motion for judgment as of nonsuit.

Other assignments of error have been given due consideration, and in them prejudicial error is not made to appear.

Affirmed.

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

IN THE MATTER OF: APPLICATION OF DEPARTMENT OF ARCHIVES AND HISTORY FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR RESTORATION OF TRYON'S PALACE, NEW BERN, NORTH CAROLINA.

(Filed 7 June, 1957.)

1. Eminent Domain § 6—Department of Archives and History, upon certificate of public convenience, has power to condemn land for restoration of Tryon's Palace.

Chapter 543, Session Laws of 1955, granted the Department of Archives and History the power to acquire real estate and personal property of statewide historical significance by gift or purchase, etc., and the power of condemnation for such purpose with the approval of the Governor and Council of State, and also substituted the Department of Archives and History for the Department of Conservation and Development in Chapter 791, Session Laws of 1945, so as to empower the Department of Archives and History under the 1945 Act, after obtaining a certificate of public convenience and necessity, to condemn land for the restoration of Tryon's Palace without the approval of the Governor and Council of State.

2. Abatement and Revival § 3—Abatement of subsequent action does not apply when prior action, as constituted, cannot be prosecuted further.

The principle of abatement of a second action on the ground of a prior action pending between the parties is a rule of convenience to prevent multiplicity of suits, and therefore the principle can have no application where the power of eminent domain is given one agency of the State, which institutes condemnation proceedings thereunder, and later this power is withdrawn from such agency and given to another, which institutes identical proceedings, since the prior proceeding, as constituted, cannot be prosecuted further, and the second petition may be treated as a motion in the cause to substitute the name of the successor State agency for that of the first.

3. Constitutional Law § 8a—

The restoration of the first fixed capital of the Colony of North Carolina is a public purpose for which the General Assembly may grant the power

of eminent domain, and provide for the payment of the necessary property out of funds available therefor.

4. Utilities Commission § 5—

The determination by the Utilities Commission of an application for a certificate of public convenience and necessity is presumed valid and will not be disturbed unless it is made to appear that it is clearly unreasonable and unjust.

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

PARKER, J., concurring.

APPEAL by protestants from *Morris, J.*, November, 1956 Term, CRAVEN Superior Court.

This proceeding originated before the North Carolina Utilities Commission upon the petition of the State Department of Archives and History, hereinafter called the applicant, for a certificate of public convenience and necessity to the end that lands necessary to the restoration of Tryon's Palace in New Bern, Craven County, North Carolina, may be acquired by condemnation, as contemplated by Chapter 791, Session Laws of 1945, and Acts amendatory thereof. Notice of the proceeding was duly served upon the owners of the lands sought to be condemned. In response to the notice, the landowners, hereinafter called the respondents, filed a special appearance and motion to dismiss the proceeding for that (1) The North Carolina Utilities Commission is without authority to grant the certificate, (2) that the restoration of Tryon's Palace is not a public purpose, (3) that an application was already pending in which the North Carolina Department of Conservation and Development sought to obtain a certificate for identically the same purpose, (4) the pendency of the prior application worked an abatement of the present application, (5) that the legislative enactments under which the applicants seek the restoration of Tryon's Palace are unconstitutional, (6) that the Governor and Council of State had not approved the application.

The Utilities Commission, after full hearing and upon competent evidence, made findings in favor of the petitioners and issued the certificate. The respondents filed exceptions to the findings of fact and to the refusal of the Utilities Commission to declare the proceeding abated. The respondents appealed to the Superior Court of Craven County.

Upon the hearing in the Superior Court, Judge Morris overruled all exceptions and objections, confirmed all findings of the Utilities Commission, and approved the order granting the certificate. The respondents excepted and appealed.

George B. Patton, Attorney General, and John Hill Paylor, Assistant Attorney General.

Henry A. Grady, Jr., W. J. Lansche, Jr., for the State of North Carolina ex rel. N. C. Utilities Comm. and the Dept. of Archives and History, appellees.

Barden, Stith & McCotter, R. E. Whitehurst, John Beaman, and Jones, Reed & Griffin for protestants, appellants.

HIGGINS, J. Chapter 791, Session Laws of 1945, authorized the Department of Conservation and Development to accept gifts, to acquire property, and to restore Tryon's Palace in New Bern. The Act gives to the Department of Conservation and Development authority to acquire by purchase or condemnation "such areas of land in New Bern . . . as it may find necessary for the restoration of said Palace." . . . And condemnation must be in accordance with Chapter 40, General Statutes of North Carolina, "including the provisions of the Public Works Eminent Domain Law." The original Act was amended by Chapter 233, Session Laws of 1949; by Chapter 649, Session Laws of 1951; by Chapter 1100, Session Laws of 1953.

Under the authority of the foregoing Acts, the Department of Conservation and Development, on 4 November, 1954, filed an application before the North Carolina Utilities Commission for a certificate of public convenience and necessity and the right to institute condemnation proceedings to acquire so much of the land described in the original Act of 1945 as the Department had been unable to acquire by purchase. Notice was served on the landowners who entered a special appearance and moved to dismiss the proceeding upon the grounds hereinbefore set forth.

While the application for the certificate was pending before the Utilities Commission, the General Assembly enacted Chapter 543, Session Laws of 1955, giving the State Department of Archives and History power to acquire real estate and personal property of statewide historical significance by gift, purchase, devise, or bequest, and when found to be important for State ownership the Department (Archives and History) after receiving the approval of the Governor and Council of State, shall have power to acquire by condemnation. (See Sec. 121-8.)

Chapter 791, Session Laws of 1945, was amended "by substituting the words 'Department of Archives and History' wherever the words 'Department of Conservation and Development' appear in the Act." Authority to condemn is not being exercised under the Acts of 1955 but under the original Act of 1945 and amendments thereto. The result is the Department of Archives and History has the power specifically conferred on it by the terms of Chapter 543, Session Laws of 1955.

The power to acquire by condemnation "historic and archaeological properties" under the Act of 1955 applies to such properties generally. The power can be exercised only with the approval of the Governor and the Council of State. It also has by substitution the powers originally given to the Department of Conservation and Development by the Act of 1945 and the amendments. The power to acquire by condemnation applies only "to such areas" as may be necessary to restore Tryon's Palace and it must be exercised as provided in the Public Works Eminent Domain Law. A certificate of public convenience and necessity is required. *Utilities Comm. v. Story,* 241 N.C. 103, 84 S.E. 2d 386; *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761. Approval of the Governor and Council of State is not required.

At the time the Department of Archives and History applied for the certificate of public convenience and necessity, an application on behalf of its predecessor (Department of Conservation and Development) was then pending before the North Carolina Utilities Commission. Whether the application now before us be treated as a motion in the cause substituting Archives and History for Conservation and Development, or as a new application made necessary by withdrawal of authority from Conservation and Development, is immaterial. There was a full hearing on the present application in which the respondents fully participated and the proceeding appears to be regular in all aspects. It is the only one in which a judgment can be rendered against the respondents. "As a general rule, this right to plead the pendency of another action between the same parties, before judgment had, is regarded to a large extent as a rule of convenience, resting in the principle embodied in the maxim *nemo debet bis vexare*—no one should be twice harassed for the same cause." *Allen v. McDowell,* 236 N.C. 373, 72 S.E. 2d 746; *Reed v. Mortgage Co.,* 207 N.C. 27, 175 S.E. 834; *Cook v. Cook,* 159 N.C. 46, 74 S.E. 639. Abatement of the second action is based on the theory that all the issues can be settled in the first action. In this case the Act of 1955 withdraws authority to maintain the proceeding from the Department of Conservation and Development and gives it to the present petitioner. The present petition and notice may be treated as a motion in the cause substituting as the petitioner the Department of Archives and History in lieu of the Department of Conservation and Development. *Beck v. Voncannon,* 237 N.C. 707, 75 S.E. 2d 895; *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124; *Craddock v. Brinkley,* 177 N.C. 125, 98 S.E. 280.

The Legislature has declared the restoration of Tryon's Palace a public purpose. The North Carolina Utilities Commission, upon a proper petition and after notice and hearing, has granted a certificate of public convenience and necessity. Upon appeal, Judge Morris has

overruled all exceptions and confirmed the Commission's order. The State has funds available to pay for the respondents' property which by the proper authorities has been found necessary for the purpose of restoring the palace. It was the first fixed capital of the Colony of North Carolina, and its most notable and unusual architectural achievement. The power of the Legislature to provide for the restoration is beyond question. *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486; *Jamison v. Charlotte,* 239 N.C. 423, 79 S.E. 2d 797.

This cause came to the Superior Court and from that court here upon appeal from a determination of the Utilities Commission. The determination is presumed to be valid and is not to be disturbed unless it is made to appear that it is clearly unreasonable and unjust. *Utilities Commission v. The Great Southern Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201. The record fails to disclose any valid reason in law why the judgment of the Superior Court should be disturbed.

Affirmed.

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

PARKER, J., concurring: The building called Tryon's Palace was "the most elegant structure in America." Marshall DeLancey Haywood's "Governor William Tryon," p. 193. It was not, however, simply a residence for the Royal Governor, but also served as a capitol or state house—containing a hall where the Assembly met, a council-chamber, and public offices.

John Hawks, who came to America with Governor Tryon, superintended its construction. It was built of brick and trimmed with marble. Skilled artisans were brought from Philadelphia to do the work. The plumbing was done by an expert who came over from England for the express purpose. The main building was three stories high. On each side was a two-storied building, connected with the central building by gracefully curving galleries. In front of the Palace was a handsome courtyard. The rear of the building was fashioned in the style of the Lord Mayor's Residence in London. All the sashes and four of the mantel pieces were imported. In the council-chamber there was a chimney-piece containing decorations of Ionic statuary, with columns of sienna, the fretwork on the frieze being inlaid with the latter material. There were richly ornamented marble tablets on which were medallions of King George and his Queen.

The work of this noble structure was begun on 26 August 1767. In 1770 the house was ready for occupancy, and the public records were moved into it in January and February of the following year.

The opening of the Palace was celebrated by a grand ball. Of this entertainment we can catch a vivid glimpse through the clouds of old

night in the correspondence between James Iredell and Sir Nathaniel Dukenfield, wherein the baronet writes how the dignified councillor, Samuel Cornell, "hopped a reel" at the close of the evening. McRee's "Life and Correspondence of James Iredell," Vol. I, p. 173. Little could those present on that festive occasion foresee that in less than two decades this Palace would be a mass of charred ruins.

Francois Xavier Martin, an early historian of the State, tells that he visited the Palace in company with the noted Venezuelan patriot, Don Francisco de Miranda, who said the building had no equal in South America.

This stately building and grounds, when completely restored, will whisper to countless generations of North Carolinians and others from the four ends of the earth:

"Tales of a brave and warlike race,
Of peace and strife, of death and life,
Of word and action bold.
It will tell of men long gone,
Of long forgotten ways;
And how our fathers wrought and fought
In old colonial days."

Quoted with slight variations from Marshall DeLancey Haywood's poem in the dedication of his book, Governor Tryon, To the Memory of the Revolutionary Patriots of North Carolina.

Verse and legend and story have told of

"The stately homes of England
How beautiful they stand!
Amidst their tall ancestral trees,
O'er all the pleasant land."

Many of these stately homes are being preserved by the English Government at public expense as a glorious memorial of the past, and millions who speak the English tongue will visit, now, and in the future, the land of their ancestors to see them. The princely benefaction of the Rockefellers in restoring Williamsburg has made universal the fame of the great Virginians of Colonial and Revolutionary Days.

When Tryon's Palace is completely restored by State aid and the generous gifts of citizens of the State, and when countless thousands in the years that are ahead gaze upon the stately building, and stand in the hall where the Assembly met, and where in immediate Pre-Revolutionary and Revolutionary Times patriotic North Carolinians debated and decided upon the principles that lie at the foundation of

our constitutional rights as free men, they will stand in the presence of history as those great men live again, and will thrill with pride over how their fathers wrought and won for them their liberties "in old colonial days." And each North Carolinian can say with great satisfaction, "this is my own, my native land."

I completely agree with the statement in the Court's opinion that the restoration of Tryon's Palace serves a public purpose. I concur in the result.

J. D. PORTER v. YODER & GORDON COMPANY, INC.

(Filed 7 June, 1957.)

1. Statutes § 5a—

The intent and spirit of an act controls in its construction, and when the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of its purpose.

2. Negligence § 3—

In this action to recover for lead poisoning resulting from the use of a commercial paint ingredient containing lead monoxide, based on the alleged negligence of the seller in selling and delivering the compound without labeling the containers "poison" in violation of G.S. 90-77, it *is held* nonsuit should have been entered, since, construing G.S. 90-77 in the light of its caption and the context of the statute, the statute relates to pharmacy and the sale of medicines containing poisonous ingredients, and, under the doctrine of *ejusdem generis*, does not apply to the sale of a lead compound used in a commercial paint ingredient.

APPEAL by defendant from *Armstrong, J.*, at October 1955 Regular Term of ROWAN, and *Crissman, J.*, at May 1956 Regular Term of ROWAN, as No. 530 at Fall Term, 1956, carried over to Spring Term, 1957.

Civil action instituted 12 August, 1955 to recover damages allegedly resulting from actionable negligence of defendant in selling and delivering to plaintiff poisonous compound of lead, lead monoxide, commonly known as "Litharge," without the word "poison" on the containers wherein such compound was sold and delivered, in violation of a statute of the State of North Carolina, G.S. 90-77, heard, first, upon motion of defendant, on special appearance, to quash the summons, and the attempted service thereof.

I. The record discloses (1) that summons issued to the sheriff of Guilford County for "Yoder & Gordon Company, Inc., by serving James P. Oliver, Route 9, Box 529, Greensboro, N. C., as agent of the defendant above named" was served on James P. Oliver on 15 August, 1955;

and (2) that summons issued to sheriff of Wake County for "Yoder & Gordon Company, Inc., by serving the Secretary of State of North Carolina, as agent for said defendant . . ." was served 15 August, 1955, on "Thad Eure, Sec. of State of the State of North Carolina at Raleigh, N. C., said Secretary being the process agent for the defendant named in the order of this summons."

Defendant Yoder & Gordon Company, Inc., appearing specially in this action solely for the purpose of moving, moved that each summons in the action be quashed, and that the attempted service thereof on defendant be set aside for reasons stated.

The cause came on for hearing before Armstrong, Judge Presiding at the regular October-November Term of Superior Court of Rowan County on the special appearance and motion of defendant to quash service of summons; and the parties having agreed that the matter might be determined and the order and judgment of the court signed out of term and outside Rowan County, and the court having received and considered evidence in the form of oral testimony, exhibits, affidavits and the verified complaint, and having heard arguments and considered briefs, submitted by counsel for the plaintiff and for the defendant, the court made specific findings of fact, upon which "THE COURT CONCLUDES AS A MATTER OF LAW THAT: This Court has jurisdiction of the person of the defendant Yoder & Gordon Company, Inc., a Maryland Corporation, by virtue of service of summons upon the Secretary of State of North Carolina pursuant to G.S. 55-38, *et seq.* as amended by Session Laws, 1955, Ch. 1143.

"This court also has jurisdiction of the person of the defendant Yoder & Gordon Company, Inc., a Maryland corporation, by virtue of service of summons upon J. P. Oliver, who, upon the facts herein found, is, and was at all times herein relevant, a managing agent transacting business in North Carolina for the defendant within the meaning of G.S. 1-97."

And thereupon the court ordered:

"1. That the Motion to Quash Service of Summons be, and the same hereby is, denied.

"2. That the defendant pay the costs of this Special Appearance."

Defendant appealed from the judgment to Supreme Court of North Carolina, "exceptions to said judgment to be hereafter assigned."

The exceptions set forth are as shown in the record and case on appeal.

Upon the merits of the case:

Plaintiff alleges in his complaint that on or about the 16th day of April 1954 defendant negligently sold, and negligently delivered to plaintiff in the State of North Carolina a quantity of poisonous compound of lead, to wit: lead monoxide, commonly known as Litharge,

without labeling same with the word "poison" in violation of a statute of North Carolina, G.S. 90-77; that plaintiff made use of "said poisonous compound of lead" in the month of May 1954 in the course of his business as a painter and painting contractor, without knowing or being warned that such compound was poisonous whereby he might have taken appropriate precaution; that as a direct and proximate result of "the aforesaid acts of negligence on the part of defendant" he, the plaintiff, "contracted lead poisoning," to his great injury; and that "The acts of negligence on the part of defendant which proximately caused said damage to plaintiff consisted in:

"(a) *Selling* . . . and (b) *Delivering* a poisonous compound of lead, to wit: Lead monoxide, to plaintiff without labeling 'poison' the containers wherein such compound 'was sold'" and "'was delivered' in violation of a statute of North Carolina."

And upon trial in Superior Court plaintiff in pertinent part testified substantially as follows: "About the end of April 1954, I obtained a job to paint some water tanks of the city of Salisbury . . . three . . . a million gallon water tank, a two hundred and fifty thousand gallon water tank and a fifteen thousand gallon . . . The materials required for the painting of the interior of these tanks were mostly red lead and litharge, red lead and linseed oil and turpentine, ready mixed red lead in cans and dry litharge . . . I obtained some litharge to do this job from Yoder & Gordon Company out of Norfolk, Va., the defendant in this case . . . eighty pounds dry litharge . . . that is the litharge I bought for this job . . . containers . . . were labeled 'Lev-L-Lite Paint Products—Litharge—Manufactured by Yoder & Gordon Co.—Established 1904—Norfolk, Virginia.' All labels were the same. The material inside all the cans appeared to be the same. There was no poison label on any one of these cans . . . I had never bought any litharge before this. I had never dealt with litharge or had anything to do with it. I did not know that litharge was a poisonous compound . . . that litharge contained lead monoxide. The only thing I knew about litharge was the specifications that required me to put two pounds of litharge to the gallon of paint. We mixed it according to specifications . . . 80 pounds @ 25c—$20.00—is the price I paid for this litharge. I paid Yoder & Gordon Company. This litharge was delivered to my home, 831 Jackson Street, Salisbury. Yoder & Gordon paid freight on it. As to how this million gallon water tank was cleaned, the specification called for cleaning interior . . . and applying two coats red paint . . . We opened up a five-gallon can of red lead . . . We had to mix ten pounds of this dry litharge inside that red lead. The specifications said pour it in slowly and stir . . . While we were stirring it up it boils up in your face . . . We mixed that paint and after we

got it mixed we applied it to the wall . . . We breathed some of this powder . . . it was determined I did have lead poisoning . . ."

And on cross-examination plaintiff stated: ". . . I did read section 5.2 in the specifications relating to painting interior surfaces of the one-million gallon tank . . . where it says: 'All interior surfaces . . . shall be given two coats of red lead, linseed oil paint, conforming to Federal Specifications TT-P-86a, Type 1, except said Federal Specifications shall be modified by the addition of two pounds per gallon of dry litharge, to be added shortly before application. The dry litharge is to be added slowly while the paint is stirred.' We went over that part of the contract very carefully to make sure we mixed our paint, etc. At that time I didn't undertake to discover what litharge was . . . When I saw this word litharge I had never seen the word before. I did not undertake to ask anyone what it was . . . I did go to the phone and call Norfolk, Virginia, and tell them to ship me some litharge along with other materials . . ."

Plaintiff offered other evidence not necessary to be recited for consideration of the determinative question on this appeal.

The case was submitted to the jury on issues as to (1) negligence of defendant, (2) contributory negligence of plaintiff, and (3) damages, all of which were answered favorable to plaintiff.

To judgment in accordance therewith defendant excepted and appeals to Supreme Court, and assigns error.

Lewis P. Hamlin, Jr., and Clarence Kluttz for Plaintiff Appellee.

David S. Sykes, C. Theodore Leonard, Jr., and W. T. Shuford for Defendant Appellant.

WINBORNE, C. J. Assuming that the court below properly overruled the motion of defendant, made upon special appearance, to quash the service of summons, as hereinabove related, there arises, upon exception to the denial of defendant's motions for judgment as of nonsuit, assigned as error, the basic question as to whether the provisions of the statute, G.S. 90-77, are applicable to the facts of this case, and available to plaintiff for support of a cause of action against defendant as alleged in the complaint.

As to this question, the history of the statute considered in context as shown by the original act, and subsequent codifications, on which it is founded, indicate a legislative intent to restrict its provisions to the profession of pharmacy, and its relation to pharmaceutics,—the science of preparing, using and dispensing of medicines, and not to manufacture and sale of paint products for commercial purposes. The intent and spirit of an act controls in its construction. *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278.

The statute G.S. 90-77 comprises in substantial conformity Sections 20 and 28 of Chapter 108 of 1905 Public Laws. This act is entitled "An Act to Revise, Consolidate, and Amend the Pharmacy Laws." By the enactment of it (thirty-one sections), the General Assembly created the North Carolina Pharmaceutical Association and declared its object "to unite the pharmacists and druggists of this State for mutual aid, encouragement and improvement, to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries." It declared the responsibility of persons engaged in the sale and dispensing of "drugs, chemicals and medicine." And in general the act prescribed rules and regulations for the Association and the ethical practice of the profession in keeping with the declared object.

When the Act of 1905 was codified, Section 20 became Revisal Section 4489, under part VII entitled "Pharmacists" in Chapter 95 entitled "Health." And Section 28 became Revisal 3655 under part XXVII entitled "Professions" in Chapter 81 entitled "Crimes." And in codification in Consolidated Statutes of 1919, Revisal Sections 4489 and 3655 were consolidated into C.S. 6671, under part 2 (entitled "Dealing in Specific Drugs Regulated") of Article 3 (entitled "Pharmacy") of Chapter 110 (entitled "Medicine and Allied Occupations"). Part 1 of Article 3 of Chapter 110 is captioned "Practice of Pharmacy." And when codified in the General Statutes, C.S. 6671 became G.S. 90-77, under identical captions.

Moreover, in the codifications it is noted that the word "oxide" appearing in the last proviso of Section 20 of the 1905 Act is spelled "dioxide." But read in context it is seen that this last proviso clearly relates to medicinal dosage of poisonous substances, and such products as are dispensed by pharmacists.

Decisions of this State are uniform in holding that if the meaning of a statute is in doubt reference may be had to the title and context as legislative declarations of the purpose of the act. *S. v. Woolard,* 119 N.C. 779, 25 S.E. 719; *Machinery Co. v. Sellers,* 197 N.C. 30, 147 S.E. 674; *Dyer v. Dyer, supra; S. v. Keller,* 214 N.C. 447, 199 S.E. 620; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643; *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129; *S. v. Lance,* 244 N.C. 455, 94 S.E. 2d 335.

In *S. v Woolard, supra, Clark, J.,* later *C. J.,* said: ". . . the title is part of the bill when introduced, being placed there by the author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the act . . . Consequently

when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered."

The text writers say that the construction and operation of statutes relating to poison are governed by the general principles applicable to all statutes; and such statutes, where penal in nature, are strictly construed and will not be extended by implication beyond their express terms. Indeed the doctrine of *ejusdem generis* applies in construing a statute pertaining to the labeling of products containing poison. 72 C.J.S. pp. 164-5. That is, "in the construction of laws, wills, or other instruments, the *ejusdem generis* rule is that where general words follow an enumeration of persons or things, by words of a particular or specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary 3rd Ed. See also *Trust Co. v. Wolfe,* 245 N.C. 535, 96 S.E. 2d 690.

And it is stated in 72 C.J.S. 165 that "statutes requiring the labeling of poisons ordinarily do not apply to articles of merchandise in the manufacture of which poison is incidentally used." Furthermore, "a statute requiring persons selling medicine belonging to a class known as poisonous to mark the package with the word 'poison' has been held to apply only to the sale of poisons usually sold by druggists and apothecaries and not to poisonous articles other than medicine . . ." *Boyd v. Frenchee Chemical Corp.,* D. C. N.Y., 37 Fed. Supp. 306; *McClaren v. G. S. Robins & Co.,* 349 Mo. 653, 162 S.W. 2d 856.

In the *Boyd case, supra,* this headnote epitomizes the opinion: "2. The purpose of Pennsylvania statute providing for the practice of pharmacy was to regulate the compounding of physicians' prescriptions, preparing drugs, and dispensing them, or other products of the apothecary's calling, including poisonous substances, as an incident to the practice of pharmacy, and not to regulate or control the sale of cleaning preparation which happened to be poisonous." And it is held in this case that "Although definition of 'poison' contained in Pennsylvania statute regulating the practice of pharmacy was broad enough to embrace a commercial shoe cleaner, the statute taken as a whole could not be construed as intended to regulate the sale of such products having no connection with pharmacy so as to require that cleaner be labeled as poison in accordance with statute."

Moreover in the *McClaren case, supra,* the Supreme Court of Missouri held that an Illinois statute penalizing "every druggist who sells and delivers any arsenic . . . or other substance . . . usually denominated as poisonous without having the word 'poison,' does not under the '*ejusdem generis*' rule manifest an intent to include 'carbon tetrachloride' therein, which is not a drug, but a grease solvent, sold com-

mercially as a cleaning fluid, and hence the sale of such a substance by manufacturer without labeling it as poison did not constitute negligence."

The reasoning of these cases is deemed sound and persuasive.

Hence in the light of the caption and context of the statute in hand, G.S. 90-77, read in connection with the whole act entitled "Pharmacy" this Court holds as a matter of law that the sale and delivery of a lead compound, such as lead monoxide or litharge, used in commercial paints, does not come within the purview of the provisions of the statute requiring the labeling of containers in which it is sold by the manufacturer with the word "poison."

Therefore, the motion of defendant for judgment as of nonsuit should have been allowed.

Judgment reversed.

J. G. JACKSON, JANIE L. LOFTIN, F. L. JACKSON, R. A. JACKSON, R. M. JACKSON AND E. E. JACKSON v. THE CITY OF GASTONIA.

(Filed 7 June, 1957.)

1. Municipal Corporations § 15a—

Where the owner of a subdivision outside a municipality constructs water and sewer lines and permits purchasers of lots to tap into the lines without charge, the municipality, upon the extension of its limits to include the subdivision, is liable to the owner of the subdivision or his heirs in *quantum meruit* for the value of the water and sewer lines in the absence of charter or contractual provision to the contrary, when the municipality takes over, uses and controls the said lines as its own.

2. Same: Dedication § 1—

The owner of a subdivision does not dedicate water and sewer lines constructed by him to the public at large by permitting the purchasers of lots in the subdivision to tap into the said lines without charge, since a dedication must be made to the use of the public in general and not to any particular part of it.

APPEAL by plaintiffs from *Campbell, J.*, at 10 December, 1956 Term of GASTON.

Civil action to recover, as stated in the case on appeal, the reasonable value of water and sewer lines taken by the defendant municipality for a public purpose without compensating the plaintiffs, who had installed, maintained and were the owners of the said lines prior to the time they were taken over by the defendant.

The parties waived trial by jury and agreed that the presiding judge should sit as a jury and find all the facts, and determine all issues, subject to the usual rights of motions and appeal by either party.

The parties stipulated facts substantially as follows:

(1) Plaintiffs are all the heirs at law of John Frank Jackson, who died 13 November, 1948, leaving a last will and testament, which is duly probated and recorded in office of Clerk of Superior Court of Gaston County, North Carolina, in Will Book 7, at page 167, under which James G. Jackson and Earl E. Jackson were appointed executors with full power of sale of any and all property, and said executors thereafter duly qualified and were acting as such at the times involved in this action, and under Item VIII of said will any and all property owned by John Frank Jackson was bequeathed to the plaintiffs herein.

(2) In the year 1922 John Frank Jackson owned over two hundred acres of land situated about one mile south of the corporate limits of the city of Gastonia, the defendant, suitable for residential purposes. And in October of that year John Frank Jackson had a portion of this property platted into residential lots for the purpose of sale,—the plat being recorded as indicated, from which plat he proceeded to sell lots. Later in same year he had a large portion of the remainder of his property platted into a certain subdivision, from which he proceeded to sell and convey residential lots. This plat was not recorded until the year 1937. On these plats streets were laid out and dedicated to the use of the purchasers of said lots and of the general public. And in the year 1939 John Frank Jackson also had an additional plat showing other land. This plat has not been recorded, although deeds conveying such (residential) lots make reference to it. Other portions of the land were deeded without reference to any plat.

(3) "To increase the salability of his lots," John Frank Jackson, in the years 1936, 1939, 1941 and 1946, at his own expense, extended certain sewer lines, specifically described, tapping same to existing sewer line outside the corporate limits of defendant, and privately owned. In the year 1949, the heirs of John Frank Jackson at their own expense made other extension of the sewer line, and installed certain water lines. All this is shown on the composite map made a part of the stipulation. Installation of the water line and "said sewer lines in the dedicated streets were to serve the purchasers and owners of lots therein," and no charge was made against the purchasers or owners of the lots so sold for taps to said lines for serving said lots with water or sewer, but the expense of said connections or taps from said lines to said lots were borne entirely by the owners and purchasers of the lots.

(4) The defendant, City of Gastonia, prior to 1 November, 1950, the date on which the territory embracing "the subject lines" was incorporated into the corporate limits of the city, exercised no control or maintenance over said lines, but did furnish its water through said lines, and did require water meters on the taps from said water line to the residential lots and collected charges for the quantity of water used by the

purchasers of the lots. However "the defendant did not collect any sewer charges from any residence on the lots tapped on the sewer lines. And after the territory embracing the water line and sewer lines were incorporated into the corporate limits of the city, *the defendant has taken over, used and controlled said water and sewer lines to the same extent as if said lines had been installed by the defendant originally.*" (Emphasis added.)

(5) Practically all of the lots in said subdivision were sold prior to the incorporation of said subdivision into the corporate limits of the city of Gastonia; and "between the year 1922 and November 1, 1950, residential homes were constructed on the great majority of the residential lots sold and taps by the purchasers of the lots and owners of said residences to the water line and to the various sewer lines permitted by John Frank Jackson or the plaintiffs." The purchasers of the various lots connected their residences with the water line, and sewer lines, at their own expense without paying a tapping charge to him or them, and have since that time purchased water from the city of Gastonia, "but were under no obligation of any kind to pay" John Frank Jackson or plaintiffs "any portion of said expense or other remuneration for water obtained from said lines, nor for the use of the water or sewer lines."

(6) Defendant, a municipal corporation, under and by virtue of Section 55 of its Charter (Chapter 199 of Private Laws of 1913) and by virtue of G.S. 160-239, *et seq.*, and G.S. 160-225, *et seq.*, has the power to operate and establish and provide a water and sewer system and to make charges to the users thereof, and further, has the power and authority under said charter and the General Statutes of North Carolina to acquire property by purchase or by eminent domain for public purpose, including the use thereof for constructing or maintaining water and sewer systems, facilities and works.

(7) At the time the water and sewer lines, which are the subject of this action, were installed defendant had no charter provision nor ordinance providing any terms, condition or event under which water or sewer lines installed outside its corporate limits by private owners and connected to its water or sewer system would become the property of the defendant if later incorporated into its city limits.

(8) But prior to 1 November, 1950, the defendant had a policy requiring any private owner installing a water or sewer line outside of its corporate limits, which was to be connected to or serviced by defendant's water or sewer system, to permit the defendant to approve the proposed installation, and after the installation of such outside line to inspect same in order that defendant could see that the installation was proper to the extent of not allowing water leakage. And at the time the water line and the sewer lines involved in this controversy were

installed the defendant through its agents, its superintendent of public utilities or the city engineer approved the proposed installation and made the inspection, but thereafter exercised no supervision, control or maintenance over said line. John Frank Jackson or plaintiffs maintained the lines at their own expense and without reimbursement or obligation to reimburse them for any expense, by the purchasers of lots, who were to pay them no further compensation for the use of the lines.

(9) No written contract has been entered into by the defendant or any of its agents with the plaintiffs or John Frank Jackson for the purpose of sale of the lines involved in this controversy.

(10) At an election duly called and held, on 3 April, 1951, the city of Gastonia was authorized to issue bonds for the purpose of installing and extending its water, sewer and electric systems in the old corporate limits, as well as the new corporate limits.

(11) Defendant in the early part of 1950 had an appraisal and survey made of the water and sewer lines in the area proposed to be annexed and to determine which lines the defendant felt could be incorporated into its water and sewer system to serve this area.

(12) But before the bonds were sold the decision by the Supreme Court of North Carolina in *Spaugh v. Winston-Salem,* 234 N.C. 708, 68 S.E. 2d 838, was rendered, as a result of which the defendant declined to pay plaintiff for the value of the said water and sewer lines.

(13) The recovery of the plaintiffs, if any, is based on *quantum meruit* and the agreed reasonable values of the lines involved in this controversy based on the appraisal the defendant had made early in 1950, are as set forth in paragraph 14 of the stipulated facts.

Motion of defendant, made at the close of all the evidence, for judgment as of nonsuit was allowed, and the action dismissed.

Plaintiffs appeal therefrom to Supreme Court and assign error.

L. B. Hollowell and Hugh W. Johnston for Plaintiffs Appellants.

J. Mack Holland, Jr., and James B. Garland for Defendant Appellee.

WINBORNE, C. J. Of the underlying questions to be properly considered on this appeal, appellee states in substance this one: Did the defendant wrongfully take possession of the water and sewer lines which are the subject of this controversy and appropriate the same to its own use without compensation therefor? In the light of the agreed facts this Court is constrained to hold that this question must be answered in the affirmative. The cases of *Farr v. Asheville,* 205 N.C. 82, 170 S.E. 125, and *Spaugh v. Winston-Salem,* 234 N.C. 708, 68 S.E. 2d 838, upon which defendant, appellee, mainly relies are distinguishable in factual situation from that of the case in hand,—and are not controlling here.

In the *Farr case, supra,* the owner of a subdivision outside the corporate limits of a city constructed water mains therein, and for his own convenience and profit connected them with the city water system, and the city furnished water through such mains to the residents of the development, collecting water rentals from the residents; and thereafter the corporate limits of the city were extended to include the development, and the city continued to furnish water to the residents of the development in the same manner as before the extension and without any assertion of ownership of the mains installed by plaintiff. The Court held that the evidence to this effect is insufficient to show a taking or appropriation of the plaintiff's main,—that the mere extension of the city limits does not amount to a wrongful taking or appropriation of plaintiff's property.

In the instant case the stipulated facts show that the city of Gastonia, after the territory embracing the water and sewer lines was incorporated into the corporate limits of the city, "the defendant has taken over, used and controlled said water and sewer lines to the same extent as if said lines had been installed by the defendant originally."

And in the *Spaugh case, supra,* it is recited that the city ordinances were in force at the time, advising those outside the city who were permitted to connect with the city mains that whenever the territory in which they were located was incorporated within the city limits the water and sewer lines and "fixtures, equipment, easements, rights and privileges pertaining thereto" should become the property of the city. And that plaintiffs' subdivision having been laid out within one mile of the corporate limits of the city, knowledge of its ordinances in the respect set out in G.S. 160-203 would be presumed.

Indeed in the *Spaugh case, Devin, C. J.,* writing for the Court, after reviewing pertinent decisions of this Court, and of other jurisdictions, had this to say: "From an examination of the cases cited and the decisions based on the particular facts of those cases, it is apparent that no comprehensive rule emerges, and that this case and others of like nature must be considered and determined in the light of the pertinent facts presented by the record in each case."

While in the instant case it is agreed (1) that no written contract has been entered into for the purchase of the water and sewer lines here involved, and (2) that at the time these water and sewer lines were installed, the defendant had no charter provision nor ordinance providing any terms, conditions, or event under which the lines installed outside its corporate limits by private owners and connected to its water or sewer system should become the property of the defendant if later incorporated into its city limits, and (3) that the city has "taken over, used and controlled" said lines as if installed by it originally, decisions

of this Court hold that in such case plaintiff is not without a remedy—it may recover on basis of *quantum meruit* for the reasonable and just value of the water and sewer lines. *Mfg. Co. v. Charlotte,* 242 N.C. 189, 87 S.E. 2d 204.

Moreover the transactions between plaintiffs and purchasers of lots in respect to water and sewer lines do not purport to be public dedications for the benefit of the city. Indeed text writers say that "there is no such thing as a dedication between owner and individuals. The public must be a party to every dedication. In fact the essence of a dedication to public uses is that it shall be for the use of the public at large. There may be a dedication of land for special uses, but it must be for the benefit of the public, and not for any particular part of it . . . In short the dedication must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire." 16 Am. Jur. 359, Dedication Section 15.

Therefore the judgment below is reversed, and the cause remanded to the end that judgment be entered in accordance with the stipulations of the parties as to reasonable value of the lines so taken over, used and controlled.

Error and remanded.

COMPETITOR LIAISON BUREAU OF NASCAR, INC., v. MRS. J. R. MIDKIFF AND J. R. MIDKIFF, ADMINISTRATOR OF THE ESTATE OF JESSE MIDKIFF, DECEASED.

(Filed 7 June, 1957.)

1. Controversy Without Action § 4—

Where the parties submit the cause upon stipulation of facts, the hearing is on the facts stipulated, and assignment of error for failure of the court to make certain requested findings of fact and conclusions of law is inapposite.

2. Appeal and Error § 1—

Upon appeal from judgment entered on facts stipulated, the review relates to whether the judgment is correct upon the stipulated facts and not the reasoning upon which the lower court reached the conclusion embodied in the judgment.

3. Appeal and Error § 38—

An assignment of error not discussed in the brief is deemed abandoned.

4. Election of Remedies § 1—

The doctrine of election of remedies applies when co-existing, but inconsistent, remedial rights vest in the same person so that such person must choose between the inconsistent and repugnant remedial rights.

5. Infants § 6—Institution of action for wrongful death by minor's administrator cannot constitute disaffirmance of insurance agreement as to beneficiary named therein.

A minor signed a registration agreement with the promoter of auto racing which provided, in consideration of the payment of the fees required, that he or his beneficiary would be entitled to certain benefits for death or any injury he might sustain in the auto racing events contemplated, and that such benefits should be the sole right and should bar claim for injury or death in such races. After the minor's death in an accident, his administrator instituted a suit for wrongful death. The promoter contended that the institution of such suit by the administrator was a disaffirmance of the insurance agreement, and in an action between it and the beneficiary of the insurance certificate, tendered refund of the registration fee. *Held:* The right of action for wrongful death existed in favor of the administrator alone, G.S. 28-173, and therefore the institution of the action could not be an election by the beneficiary of the certificate, and could not bar the action on the certificate.

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

APPEAL by plaintiff from judgment of *Nimocks, J.*, entered 20 March, 1957, ALAMANCE Superior Court.

Plaintiff instituted this action on 18 November, 1953, under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, asserting its ownership of a fund of $3,000.00 now held by the Clerk of the Superior Court of Alamance County. J. R. Midkiff, administrator of the estate of Jesse Midkiff, deceased, originally a defendant herein, demurred to the complaint. By judgment entered 21 January, 1954, said demurrer was sustained; and the action, as to said administrator, was dismissed. Mrs. J. R. Midkiff, now sole defendant, answering, asserted ownership of said $3,000.00 fund.

The record shows that the hearing was before Nimocks, J., at May Civil Term, 1954, on a "Stipulation of Facts." The following is a condensed statement thereof.

Under date of 3 June, 1953, Jesse Midkiff signed an application "for registration in the Benefit Plan of Competitor Liaison Bureau of NASCAR, Inc., in accordance with NASCAR rules," hereinafter called registration agreement. Apart from data identifying the applicant and his death beneficiary, to wit, Mrs. J. R. Midkiff, the applicant's mother, the registration agreement provided:

"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.

"It is further understood and agreed that the foregoing shall be and constitute the limit of liability for any injuries (including death) that I may incur, provided claim is filed within 30 days of the 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 enroute into and out of premises where NASCAR sanctioned races or other events are presented.

"I have read and fully understand the foregoing."

On 19 September, 1953, "while a registered participant" in plaintiff's benefit plan, Jesse Midkiff was killed "in a NASCAR-sanctioned racemeet"; and under plaintiff's benefit plan Mrs. J. R. Midkiff, as death beneficiary, became entitled to $3,000.00.

Jesse Midkiff died intestate. J. R. Midkiff, his father, qualified as administrator of Jesse Midkiff's estate. On 3 October, 1953, the administrator brought suit, *now pending* in Alamance Superior Court, against plaintiff and others for the alleged wrongful death of his intestate. (See *Midkiff v. Auto Racing, Inc.*, 240 N.C. 470, 82 S.E. 2d 417, where judgment overruling demurrers was sustained.)

Before the administrator instituted said wrongful death action, plaintiff forwarded its check dated 21 September, 1953, to Mrs. J. R. Midkiff. Plaintiff had placed thereon an endorsement to be signed by Mrs. J. R. Midkiff to the effect that her acceptance would constitute a release by her "of all claims the payee might have against National Association for Stock Car Auto Racing, Inc., and/or Competitor Liaison Bureau of Nascar, Inc., and/or J. & W. Corporation on account of the death of Jesse Midkiff." It does not appear when Mrs. J. R. Midkiff received this check. It does appear that, after the wrongful death action was

instituted, she refused to sign the said endorsement, struck it out, and signed in lieu thereof an endorsement she placed thereon, to wit: "In settlement of insurance on life of Jesse Midkiff by Competitor Liaison Bureau of Nascar, Inc., under benefit plan in event of death." Plaintiff's check, bearing this substituted endorsement, was not honored. Mrs. J. R. Midkiff then contended and now contends that she was and is entitled to the $3,000.00 death benefit unconditionally.

Thereupon, plaintiff deposited with said clerk the sum of $3,000.00, for disbursement in accordance with final judgment herein. Also, plaintiff deposited with said clerk the additional sum of $2.00, to wit, the amount paid as registration fee by Jesse Midkiff when he signed the registration agreement.

The plaintiff's benefit plan, referred to in the registration agreement, is underwritten by American Universal Insurance Company.

In said registration agreement, Jesse Midkiff gave 18 August, 1931, as the date of his birth; but on 3 June, 1953, and also on 19 September, 1953, he was less than 21 years of age.

The record shows that, upon conclusion of said hearing, the parties "stipulated and agreed that the Judge might hear the matter upon the pleadings and agreed facts and render his judgment out of term, out of the county and out of the district."

Judgment dated 20 March, 1957, was entered. Judge Nimocks, being of the opinion that "Mrs. J. R. Midkiff is entitled to recover the sum of $3,000 as beneficiary under said benefit plan," adjudged that the clerk pay the said $3,000.00 to her and that plaintiff pay the costs. Plaintiff excepted and appealed.

Long, Ridge, Harris & Walker for plaintiff, appellant.

Thomas C. Carter, Clarence Ross, and Basil Sherrill for defendant, appellee.

BOBBITT, J. Plaintiff assigns as error the failure of the court to make certain requested findings of fact and conclusions of law; but these assignments are based on a misconception of the nature of the hearing. The hearing was not on evidence submitted to the court, upon waiver of jury trial in accordance with G.S. 1-184. When this procedure is adopted, a statement of the court's findings of fact and conclusions of law is appropriate. G.S. 1-185; *Goldsboro v. R. R., ante,* 101, 97 S.E. 2d 486. Here, the cause was submitted for decision on the facts stipulated.

Appellant assigns as error certain recitals in the judgment, indicating the legal reasoning upon which the court reached the conclusion embodied in the judgment. These assignments do not require separate consideration; for, whether we agree in whole or in part with the court's

reasoning, the only question posed for decision is whether, upon the facts stipulated, the judgment is correct.

While appellant excepted, it did not appeal from said judgment dismissing this action as to J. R. Midkiff, administrator of the estate of Jesse Midkiff, deceased. Appellant undertakes to base an assignment of error on his exception to said judgment, but there is no discussion of this assignment in its brief. Under well established rules, this assignment is deemed abandoned.

In *NASCAR, Inc., v. Blevins,* 242 N.C. 282, 87 S.E. 2d 490, this question was presented: "Do the release provisions of registration agreement executed by participant in stock car race prior to entering race event constitute a bar to claim for injury and death on account of alleged negligence of plaintiffs during course of race?" *Winborne, J.* (now *C. J.*), said: "Patently as here presented this is a moot question. In the first place, sufficient facts are not agreed to present a controversy cognizable under the Uniform Declaratory Judgment Act. It is not admitted that the death of William W. Blevins, participant in a stock car race, was the proximate result of negligence of anyone."

As in *NASCAR, Inc., v. Blevins, supra,* the facts stipulated herein do not establish that the death of Jesse Midkiff "was the proximate result of negligence of anyone."

Appellant presents a different question. It is based on the fact that Jesse Midkiff was under 21 years of age when he signed the registration agreement and also when he was killed.

Appellant alleges and contends that Mrs. J. R. Midkiff's right to the death benefit of $3,000.00 otherwise due her under plaintiff's benefit plan is now barred because the administrator had the right to avoid and disaffirm the registration agreement entered into by the minor intestate and has elected to do so by the institution of the wrongful death action.

Before dealing directly with appellant's basic contention, the facts stated below should be noted.

Close consideration of the registration agreement discloses: 1. The only signature thereon is that of Jesse Midkiff, the applicant for registration. 2. Upon (a) "issuance of NASCAR license" to the applicant, and (b) "payment of fees required by NASCAR," the applicant, or his death beneficiary, is entitled only to the benefits provided by plaintiff's benefit plan for injuries (including death) the applicant "might sustain in NASCAR-sanctioned racemeets or other events" pursuant to the contract between NASCAR and plaintiff and the insurance carrier. 3. The amount to which the applicant or his death beneficiary would be entitled is not stated. 4. The identity of the party or parties obligated to pay whatever is due the applicant or his death beneficiary is not stated.

On the facts stipulated, Mrs. J. R. Midkiff was entitled to recover $3,000.00 under plaintiff's benefit plan. From whom? Plaintiff's benefit plan (the terms of which are not set forth in the registration agreement) was underwritten by an insurance company. Whether originally provided by said insurance company, by plaintiff, or otherwise, the $3,000.00 was deposited by plaintiff with the clerk *as the death benefit* to which Mrs. J. R. Midkiff would be entitled under plaintiff's benefit plan *unless* she is barred from recovering any amount thereunder by reason of the administrator's wrongful death action now pending against plaintiff and others. Hence, for present purposes, we dismiss as immaterial questions that come to mind, unanswered by the facts stipulated, as to the original source of the $3,000.00.

Appellant's said basic contention rests upon the premise that the administrator had the right to elect whether he would affirm or disaffirm said registration agreement and that he has elected to avoid and disaffirm it.

The doctrine of election of remedies applies when a person must choose between inconsistent remedial rights, "the assertion of one being necessarily repugnant to, or a repudiation of, the other." 28 C.J.S., Election of Remedies secs. 1 and 4. *Jenkins v. Trantham,* 244 N.C. 422, 426, 94 S.E. 2d 311; *Davis v. Hargett,* 244 N.C. 157, 162, 92 S.E. 2d 782; *Surratt v. Ins. Agency,* 244 N.C. 121, 131, 93 S.E. 2d 72; *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345.

When the doctrine applies, the available co-existing but inconsistent, remedial rights, vest in the same person; otherwise, there can be no right of election. ". . . an election of remedies presupposes a right to elect." 18 Am. Jur., Election of Remedies sec. 10.

The administrator's action for wrongful death is statutory. G.S. 28-173. The administrator neither has nor claims any right to recover the death benefit provided by said registration agreement. Nor does he seek to recover the $2.00 registration fee paid by the minor intestate. Whether an action by the administrator to recover said $2.00 registration fee would constitute an avoidance and disaffirmance is an academic question. In short, upon the facts stipulated, the administrator has not received, nor does he claim, any benefit under and by virtue of said registration agreement, and has made no election with reference thereto.

The right to recover the death benefit provided by said registration agreement vested exclusively in Mrs. J. R. Midkiff, the beneficiary named therein. She has asserted and now asserts her right to recover this death benefit. She neither has nor claims any right to the $2.00 registration fee.

Questions as to the legal effect, if any, of Mrs. J. R. Midkiff's recovery herein of the $3,000.00 death benefit, upon the administrator's wrongful death action, and questions as to the validity, legal effect and scope of

the release provisions of said registration agreement, may be presented in said wrongful death action. *Blevins v. France,* 244 N.C. 334, 93 S.E. 2d 549.

Suffice to say, on the facts stipulated, Mrs. Midkiff, as death beneficiary under plaintiff's benefit plan, is entitled to the $3,000.00 fund. Hence, the judgment is affirmed. It is noted that the $2.00 deposit, not referred to in the judgment, is available to the use of appellant.

Affirmed.

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

W. J. McBRYDE AND WIFE, SARAH McBRYDE, JAMES FULTON McBRYDE AND WIFE, MARGARET McBRYDE, SARAH MAE McBRYDE VEASEY AND HUSBAND, JAMES VEASEY, CATHERINE ANN McBRYDE PHILLIPS AND HUSBAND, EDWARD PHILLIPS, AND JOHN DOUGLAS McBRYDE AND WIFE, ESTHER McBRYDE, v. COGGINS-McINTOSH LUMBER COMPANY, INC., R. D. SINGLETON AND WIFE, SALLIE C. SINGLETON.

(Filed 7 June, 1957.)

1. Trespass § 21½—

Where the grantors in a timber deed go upon the land, point out the boundary and mark trees as being within their boundary, both the grantors and the grantee who actually cuts the timber within the boundary designated are liable to the owner of the adjacent land for trespass as joint tort-feasors if any of the trees so cut stood on land belonging to the adjacent owner.

2. Torts § 6—

Where the grantee in a timber deed cuts trees within the boundaries pointed out by the grantors, and is thereafter sued for trespass by the owners of the adjacent lands upon allegations that some of the trees so cut stood upon lands owned by them, such grantee is entitled to join his grantors for contribution under the statute, G.S. 1-240, since both grantee and grantors are liable as joint tort-feasors and the owners of the adjacent lands could have joined them as parties defendant in the first instance.

3. Pleadings § 19b—

Where additional parties, joined for contribution under G.S. 1-240, file answer, they are precluded from thereafter demurring *ore tenus* for misjoinder of parties and causes, but plaintiffs, seeking no relief against such additional defendants, are not precluded thereby from demurring *ore tenus* on such ground.

JOHNSON, J., concurring.

APPEAL by defendant Coggins-McIntosh Lumber Company, Inc., from *Sink, E. J.*, January Special Term 1957 of HOKE.

Civil action for damages for the alleged wrongful trespass upon land and the cutting and removal of timber heard upon demurrers *ore tenus* of plaintiff and the defendant R. D. Singleton and wife, Sallie C. Singleton, to the further answer and demand of defendant Coggins-McIntosh Lumber Company, Inc., for contribution from the defendants Singleton as alleged joint tort-feasors on the ground of misjoinder of parties and causes.

Plaintiffs instituted an action for damages for trespass upon their land and the cutting and removal of timber therefrom against Coggins-McIntosh Lumber Company, Inc. They alleged in their complaint that the Lumber Company purchased the timber on an adjoining tract of land from R. D. Singleton and wife, Sallie C. Singleton, and while cutting this timber, it trespassed upon their land and cut, removed and converted to its use some of their timber.

The Lumber Company filed an answer denying that it had trespassed upon plaintiffs' land and cut and removed therefrom any timber. The Lumber Company alleged by way of affirmative relief that R. D. Singleton and wife, Sallie C. Singleton, executed and delivered to it a timber deed for the timber growing on their land, that before it cut the timber R. D. Singleton, who was acting for himself and as agent for his wife, pointed out to it a line marked with paint and blazes on the trees, beginning at a concrete monument and running to a large pine tree which he said was a corner between him and the plaintiff, W. J. McBryde, that he also pointed out the concrete monument as a corner between his land and the land of the plaintiffs, that he further pointed out numerous trees smeared with paint, the painted trees being in the area adjacent to the line pointed out as the McBryde line, and he said at the time that the painted trees were on his land and that all of the land on which the painted trees stood was his land, and up to the line pointed out and designated by him as the McBryde line, that the line was clearly marked with paint and easily discernible to the naked eye, that it relied upon such statements and pointing out the boundaries in cutting the timber, and that if it trespassed upon plaintiffs' land, and cut and removed timber therefrom, then the defendants Singleton are jointly liable therefor as joint tort-feasors, and it requested that the Singletons be made parties defendant by virtue of G.S. 1-240, and that if plaintiffs recover a judgment against it, it may have and recover judgment against the Singletons "under their primary liability as joint tort-feasors for the full amount" recovered against it.

By order of the Clerk of the Court R. D. Singleton and wife, Sallie C. Singleton, were made defendants.

The Singletons filed an answer admitting that they sold their timber to the Lumber Company, admitting that in the sale R. D. Singleton was acting for himself and his wife, but denied that R. D. Singleton pointed out to the Lumber Company plaintiffs' line.

When the case came on for trial, plaintiffs demurred *ore tenus* to the Lumber Company's demand for affirmative relief on the ground of a misjoinder of parties and causes, and the Singletons at the same time demurred *ore tenus* to the demand of the Lumber Company for affirmative relief on the same ground. At the suggestion of the court and with the assent of the parties, the demurrers *ore tenus* were argued after the jury was impaneled.

After hearing the argument the court entered judgment sustaining the demurrers *ore tenus* on the ground of misjoinder of parties and causes, and dismissed the demand of the Lumber Company for affirmative relief against the Singletons.

From the judgment, Coggins-McIntosh Lumber Co., Inc., appealed.

S. H. McCall, Jr., Garland S. Garriss, David H. Armstrong, and Gordon B. Rowland for Coggins-McIntosh Lumber Company, Inc., Defendant, Appellant.

H. D. Harrison, Jr., and J. M. Andrews for Plaintiffs, Appellees.

McLean & Stacy for Defendants Singleton, Appellees.

PARKER, J. Plaintiffs and the defendants Singleton filed in the Supreme Court a written demurrer to the demand for affirmative relief alleged in the further answer of the Coggins-McIntosh Lumber Company, Inc., against the defendants Singleton on the ground that such demand for affirmative relief does not state facts sufficient to state a cause of action against the defendants Singleton, nor a defense against plaintiff.

In 34 Am. Jur., Logs and Timber, sec. 116, it is said: "One who assumes to sell timber on another's land may be liable to the true owner for trespass by the purchaser in cutting the timber, especially where he points out the exact trees cut; even though the seller, due to a surveyor's mistake, believed himself to be the owner of the land."

This Court said in *Locklear v. Paul,* 163 N.C. 338, 79 S.E. 617: "It may be well, however, to refer to an exception that the defendant Sarah A. Paul is not responsible for the trespass complained of, inasmuch as she had made an outright conveyance of the timber to her codefendant, the planing mills, and this company alone had done the cutting. The deed conveyed the timber, with rights of way, etc., required to remove the same. It clearly contemplated and authorized the acts complained of, and, if trespass is established against the company, the grantor in

the deed is also responsible. *Dreyer v. Ming,* 23 Mo., 434." See *Owens v. Mfg. Co.,* 168 N.C. 397, 400, 84 S.E. 389, 391.

The headnote in *Dreyer v. Ming,* 23 Mo. 434, correctly summarizes the decision, and reads as follows: "A. claiming to own land belonging to B. sells timber on said land to C., who cuts and removes the same: held, that A. may be held liable to B., as a principal trespasser, for the timber so cut and taken away."

In *Oswalt v. Smith,* 97 Ala. 627, 12 So. 604, the Court held that, if a landowner points out to a person to whom he has sold the timber on his land the dividing line between himself and his neighbor, and he points out a line which is over on his neighbor's land, he is responsible to his neighbor for the trespass if trees are cut on his neighbor's land.

In *Hutto v. Kremer,* 222 Miss. 374, 76 So. 2d 204, the Court held that one who assumes to sell timber on another's land is liable to true owner for trespass by purchaser in cutting of timber, especially where seller points out exact trees subsequently cut, even though seller, due to a surveyor's mistake believed himself to be the owner of the land. The Court said: "It may be true that the appellant had nothing to do with the manual cutting and removal of the timber from Kremer's land; but that did not relieve the appellant from liability for his part in the commission of the trespass if he went upon the land and pointed out the boundaries of the tract of timber which he was selling so as to include a part of Kremer's 40-acre tract."

In *Hambright v. Walker,* 211 S.C. 201, 44 S.E. 2d 310, it was held that respondent, an adjoining landowner of plaintiff who sold timber on his land to codefendants was not relieved of liability for their trespass in going upon plaintiff's land and cutting and selling timber therefrom though he had nothing to do with manual cutting and removal thereof, where he went upon the land and pointed out the timber and claimed the boundaries, conveyed the timber and received the consideration. The Court said: "It is a tenet of the law of trespass that all tort-feasors are principals and each of the trespassers is liable for all the injury done."

The rule stated above finds support in *Castleberry v. Mack,* 1943, 205 Ark. XIX, 167 S.W. 2d 489; *Kolb v. Bankhead,* 18 Tex. 228; *McCloskey v. Powell,* 123 Pa. 62, 16 A. 420, 10 Am. St. Rep. 512. See also the cases cited to the same effect in Anno. 127 A.L.R., p. 1016, *et seq.*

The Lumber Company's allegations against the defendants Singleton do not seek to alter or change the description in the timber deed by parol evidence. These allegations are to the effect that R. D. Singleton, acting for himself and as agent for his wife, went upon the land and pointed out painted trees as theirs and claimed boundaries, conveyed the land and received the consideration. These things were part and parcel of the whole transaction by which plaintiffs allege they were

damaged. "And in trespass, all procurers, aiders, and abettors—nay, those who are not even privy to the commission of a trespass for their use and benefit, but who afterwards assent to it—are in judgment of law principals." *Horton v. Hensley,* 23 N.C. 163.

The defendants Singleton were made defendants by virtue of G.S. 1-240. This Court said in *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413: "The purpose of the Act, G.S. 1-240, is to permit a defendant who has been sued in tort to bring into the action, for the purpose of enforcing contribution, a joint tort-feasor whom the plaintiff could have joined as party defendant in the first instance."

By authority of the rule we have stated above, it is indisputable that plaintiffs could have joined the defendants Singleton as parties defendant in the first instance. It is also clear that the allegations for affirmative relief in the answer of the Lumber Company state facts sufficient to enforce contribution on the part of the defendants Singleton as joint tort-feasors. Whether the Lumber Company can prove what it has alleged lies in the future for determination. The written demurrer filed in this Court is overruled.

The defendants Singleton filed an answer. Having done so, they are precluded from demurring *ore tenus* for misjoinder of parties and causes. G.S. 1-134; *Roberts v. Grogan,* 222 N.C. 30, 21 S.E. 2d 829; *Ezzell v. Merritt,* 224 N.C. 602, 31 S.E. 2d 751; *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2.

This rule does not prevent the plaintiffs from demurring *ore tenus* for misjoinder of parties and causes. The plaintiffs in their complaint seek no relief against the defendants Singleton. This Court said in *Norris v. Johnson, ante,* 179, 97 S.E. 2d 773: "The enactment of the contribution statute created as to parties jointly and severally liable a new right and ready means for the enforcement of that right. Citing authority. Now when some, but not all of the parties jointly and severally liable are sued, they are permitted in that action to sue those not originally joined. They are not required to seek permission from the original plaintiff. The right is theirs by virtue of the statute, G.S. 1-240."

There is no misjoinder of parties and causes. To hold otherwise would be to ignore the plain provisions of G.S. 1-240.

The lower court erred in sustaining the demurrer *ore tenus* and in dismissing the demand for contribution from the defendants Singleton as joint tort-feasors, alleged in the Lumber Company's answer. The judgment below is

Reversed.

JOHNSON, J., concurring: The original defendant's cross complaint against its codefendants, Singleton and wife, is sufficient in form to

invoke the doctrine of indemnity, commonly referred to as primary and secondary liability, as between the defendants. While the appellant seems to have placed chief emphasis on the idea of contribution, both in the court below and on appeal here, nevertheless the cross complaint, when viewed in the light of its general tenor, would seem to put to test the doctrine of primary and secondary liability ahead of that of contribution. The principles of joinder governing primary and secondary liability operate quite apart from and independent of the 1929 statute, now codified as G.S. 1-240, which permits contribution between joint tort-feasors. *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 63 S.E. 2d 118; *Johnson v. Asheville*, 196 N.C. 550, 146 S.E. 229; *Taylor v. Construction Co.*, 195 N.C. 30, 141 S.E. 492, and cases cited. On this record the joinder of Singleton and wife and the plea over against them may be upheld both under the contribution statute and under the rules of joinder governing the doctrine of primary and secondary liability.

HYLTON K. CROTTS v. OVERNITE TRANSPORTATION COMPANY AND EARL T. WILLIAMS.

(Filed 7 June, 1957.)

1. Negligence § 19c—

In passing upon the question of nonsuit on the ground of contributory negligence, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of all the inferences to be reasonably drawn therefrom and drawing no inference adverse to him not reasonably necessary from the evidence.

2. Automobiles § 7—

A motorist is required to act as a reasonably prudent man and 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 any person or property, G.S. 20-140, G.S. 20-141, and his failure to do so is negligence.

3. Automobiles § 8—

A motorist is required by statute to remain on the right side of the highway at a crossing or intersection, G.S. 20-147, and the violation of this statute is negligence.

4. Automobiles § 18—

G.S. 20-150(c) prohibits a motorist from overtaking and passing at highway intersections, and the violation of this statute is negligence.

5. Automobiles § 14—

A motorist is prohibited from following another vehicle more closely than is reasonable and prudent under the circumstances with regard to the

traffic and condition of the highway, G.S. 20-152, and the violation of this statute is negligence.

6. Same—

The condition and effectiveness of his brakes must be taken into consideration by a motorist in determining what is a safe distance and a safe speed at which he may follow another vehicle.

7. Automobiles § 41d—Evidence held to show contributory negligence as matter of law in failing to keep proper lookout or in following vehicle too closely.

The evidence tended to show that plaintiff was following a tractor-trailer on the highway, that as they approached an intersection the tractor-trailer twice decreased speed, that plaintiff, upon apprehending this, also decreased speed, but that he permitted the distance between the vehicles to lessen, and that as the tractor-trailer entered the intersection it slowed down suddenly and started turning left, and that plaintiff, traveling some 30 to 35 miles per hour, also pulled to the left, applied his brakes and then attempted to clear the tractor-trailer to the right, but struck the right rear of the tractor-trailer with the left front of his car. *Held:* The evidence discloses that plaintiff was either following the tractor-trailer too closely or was not keeping a proper lookout, and that his negligence in regard thereto was a proximate cause of the collision, so that judgment of nonsuit on the ground of contributory negligence was proper.

HIGGINS, J., dissenting.

JOHNSON, J., concurs in dissent.

APPEAL by plaintiff from *Craven, J.*, December 1956 Term of FORSYTH.

Plaintiff seeks compensation for personal injuries and property damage resulting from a collision between an automobile owned and operated by plaintiff and a tractor-trailer owned by the corporate defendant and driven by the individual defendant. The pleadings raise issues of negligence and contributory negligence. At the conclusion of plaintiff's evidence, defendants moved for nonsuit. The motions were allowed. Judgment was entered dismissing the action and plaintiff appealed.

Ingle, Rucker & Ingle, Womble, Carlyle, Sandridge & Rice, and Ratcliff, Vaughn, Hudson, Ferrell & Carter for plaintiff appellant.

Deal, Hutchins & Minor for defendant appellees.

RODMAN, J. The correctness of the judgment rests on the answer given to the question: Does the evidence establish that a proximate cause of plaintiff's injuries was his own negligence?

The question is answered by reviewing the evidence in the light most favorable to plaintiff, giving to him the benefit of all the inferences to be reasonably drawn therefrom and drawing no inference adverse to

him not reasonably necessary from the evidence. When so viewed, the evidence establishes these facts:

The collision occurred around 3:00 p.m., 12 February 1952, on Highway 54, just outside of Burlington. The highway is straight for considerable distance as it approaches Burlington from the west. The highway is paved to a width of eighteen feet. On each side of the pavement is a dirt shoulder six feet wide. Tucker Street intersects the highway. The intersection is indicated by highway signs 100 yards west of the intersection. Tucker Street lies in a north-south direction. On the north side of the highway and in the center of Tucker Street is a concrete "island" dividing Tucker Street into its eastern and western halves at the intersection. On the island is a highway traffic sign directing traffic coming from Tucker Street to stop before entering the highway. West of Tucker Street is a ravine over which the highway passes by bridge without rails. The drop from the highway to the ravine is about twelve feet. The tractor-trailer is forty feet long.

The tractor-trailer was approaching Burlington from the west. Plaintiff was likewise traveling in an eastwardly direction. When half a mile west of the intersection, plaintiff observed the tractor-trailer. It was at that time 500 to 600 feet ahead of him. Plaintiff's speed at that time was 50 to 55 m.p.h., and the speed of the tractor-trailer was 40 to 45 m.p.h., "nearer 40 miles." When the tractor-trailer was 300 feet west of the intersection, plaintiff had lessened the distance separating the vehicles to 125 feet. The vehicles had at that time reduced their speed to 35 to 40 m.p.h. When the tractor was 150 feet from the intersection, plaintiff noticed that the distance separating the vehicles was decreasing. He testified: "There was nothing to indicate the truck was slowing down except that I closed in a little bit. I did not see any light, there was no light burning, but I could see the intersection and I assumed he was slowing a little at that time for the intersection, and I slowed a little at that time also to maintain my distance. As he approached the intersection, within about 20 feet of the intersection, I noticed that I was gaining again on him rather suddenly without increasing my speed. Almost within the next second, I noticed that he started turning abruptly to the left, and he slowed down suddenly just as if something had grabbed the truck and started cutting right across.

"As the truck turned abruptly to the left, I pulled over to the left a little, across the center line, because he scared me over to the left. . . . I was traveling between 35 and 40 miles per hour and was approximately 110 to 115 feet behind the tractor-trailer when I pulled over to the left a little bit. The second time I was approximately 100 feet behind him and was traveling between 30 and 35 miles per hour when I closed in a little bit and realized he was slowing down suddenly. That is when he made an abrupt left turn and I started to turn with him.

"The brakes on my car were good. At 30 to 35 miles per hour it ordinarily takes 80 feet to stop my car. In this particular instance, I did not have enough room either to stop or slow down. As he made his turn, I was 100 to 125 feet back, and then it took me a little while to slow up because it was down to where I was approximately 75 feet when I realized that the truck, the cab had gotten over to that point where it greatly alarmed me. Part of his truck was crosswise the street and I could see which way he was heading. . . . I moved as he did to the left. I feared I would run into him if I had gone straight on behind him. My movement was to avoid a wreck that way. If I had put on my brakes fully, I would have thrown my wife into the windshield and done great damage to her. After she had had a chance to get alerted and I saw no avenue of escape on the left side, that is when I put them on, about 75 feet, and turned to the right, giving the truck, I hoped, time enough to move out of my way so that there wouldn't be a wreck." Plaintiff then pulled to the right and attempted to go on the right-hand side of the highway and to the rear of the tractor-trailer. The left side of plaintiff's automobile collided with the right rear of the tractor-trailer, resulting in serious damage to plaintiff and his automobile.

This is the factual background to which must be applied the rule requiring a motorist to act as a reasonably prudent man. That plaintiff did not so act is, we think, apparent. "The hub of our motor vehicle traffic regulations is contained in G.S. 20-140, 141." *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676. Each of these statutes provides a penalty for the motorist who drives "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." G.S. 20-147 commands a motorist to remain on the right side of the highway when crossing an intersection, and G.S. 20-150(c) prohibits a motorist from overtaking and passing at highway intersections. G.S. 20-152 is a statutory declaration of the common law that "The driver of a motor vehicle shall not follow another motor vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon the condition of the highway."

A violation of any of these statutes constitutes negligence. *Lutz Industries v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Morgan v. Coach Co.,* 225 N.C. 668, 36 S.E. 2d 263; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607.

If a vehicle is equipped with four wheel brakes, it should stop in 25 feet when traveling at 20 m.p.h., and when equipped with two wheel brakes, in 45 feet at that speed. G.S. 20-124(c). The evidence does not disclose whether plaintiff's car was equipped with two or four wheel brakes, but the braking equipment of plaintiff's car was a factor which

he was required to take into consideration in determining what was a safe distance and a safe speed at which he could follow defendant's vehicle. Plaintiff knew he was approaching a highway intersection, and the vehicle ahead might be forced by other traffic to stop, or it might make a right or left turn. He knew that the speed of defendant's vehicle had been twice reduced and the distance separating them twice shortened by the reduction in the speed of the vehicle ahead. Plaintiff apparently only became aware of these facts by noting the shortening of the distance. Defendant's reduction in speed should have alerted plaintiff to the probability of further changes in the movement of defendant's vehicle. He knew that it normally required 80 feet to stop his vehicle at a speed of 30 to 35 m.p.h., and yet he permitted the distance to be reduced to "approximately 75 feet when I realized that the truck, the cab had gotten over to that point where it greatly alarmed me." It was necessary to alert his wife before he could fully apply his brakes.

It is manifest that he was either following too closely or was not keeping a proper lookout. Neither is the conduct of the reasonably prudent man. There can be no reasonable doubt that this negligent conduct of the plaintiff was at least one of the proximate causes of the collision. The judgment is in accord with our decisions in similar factual situations. *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730; *Fawley v. Bobo,* 231 N.C. 203, 56 S.E. 2d 419; *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887; *Tarrant v. Bottling Co., supra; Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326. The judgment is

Affirmed.

HIGGINS, J., dissenting: I think the evidence warrants the inference that the defendant's truck was in the act of turning to the left of the center of the intersection at the time of the accident. The plaintiff had a right to assume and to act on the assumption the driver would obey the law and make the turn to the right of the center; and if he had done so, the plaintiff may have had sufficient time to avoid the accident. It is my view that the issues of negligence and contributory negligence should have been submitted to the jury.

I vote to reverse.

JOHNSON, J., concurs in dissent.

ROSA MAUDE TOWNSEND McCORMICK v. JAMES K. SMITH AND WIFE, THELMA SMITH; AND RUFUS GRAHAM AND WIFE, MARY GRAHAM.

(Filed 7 June, 1957.)

1. Ejectment § 16—

In an action to determine ownership of a tract of land, a map prepared by a surveyor employed by plaintiff, defendants being present when the survey was made, is properly admitted in evidence to illustrate the testimony of the surveyor as to what he did, where he went and what he found in making the survey of the land as described in the deeds in plaintiff's chain of title, the map not being admitted as substantive evidence.

2. Same—

A sketch or map made by a surveyor from the report of the commissioners in a partition of the lands among the heirs of the common source of title, is competent for the purpose of illustrating the testimony of the surveyor, as well as the testimony of the court surveyor, that the land in controversy was within the boundaries of the tract allotted to one of the tenants in common.

3. Same—

Where defendants introduce timber deed and judgment in favor of the grantor therein against other parties conveying the timber, which judgment described the line as contended for by defendants, *held*, a sketch made by the court surveyor showing the land in controversy and the descriptions in the judgment is competent for the purpose of explaining the testimony of the witness as to the location of the land in the judgment, the sketch not being admitted as substantive evidence.

4. Reference § 8—

The fact that the referee in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporates in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, *held* not prejudicial. G.S. 1-195.

APPEAL by defendants from *Mallard, J.*, January 1957 Civil Term of ROBESON.

McLean & Stacy for plaintiff appellee.

L. J. Britt and Varser, McIntyre, Henry & Hedgepeth for defendant appellants.

RODMAN, J. This is an action to determine the ownership of a tract of land in Robeson County containing 178.5 acres. The complaint alleges plaintiff is the owner of a tract of land described both by metes and bounds and by the abutting landowners containing 539 acres, and defendants' possession of a portion of said lands. A court survey was

ordered. After this survey was made, defendants filed answer denying plaintiff's ownership, admitting their possession, and asserting their ownership of the land in dispute as surveyed by the court surveyor.

The cause was referred. The referee, after hearings, made a report which contained findings of fact, conclusions of law, and what he called a "History of Case," consisting of a brief summary of the contentions of the parties, the evidence offered by the parties, his interpretation of the evidence, and reasons leading to his findings of fact and conclusions of law.

Defendants filed exceptions to the referee's rulings on the evidence, to his "History of Case," to each finding of fact and each conclusion of law. The court heard the exceptions, reviewed the evidence, sustained some of the exceptions thereto, overruled the others, adopted the referee's findings of fact as his own, and thereupon entered judgment adjudging plaintiff the owner of the land and entitled to possession.

Defendants excepted to the judgment and excepted to each ruling of the court which did not sustain the exceptions theretofore filed. The exceptions and assignments of error fall into three classes: (1) sufficiency of the evidence to sustain the findings; (2) competency of the evidence; (3) prejudice asserted to arise from the form of the report.

The land in controversy is part of either lot 3 or lot 4 of the James P. Barnes land on Back Swamp which was divided among his heirs in 1869. The report of the commissioners making the division and allotting to each heir his share by metes and bounds was offered in evidence by the plaintiff. Lot 3 allotted to Eliza Rae Stokes was conveyed to Richard Townsend in 1877. Lot 4 was allotted to Mary Ann McLean. The northern portion of this lot was conveyed by Mrs. McLean to Richard Townsend in 1881. Plaintiff offered her chain of title tracing to Richard Townsend. She then offered defendants' record title to show that they likewise traced to Richard Townsend. Richard Townsend devised to his son R. W. Townsend his "Stokes land" on Back Swamp. Plaintiff claims by deeds from the heirs of R. W. Townsend.

Richard Townsend also devised land on Back Swamp to his daughter-in-law Sallie Hicks Townsend. Defendants claim under her. The ultimate question for decision was one of fact. Is the land in controversy a part of the land devised to R. W. Townsend or is it a part of the land devised to Sallie Hicks Townsend?

David Townsend, a witness for the plaintiff, testified without objection: "The tract shown on the report of Mr. Stone, surveyor, is known as part of the Stokes land. The land described in the Complaint is known as the Stokes land." Stone, the court surveyor, also testified without objection that the land in controversy was a part of lot 3 of the Barnes division. There was other testimony to the same effect. There was also testimony tending to show possession by R. W. Town-

send for many years and a sale by him of the timber from the disputed area, the cutting of this timber by his grantee without objection by the owners of the Sallie Hicks Townsend lands. There was ample evidence to support the referee's finding of fact that the land in controversy was a part of lot 3 of the Barnes division, that is, the Stokes land, and that plaintiff and her ancestors in title had been in possession of the land for more than twenty years.

The deeds to plaintiff describe the land in the language used to describe lot 3 in the Barnes division. The distances there given are in chains. In 1951 plaintiff employed the witness Johnson to survey her land. He did so and made a map. The courses and distances shown on his map form the basis for the description set out in the complaint. The courses shown on his map vary from the calls in the Barnes division from one degree to a degree and a half. Distances on the map are shown in feet. The Johnson map shows the entire land described in the complaint, the portion thereof claimed by the defendants, the small area (about four acres) cleared by the defendants, the location of the old R. S. Townsend home, highways intersecting the land, canals and other physical objects. Johnson testified that defendants were present when he made his survey. He testified that his map correctly depicted the land described in the deeds to plaintiff. The map was offered in evidence. The referee ruled with respect to this map and the other two maps offered in evidence by plaintiff that they could be "considered only as they illustrate the testimony of the witnesses for both sides." The map was not of itself substantive evidence. It was a mere means used by the witness to convey to the fact finder a description of what he did, where he went, and what he found. It was proper to so use it. *Poole v. Gentry*, 229 N.C. 266, 49 S.E. 2d 464; *McKay v. Bullard*, 219 N.C. 589, 14 S.E. 2d 657; Stansbury, N. C. Evidence, sec. 34.

The Barnes land was a large tract. The lots assigned to his heirs are subdivisions of that tract. By the express language in the division, lot 4 lies immediately east of lot 3. Johnson, the surveyor, using the report of the commissioners in the Barnes division, made a sketch or plan depicting the relative location of the various tracts in the subdivision. It was competent for that purpose and illustrative of his and Stone's, the court surveyor's testimony that the land in controversy was within the boundaries of lot 3 of the Barnes division.

Defendants offered in evidence a timber deed executed by their ancestors in title. That deed did not give course and distance of the land on which the timber was conveyed. Defendants then offered a judgment by the owner of the timber against the parties conveying the timber in which the land was described by metes and bounds. Defendants contended the land described in the timber deed, as its boundaries were declared by the judgment, included the land in controversy. A

witness for defendant testified that the description set out in the judgment included the land in controversy. The court surveyor testified that the description contained in the judgment did not cover the land in controversy. He was asked if he could show the location of the land described in that judgment with respect to the land in controversy. He made a sketch showing the land in controversy and the description in the judgment. This was likewise offered in evidence. It was received only for the purpose of explaining the testimony of the witness as to the location of the land described in the judgment.

Neither of the maps last referred to were treated as substantive evidence. The witnesses testified without objection that the land in controversy was or was not within the boundaries of the instruments offered in evidence. Even if objection had been taken, it would seem that the evidence was competent. *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313. If the description did not include the land in controversy as the witness testified, it was competent for him to show where it was situate with respect to the land in controversy, that is, that it was adjacent but not a part of the land in controversy.

It is true, as contended by defendants, that the statute, G.S. 1-195, prescribing the form of a referee's report only requires him to make findings of fact, conclusions of law, and his decision. A failure to do more than the minimum required by the statute is not prejudicial error. *Barbee v. Green,* 92 N.C. 471. The referee, Mr. McKinnon, was meticulous in conforming to the provisions of the statute. Defendants do not complain of his compliance. Their complaint is that he did more than was required of him, that to assist the court in its review of the evidence, the exceptions, and conclusions of law, the referee included an analysis consisting of a statement of the contentions, a summary of the evidence relating to each contention, and his view of the law. Doubtless this so-called History of Case proved helpful to the court when called upon to hear and pass on defendants' exceptions. It has proven helpful to us. It would seem that no exceptions were necessary to the analysis so made; but exceptions were taken and overruled. Defendants have failed to demonstrate that the court erred in so doing.

Affirmed.

DESSIE AGNES MORGAN, ADMINISTRATRIX OF THE ESTATE OF ALBERT FRED MORGAN, DECEASED, v. BELL BAKERIES, INC., AND MILLER J. COOK, ORIGINAL PARTIES DEFENDANT, AND O. W. CLAYTON T/A C & S TRANSPORT COMPANY AND JOE WILLIAM FOY, ADDITIONAL PARTIES DEFENDANT.

(Filed 7 June, 1957.)

1. Appeal and Error § 51: Trial § 22a—

In passing on motion to nonsuit and in passing on assignment of error to the refusal of the motion, the evidence must be taken in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences which may be drawn from the evidence.

2. Automobiles § 41i—Evidence of negligence in entering highway in path of traffic, causing collision between two other vehicles, held for jury.

The evidence tended to show that the driver of defendant's truck entered the highway from a store on the east side of the highway, traversed the north-bound lane and turned left into the south-bound lane between two tractor-trailers, traveling in opposite directions, when they were some 50 or 60 feet apart, so that the driver of the south-bound tractor-trailer, to avoid hitting the truck, suddenly applied his brakes, causing the tractor-trailer to jackknife on the wet asphalt, resulting in collision between the two tractor-trailers, in which collision the driver of the south-bound vehicle was killed. *Held:* In action by the personal representative of the deceased driver, the evidence is sufficient to be submitted to the jury on the question of whether the negligence of defendant driver was the proximate cause, or one of the proximate causes of the collision, even though his vehicle continued on its way without colliding with either of the tractor-trailers.

3. Automobiles §§ 37, 41p—

The identity of the vehicle as the one which was negligently operated by the driver thereof may be established by circumstantial evidence. Therefore, when the evidence tends to show that the vehicle negligently operated was a bakery truck which entered the highway from a store, evidence tending to show that bakery products of that company had just been delivered to the store, that other bakeries selling products to the store made no deliveries near the time in question, and testimony describing the trucks used in making deliveries of bakery products to the store, including the color of defendant's truck, are competent.

4. Evidence § 42d—

Where relevant statements made by the employee to a patrolman who interviewed him in the afternoon of the day during which the accident in suit occurred, are admitted solely against the employee and the jury instructed not to consider them against the employer, exception to the admission of the testimony cannot be sustained.

5. Appeal and Error § 42—

Ordinarily, the court's recital of the evidence and the statement of the contentions of the parties will not be held for error when asserted mis-

statements therein are not called to the court's attention before the case is submitted to the jury and no request for correction is made.

APPEAL by defendants from *Sink, E. J.*, October, 1956 Term, CUMBERLAND Superior Court.

Civil action to recover damages for the wrongful death of plaintiff's intestate in a motor vehicle accident alleged to have been caused by the actionable negligence of the defendants. The defendants filed a joint answer in which they denied involvement in the accident, denied negligence, and alleged contributory negligence on the part of plaintiff's intestate. The defendants, upon motion in the cause, had O. W. Clayton, trading as C & S Transport Company, and Joe William Foy made additional parties defendant for purpose of contribution as joint tortfeasors. At the close of all the evidence the court entered an order dismissing the cross action as to the additional defendants. From that order, there was no appeal. The jury answered issues of negligence, contributory negligence, and damages in favor of the plaintiff. From the judgment on the verdict, the defendants appealed.

Cooke & Cooke,
By: Arthur O. Cooke,
King, Adams, Kleemeier & Hagan,
By: Charles T. Hagan, Jr., for plaintiff, appellee.
Varser, McIntyre, Henry & Hedgpeth, for defendants, appellants.

HIGGINS, J. Appellants' assignment of error first discussed in their brief and heavily relied on in the oral argument is based upon the trial court's refusal to grant their motion for nonsuit made at the close of all the evidence. *White v. Lacey*, 245 N.C. 364, 96 S.E. 2d 1. In passing on the motion it was the duty of the trial court, and in passing on the assignments of error it is the duty of this Court, to take the evidence in the light most favorable to the plaintiff; to resolve all conflicts in her favor; and to give her the benefit of all reasonable inferences which may be drawn from the evidence. *Poindexter v. Bank*, 244 N.C. 191, 92 S.E. 2d 773.

Taking the evidence in the light most favorable to the plaintiff, it discloses the following: North Carolina Highway No. 87 between Fayetteville and Elizabethtown is of asphalt surface, 22 feet wide. About seven miles south of Fayetteville, Burney's store is located on the east side of the highway and about 35 feet from it. On either side of the store and between it and the highway is a parking or service area. From Burney's store the highway is straight and level for about half a mile both north toward Fayetteville and south toward Elizabethtown.

At about 6:15 on the morning of 14 March, 1955, the plaintiff's intestate was driving a Southern Oil Transportation Company's combination tanker and tractor south on highway 87. A mist of rain was falling. The surface of the road was wet. As plaintiff's intestate approached the store going south, another tractor-tanker combination, owned by the C & S Transport Company and driven by Joe William Foy, approached from the south.

Joe William Foy, the driver of the C & S tanker, testified: "I came on 87 up to Burney's store. My rig was involved in a collision, I would say around six o'clock. . . . As I approached Burney's store there was a vehicle approaching me from the north (the tanker operated by plaintiff's intestate) . . . The lights on my rig were burning, . . . headlights and clearance lights. . . . The lights were burning on the vehicle approaching me. I did not see anything at Burney's store, or at or about the road there. . . . Right at Burney's store a truck ran out across the road ahead of me, I would say we (the two tanker combinations) were probably 50 or 60 feet, something like that, apart. . . . I just glimpsed this truck that came out of Burney's store as it ran across the road ahead of me. My vehicle did not strike that truck. It went across my lane. The truck that ran across the road ahead of me did not have any lights. . . . All I saw was a glimpse and just the shape of a bread truck. All I figured, just so close the man (plaintiff's intestate) hit his brakes to keep from hitting it (the bread truck) and the truck (tanker) started jackknifing and jackknifed across the road ahead of me." (Defendants' exception No. 161 is to the refusal of the court to strike the last quoted sentence. However, the defendants, from the same witness on cross-examination, brought out the following): "I swore that the oil tanker applied brakes too suddenly, in case where he was at, he had to do something. I swore and now say that he applied brakes too suddenly and jackknifed."

Susie Edwards, a witness for the plaintiff, testified that she was on her back porch "about two city blocks" from Burney's store. She heard the crash, took five or six quick steps to the front. "I saw the bread truck going on down the road. I could see the oil tankers in the ditch. . . . When I saw the bread truck it was just about as far as from here maybe to the back of the courtroom from the tankers. The bread truck was orange or some color of red like."

S. A. Burney testified in substance that about 6:15 on the morning of 14 March, 1955, he was in bed at the time the wreck occurred. His store was not open. It was the custom of the defendant Cook to make deliveries of Bell Bakeries bread each day except Sunday, usually before the witness got up. On the morning of the 14th the bread, as usual, was left in the rack under an awning at the front of the store. Immediately after the wreck he found Bell Bakeries bread in the rack.

Two other bakeries made deliveries to him daily, but their deliveries were made between 11:00 and 12:30 in the daytime. Plaintiff's intestate was killed in the wreck.

F. T. Rolland testified that he lived about 10 miles south of Burney's store and bought bread from Bell Bakeries every morning except Sunday. The deliveries were made about six o'clock; that deliveries had been made each morning between October and the day of the accident. On that day the defendant Cook made the delivery in the afternoon rather than in the morning as usual.

The highway patrolman testified that he had a conversation with the defendant Cook about three o'clock on the afternoon of the accident; that Cook stated he delivered bread at Burney's store in the early morning, pulled out at an angle in front of north-bound traffic; that he looked in his side view mirror, didn't see any south-bound traffic, and continued on his journey. (The evidence was admitted against Cook only and the jury was instructed accordingly.)

Other drivers who delivered bread at Burney's store testified they were not at the store in the early morning on the day of the accident. Evidence was offered tending to show that the Bell Bakeries' bread truck had pink or red markings and that other bread trucks had different markings.

The defendants, in their joint answer, say:

> "It is admitted that Miller J. Cook served, as an employee of the said Bell Bakeries, Inc., grocery stores on N. C. Highway 87, and including Simon A. Burney, . . .
>
> "It is admitted that on 14 March 1955 Miller J. Cook as an employee of Bell Bakeries, Inc., sold and delivered certain of the products of said Bell Bakeries, Inc., and that the truck used by said Miller J. Cook in connection with said business was the property of said Bell Bakeries, Inc., . . .
>
> "It is admitted that sometime between 6 a.m. and 6:30 a.m. on 14 March 1955 the said Miller J. Cook left products of Bell Bakeries, Inc., at the store of Simon A. Burney, at which time the said Simon A. Burney had not opened for business, . . ."

The evidence and admissions in the pleadings are sufficient to support these findings: (1) At the time of the accident Cook was agent of and driving the truck for Bell Bakeries, Inc.; (2) he drove the truck into the path of the tanker operated by plaintiff's intestate when such movement could not be made in safety; (3) by so doing Cook placed plaintiff's intestate in a position of sudden peril and in his efforts to extricate himself he was killed; (4) the defendants' negligent conduct was the

proximate cause or one of the proximate causes of the accident and death of plaintiff's intestate. The evidence was sufficient to warrant the jury in answering the first issue for the plaintiff. *Price v. Gray, ante,* 162.

On the second issue the burden of showing contributory negligence was on the defendants. *Murphy v. Coach Co.,* 200 N.C. 92, 156 S.E. 550. The jury found the defendants did not carry this burden and the evidence does not show contributory negligence as a matter of law. *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170. The evidence was sufficient to support the verdict. The motion for nonsuit was properly denied.

The defendants insist evidence relating to the delivery of bread by other bakeries, the testimony of their drivers with respect to their times of delivery at Burney's store, and the description of the trucks used in making the deliveries was all erroneously admitted. The admissibility is challenged by 89 exceptions. The defendants contend that the Bell Bakeries' truck was not involved in the accident in any way and the evidence fails to show that it actually came in contact with either of the tankers which were wrecked. But the evidence offered and admitted were circumstances tending to identify the truck as belonging to and operated by the defendants. Circumstantial evidence was admitted for that purpose. The rule with respect to such evidence is thus stated: "While he (the judge) shall reject as too remote every fact which merely furnishes a forceful analogy or a conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indistinct and feeble light on the question at issue." *S. v. Stone,* 240 N.C. 606, 83 S.E. 2d 543. Error does not appear and the exceptions cannot be sustained.

The defendants' assignment of error No. 15 is based on seven exceptions to the testimony of the highway patrolman who interviewed the defendant Cook in the afternoon of the day on which the accident occurred. At the time the evidence was admitted the court instructed the jury that Cook's statements were not admissible against the corporate defendant and could not be considered against it. There can be no question but that they were admissible against the defendant Cook who made them.

The defendants bring forward 50 exceptions to the court's charge. Only a few paragraphs escape their exceptive assignments. Those free of objection deal with the issues, burden of proof, measure of damages, constituent elements of actionable negligence, and the admissibility of photographs. Unobjected to are the instructions given in obedience to defendants' request. Virtually all of the court's recital of the evidence and his statement of the contentions of the parties are challenged, though no request for correction was made or called to the

court's attention before the case was submitted to the jury. The failure constituted a waiver. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817; *Brewer v. Brewer*, 238 N.C. 607, 78 S.E. 2d 719.

Upon careful examination the charge appears to have covered all essential elements of the case and is in substantial accord with applicable principles of law. The careful review of this record has been difficult and time consuming. More than 200 exceptions have been examined. The assignments of error alone cover 68 pages of the record. If there is grain of merit in this appeal it is covered up in the chaff.

No error.

STATE v. JIMMIE FLOYD, ALIAS JOHNNY FLOYD.

(Filed 7 June, 1957.)

1. Criminal Law § 81c(2)—

Where the charge of the court, construed contextually, is not prejudicial, an assignment of error thereto cannot be sustained.

2. Constitutional Law § 35—

The constitutional privilege against self-incrimination applies only to the compulsion of a defendant to testify against himself, and not to testimony voluntarily given, and further, does not preclude witnesses from testifying as to distinguishing marks on defendant's body.

3. Same—

Witnesses for the State had testified as to a small scar near the culprit's left eye, a small mole on his left ear, and gold fillings in his teeth. Upon return of the jury into the courtroom in disagreement as to defendant's identity as the culprit, the court permitted a juror, with defendant's consent, to examine defendant's body for the distinguishing marks. *Held:* Defendant's exception to the proceedings is untenable.

4. Criminal Law § 62a: Intoxicating Liquor § 9g—

Possession of non-taxpaid whiskey, possession of such whiskey for the purpose of sale, and the selling of such whiskey, are misdemeanors, and sentence of defendant, upon conviction, to be confined in the State's prison is not sanctioned by law, and the cause must be remanded for proper sentence. Constitution of North Carolina, Art. XI, Section 3, G.S. 148-28.

APPEAL by defendant from *Williams, J.*, at December Criminal Term 1956, of ROBESON.

Criminal prosecution upon a bill of indictment containing three counts charging (1) that on 10 October, 1956, defendant did unlawfully have in his possession a quantity of non-taxpaid intoxicating

whiskey, to wit: one pint; (2) that on same date defendant did unlawfully have and possess for the purpose of sale a certain quantity of non-taxpaid intoxicating whiskey, to wit: one pint; and (3) that on same date defendant did unlawfully sell a certain quantity of non-taxpaid intoxicating whiskey, to wit: one pint—each against the form of the statute, etc.

Defendant pleaded not guilty.

Upon trial in Superior Court the State offered as a witness one James E. King, an agent of the Alcohol and Tobacco Tax Unit of the United States Treasury Department, who, on direct examination, testified, in substance, that on 10 October, 1956, he with an Indian male went from Lumberton out Highway 41 to the Meadow Road and turned left there and went on approximately one mile to a wooden frame house on the left side of the road, and went into the kitchen of this residence where he saw Johnny or Jimmy Floyd; that he, the witness, bought from and paid defendant for, a pint of non-taxpaid whiskey which defendant poured out of a half-gallon fruit jar.

This witness, under cross-examination, testified, among other things, that the man he bought liquor from was named Johnny Floyd, that it is Johnny or Jimmy Floyd; that as to his physical description on 10 October, he was light skinned, had a small scar near his left eye, had some gold on his front teeth, and a small mole on the lobe of his left ear.

At the conclusion of testimony of this witness the State rested its case.

Thereupon defendant offered testimony of several witnesses tending to show as an alibi that another lived in the house the State's witness described as that of defendant; that defendant is named Jimmy; and that he was elsewhere at the time of the offenses charged.

The case was submitted to the jury under the charge of the court to which certain exceptions are taken, as hereinafter recited. And after some deliberation, the jury returned to the courtroom and the following proceedings were had:

"(The Court: Gentlemen of the Jury, have you agreed on a verdict?

"Juror: No sir.

"The Court: I do not care to know how you stand, but would like to know how you are divided.

"Juror: We are divided on the identity of the man.

"The Court: Numerically speaking, how are you divided?

"Juror: Eight to four, Sir.

"The Court: Is there any additional instructions you desire?

"Juror: There is. The jury would like to ask the Court if we could examine the markings on this defendant's face?

"The Court: The court inquired of the defendant's counsel if there was any objection to the jury looking at the defendant.

"Defense Counsel: No objection. Come around here boy and let them look at you.

"Juror: There was a mole on his ear and scar, and it was said he had some gold in the front teeth. Has he got that?

"The Defendant (opening his mouth, indicating gold fillings) I had two, but one is now gone. (The defendant put his finger in his mouth on a gold filling).

"Juror: Got a mole on your ear?

"Counsel for Defendant: Take a look at it. It doesn't look like a mole to me. (The juror then walked over to defendant, then stood behind him, looked closely at his ears, and felt of one of his ears, but said nothing else.

"The Court: All right, gentlemen, you may retire and resume your deliberations.)"

The defendant excepts to the foregoing proceedings set out in parentheses. Exception No. 4.

Verdict: Guilty on all counts as charged in the bill of indictment.

Judgment: That the defendant be confined in the State's Prison for a term of twelve months.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

F. D. Hackett and Robert Weinstein for Defendant Appellant.

WINBORNE, C. J. The first assignment of error brought up for consideration is based on exceptions to portions of the charge lifted out of text, pertaining to the subject of alibi. But considering the charge contextually it does not appear that there is prejudicial error. What is said by this Court, in this respect, in *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867, in *S. v. Minton,* 234 N.C. 716 (at 726), 68 S.E. 2d 844, and in *S. v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147, is pertinent here. There this Court considered that error prejudicial to defendant did not appear. And in both the *Bridgers* and *Minton cases* suggested forms to be applied are set forth, and need not be repeated now.

The next assignment of error is predicated upon exception four to the proceeding had on the return of the jury for further information relating to identity of defendant.

Defendant contends that here he was put on the spot, so to speak, that as a result of the court's inquiry directed to the jury he was required to give evidence against himself or risk the ire of the jury by his refusal.

This position is not well taken for these reasons: While in this respect, as stated in Stansbury's North Carolina Evidence, sec. 57, "the

privilege against self-incrimination, which finds expression in the Constitution and statutes of North Carolina, protects a witness from being compelled to give testimony to show his guilt of a criminal offense for which he may be prosecuted under the laws of the State . . ., the privilege is one against being compelled to testify. It furnishes no protection against the use of testimony which was voluntarily given." *S. v. Simpson,* 133 N.C. 676, 45 S.E. 567.

Indeed in *S. v. Riddle and Huffman,* 205 N.C. 591, 172 S.E. 400, this headnote reveals the ruling of the Court in this manner: "The constitutional guarantee that a defendant shall not be compelled to testify against himself, Art. 1, Section 11, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime." *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387, and cases cited. Also in *S. v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832, opinion by *Stacy, C. J.,* this Court held that the State has a right to have a prisoner identified, and there was no error, in a prosecution for rape, for the court to require the defendant to stand up, while prosecutrix was on the witness stand, and allow her to identify him as the man who assaulted her on the night in question. And in both *S. v. Riddle and Huffman, supra,* and *S. v. Vincent, supra,* the Court distinguishes the case of *S. v. Jacobs,* 50 N.C. 259, relied upon by defendant. In the *Vincent case* it is said that: ". . . the identity of the defendant, and not his status or degree of color was at issue," citing *S. v. Garrett,* 71 N.C. 85. It is pointed out that under *S. v. Johnson,* 67 N.C. 55, it was held that the State had a right to have the prisoner identified as the person charged.

Too, quoting from *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720, it is stated: "It was the right of the State to have the defendant present at the trial, both for the purpose of identification and to receive punishment if found guilty . . . and if a defendant should persist, for example, in wearing a mask while on trial, the court would be fully justified in ordering the mask removed so that he might be identified by the witness," citing *Warlick v. White,* 76 N.C. 175.

In the light of these principles it is noted that in the instant case the witness for the State had testified as to a small scar near defendant's left eye, a small mole on his left ear, and gold on his front teeth. It was as to these that the juror inquired. True, under the circumstances here revealed, the trial judge might have denied the inquiry but, defendant having readily and fully consented for the jury to examine his person in the respects indicated, this Court holds that prejudicial error is not made to appear. The exception taken would seem to have been taken as an afterthought.

It is noted, however, that while the defendant was convicted only of a misdemeanor, the sentence imposed by the court is in the State's

Prison. This is not sanctioned by law. See Constitution of North Carolina, Art. XI, Section 3, G.S. 148-28, and *S. v. Cagle*, 241 N.C. 134, 84 S.E. 2d 649.

Hence the case is remanded for proper sentence.

Error and remanded.

STATE v. ARCHIE MALCOLM DUTCH.

(Filed 7 June, 1957.)

1. **Automobiles § 76—**

If the owner and driver of an automobile fails to stop and give his name, address and license number, after an accident resulting in injury to a person in violation of G.S. 20-166(a) and G.S. 20-166(c), an occupant of the car, merely because he is a guest passenger in the car driven by the owner, is not guilty as an aider and abettor.

2. **Same: Criminal Law § 8b—Where two occupants of car each testify the other was driving, jury must determine which was driving to convict the other as abettor.**

The State's evidence tended to show that a car with two occupants, one of whom was the owner, was involved in a collision resulting in personal injury to another, and that the driver failed to stop at the scene of the accident, but stopped a distance therefrom where the occupants pried the fender from the tire. Each occupant of the car testified that the other was driving. An instruction that the occupant who was not the owner might be convicted as an aider and abettor if he encouraged, assisted or aided the driver thereof, which instruction is not predicated upon the jury's finding that the owner was driving, and which fails to apply the general law as to guilt as an aider and abettor to the facts adduced by the evidence, must be *held* for prejudicial error as failing to explain the applicable law. G.S. 1-180.

APPEAL by defendant Archie Malcolm Dutch from *Hall, J.*, December Term, 1956, of SCOTLAND.

Appellant, hereinafter called Dutch, and also one Ellerbe Cox, hereinafter called Cox, were separately indicted; but, upon consolidation, the two cases were prosecuted in a single trial.

Each bill of indictment charged that the defendant named therein did, on 14 July, 1956, unlawfully, wilfully, knowingly and feloniously, "operate and drive a motor vehicle when it was involved in an accident resulting in injury to one Sam Wright and did fail, refuse, and neglect to immediately stop the said motor vehicle he was then driving at the scene of said accident and give his name, address, operator's or chauffeur's license number and registration number of the said motor vehicle

to the person struck, viz.: Sam Wright and did fail to render any assistance to the said Sam Wright," etc.

The jury found both defendants guilty as charged. Judgments, imposing prison sentences, were pronounced. Dutch appealed.

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

Joe M. Cox for defendant, appellant.

BOBBITT, J. The State offered plenary evidence that on 14 July, 1956, at night, the car operated by Wright and a 1941 Ford, later identified as the Cox car, were involved in an accident resulting in injury to Wright; that these cars, proceeding in opposite directions, collided on Wright's side of the highway, the contact being from the bumper to the rear fender along the left side of each car; that the driver of the Cox car did not stop at or return to the scene of the accident; and that, as disclosed by subsequent investigation, the *occupants* of the Cox car when involved in said accident were Cox and Dutch.

Both defendants offered evidence. Evidence in behalf of Dutch, including his positive testimony, tended to show that Cox was the driver. Evidence in behalf of Cox, including his positive testimony, tended to show that Dutch was the driver.

There was evidence that, after the accident, the Cox car stopped some distance from and out of sight of the scene of the accident, at which time a fender, dragging against a tire, was lifted therefrom. With reference thereto, the testimony of Cox and that of Dutch was in conflict as to whether Dutch helped Cox lift the fender from the tire and as to whether Cox or Dutch drove the Cox car away from the place where this incident occurred.

In charging the jury, the court gave this instruction:

> "In this case, as to defendant, Archie Malcolm Dutch, I instruct you, if the State of North Carolina has satisfied you from the evidence and beyond a reasonable doubt that the motor vehicle occupied by the two defendants, was driven and involved in an accident or collision with a motor vehicle driven by witness, Sam Wright; that Mr. Wright was personally injured in the accident; that the driver of the motor vehicle, occupied by the two defendants, knew that his vehicle had been involved in an accident, resulting in injury to the person of the occupant of the other vehicle; that the driver of the car occupied by the two defendants, wilfully failed to stop at the scene of the accident, wilfully failed to give his name, address, operator's license number and registration number and wilfully failed to render reasonable assistance to the in-

jured person; and if the State has further satisfied you from the evidence and beyond a reasonable doubt that defendant, Dutch, was driving the vehicle at the time, that is, the vehicle occupied by the two defendants, (or if not driving, that he encouraged, assisted, aided and abetted the driver thereof, in all of said acts and conduct and participated therein as an aider and abetter, as I have explained the law of aiding and abetting to you, it would be your duty to find the defendant, Dutch, guilty as charged;) . . ."

As to Cox, the court gave the same instruction.

Dutch assigns as error the portion of the quoted instruction indicated by parenthesis.

If Dutch was the driver, the evidence was sufficient to support his conviction of the crime for which he was indicted. But, under the instructions given, the verdict does not establish the identity of the driver; nor do the instructions predicate Dutch's guilt as an aider and abettor upon a prior finding that Cox was the driver.

Under the evidence, Dutch's criminal responsibility, if any, as an aider and abettor presupposes that Cox was the driver. There was sharp conflict between the testimony of Cox and that of Dutch as to the identity of the driver. But the fact that this conflicting testimony was in evidence did not establish that either Cox or Dutch was the driver. The identity of the driver of the car was a material fact for jury determination.

It does not appear, from the charge or otherwise, that the State made any explicit contention as to the identity of the driver. The State's theory seems to have been that, regardless of the identity of the driver, the other occupant was guilty as an aider and abettor. The fallacy of this theory is that unless and until the State established from the evidence beyond a reasonable doubt that Cox was the driver, there existed no factual basis upon which the court could predicate instructions bearing upon Dutch's criminal responsibility, if any, as an alleged aider and abettor.

It is noted that G.S. 20-166(a) and G.S. 20-166(c), the statutory provisions upon which the indictments are based, refer repeatedly to "the driver of any vehicle involved in an accident or collision resulting in injury or death to any person."

It is noted further that, in the instructions relating to guilt as an aider and abettor, no distinction was drawn between the status of Cox, the owner of the car, if Dutch were driving, and the status of Dutch, the guest passenger, if Cox were driving.

If we assume that Cox was the driver, and that Dutch was his guest passenger, there is no evidence that Dutch, by word or deed, aided and abetted Cox either at the time of the accident or between the time of

the accident and the time Cox stopped the car to fix the fender. It is clear that Dutch would not be guilty as an aider and abettor simply because he was a guest passenger in the Cox car when Cox committed the crime. *S. v. Banks,* 242 N.C. 304, 87 S.E. 2d 558.

The State bases its contention that Dutch may have been criminally responsible as an aider and abettor on Cox's testimony as to what occurred when the fender was lifted from the wheel and thereafter. But when this evidence is considered in the light of the fact that Cox, as owner of the car, had full authority to control and direct its operation, a serious question arises as to whether the evidence afforded a factual basis for any instruction as to Dutch's guilt as an aider and abettor. However, since other evidence may be offered at the next trial, we refrain from discussing in detail the evidence in this record bearing on that question.

In the quoted portion of the charge, the court referred to instructions previously given on the subject of aiding and abetting. These consisted of correct general definitions. They have been stated often and fully and need not be repeated. *S. v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241; *S. v. Banks, supra;* and cases cited therein. But the court did not instruct the jury that before Dutch would be guilty as an aider and abettor, the jury must first find from the evidence beyond a reasonable doubt that Cox was the driver; nor did the court instruct the jury as to any theory or factual basis upon which Dutch could be found guilty as an aider and abettor. Indeed, no appropriate instruction as to Dutch's criminal responsibility, if any, as an aider and abettor, could have been given unless predicated upon a prior finding that Cox was the driver.

While no mention thereof is made in the briefs, we have considered *S. v. Newton,* 207 N.C. 323, 177 S.E. 184. There the first count charged the two defendants jointly with an assault with a deadly weapon, to wit, an automobile. The original record discloses that the court's instructions were explicit to the effect that the jury should return a verdict of not guilty unless they were satisfied from the evidence beyond a reasonable doubt "that the defendants were the persons operating this car *jointly.*" (Italics added.) The *Newton case* is also distinguishable in other respects.

For the failure of the court to explain the applicable law arising on the facts in evidence, as related to Dutch's criminal responsibility, if any, as an aider and abettor, a new trial is awarded. G.S. 1-180; *S. v. Floyd,* 241 N.C. 298, 84 S.E. 2d 915; *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53.

New trial.

F. D. ASHLEY AND GUY F. McCORMICK, PARTNERS, OPERATING UNDER THE FIRM NAME OF FAIRMONT GAS COMPANY, v. J. WILBUR JONES, TRADING AS JONES TRANSFER.

(Filed 7 June, 1957.)

1. Trial § 25—

If the evidence upon defendant's counterclaim is sufficient to take the issue on the cross action to the jury, plaintiff may not take a voluntary nonsuit to escape the counterclaim.

2. Bailment § 11—Evidence of negligence in delivering to bailee chattel having dangerous defect without warning bailee thereof, held to take issue to jury.

Evidence tending to show that a tank-truck containing propane gas held in liquid form by pressure, was delivered by plaintiffs to defendant for repair to differential housing without disclosing to defendant the fact, well known to the plaintiffs, that the pipe from the tank was leaking gas, that the defendant, awaiting parts, stored the truck in its closed garage, and that when the door was opened, giving the gas access to fire, there was a terrific explosion, setting fire to and destroying the garage, *is held* sufficient to overrule nonsuit on defendant's cross action for damage to his garage, set up in plaintiffs' action for destruction of the truck by fire.

3. Trial § 22b—

In passing upon the sufficiency of the defendant's evidence upon his counterclaim, evidence favorable to plaintiff must be disregarded.

4. Trial § 23a—

Where the determinative facts are in dispute and different conclusions may be reasonably reached from the testimony, nonsuit may not be entered.

APPEAL by defendant from *Mallard, J.*, January, 1957 Civil Term, ROBESON Superior Court.

Civil action instituted by the plaintiffs for the recovery of $4,000.00 alleged to have been the value of a gas distribution truck destroyed by fire due to the alleged negligence of the defendant while the truck was in his possession for repairs. The defendant denied negligence and set up a cross action and counterclaim against the plaintiffs in which he alleged that the plaintiffs were the owners of the truck on which was installed a tank containing propane gas; that the connecting pipe between the tank and the pump was leaking gas and had been for three weeks to the knowledge of the plaintiffs; and that the plaintiffs left the outfit with the defendant for repairs without disclosing the presence of the leak in the pipe. "The leakage of gas from the gas pipe was not known to the defendant or any of his agents or employees until sometime during the night of 3rd August 1954 when the gas which had leaked from the defective pipeline of plaintiffs' said truck in the garage of the defendant came in contact with fire and caused a terrific ex-

plosion, completely destroying the garage building, all of its contents, etc. That the destruction of defendant's property was proximately caused by the negligence of the plaintiffs in that they knowingly left in a closed garage of defendant their gas truck with gas in the tank leaking on account of defective union in the pipe . . . to the defendant's damage in the sum of $42,158.17."

At the close of the defendant's evidence the plaintiffs moved for nonsuit on defendant's cross action and counterclaim. The motion was allowed and the defendant excepted. The plaintiffs were then permitted over defendant's objection to take a voluntary nonsuit. From the order dismissing the defendant's cross action and counterclaim and permitting the plaintiffs to take a voluntary nonsuit, the defendant appealed.

Nance, Barrington & Collier, Floyd & Floyd, McLean & Stacy, for defendant, appellant.

Varser, McIntyre, Henry & Hedgpeth, for plaintiffs, appellees.

HIGGINS, J. This appeal presents the question whether the evidence was sufficient to go to the jury on the defendant's counterclaim. If sufficient, the order permitting the plaintiffs to take a voluntary nonsuit was error. A plaintiff has no right to get out of court to escape a counterclaim against him. If the order of the court dismissing the counterclaim is correct, after it was dismissed and out of the way the plaintiffs had the right to take a voluntary nonsuit. Was the evidence sufficient to require the submission of the counterclaim to the jury?

The evidence pertinent to decision in its light most favorable to the defendant may be thus summarized: The gas tank on the plaintiffs' truck had a capacity of 1,000 gallons. The plaintiffs used it to deliver liquid petroleum or propane gas. Pressure was maintained at about 200 pounds per square inch. Upon release from pressure the gas would become "a vapor formation." For a period of two or three weeks prior to August 3, 1954, the union between the tank and the pump had been leaking. Efforts to repair the leak had been attempted by the plaintiffs' agents and had been unsuccessful. The plaintiffs had knowledge the leak continued. On August 3, 1954, the truck to which the gas tank was attached was delivered to the defendant's garage for repairs, not with respect to the leaking pipe, but to the differential housing. At the time the gauge to the tank showed there were 125 to 150 gallons of liquid petroleum under pressure in the tank. The defendant was not advised and had no knowledge there was a leak in the pipe which permitted the gas to escape and upon being released from the pressure to become vaporized, highly volatile, and explosive if exposed to fire or spark. The defendant at the time the truck was delivered to him for repairs did not have available parts necessary to complete them. While

awaiting parts the truck was stored for the night in the garage part of the defendant's building. The doors and windows to that part of the structure were closed. Later that night a door between the garage part of the building and the driver's room was opened and a strong odor of propane gas came through the door. Two of defendant's employees entered the garage and immediately thereafter a terrific explosion occurred in the garage, blowing the roof from the building and demolishing a part of the walls. Immediately fire flashed all over the garage. The building and its contents were completely destroyed. An expert witness, in answer to a hypothetical question, expressed the opinion that the explosion was caused by the ignition of propane gas.

Was it not the duty of plaintiffs to warn the defendant there was a leak in their tank which permitted propane gas to escape and which could and would explode if ignited? "It is a scientific fact that gas ordinarily useful for fuel is so inflammable that the moment a flame is applied it will ignite into an immediate explosion. . . . Gas is a dangerous substance when it is not under control." *Graham v. North Carolina Butane Gas. Co.*, 231 N.C. 680, 58 S.E. 2d 757; *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E. 2d 689. A gas company is answerable in damages for negligence if it fails to use reasonable care to prevent its escape, if the failure is the proximate cause of injury to persons or property. 24 Am. Jur., Gas Companies, secs. 20, 21 and 22; 38 C.J.S., Gas, secs. 40, 41 and 42.

When viewed in the light of applicable principles of law the evidence appears sufficient to require its submission to the jury. Evidence favorable to the plaintiffs must be disregarded in passing on the motion for nonsuit. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *Deaton v. Elon College*, 226 N.C. 433, 38 S.E. 2d 561. "This being true, the court cannot properly enter a compulsory nonsuit and withdraw the case from the jury if the facts are in dispute or if testimony is such that different conclusions may reasonably be reached thereon." *Graham v. Butane Gas Co., supra.*

For the reasons indicated, the judgment of the Superior Court of Robeson County is.

Reversed.

STATE v. LESLIE MAE WALLACE, ALIAS MAE WEST.

(Filed 7 June, 1957.)

Criminal Law § 6a—

Entrapment is a defense, and when the court, upon defendant's supporting evidence, instructs the jury that if officers induce an innocent person to commit a crime he would not otherwise have committed, this would constitute entrapment, and "may constitute a defense," must be *held* prejudicial as leaving it optional with the jury whether to apply the law of entrapment.

APPEAL by defendant from *Williams, J.*, December, 1956 Special Term, ROBESON Superior Court.

Criminal prosecution upon a three-count bill of indictment charging that the defendant did on July 9, 1956, unlawfully (1) possess one pint of nontaxpaid intoxicating whisky, (2) possess one pint of nontaxpaid intoxicating whisky for the purpose of sale, and (3) sell one pint of nontaxpaid intoxicating whisky.

The State offered Donald Torrence as a witness who testified that on July 9, 1956, he purchased from the defendant one pint of whisky which she poured from a half-gallon jar; that neither the fruit jar nor the pint bottle which she filled had stamps affixed indicating the tax on the contents had been paid; that he paid the defendant $2.00 for the whisky.

On cross-examination the witness testified he had been to the defendant's home on two occasions prior to the day he made the purchase. "The first time I went there with a colored subject . . . he went in and did not tell her I was all wrong; he assumed that I was all right so she would sell me some liquor or beer. . . . I relied on the man to present me in a good light before this woman in order to try to get her to violate the law; I tried to purchase whisky from her and did succeed, but not the first time I went. . . . It took me three trips before she ever sold me any whisky, but she gave me a drink on the second trip. I purchased two cans of beer from her the second time and she gave me a drink of whisky after I bought the beer. . . . The first time we didn't get the beer as she didn't have any and the second time she had to leave the house to get the beer. Where she got it, I don't know, but it wasn't on her premises or in her possession. I don't know whether I was drinking at all on the day I bought the pint as I don't recall." This State's witness testified that he was an agent of the Alcohol and Tobacco Tax Unit, Treasury Department of the United States, engaged at the time in undercover work in connection with liquor law violations; that he used public money supplied by the sheriff to make the purchase. His custom was to engage a local "subject" "to put him onto the ropes."

The defendant testified in her own behalf and denied that she was in the business of selling whisky or beer. She testified: "The first time a colored boy was with him. I told him I had no whisky. . . . On the second occasion he continued to ask me would I please go and get him some whisky . . . that it seemed like he just had to have a drink. I was under the impression he was a tobacco man. He kept on asking me and just to keep him from worrying me . . . I wanted to do my ironing . . . I told him the boy who was helping me paint would go find him some whisky since he wanted it so bad. (The boy said when he went there they would not have any bottles.) He found a bottle . . . I took it and washed it so it wouldn't be filthy. He stayed about 10 minutes, came back with the whisky. I wiped the bottle off and told him, 'Here is your whisky.' I took my money and paid for the whisky and I wanted my money. It seems like he handed me or him (the boy) $2.00. He took the whisky and went on out. I did not sell him any whisky. I did not sell him any beer, but the boy went out and got him two cans of beer and I don't know what the man gave him. He did not give me anything.

The jury returned a verdict of guilty on all three counts. From the judgment that the defendant be imprisoned for a term of 18 months, she appealed.

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

Britt, Campbell & Britt for defendant, appellant.

HIGGINS, J. The court in its charge set forth in detail the elements necessary to constitute entrapment, stated the separate contentions of the State and the defendant as to whether the evidence made out a case of entrapment. The court did not make its own application of the law to the facts as the jury might find them and did not instruct the jury as to its permissible verdicts according to its actual findings. The failure of the court to apply the law to the facts, as the jury might find them, is not the subject of an exceptive assignment. We mention the failure here only to emphasize the probable prejudicial effect of that portion of the court's charge to which the defendant did object.

The defendant included in her exception and assignment of error No. 4 that portion of the charge defining entrapment. The exception, we concede, included more of the charge than is required to point up the error of which the defendant complains. However, the Attorney-General does not raise the objection that the charge was broadside. To pinpoint the exception we need only quote the following part of the charge: "If officers of the law induce an innocent person to initiate a

crime which he would not otherwise commit, this would constitute entrapment and may constitute a defense of the crime charged."

The law of entrapment is that it not only *may*, but it *does* constitute a defense. The charge as given left it optional with the jury whether to apply the law of entrapment as a defense. The court should have, but did not, charge that entrapment is a defense; and upon a finding that the defendant had been entrapped into the commission of the offense charged, it would be the duty of the jury to return a verdict of not guilty. In this case the State's only witness to the offense was an officer. The law of entrapment is fully discussed in the following cases: *S. v. Jackson*, 243 N.C. 216, 90 S.E. 2d 507; *S. v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191; *S. v. Nelson*, 232 N.C. 602, 61 S.E. 2d 626; *S. v. Love and West*, 229 N.C. 99, 47 S.E. 2d 712.

For the error indicated, it is ordered that there be a

New trial.

ZOLLIE S. MARSHALL v. WASHINGTON NATIONAL INSURANCE COMPANY.

(Filed 7 June, 1957.)

1. Insurance § 13a—

Where the language of an insurance policy is plain and unambiguous, extrinsic evidence as to the meaning of the language is not admissible, and, the facts not being in dispute, the question of its coverage is a question of law for the court.

2. Insurance § 43b—

A policy providing for benefits if insured should be killed in an accident while driving or riding in a private passenger car of the pleasure type, does not cover the risk of insured's death while driving a pick-up truck, notwithstanding this was the only vehicle owned by insured when the policy was issued, and notwithstanding the vehicle was used by insured solely as a passenger vehicle in going to and from work and for pleasure.

APPEAL by plaintiff from *Sink, E. J.*, at March, 1957, Civil Term of DURHAM.

Daniel K. Edwards for plaintiff, appellant.

Reade, Fuller, Newsom & Graham for defendant, appellee.

JOHNSON, J. Civil action to recover on a policy of accident insurance.

At the close of the plaintiff's evidence the trial judge allowed the defendant's motion for judgment as of nonsuit. The single question

presented by the appeal is whether this ruling was correct. Decision turns on whether the insured's GMC pick-up truck was a "private passenger automobile of the pleasure type" within the meaning of the insurance policy sued on.

The policy provided for the payment of $2,000 to the beneficiary (the plaintiff) in case of accidental death of the insured, James C. Marshall, as a result of an injury sustained by the insured: ". . . (d) while riding or driving in a private passenger automobile of the pleasure type, provided 'such injury' so sustained must be the direct result of the wrecking of such automobile; . . ."

The insured's death resulted from injuries sustained in a motor vehicle wreck while the policy was in full force and effect. The insured was driving the vehicle which wrecked. It was a GMC pick-up type motor vehicle, owned by the insured. He acquired it before the insurance policy was issued and it was the only motor vehicle owned by him. He used it for going back and forth to his work, for pleasure purposes such as going on fishing trips and visiting relatives, and for carrying friends and relatives as passengers. The vehicle was not used for cargo hauling or for any commercial purpose. It had an enclosed cab, with seat for the driver and two other persons. Behind the cab there was an uncovered body 4½ feet long. The only seat was the one in the cab.

The insurance policy was issued for an annual premium of $6.00, and it had printed across its face: "LOW COST ACCIDENT POLICY. . . . THIS IS A LIMITED POLICY READ IT CAREFULLY."

The plaintiff contends that the use to which the vehicle in question was put is a material factor to be considered in determining whether it was a "private passenger automobile of the pleasure type" within the meaning of the policy. The defendant, on the other hand, urges, and we think with sound reason, that since the language of the insuring provision of the policy is plain and unambiguous, liability must be tested wholly and solely by the natural and obvious meaning of such language. The insured's truck does not come within the natural and obvious meaning of the language of the insuring provision of the policy. This being so, it is immaterial whether the truck was used by the insured as a passenger vehicle and for pleasure. The defendant had the right to prescribe the type of vehicle it desired and was willing to cover in this limited coverage insurance policy. The use to which the insured put the truck could not and cannot change the plain meaning of the language of the policy or extend its coverage. See *Bernice Lloyd, Admrx. v. Columbus Mutual Life Ins. Co.*, 200 N.C. 722, 158 S.E. 386; *Spence v. Washington Nat. Ins. Co.* (Ill.), 50 N.E. 2d 128; *Dirst v. Aetna Life Ins. Co.* (Iowa), 5 N.W. 2d 185. The cases cited by the plaintiff are either factually distinguishable or are not considered as controlling.

There being no dispute as to the material facts, the case presented only a question of law for decision by the court below; *i.e.*, whether the pick-up truck was a "private passenger automobile of the pleasure type" within the meaning of the policy. *Bernice Lloyd, Admrx. v. Columbus Mutual Life Ins. Co., supra.* The court below correctly resolved the question by allowing the defendant's motion for judgment as of nonsuit.

Affirmed.

JEFF J. GARNER, CHARLES L. GREEN, CLAUDE A. HENDERSON, LESLIE MANN, CLAUDE HENDERSON, H. F. WILLIAMS, J. I. MIZELLE, J. C. BELL, IVEY V. HASKETT, T. W. HASKETT, J. S. SMITH, L. P. SMITH, C. M. GARNER, LEONARD CARROLL, C. C. NORRIS, H. S. JONES, L. C. MANN, LEE F. BROCK, AMY HARKLEY, JOHN CARROLL, J. WHEELER SMITH, WILLIAM R. BELL AND C. S. GOULD, SR., v. THE TOWN OF NEWPORT, A MUNICIPAL CORPORATION; BOARD OF COMMISSIONERS OF THE TOWN OF NEWPORT; PRENTICE M. GARNER, B. R. GARNER, H. G. GURGANUS, W. V. GARNER AND J. M. COX, COMMISSIONERS OF THE TOWN OF NEWPORT; LEON MANN, JR., MAYOR OF THE TOWN OF NEWPORT; EDITH LOCKEY, TOWN CLERK OF THE TOWN OF NEWPORT.

(Filed 7 June, 1957.)

1. Elections § 18b—

In an action to restrain the issuance of bonds on the ground of irregularities in the bond election, a complaint which fails to allege that the officers appointed to hold the election had reported the results thereof to the governing body of the municipality and that the governing body had canvassed the returns and judicially determined the result, is demurrable, since the court will not permit itself to be substituted for the proper election officials in the first instance for the purpose of canvassing the returns and declaring the result.

2. Taxation § 38a—

A municipal ordinance for the issuance of funding or refunding bonds need not specify that a tax sufficient to pay the principal and interest shall be annually levied and collected, and in an action to enjoin the issuance of bonds, the failure of the complaint to allege that the proposed bonds were not funding or refunding bonds does not disclose invalidity. G.S. 160-379 (2) (c).

APPEAL by plaintiffs from *Frizzelle, J.*, January Term 1957 of CARTERET.

Action to restrain the issuance and sale of $120,000.00 of bonds for the purpose of enlarging and extending a water works system in the Town of Newport.

The original complaint alleged numerous alleged irregularities in the bond election held in the Town of Newport on 4 September 1956. Defendants filed a written demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, and in the demurrer pointed out in detail that the complaint failed to allege facts as to how the so called irregularities affected the result of the election, failed to state that the vote was canvassed as provided by statute, failed to allege that any qualified voter was denied the right to vote, failed to allege that any unqualified voter cast a vote, etc. This demurrer came on to be heard at the November Term 1956 of the Superior Court, the Honorable Chester R. Morris, Judge Presiding. Judge Morris sustained the demurrer, and in his discretion allowed plaintiffs 30 days within which to amend their complaint, or to replead.

Whereupon, plaintiffs amended their complaint by alleging:

"10. That the registrar and judges of the election failed at all times to remain at their posts and at times vacated the precinct polling place, leaving same improperly attended and the ballots, both cast and unused, unguarded.

"11. That the defendants failed to act in accordance with the requirements of the statute, did not see that the polling places were properly attended and in effect did not see fit to make inquiry on their own after they were advised of the defects herein set forth."

Defendants filed a demurrer to the amended complaint similar to their demurrer to the original complaint.

Judge Frizzelle rendered judgment sustaining the demurrer, and plaintiffs appealed.

C. R. Wheatly, Jr., for Plaintiffs, Appellants.

George W. Ball for Defendants, Appellees.

PER CURIAM. Plaintiffs in their brief have restricted their argument to this one allegation in their complaint: "5. . . . there were more electors who cast a ballot against the proposal than there were those who cast a ballot for the proposal and that if the election had been conducted properly in accordance with the pertinent provisions of the law the proposal as contained in the ordinance would have been defeated."

The effect of the judgment upon the demurrer to the original complaint as to whether or not it is *res judicata* is not presented by any pleading. *Thomason v. R. R.*, 142 N.C. 300, 55 S.E. 198. This action is before us on the pleadings alone.

G.S., Chapter 160, is entitled Municipal Corporations. G.S. 160-387 is captioned "Elections on Bond Issue," and subsection 6 thereof reads: "The officers appointed to hold the election, in making return of the result thereof, shall incorporate therein not only the number of votes cast for and against each ordinance submitted, but also the number of voters registered and qualified to vote in the election. The governing body shall canvass the returns, and shall include in their canvass the votes cast and the number of voters registered and qualified to vote in the election, and shall judicially determine and declare the result of the election."

Plaintiffs have not alleged that the officers appointed to hold the election made a report of the result thereof to the governing body, and have not alleged that the governing body canvassed the returns and judicially determined the result of the bond election. The statute contemplates and intends that the result of an election as determined by the proper election officials shall stand until it shall be regularly contested and reversed by a tribunal having jurisdiction for that purpose. The court will not permit itself to be substituted for the proper election officials in the first instance for the purpose of canvassing the returns from the officers holding the election and declaring the result thereof.

Ledwell v. Proctor, 221 N.C. 161, 19 S.E. 2d 234, was a *quo warranto* proceeding to try title to the office of alderman of the Town of Sanford. Plaintiff alleged that he received 186 votes in the municipal election and the defendant 179 votes, which was set out in the official returns of the election officials, that plaintiff received a majority of the legal votes cast in the election. This Court held that the complaint failed to allege that the returns of the precinct officials had been canvassed and judicially determined by the proper officials, and was fatally defective. The Court said: "The contesting candidates must first use the machinery at hand before applying to the court for relief."

The allegation in the complaint solely relied on by plaintiffs in their brief is insufficient to meet the challenge of the demurrer.

Plaintiffs have alleged in their complaint "that the ordinance failed to specify that a tax sufficient to pay the principal and interest of the bonds shall be annually levied and collected." Such a statement may be omitted in the ordinance in the case of funding or refunding bonds in the discretion of the governing board of the town. G.S. 160-379, sub-section 2(c). There is no allegation in the complaint that the proposed bonds were not funding or refunding bonds.

A consideration of the complaint, and the amendment thereto, leads us to the conclusion that facts sufficient to constitute a cause of action are not stated.

Affirmed.

GRADY HARVEY JOHNSON, SR., AND BOBBY RAY JOHNSON v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES, AND MRS. MOZELLA J. JONES.

(Filed 7 June, 1957.)

1. Automobiles § 2—

Where, upon petition for review of order of the Commissioner of Motor Vehicles suspending petitioners' operator's licenses under G.S. 20-279.2, the owner of the other car involved in the collision is made a party by consent order and files answer, such owner must be served with statement of case on appeal to the Supreme Court.

2. Appeal and Error §§ 29, 33—

Appeal in this case dismissed for insufficiency of the record and for failure to serve statement of case on appeal upon a party made a party to the proceeding by consent order.

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

APPEAL by petitioners from *Rousseau, Judge,* 24 September, 1956, Civil Term, of GUILFORD, Greensboro Division.

Petitioners, aggrieved by an order of the Commissioner of Motor Vehicles dated 30 January, 1956, filed their petition in accordance with the procedure prescribed by Ch. 1300, sec. 2(b), 1953 Session Laws (G.S. 20-279.2, 1955 Cumulative Supplement); and, upon allegations to the effect that the sole proximate cause of the collision referred to below was the negligence of Mrs. Mozella J. Jones, prayed that the court reverse the Commissioner's order.

The Commissioner's order, which, effective 14 February, 1956, suspended petitioners' operator's licenses unless they deposited security in the amount of $1,050.00, was based on a report of a collision that occurred 3 December, 1955, in Guilford County, on a three-lane highway (#29 and #70), at or near the Osborne Road intersection, between a Ford car owned by petitioner Grady Harvey Johnson, Sr., operated by petitioner Bobby Ray Johnson, and a Willys station wagon owned by Guy O. Jones, operated by Mrs. Mozella J. Jones, causing damage to said station wagon and personal injuries to the occupants thereof, including Mrs. Mozella J. Jones.

Answering, the Commissioner averred, in part, that petitioners were "not exempt from the provisions of G.S. 20-279.5 of the Motor Vehicle Safety and Financial Responsibility Act of 1953 by virtue of the petitioners maintaining automobile liability insurance or otherwise"; that he had notified the injured occupants and the owner of the Willys station wagon of petitioners' action and of their petition; and that he presented to the court for determination the questions raised by said petition.

After hearing evidence offered by petitioners, and also the testimony of Mrs. Mozella J. Jones, the court entered judgment, which, after recitals, set forth that "the Court is of the opinion, and finds as a fact, that the plaintiff petitioners were probably guilty of negligence in the operation of an automobile on the occasion as set forth in the petition," and affirmed the Commissioner's order of 30 January, 1956, suspending the operator's licenses of both petitioners.

Attorney-General Patton and Staff Attorney Kenneth Wooten, Jr., for defendant Scheidt, appellee.

Henderson & Henderson and Robert S. Cahoon for petitioners, appellants.

Jordan & Wright and Charles E. Nichols for Mrs. Mozella J. Jones, movant in this Court.

PER CURIAM. The clerk of the Superior Court certified that the "case on appeal," appearing in the purported transcript filed in this Court, was served on the Commissioner, and that the Commissioner did not file exceptions thereto or serve a countercase. The clerk's said certificate made no reference to documents purporting to constitute the record proper; nor did the purported transcript contain any stipulation with reference thereto. In the purported transcript, the name of Mrs. Mozella J. Jones appeared in the caption of the cause; and in the said "case on appeal" it appeared that she testified at the hearing. Neither the purported transcript, nor the "case on appeal," contained other indication that Mrs. Mozella J. Jones had been made a party defendant.

In this Court, Mrs. Mozella J. Jones moved to dismiss the appeal on the ground that she was a party defendant but had not been served with petitioners' statement of case on appeal. Answering said motion, petitioners (appellants) do not contend that the "case on appeal" was served on her; rather, they take the position that Mrs. Mozella J. Jones was not a proper party.

At our request, the said clerk has certified to this Court a copy of his order of 20 March, 1956, entered with consent of petitioners' counsel, which made Mrs. Mozella J. Jones a party defendant herein, and also a copy of the answer filed by Mrs. Mozella J. Jones pursuant to said consent order.

Whether Mrs. Mozella J. Jones is a *proper* party is not presented. Suffice to say, by *consent order,* she was made a party and filed answer; and petitioners were not at liberty to ignore these facts. Indeed, it appears now that she, represented by her counsel, (not the Commissioner), appeared at the hearing and opposed the granting of the petition.

For failure to file in this Court a properly certified and accurate transcript of the record proper, and for failure to serve the "case on appeal" on Mrs. Mozella J. Jones, an adversary party, petitioners' appeal is dismissed.

Appeal dismissed.

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

STATE v. OTIS HUNT.

(Filed 7 June, 1957.)

Criminal Law § 53j—

Where the State's sole witness is an undercover agent who testifies that he purchased nontaxpaid whisky from defendant, an instruction that the jury should scrutinize his testimony in the light of his interest and bias, but that if the jury believed beyond a reasonable doubt that the witness was telling the truth, and if the jury were satisfied beyond a reasonable doubt from such testimony that defendant was guilty, to return such verdict, *is held* without error.

APPEAL by defendant from *Hall, J.*, November, 1956 Criminal Term, ROBESON Superior Court.

Criminal prosecution upon a three-count bill of indictment charging the defendant with unlawful possession, unlawful possession for the purpose of sale, and unlawful sale of (nontaxpaid intoxicating whiskey).

The only State's witness, Donald Torrence, an undercover officer, testified: "On July 12 . . . I entered the house and saw Otis Hunt for the first time; I asked Otis Hunt if he could get a jar, and he said, 'Yes'; he left out the back door, was gone a few minutes, returned with a half-gallon jar of nontaxpaid whiskey which contained no stamps. . . . I paid Otis Hunt $3.00 for the half-gallon jar of nontaxpaid whiskey." . . . On cross-examination the witness testified: "As I recall, Otis Hunt lived on a dirt road."

The defendant's only witness testified that Otis Hunt lived on a paved road.

The only assignment of error relates to the following part of the judge's charge:

> "I instruct you in this case as to the testimony of Mr. Torrence, State's witness, that it is your duty to scrutinize his testimony with caution and care, in the light of his interest and bias, if any you find; but if after you do that, you believe beyond a reasonable

doubt that he is telling the truth, and you are satisfied from his testimony and beyond a reasonable doubt of the defendant's guilt, it would be your duty to so find, that is, return a verdict of guilty."

In addition to the above, the court charged: "If the State has failed to satisfy you from the evidence beyond a reasonable doubt or if you have a reasonable doubt as to the defendant's guilt, it would then be your duty to return a verdict of not guilty. . . ."

From an adverse verdict and judgment thereon, the defendant appealed.

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

F. D. Hackett and Robert Weinstein for defendant, appellant.

PER CURIAM. The testimony of witness Torrence was the only evidence relating to the charges in the bill of indictment. The instruction complained of here is similar, in principle, to the instruction approved by this Court in *S. v. Moore,* 192 N.C. 209, 134 S.E. 456. This record discloses

No error.

STATE v. JESSIE BELL KILGORE.

(Filed 7 June, 1957.)

Criminal Law § 6a—

The defense of entrapment is not presented upon evidence tending to show merely than an officer of the law, not in uniform and not informing defendant that he was an officer, purchased intoxicating liquor from defendant for the purpose of obtaining evidence.

APPEAL by defendant from *Williams, J.,* December 1956 Special Term of ROBESON.

Defendant was tried on two bills of indictment, each of which contained two counts. The first bill charged possession for the purpose of sale of intoxicating liquor and the sale of intoxicating liquor on 20 September 1956. The second bill contained similar charges with respect to possession and sale on 4 October 1956. The jury found defendant guilty on each count in the first bill and not guilty of the charges in the second bill.

The only evidence offered was the testimony of James E. King and two bottles of beer which he testified he purchased from defendant. King, an employee of the Alcohol & Tobacco Tax Division of the U. S.

Treasury Department, testified he, in company with another person, went to the home of defendant on 20 September 1956 and knocked on her door. She came to the door and asked what they wanted. The witness replied "some beer." She unlocked the door and led them to her kitchen where she sold him two quarts of Miller's High Life beer for two dollars which she put in a paper sack and he carried away with him. The witness was not in uniform nor did he have any badge on when he went to defendant's home. He did not inform the defendant that he was an officer, or that he was seeking evidence to convict defendant.

Judgment of imprisonment for eight months was entered on the verdict. Defendant appealed.

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

Britt, Campbell & Britt for defendant appellant.

PER CURIAM. Defendant claims entrapment as her defense. There is no evidence of entrapment. *S. v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191. No defense can, on this record, be predicated thereon. Hence, if error exists in the charge with respect to defendant's claim of entrapment, the asserted error is not prejudicial.

The charge with respect to the failure of the defendant to testify substantially conforms to the statute. *S. v. Horne,* 209 N.C. 725, 184 S.E. 470.

No error.

CLETUS OXENDINE RANSOM v. WILLIAM PRICE LOCKLEAR.

(Filed 7 June, 1957.)

Automobiles § 41d—

Evidence tending to show that as plaintiff, driving within the corporate limits of a town, slowed and gave a hand signal for a left turn into the driveway of a residence on her left, her car was struck from the rear by an automobile driven by defendant at a speed of some 70 miles per hour, *is held* sufficient to overrule nonsuit.

APPEAL by defendant from *Hall, J.,* at October 1956 Term, of ROBESON.

Civil action to recover damages for personal injuries allegedly proximately caused by negligence of defendant.

Defendant, answering, denied liability therefor.

Upon trial in Superior Court plaintiff offered evidence tending to show that on 8 May, 1956, about 9:30 a.m., as she was operating her 1951 Ford automobile west toward Maxton on Highway 74A, at a speed of about 35 miles per hour, in corporate limits of Pembroke, N. C., she slowed up and gave a hand signal for a left turn into a residence on the left, her automobile was struck by an automobile operated by defendant traveling west also; that this automobile traveling at a speed of 70 or more miles per hour had just passed another automobile, which was following and about 100 yards behind plaintiff's automobile, and turned back partly across the white line, and then on into and colliding with plaintiff's automobile; and that thereby she sustained personal injuries.

The defendant offered evidence as to his version of the occurrence.

The case was submitted to the jury upon three issues as to (1) negligence of defendant, (2) contributory negligence of plaintiff, and (3) damages sustained by plaintiff, all of which were answered in favor of plaintiff.

And to judgment in accordance with verdict, defendant excepted and appeals to Supreme Court, and assigns error.

Britt, Campbell & Britt for Plaintiff Appellee.
Nance, Barrington & Collier for Defendant Appellant.

PER CURIAM. The sole assignment of error on this appeal, other than formal ones, is directed to denial of defendant's motion for judgment as of nonsuit. Taking the evidence offered upon the trial below in the light most favorable to plaintiff, as is done in considering demurrer to the evidence, the case was one for the jury, and properly submitted to the jury. The jury has spoken. Hence in judgment signed there is

No error.

STATE v. CLEVELAND OXENDINE.

(Filed 7 June, 1957.)

APPEAL by defendant from *Mallard, J.*, January Term 1957 of ROBESON.

This is a criminal action tried upon a bill of indictment charging the defendant upon three counts: (1) with the unlawful possession of nontax-paid whiskey; (2) with the possession of nontax-paid whiskey for the purpose of sale; and (3) with the sale of nontax-paid whiskey. The defendant entered a plea of not guilty to each count.

The State offered as a witness Earl Branum, an employee of the Alcohol and Tobacco Tax Unit of the United States Treasury Department, who testified that he went with two day laborers to the house where the defendant was on the night of 9 September 1956, and one of the men accompanying him asked to buy some whiskey. The defendant told the man who asked for the whiskey that "he was pretty nearly out, but would let us have a drink. He poured out three drinks and each one paid for his drink." The witness further testified that the whiskey was poured from a pint bottle and that there were no tax stamps on the bottle; that his purpose in buying the whiskey was to discover law violators; that he used money which had been given to him by an Investigator of the Alcoholic Tax Unit.

The defendant offered no testimony. The jury returned a verdict of guilty on all three counts, which were consolidated for judgment. From the judgment imposed, the defendant appeals, assigning error.

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

Britt, Campbell & Britt and Nance, Barrington & Collier for defendant.

PER CURIAM. The State's evidence was sufficient to carry the case to the jury. Hence, the exception and assignment of error directed to the failure of the court below to dismiss as of nonsuit is without merit. Furthermore, the portions of the charge to the jury, to which the defendant has excepted and assigned as error, are in substantial compliance with our decisions bearing on similar instructions.

The defendant has failed to show any error which in our opinion would justify a new trial.

No error.

FAIRCHILD REALTY COMPANY v. SPIEGEL, INC., AND MORRISON-NEESE, INC.

(Filed 28 June, 1957.)

1. Appeal and Error § 49—

The findings of fact of the trial court are conclusive on appeal when supported by any competent evidence, but its conclusions of law, even though denominated findings of fact, are reviewable.

2. Waiver § 2—

Where a party is faced with the inconsistent choices of declaring a contract terminated by reason of breach or of accepting continuing benefits

under the contract, his election, with full knowledge of all the facts, to accept the continuing benefits waives his right to declare the contract terminated for such prior breach.

3. Landlord and Tenant § 17—

If the landlord receives rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, the acceptance of the rent constitutes a waiver of the forfeiture, which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent.

4. Same: Landlord and Tenant § 14—Lessor held to have waived right to declare forfeiture by acceptance of rents after sublease of premises.

The lease in question provided that lessee might not assign or sublease without the consent of lessor. The lease also provided for termination for default continuing for forty-five days after written notice by lessor to lessee of such default. Lessee assigned the lease and lessor notified lessee that it did not consent to the assignment and it would declare a forfeiture for breach of condition unless the breach was cured within the forty-five day period. Lessor refused rent tendered by the sublessee, but accepted rent from the lessee in accordance with the terms of the lease for more than a year after the expiration of the forty-five day period. *Held:* By accepting the rent after the expiration of the forty-five day period, lessor waived its right to declare forfeiture, and it was immaterial that payment of rent was made by the lessee rather than the sublessee.

HIGGINS, J., dissenting.

APPEAL by defendants from *Gwyn, J.*, November 1956 Civil Term of GUILFORD (Greensboro Division).

This action was instituted 1 December 1955. Each party by its pleading seeks a declaratory judgment determinative of its rights under a lease from plaintiff to Spiegel and by it assigned to its codefendant. A jury trial was waived. The court made detailed findings of fact. Summarized the facts found are:

Plaintiff is owner of a six-story building on Greene Street in Greensboro, N. C. On 20 October 1945 plaintiff leased this building to Spiegel, Inc., hereafter referred to as Spiegel, for a term of twelve years beginning 1 November 1945, with an option to renew for an additional term of twelve years. When the lease was made, the building was occupied by Morrison-Neese Furniture Company, hereafter referred to as Furniture Company, and had been so occupied for thirty years or more. It had conducted in said building a high-class retail furniture and decorating business. About 1 November 1945, Furniture Company sold its business, including its name and good will, to Spiegel, who continued to operate under the name of Morrison-Neese. Furniture Company had a paid-in capital in excess of $300,000. It was dissolved in 1946 or 1947.

The building was rented for $1,250 per month, plus three per cent of all sales in excess of $500,000 made from the demised property, the additional rental to be ascertained annually as of 31 October. The provisions of the lease with respect to assignment and default are:

"ASSIGNMENT AND SUBLETTING TWENTY-THREE: The Lessee may without the consent of the Lessor, assign or sublet, in whole or in part, the demised premises to any successor corporation without restrictions or to any subsidiary or affiliate upon the express condition that Lessee shall remain primarily liable for the performance of the conditions, agreements and terms of this indenture, including the payment of both minimum and additional rents, and Lessee may assign or sublet in whole or in part, the demised premises to any other person, persons or corporation, with the approval of the Lessor, which approval shall not be unreasonably withheld.

"DEFAULT TWENTY-FOUR: Lessee hereby agrees that if the rental hereunder reserved be not paid within fifteen days after written notice from Lessor to Lessee, that the same has become due and was not paid, or if default be made in the performance of any of the other covenants on its part herein contained and shall continue for forty-five days after written notice thereof given to the Lessee by the Lessor, such default or breach shall, at the option of the Lessor, work a termination of this lease to the same extent and with all the legal incidents as if the term hereof had expired by lapse of time, and it shall then be lawful for the Lessor, Lessor's agent or agents, to reenter the premises and remove all persons therefrom and to repossess said premises as of Lessor's original estate, without prejudice to other rights and remedies."

Spiegel is a large corporation, rated AAA, with a net worth in excess of $44,000,000. It has, in addition to financial strength, retail sales experience in the furniture business and other retail fields and had aggressive and competent management and sales personnel. The rental paid by Spiegel to plaintiff approximated $35,000 per year.

In July 1955 Spiegel sold its furniture business in Greensboro, and also retail furniture stores which it operated in Scranton, Pa., Oklahoma City, Okla., and Phoenix, Ariz., to Lewittes-Helser syndicate. The sale price of each store was based on 50% of inventory plus one dollar for fixtures and other assets except accounts receivable. The syndicate purchasing from Spiegel created corporations to operate each of the stores which it acquired. The corporation created to operate the store in Greensboro was defendant Morrison-Neese, Inc., a North Carolina corporation, hereafter called Morrison. Its president was formerly Spiegel's vice-president in charge of all of its furniture business. On 1 August 1955, Spiegel assigned the lease to Morrison.

On 26 July 1955 Spiegel wrote requesting plaintiff to assent to an assignment of the lease to Morrison. On 4 August plaintiff replied stating that it was informed Morrison had an authorized capital of $100,000 and only $3 paid in, and because of lack of satisfactory information it could not consent to the assignment. It requested additional information. On 15 August Spiegel wrote plaintiff, giving the business experience of those interested in and who would operate Morrison. The letter stated Morrison had a paid-in capital of $32,000, excellent banking connections, its backers had a net worth in excess of $1,000,000. It concluded: "In addition to the above, of course, there is a continuing liability of Spiegel, Inc., on the lease for the location. We are confident that the purchasers will do extremely well with the store and will make most satisfactory tenants."

On 15 August Morrison sent plaintiff a check for $1,250, the minimum rent for August. Plaintiff returned the check on 16 August, stating that it did not have a lease with Morrison and had not consented to the assignment by Spiegel.

On the same date plaintiff wrote Spiegel: "Due to failure to pay rent as provided in your lease of October 20, 1945, on the above captioned premises, and due to the fact that you have assigned the said lease and put another tenant into possession of the premises without our approval and consent, we hereby advise you that you have breached your lease and unless the defaults are cured within the time provided in Paragraph 24 of your said lease of October 20, 1945, we shall terminate the lease, take steps to repossess the premises, and preserve for ourselves all other legal rights and remedies provided in the lease."

On 18 August plaintiff acknowledged Spiegel's letter of 15 August giving information with respect to Morrison's financial and operating capacity. Plaintiff stated the information was inadequate. It concluded its letter thus: "We respectfully direct your attention to our letter of August 16, 1955, and wish to advise you that your letter of August 15 does not cause us to in any way alter the position expressed to you in our letter of August 16."

Spiegel promptly sent plaintiff a check for $1,250 to take the place of Morrison's check which plaintiff had refused to accept. On 19 August plaintiff acknowledged Spiegel's check for $1,250 for rent and added: "This is to advise that the said payment by you does not satisfy the defaults outlined to you in our letter of August 16, 1955, and that because of your continuing defaults and breach, our position as expressed to you in our letter of August 16 is not altered and the notice as contained in said letter is still in effect."

On 24 August Spiegel wrote plaintiff that Morrison had furnished Spiegel with guarantees on the lease assuring a net worth for Morrison and its guarantors of $800,000. It expressed the opinion that plaintiff

was acting arbitrarily in not approving the assignment, and hence it would maintain the validity of the assignment.

On 30 August plaintiff again wrote Spiegel asserting the information furnished it was inadequate for it, acting with reasonable business prudence, to approve the assignment. It stated: "But we wish to impress upon you that you made the assignment without first requesting our consent and approval, and your assignment of the lease to Morrison-Neese, Inc., without our consent and approval, is a breach of the lease. Our letter of August 16, 1955, notified you of this breach and also of your failure to pay rent as provided in the lease. Unless you cure these breaches within the time provided in the lease, we shall terminate the lease as stated in our letter of August 16, 1955."

On 27 September plaintiff wrote Spiegel: "On August 16, 1955, we served notice on you of your breach of your lease with us for the above described premises and advised you that unless the defaults are cured within the time provided in Paragraph 24 of your lease of October 20, 1945, we shall terminate the lease, take steps to repossess the premises, and preserve for ourselves all other legal rights and remedies provided in the lease.

"The time within which you may cure the defects will expire October 3, 1955.

"If the matter can be settled out of Court we do not want to bring a suit, but your refusal to furnish us with the information requested in our letter of August 30, 1955 does not leave us any alternative. Your conclusion that information would not be considered by the landlord is erroneous.

"We again request that you send us the information asked for in our letter of August 30, 1955 and again advise you that unless we are furnished with information which would justify our consent to your assignment of the lease, we shall proceed as outlined in our letter of August 16, 1955."

On 3 October Spiegel replied to plaintiff's letter of 27 September. It reiterated its position that the information furnished would suffice to satisfy a prudent business person in approving the lease. The letter concluded: "Should you take steps to repossess the premises we, of course, intend to take any and all steps necessary to resist such efforts. We are very confident that a court will uphold our position and that an arbitrary refusal of the landlord to recognize this assignment will not be sustained."

So far as the record discloses there were no further communications between plaintiff and Spiegel with respect to the assignment. Spiegel sent checks each month to plaintiff for the rent in accordance with the terms of the lease, including a check for additional rent based on sales

ending 31 October 1955. These checks were received and promptly cashed by plaintiff through September 1956.

On 16 April 1956 Morrison wrote plaintiff that as assignee of Spiegel it elected to exercise its option to extend the lease in accordance with its provisions. Plaintiff replied that it had not assented to the assignment and for that reason did not accept the letter as notice of intent to renew.

In addition to the facts stated above the court found:

"From August 16, 1955, until the trial of this case the plaintiff has consistently contended that Spiegel, Inc. assigned the lease to Morrison-Neese, Inc., without the plaintiff's consent and that the plaintiff had not unreasonably withheld such consent. On the other hand, from the inception of this matter, the defendants have both consistently contended that the assignment of the lease was valid and effective without the plaintiff's consent. These conflicting contentions of the parties could not be resolved short of litigation so long as the plaintiff, on the one hand, and the defendants, on the other, adhered to their respective positions."

"The plaintiff did not act unreasonably in withholding its approval of the assignment of the lease by Spiegel, Inc., to Morrison-Neese, Inc., because both Spiegel, Inc. and Morrison-Neese, Inc. failed to furnish to the plaintiff reasonably adequate and accurate financial information upon which the plaintiff could base a decision. The refusal of Spiegel, Inc. and Morrison-Neese, Inc. to supply the requested information justified the plaintiff in its decision to question the desirability of the assignment from the standpoint of the plaintiff."

"The plaintiff never accepted the payment of any rent from the defendant Morrison-Neese, Inc., returning to Morrison-Neese, Inc., all rent checks tendered by it. After this controversy arose between these parties with reference to assignment of the lease, the plaintiff did accept rent payments from the defendant Spiegel, Inc., taking the position that while plaintiff contended there was a default under the lease arising out of the failure of Spiegel, Inc., to secure the plaintiff's approval of the assignment, Spiegel, Inc., remained liable for the payment of rent so long as Spiegel, Inc. refused to concede that such default existed and did not surrender possession of the premises. Spiegel, Inc. paid and plaintiff accepted checks for the minimum monthly rental in the amount of $1,250.00 each for and during the months of August, 1955, through October, 1956, and also the percentage overage rental for the lease year which ended October 31, 1955. . . . During the pendency of this controversy the plaintiff has not attempted to exercise its option to terminate the lease and repossess the premises, because of uncertainty as to whether the plaintiff had the right to do so. The plaintiff has consistently contended that it has such right and the defendants have consistently contended otherwise. Until this conflict could be

resolved, the plaintiff did not exercise its option to terminate the lease. The plaintiff has brought no suit in ejectment against either of the defendants. As early as August 20, 1955, the plaintiff knew that Spiegel, Inc. had assigned the lease to Morrison-Neese, Inc., without the plaintiff's consent, but the plaintiff had no knowledge whatsoever concerning the terms and provisions of the assignment or the conditions, if any, upon which the assignment was made. A serious controversy existed between the plaintiff on the one hand and the defendants on the other as to whether the plaintiff's consent to the assignment was necessary, and neither the plaintiff nor the defendants were certain as to what their rights were in reference to this matter. The plaintiff was justified in not running the risk and uncertainty which would have been involved in an ejectment action. Therefore, the plaintiff's acceptance of the rental payments made by its lessee, Spiegel, Inc., did not constitute a waiver of the plaintiff's rights to have a judicial determination of whether Spiegel, Inc. had breached the lease by reason of the fact that the plaintiff's consent to the assignment had not been obtained. Until the time when such determination should be made, the plaintiff did not know whether it had the right to terminate the lease."

Based on its findings the court concluded that there was a *bona fide* controversy sufficient to give the court jurisdiction to render a declaratory judgment; that Spiegel had breached the lease by assigning it to Morrison without plaintiff's consent; that the assent had not been unreasonably withheld; that Spiegel did not cure the breach within the time provided by sec. 24 of the lease; and that this action was instituted with reasonable promptness. It further concluded:

"(5) The plaintiff has not yet elected to terminate the lease and it is still in force and effect between the plaintiff and the defendant Spiegel, Inc., and the plaintiff now has the right to exercise its option to terminate the lease because of said breach, if the plaintiff shall elect so to do.

"(6) The plaintiff's acceptance of the rental payments made by the defendant Spiegel, Inc., since this controversy between the parties has arisen did not constitute a waiver by the plaintiff of its position that there was a breach of the lease by the defendant Spiegel, Inc., and did not waive the plaintiff's right to seek an adjudication by this Court of the question of whether the defendant Spiegel, Inc. had breached the lease by assigning the same without the plaintiff's consent, as contended by the plaintiff, or whether the defendant Spiegel, Inc., had not breached the lease, as contended by the defendants, and the plaintiff is not thereby estopped to obtain the adjudication sought in this action."

Upon its findings and conclusions the court adjudged that plaintiff has a right to exercise its option to terminate the lease, which option plaintiff is required to exercise within thirty days. Upon the rendition

of the judgment defendants took exceptions to findings of fact and conclusions of law and to the judgment and appealed.

Jordan & Wright for plaintiff appellee.

Brooks, McLendon, Brim & Holderness for defendant appellants, by Hubert Humphrey.

RODMAN, J. Findings of fact, when supported by any evidence, are conclusive on appeal. *Rubber Co. v. Shaw,* 244 N.C. 170, 92 S.E. 2d 799; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; *Coach Co. v. Coach Co.,* 237 N.C. 697, 76 S.E. 2d 47. Conclusions of law, even if stated as factual conclusions, are reviewable. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507; *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861; *Radio Station v. Eitel-McCullough, Inc.,* 232 N.C. 287, 59 S.E. 2d 779.

The parties are not in agreement with respect to what transpired at the July 1955 conference between representatives of plaintiff and representatives of defendants, called for the purpose of discussing a sale of Spiegel's furniture business and an assignment of the lease of plaintiff's building. Defendants assert that plaintiff arbitrarily announced it would not assent to any assignment unless it could get a new lease based on 4 or 4½% of sales, with a guaranteed minimum of $25,000. Plaintiff denies this, and its witnesses testified that there was discussion of a new lease with changes to be made in the building including air conditioning; and only after that idea was abandoned was the question of an assignment of the lease discussed. At that time defendants were notified plaintiff would require complete information with respect to the merchandising ability and financial standing of any proposed assignee before it would give its consent.

There is evidence supporting the court's finding of fact that plaintiff was not furnished information sufficient to require its assent to the assignment and that its consent was not unreasonably withheld. The rights of the parties must be determined in the light of that established fact.

Article 23 of the lease is a restriction on lessee's right of alienation. *Rogers v. Hall,* 227 N.C. 363, 42 S.E. 2d 347. It does not purport to be a covenant on the part of lessee. Whether a violation of that restrictive provision comes within the provision of Article 24 which permits lessor to terminate the lease upon default by lessee of its covenants need not now be determined. Plaintiff so asserted and has acted upon the theory that it did have that right.

Thus we are brought to the crucial question of the case: Has plaintiff, by the acceptance of rents for a period of more than a year and with knowledge that the lease had been assigned, waived any right

which it had to declare a forfeiture on account of the assignment, or may it now exercise that right?

The Court, in *Manufacturing Co. v. Building Co.*, 177 N.C. 103, 97 S.E. 718, said: "No one can be said to have waived that which he does not know, or where he has acted under a misapprehension of facts. Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so he neglects to enforce them, or chooses one benefit instead of another, either, but not both of which he might claim. The knowledge may be actual or constructive; but one cannot be willfully ignorant and relieve himself of a waiver because he did not know. The question of waiver is mainly one of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waive, when he will be forbidden to assert to the contrary."

"Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." *Mr. Justice Holmes* in *Bierce v. Hutchins,* 205 U.S. 340, 51 L. Ed. 828.

Stacy, J. (later *C. J.*), in applying these principles to the case of a landlord who with knowledge of a breach accepted rents, said: "It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent." *Winder v. Martin,* 183 N.C. 410, 111 S.E. 708.

The rule as stated has been consistently applied in similar factual situations. *Richburg v. Bartley,* 44 N.C. 418; *Fredeking v. Grimmett,* 86 S.E. 2d 554 (W. Va.); *Whitehouse Restaurant v. Hoffman,* 68 N.E. 2d 686 (Mass.); *Hart v. Shell Oil Co.,* 116 F. 2d 598.

The case of *Woollard v. Schaffer Stores Co.,* decided by the New York Court of Appeals, reported 5 N.E. 2d 829 and 109 A.L.R. 1262, with lengthy annotations, bears close resemblance to the facts of this case. There, as here, a declaratory judgment was sought to determine the rights of the parties. There the lease contained a covenant that lessee would not sublet nor make structural changes in the building. These covenants were violated. Here the lease contains a restriction on the right to assign. This provision has been violated. There the landlord, after learning of the breach of the covenant, accepted rents with this reservation: "any rentals you may pay hereafter will be received by me only with the understanding that the same are received

without prejudice to the action which will follow your failure to comply with my notice of September 19." The notice referred to was that the lease had terminated by the breach. Here no reservation of rights was attempted by the landlord when it accepted the rent checks from the lessee. There and here rent checks were issued and accepted after suit was begun by the landlord to enforce his asserted rights. The court held that the acceptance of rent, notwithstanding the notification and reservation waived landlord's right to terminate. Here there has been no reservation attempted in accepting the rents. True the landlord refused to accept a check of the assignee, and the payments were made by lessee. That fact makes no difference. See Landlord and Tenant, 32 Am. Jur. sec. 883, 51 C.J.S. sec. 117 (2) (a).

Every fact necessary to establish waiver in accordance with the definition given in *Manufacturing Co. v. Building Co., supra,* is present here. Plaintiff, when it wrote its letter of 16 August had knowledge of the assignment if not the details of the assignment. It knew the provisions of the lease and that the assignment did not have lessor's approval. It notified defendant Spiegel: "We shall terminate the lease, take steps to repossess the premises and preserve for ourselves all other legal rights and remedies provided in the lease." In several letters written thereafter it reiterated its intent to terminate the lease. It informed Spiegel that its opportunity to cure the breach expired on 3 October. On that date Spiegel notified plaintiff that it would stand by its position. Prior to 3 October 1955 plaintiff did not know whether the breach would be cured or not. Hence, acceptance of rents in August and September 1955 did not waive its rights, but when 3 October came and passed, plaintiff was required to elect whether it would continue with the contract or maintain its position that there was no longer any contractual relations existing between it and the defendants. Two roads were open. Plaintiff had the right to choose which route it would take. Plaintiff says that the rent payments were but the contractual obligation of Spiegel, and hence there was no waiver of its rights; but Spiegel had no contractual obligation if no contract any longer existed. Its obligation to pay rents was based on the continued existence of the contract. If and when the contract terminated and Spiegel or Morrison remained in possession, their possession was wrongful, and plaintiff was entitled to recover from them damages for wrongful possession, not rent. Damages and rent are different. *Stacy, C. J.,* speaking in *Seligson v. Klyman,* 227 N.C. 347, 42 S.E. 2d 220, said: "The law is well settled that from a lessee who wrongfully holds over, the landlord is not only entitled to obtain possession of his property, but also to recover indemnity for its wrongful detention. *McGuinn v. McLain,* 225 N.C. 750, 36 S.E. 2d 377; *Allen v. Taylor,* 96 N.C. 37, 1 S.E. 462; Anno. A.L.R. 386. This is not necessarily the stipulated rent in a lease for a time

prior thereto. . . . Indemnity or compensation, rather than rent, would seem to be the proper measure of recovery."

The acceptance of rents subsequent to 3 October 1955 including the substantial sum in excess of the minimum paid for the use of the property for the year ending 31 October 1955 which included three months' occupancy by Morrison constituted a waiver of the breach and a recognition by plaintiff that the contract remained in effect. After this action was instituted and after the defendants had expressly pleaded the acceptance of rents as a waiver of plaintiff's right to assert a forfeiture, plaintiff continued to accept rents for several months and practically up to the time of the trial.

The doctrine of election and waiver has been applied in other factual situations where one is required to make a choice. Illustrative are *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210; *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122; *Benton v. Alexander,* 224 N.C. 800; *Macbeth-Evans Glass Co. v. General Electric,* 246 F. 695.

While plaintiff, by the acceptance of rent, has waived its right to object to the assignment, it has not released Spiegel of any of its contractual obligations. Its refusal to accept payment of the rent from Morrison was notice to Spiegel that it would be held to a compliance with all of its contractual obligations. Spiegel has properly recognized its responsibility to plaintiff under the contract. It must, of course, comply with each of its contractual obligations. *Bank v. Bloomfield, post,* p. 492; *Childs v. Warner Bros. Southern Theatres,* 200 N.C. 333, 156 S.E. 923; *Connolly v. Rogers,* 100 A.L.R. 552, and annotations; *Maybury Shoe Co. v. Rochester Factory Holding Co.,* 185 A. 654 (N.H.); 32 Am. Jur. 313, 314; 51 C.J.S. 574.

There was error in the conclusion that plaintiff had not waived its right to declare a forfeiture and that it now had the option of declaring a forfeiture. On the facts found the court should have concluded that plaintiff had waived its right to object to the assignment, that the contractual relationship created by the original lease, with the obligations there assumed by Spiegel and plaintiff continued in full force and effect.

Error and remanded.

HIGGINS, J., dissenting: The plaintiff had a rental contract with Spiegel which called for the payment of $1,250 per month plus a percentage of the sales above a fixed amount. The total annual rental amounted to about $35,000. The lessor is a large corporation with a net worth of more than $40,000,000.00, with vast experience and a history of splendid success in the retail sales of furniture. The plaintiff is and has been willing to continue this rental contract with Spiegel.

However, this controversy arose by reason of the refusal of the lessor to approve a sublease to Morrison-Neese, a new corporation with

$32,000 capital and its prospects of success questionable. Approximately two-thirds of the plaintiff's rent came from the percentage on sales. The plaintiff, therefore, has a vital interest in the amount of sales. It cannot in good conscience be expected to approve a transfer of the business to another tenant whose prospects are doubtful. The plaintiff refused to receive rent from the sub-lessee but continued to receive payments from the original lessee. In my opinion the trial court's finding that the plaintiff had not waived its right to refuse approval of the transfer is supported by competent evidence.

There is some question about the form of the judgment. I vote to modify and affirm.

JOSEPH C. GLENN, BY HIS NEXT FRIEND, MRS. NORA G. GLENN, v. THE CITY OF RALEIGH, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 28 June, 1957.)

1. Municipal Corporations § 14i—

Evidence tending to show that a municipal employee was using an old and powerful rotary-blade mower on rocky ground in cutting grass in a park operated and maintained by the municipality, that the mower had no guards and had been throwing rock for such length of time that the municipality had actual or constructive knowledge of the danger, and that the mower threw a rock which hit an invitee of the park, *is held* sufficient to be submitted to the jury on the issue of negligence.

2. Same—

A resident of a municipality is at least impliedly invited to visit a public park and use recreational facilities therein maintained by the municipality for the benefit of its citizens.

3. Municipal Corporations § 12—

A municipality is immune to suit for negligence in the performance of a governmental function of the municipality, but is liable for negligence in fulfilling a function of a proprietary character.

4. Trial § 22b—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him, and defendant's evidence which tends to establish another or different state of facts or which tends to impeach or contradict plaintiff's evidence must be disregarded.

5. Municipal Corporations §§ 12, 14i—Plaintiff's evidence held not to warrant nonsuit on ground of governmental immunity.

Plaintiff's evidence tended to show that he was injured while an invitee in a municipal park by the negligence of an employee of the city, and that the municipality received charges and fees for the use of recreational

facilities of the park for the year in question, resulting in net revenues which were used by the city for capital maintenance of the park, salaries, expenses, etc. Defendant municipality moved for nonsuit on the ground of governmental immunity. *Held:* Plaintiff's evidence was sufficient to import a corporate benefit or pecuniary profit or advantage to the municipality so as to exclude the application of governmental immunity, and nonsuit was properly denied, defendant's evidence at variance therewith or in contradiction thereof not being considered upon the motion to nonsuit.

6. Negligence § 20—

An instruction of the court defining negligence and proximate cause in general terms in giving the contentions of the parties in detail, but failing to instruct the jury what facts were necessary to be found by them from the evidence to warrant an affirmative finding on the issue of negligence, must be held for prejudicial error.

7. Trial § 31b—

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, G.S. 1-180, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient.

DENNY, J., concurring in result.

APPEAL by defendant from *Seawell, J.*, First October Civil Term 1956 of WAKE.

Civil action to recover damages for personal injuries.

The essential allegations of the complaint are these: Plaintiff is a 17 year old boy, resident in Raleigh, and on 14 May 1953 was a junior in a High School in that city, which is a municipal corporation. That for a long period of time prior to 14 May 1953, and on that day, the city of Raleigh maintained, managed, controlled and operated for profit a public recreation ground known as Pullen Park. That about 4:00 o'clock p.m. on 14 May 1953, plaintiff and some of his schoolmates as invitees of the city of Raleigh went to Pullen Park to have a picnic supper. That while he and some of his schoolmates were sitting at a table provided by the city for public use in the Park, he was struck violently on his head by a rock about 3 inches in diameter thrown from a large grass or lawn mower of the defendant negligently operated by an employee of the city. That the grass mower was defective and dangerous. That plaintiff's skull was fractured, and he sustained severe permanent injuries.

Defendant's answer denies the complaint's allegations of negligence, and while admitting that it maintains Pullen Park as a public recreational ground for the use of its citizens, denied that the Park was operated for profit.

Plaintiff's evidence showed these facts: About 4:00 p.m. o'clock on 14 May 1953 plaintiff and five of his High School classmates went

to Pullen Park to prepare a wiener roast or picnic for a group of 30 or 40 of their classmates. Having completed their preparations for the wiener roast, and while waiting for their other classmates to arrive, these six students were seated at a table about 6 feet long and about waist high, provided by the city. This table was in front and east of a shed or cabin and some distance west of a pavilion. At this time Walter Lucas, an employee of the city, was operating a 24-inch blade Whirlwind mower, rotary blade, Toro make, 8 horse power motor, with no guard on the front of it. He was cutting grass in a very rocky area some 50 to 60 feet from where plaintiff and his classmates were seated at the table. No other persons were in the area. Suddenly "a whizzing sound" came from the direction of the mower, which whizzing sound went straight down the middle of the table between the students seated on its sides, and then there was the sound of an impact as a rock struck plaintiff's head and fell to the ground. Plaintiff threw his hands to his forehead, and bleeding profusely was carried to a hospital. Christine Owens, who was seated at the table, picked up the rock, which weighs 6½ ounces, and was offered in evidence.

The mower was an old model mower, "that must have been purchased in 1942 or 1943." From 1950 on the mower had had no guard on the front, if it had ever had one. Since 1946 the Whirlwind rotary mowers have had guards, front and rear and on the sides. The revolutions per minute of this type mower are from 1800 to 3600.

J. D. Hinsley was Superintendent of Park Maintenance for the city of Raleigh from 8 August 1950 to August 1956. He was a witness for plaintiff, and testified on cross-examination: "I have seen them (rocks) go out from under mowers in any direction thousands of times; how the rocks got out from under there I couldn't say whether from on top of the blade or underneath it, or whether knocked out from under it there or how, but I have seen them hit the ground and go as far as 150 feet. I have seen a rock propelled up in the air only a short distance, I would say maybe 50 feet before it hit the ground, just pop up and back down. I have seen them travel a greater distance than that on the ground. Q. You mean from this particular mower? A. Yes, sir,—well, I don't know particularly about that one, never paid any particular attention to where it was throwing them, but in similar makes in my everyday work with them I have seen many go from all types of machines."

W. H. Carper, city manager of the city of Raleigh, testified, as a witness for plaintiff, that the net revenue to the city of Raleigh from Pullen Park for the fiscal year 1 July 1952 to 30 June 1953 was $18,531.14. On cross-examination Carper testified in substance as follows in the absence of the jury—the defendant made no objection to the jury not hearing the testimony—: During the year ending 30 June

1953 the city of Raleigh had two major parks: Pullen Park and Chavis Park. The net receipts from Chavis Park for the fiscal year 1 July 1952 to 30 June 1953 was $4,117.85. During this period the maintenance cost to the city of Raleigh of all its parks was $90,024.95, and the cost of the recreation program was $68,223.00. The maintenance fund came from the general fund revenue, and the recreational appropriation came from revenue other than *ad valorem* taxes. The net revenue from Pullen and Chavis Parks was used for capital maintenance of the park areas, building items, paying salaries, buying fuel, etc.

During the presentation of the defendant's evidence, the city introduced a considerable volume of evidence in the absence of the jury bearing upon whether or not there is governmental immunity for the defendant in this case. The city made no objection to the jury not hearing it. A great part of this evidence is devoted to the benefits and advantages of recreational facilities and parks. This evidence in respect to the financial operation for the fiscal year 1952-1953 of Pullen Park is as follows: During the fiscal year 1952-1953 the city of Raleigh spent for the maintenance of all its parks $90,024.95, and from this amount $25,125.01 was spent for that purpose on Pullen Park. During the same period the city spent for recreation $68,223.00, and of that amount $18,870.95 was spent for that purpose in Pullen Park. The receipts during that period for all activities in Pullen Park for which charges were made amounted to $18,531.14. These receipts were expended "for upkeep, repairs, installation of new fixtures in the park amusement section, repairs to the particular activities that went into the receipts in what is called the amusement park, the swimming pool, the rides." No part of the receipts was spent in that part of the park not embraced in the amusement area. There was a park maintenance fund for that. The amusement area contains the train, the merry-go-round and the swimming pool: they were the only things in Pullen Park for which a charge was made. Adjacent to the amusement area is the picnic area. No charge is made by the city for the use of the picnic area and the cabin. Pullen Park has 42 acres.

Upon issues submitted the jury found that plaintiff was injured by the negligence of the defendant as alleged, and awarded damages in the amount of $32,500.00.

From judgment on the verdict defendant appeals.

Paul F. Smith for Defendant, Appellant.
Douglass & McMillan for Plaintiff, Appellee.

PARKER, J. The defendant assigns as error the failure of the court to allow its motion for judgment of nonsuit renewed at the close of all the evidence.

The defendant contends that plaintiff should have been nonsuited for the reason that he had not made out a case of actionable negligence against it, but if he has, it, as a municipal corporation, is immune to suit for negligence in the performance of a governmental duty in the operation and maintenance of Pullen Park.

Defendant's contention that plaintiff has not made out a case against it of actionable negligence need not detain us. Considering plaintiff's evidence in the light most favorable to him, it appears that defendant's employee on the afternoon of 14 May 1953 was operating on very rocky ground in Pullen Park defendant's old, powerful 24-inch blade Whirlwind mower, dangerous because it had no guard in front, and which, when in operation on such ground, had been throwing rocks from it for some distance, that the defendant had actual knowledge of such facts, or, if not, these facts had existed for a sufficiently long time for it in the exercise of due care to have had knowledge of them, that the defendant should have reasonably foreseen that some injury would likely follow from the operation of this Whirlwind mower to a person using the Park, and that a rock thrown by such mower proximately caused plaintiff's injuries.

Plaintiff was at least impliedly invited to visit Pullen Park and make use of its facilities. *Lovin v. Hamlet,* 243 N.C. 399, 90 S.E. 2d 760. This Court said in *Brigman v. Construction Co.,* 192 N.C. 791, 136 S.E. 125, "if a person enters upon the premises of another by reason of express or implied invitation, the owner is bound to exercise ordinary care for his safety." Plaintiff's evidence makes out a case of negligence.

The rule that a municipal corporation is immune to suit for negligence in the performance of a *governmental* function of the municipality, but is liable if it is fulfilling a function of a *proprietary* character is well settled in this jurisdiction. *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770; *Rhodes v. City of Asheville,* 230 N.C. 134, 52 S.E. 2d 371; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Hodges v. City of Charlotte,* 214 N.C. 737, 200 S.E. 889; *Lowe v. City of Gastonia,* 211 N.C. 564, 191 S.E. 7; *Fisher v. City of New Bern,* 140 N.C. 506, 53 S.E. 342; *Moffitt v. City of Asheville,* 103 N.C. 237, 9 S.E. 695.

In *Moffitt v. City of Asheville, supra,* this Court said:

> "The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. A town acts in the dual capacity of an *imperium in imperio,* exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit. When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the man-

agement of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality. (Citing cases). The grading of streets, the cleansing of sewers and keeping in safe condition wharfs, from which the corporation derives a profit, are corporate duties. (Citing cases). On the other hand, where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. (Citing cases)."

The late cases, as the earlier ones, present conflicting decisions as to the question whether a municipal corporation in the maintenance of parks as places of recreation and resort for the people is discharging a governmental duty or a proprietary duty. The view taken in probably a majority of the jurisdictions in this country is that a municipality in maintaining a public park is engaged in a governmental duty, and therefore in the absence of a statute imposing liability, except in certain instances set forth in 39 Am. Jur., Parks, Squares, and Playgrounds, Sec. 37 *et seq.*, is not liable for injuries resulting from the negligence of its employees. Other jurisdictions are committed to the view that a municipality must exercise ordinary care in maintaining its public parks to make them reasonably safe for persons frequenting and using them, and that it is subject to liability for injuries resulting from its failure to do so, which decisions are based for the most part, but not in every instance, upon the theory that it maintains its parks in a proprietary capacity. The very numerous cases are cited in Anno.: 29 A.L.R. 863 *et seq.;* 42 A.L.R. 263 *et seq.;* 99 A.L.R. 687 *et seq.;* 142 A.L.R. 1342 *et seq.;* 42 A.L.R. 2d 947; 39 Am. Jur., Parks, Squares, and Playgrounds, Sec. 35; McQuillin's Municipal Corporations, 3rd Ed., Vol. 18, Sec. 53.112; 63 C.J.S., Municipal Corporations, Sec. 907(b) and (c).

The Courts of different states have taken varying views of the effect of a municipality conducting its parks in such a manner as to derive revenue therefrom in considering the question as to whether the municipality was acting in a governmental or proprietary capacity. Anno.: 29 A.L.R. 874-875; 42 A.L.R. 265; 99 A.L.R. 694-696; 142 A.L.R. 1370-1372; 39 Am. Jur., Parks, Squares and Playgrounds, Sec. 37; McQuil-

lin's Municipal Corporations, 3rd Ed., Vol. 18, pp. 451-452; 63 C.J.S., Municipal Corporations, p. 318.

In *Carta v. City of Norwalk*, 108 Conn. 697, 145 A. 158, the city received a $2,500.00 rental for the lease of a bathing beach, the city lessor reserved the right to inspect the premises at all times. This rental was held *prima facie* to import such corporate benefit or pecuniary profit as to exclude city from rule granting it immunity from liability for its negligence, and to render erroneous direction of nonsuit in action for negligent injuries resulting in death. The Court said:

> "However, if property is not held and used by the city for municipal purposes exclusively, but in considerable part as a source of revenue, the city is responsible, as a private owner would be, for injury sustained through its negligence. *Hourigan v. Norwich*, 77 Conn. 358, 365, 59 A. 487; *Oliver v. Worcester*, 102 Mass. 489, 502, 3 Am. Rep. 485; *Chafor v. Long Beach*, 174 Cal. 478, 163 P. 670, L.R.A. 1917E, 685, Ann. Cas. 1918D, 106; 6 McQuillin on Municipal Corporations, p. 5512. . . . In the present case the amount of annual rental accruing to the city ($2,500) is such as to remove it, at least *prima facie*, from the category of such incidental income, and to import such a 'special corporate benefit or pecuniary profit' as to exclude the application of the rule of governmental immunity. It may be that a further development of facts may alter the situation, but the plaintiff's evidence and the required inferences therefrom were sufficient to protect him from a nonsuit on this ground."

See, also, *De Capua v. City of New Haven*, 126 Conn. 558, 13 A. 2d 581; *Tierney v. Correia*, 120 Conn. 140, 180 A. 282.

We have examined the record and briefs in *Lowe v. City of Gastonia, supra*, in the Clerk's Office. The complaint alleges, "the defendant, city of Gastonia, maintained and operated in its corporate capacity, the said Golf Course as a business for profit, charging patrons thereon a fee for playing golf on said course." The city clerk was a witness for plaintiff, and testified in substance: The Golf Course was a part of the Recreational System of the city of Gastonia. It was operated by Neely Price for the city. The city did not make any money off the Golf Course, but lost money every year. Plaintiff's evidence further showed fees were charged to all who played, except caddies. Plaintiff, when injured, was on the Golf Course as a caddy. Defendant in its answer admitted that it owned the Golf Course, but denied that it operated it as a business for profit. Defendant contended in its brief that plaintiff should have been nonsuited on the ground that there was no evidence of negligence on its part, but if there was, plaintiff was guilty of contributory negligence as a matter of law, and further, that if these contentions

were untenable, then it was operating the Golf Course as a governmental function, and is immune from suit. Issues of negligence, contributory negligence and damages were submitted to the jury, and answered in plaintiff's favor. In upholding the trial this Court said: "Defendant's contention on its appeal to this Court that it is not liable to the plaintiff in the action because it owned and maintained the Golf Course in the exercise of a governmental function, cannot be sustained."

This Court said in *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325: "When a municipal corporation is acting in its ministerial or corporate character in the management of property for its own benefit, it may become liable for damages caused by the negligence of its agents subject to its control."

Bolster v. Lawrence, 225 Mass. 387, 114 N.E. 722, L.R.A. 1917B 1285, points out the test, with plenary citation of authority, which is generally applied respecting liability in tort against municipalities. The Court very tersely said: "The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability, if it is not, there may be liability."

In 39 Am. Jur., Parks, Squares, and Playgrounds, sec. 37, it is said: ". . . the rule in many jurisdictions is that if a municipality conducts its parks in such a manner as to derive revenue therefrom, it acts in a proprietary capacity and will be held liable for injuries resulting from defective or dangerous conditions which are allowed to exist. In order to deprive a municipal corporation of the benefit of governmental immunity, however, the act or function must involve special corporate benefit or pecuniary profit inuring to the municipality."

In *Hannon v. Waterbury,* 106 Conn. 13, 136 A. 876, 57 A.L.R. 402, it was held that the maintenance of a swimming pool and locker rooms in high school was a governmental function of the city, so as to render it immune from liability for injury, though a small charge was made for use of pool partially covering expense of maintenance. See *Burton v. Salt Lake City,* 69 Utah 186, 253 P. 443, 51 A.L.R. 364, where it was held that the city, in maintaining under statutory authority a bath house and swimming pool for the use of which admission is charged, acts in its private capacity, and is liable for injuries caused by their negligent operation.

In *Pickett v. City of Jacksonville,* 155 Fla. 439, 20 So. 2d 484, the city owned and operated a pool for swimming in Springfield Park, and charged a fee for the use thereof. Plaintiff's 12 year old son paid the city to use the pool, put on his bathing suit, and entered the pool. The declaration alleged he drowned due to the city's negligent failure to provide a sufficient number of attendants and to make reasonable use of

safety equipment. The Court reversed the sustaining of a demurrer to the declaration.

We are advertent to G.S. 160-156, which is a declaration of State Public Policy as to adequate recreational programs and facilities, and to G.S. 160-163 entitled Petition for establishment of system and levy of tax. We are also advertent to *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702; *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486; *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292; *Lovin v. Hamlet, supra; Atkins v. Durham,* 210 N.C. 295, 186 S.E. 330. We are also advertent to *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423, where it was held that the city charging the actual expense of removing garbage did not change its act from a governmental function to a proprietary function. We are further advertent to our decisions that where a municipality enters the business of selling light and power to its citizens for profit, it is not regarded as being in the exercise of governmental functions, and under proper circumstances may be held to civil liability for its torts. *Munick v. Durham,* 181 N.C. 188, 106 S.E. 665; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399; *Fisher v. New Bern, supra.*

Considering plaintiff's evidence in the light most favorable to him, and disregarding defendant's evidence which tends to establish another and a different state of facts, or which tends to impeach or contradict his evidence, which we are required to do on the motion for judgment of nonsuit (*Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676), it is our opinion that the net revenue of $18,531.14 for the fiscal year 1 July 1952 to 30 June 1953 received by the city of Raleigh from the operation of Pullen Park for that period, which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc., (the evidence that the $18,531.14 was spent in the amusement area only is the defendant's evidence), was such as to remove it, for the purposes of the consideration of a motion for judgment of nonsuit, from the category of incidental income, and to import such a corporate benefit or pecuniary profit or pecuniary advantage to the city of Raleigh as to exclude the application of governmental immunity. The required inferences from plaintiff's evidence as set forth in the Record are sufficient to protect him from a nonsuit on this ground.

However, the case must be tried anew because of a fatal error in the charge. The defendant's assignments of error Nos. 30 and 31 are to the effect that, while the court in instructing the jury on the first issue of negligence stated in general terms negligence and proximate cause, it failed and neglected to tell the jury what facts, if found by them, would constitute actionable negligence on defendant's part, and left the jury unaided to apply the law to the facts relating to this issue.

A reading of the charge shows that in respect to the first issue the court elaborately defined negligence and proximate cause in general terms, and in detail stated the contention of the parties, but that it is indisputably clear that the Trial Judge failed to declare and explain the law upon the evidence given in the case. Nowhere in the charge did he instruct the jury what facts it was necessary for them to find to constitute negligence on the part of the defendant. Nowhere in the charge did the Trial Judge instruct the jury as to the circumstances under which the first issue should be answered in the affirmative, and under what circumstances it should be answered in the negative.

The provisions of G.S. 1-180 require that the Trial Judge in his charge to the jury "shall declare and explain the law arising on the evidence in the case," and unless this mandatory provision of the statute is observed, "there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented." *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375.

The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G.S. 1-180 imposes upon the Trial Judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties, as here, is not sufficient to meet the statutory requirement. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases are cited. In *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, this Court said, quoting from Am. Jur.: "The statute requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' 53 Am. Jur., Trial, section 509."

New trial.

DENNY, J., concurring in result: I have come to the conclusion that in view of our decisions which hold that a municipality may be held liable for its acts of negligence in connection with the construction and maintenance of a golf course, *Lowe v. Gastonia,* 211 N.C. 564, 191 S.E. 7; an airport, *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371; streets, *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694; a water and light plant, *Munick v. Durham,* 181 N.C. 188, 106 S.E. 665; wharves, *Henderson v. Wilmington,* 191 N.C. 269, 132 S.E. 25, etc., that municipalities may be properly held liable for acts of negligence committed by its agents and employees in the operation and maintenance of its parks and playgrounds.

A municipality may in certain instances be liable in *tort* even though it be engaged in a governmental function as well as when it is engaged in a proprietary function, although such governmental function is for a public purpose and may be maintained as a necessary governmental expense.

The construction and maintenance of streets by a municipality is a governmental and not a proprietary function; but since the decision in *Bunch v. Edenton,* 90 N.C. 431 (1884), it has been uniformly held in this jurisdiction that municipalities may be held liable in *tort* for failure to maintain their streets in a reasonably safe condition, and they are now required by statute to do so. G.S. 160-54; *Hamilton v. Rocky Mount,* 199 N.C. 504, 154 S.E. 844; *Speas v. Greensboro,* 204 N.C. 239, 167 S.E. 807; *Whitacre v. Charlotte,* 216 N.C. 687, 6 S.E. 2d 558, 126 A.L.R. 438; *Hunt v. High Point, supra.*

A city may establish and maintain a water plant and operate such plant in its governmental capacity in so far as it uses the water for extinguishing fires, washing streets and the like, *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411, but it operates such plant in its proprietary capacity when it sells water to its citizens. Even so, the expenditure of money derived from taxes for the construction and maintenance of such plants is held to be for a public purpose and a necessary governmental expense. *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029. Likewise, a municipal light plant is held to be a necessary expense and may be constructed without a vote of the people. *Fawcett v. Mt. Airy, supra.* A municipality is held to be acting in its governmental capacity in distributing electric current for lighting its streets, *Baker v. Lumberton,* 239 N.C. 401, 79 S.E. 2d 886, and in the operation and maintenance of its traffic signals, *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889. However, a municipality acts in its proprietary capacity when it establishes an electric distribution system and sells electric current for profit. *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543.

Our Court, in *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702, speaking through *Seawell, J.,* said: "The Constitution plainly lays upon all agencies concerned with administration, including the courts, the duty to put first things first; not to lose perspective in spending tax money, which is said to be the lifeblood of government. So long as our conception of municipal power is such as to permit those who fight the battles of industry in crowded cities to be regarded as dispensable, and the casualties of accident and disease, directly caused or greatly augmented by congested living, as of no direct concern of municipal government, it is difficult to see how playgrounds and recreational facilities can be regarded as a necessary municipal expense.

"Independently of any question as to the degree of social necessity, we believe that the activities proposed, however qualifying as a public

purpose for which the municipality may provide by approval of the people, are too remote from the governmental function to be classed as objects of necessary public expense."

I do not consider the incidental charges made for the use of the facilities at Pullen and Chavis Parks to be determinative on the question of governmental immunity. The total receipts from these sources amounted to only $22,648.99 for the fiscal year ending 30 June 1953, in comparison with the over-all cost of $158,247.95 to operate and maintain all the parks in Raleigh, including its recreational program, for that period. The profit motive it would seem could not have been a substantial factor in the operation and maintenance of the defendant's parks or in the maintenance of its recreational program.

Ordinarily, when a city engaged in a business for profit it is one that will not only pay the expenses in connection with its operation, but will earn substantial income that will go into its treasury for the benefit of all its citizens and taxpayers. In the instant case, the income from Pullen Park, during the period under consideration, lacked $6,593.87 of being sufficient to operate and maintain that particular park. Anno.—Parks—Liability of Municipality, 99 A.L.R. 694, *et seq.*

In light of the decisions I have cited, and in view of the fact that the trend in this country is to limit rather than to extend the doctrine of governmental immunity, Municipal Corporation Law by Antieau, Volume 2, section 11.11, page 34; McQuillin's Municipal Corporations, 3rd Edition, Volume 18, section 53.112, page 453, *et seq.; Augustine v. Town of Brant,* 249 N.Y. 198, 163 N.E. 732, I am constrained to support the rule to the effect that municipalities are liable for express acts of negligence of their agents and employees in the operation and maintenance of municipal parks and playgrounds, when such negligence is the proximate cause of injury or damage. This view is supported by many authorities. See 63 C.J.S., Municipal Corporations, section 907(b), page 314; Anno.:—Parks—Liability of Municipality, 142 A.L.R. 1350; McQuillin's Municipal Corporations, 3rd Edition, Volume 18, section 53.112, page 445, *et seq.,* and cases therein cited.

I believe, however, it would be wise and proper for the General Assembly to limit recovery for injuries sustained in a municipal park or playground to those injuries proximately caused by the negligent acts of the city's employees, and also to put a reasonable limit on the amount recoverable in such actions. *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571.

J. A. JONES CONSTRUCTION COMPANY, A CORPORATION, v. LOCAL UNION 755 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (A. F. OF L.) AND W. W. CAUDLE, BUSINESS AGENT, LOCAL UNION 755 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (A. F. OF L.).

(Filed 28 June, 1957.)

1. Associations § 5—

An unincorporated labor union which is doing business in North Carolina by performing acts for which it was formed is suable as a separate legal entity, G.S. 1-69.1, G.S. 1-97(6), and may be served with process in the manner prescribed by statute.

2. Same: Process § 7½—

On the hearing of motion of defendant labor union to dismiss the action against it on ground of want of valid service, evidence disclosing that defendant was doing business in this State by performing the acts for which it was formed, that it had appointed no process agent, and that service was had on defendant by service on the Secretary of State, supports adjudication that service was valid, G.S. 1-97(6), the burden being upon defendant, if it contended that the Secretary of State had not forwarded a copy of the process to defendant, to show such failure.

3. Public Officers § 7a—

There is a presumption that a public official discharged his duties in good faith and exercised his powers in accord with the spirit and purpose of the law.

4. Process § 7½—

Service of process on a defendant labor union by service on its business agent in charge of its affairs, who collected and disbursed money for it, is calculated to give the union full notice.

5. Pleadings § 19a—

On demurrer to the jurisdiction of the court and motion to dismiss for want of valid service on defendant, there is no statute which requires the judge to find the facts.

6. Appeal and Error § 22—

Where the court, in overruling motion to dismiss for invalid service, finds no facts, and there is no request for findings, it will be presumed that the court, upon proper evidence, found facts to support its judgment.

7. Pleadings § 17c—

A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked.

8. Same—

Where, in an action to enjoin alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Statute, G.S. 95-78 through 95-84, demurrer on the ground that the action was

within the exclusive jurisdiction of the National Labor Relations Board and the Federal Courts, is properly overruled when it is not alleged in the complaint, expressly or inferentially, that plaintiff was or is engaged in a business affecting interstate or foreign commerce, and the allegation of additional facts in the demurrer relative to this point is bad as a speaking demurrer.

9. Appeal and Error § 38—

Where no reason or argument is stated or authority cited in the brief in support of an assignment of error, such assignment is taken as abandoned. Rule of Practice in the Supreme Court No. 28.

10. Injunctions § 8—

Where the verified complaint alleges sufficient facts to support an order continuing the temporary restraining order to the hearing, the court's order to this effect upon its finding the facts to be as set out in the complaint is without error, and defendant's exception that such finding is a broadside finding is without merit.

11. Same: Master and Servant § 2e—Record held not to show that continuance of temporary order enjoined the exercise of any rights under Federal Labor Management Act.

This action was instituted to restrain alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Law. On motion to show cause why the temporary restraining order should not be continued, the court found the verified allegations of the complaint to be facts and found further from defendant's answer and plaintiff's admission that plaintiff was engaged in the construction business, performing services both within and without the State in excess of $500,000 per year, purchased goods from out of State of a large value and had a gross annual income of over $3,000,000 per year. *Held:* The facts are insufficient to show that continuance of the temporary restraining order enjoined the exercise of any rights of defendants protected by the Federal Labor Management Act, and the order will not be disturbed, the question being determinable upon the evidence to be offered upon the hearing upon the merits.

12. Injunctions § 9—

The findings of fact and the other proceedings upon the hearing of a motion for the continuance of an interlocutory injunction are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing.

13. Appeal and Error § 6—

On defendants' appeal from order continuing a temporary order restraining alleged unlawful picketing, plaintiff moved to dismiss the appeal on the ground that the projects in question had been completed, and that therefore the questions had become moot. Defendants filed a written reply asserting that questions as to invasion of the jurisdiction under the National Labor Management Relations Act and other issues had been raised in the action, and that the questions were not moot. The motion to dis-

miss is denied, since whether the questions had become moot may be more properly determined when the case comes on for trial on the merits.

APPEAL by defendants from *Sharp, S. J.*, Special Civil Term 3 December 1956 of MECKLENBURG.

Civil action to restrain the establishment and maintenance of picket lines.

On 21 November 1956 plaintiff had a summons issued in this action, and procured an order for extension of time to file a complaint until 11 December 1956. On the same day plaintiff filed with the court a verified petition praying for an injunction restraining the defendants from establishing and maintaining a picket line at building jobs of petitioner at Charlotte, at Jefferson, and at other places in the State. The allegations of the petition are more fully set forth in plaintiff's complaint, which will be summarized below. On the same day plaintiff presented its summons and petition as an affidavit to the Honorable J. Frank Huskins, Judge Presiding over a regularly scheduled B Term of Mecklenburg Superior Court, and Judge Huskins issued a temporary injunction restraining the defendants from further alleged unlawful picketing of plaintiff's construction jobs as prayed in the petition, and ordering them to appear before Sharp, S. J., at the courthouse in Charlotte on 10 December 1956 at 10:00 o'clock a.m. and show cause, if any they could, why the temporary injunction should not be continued until the final determination of the action. On the same day copies of the summons, petition and temporary injunction were served upon two pickets at plaintiff's construction job in Charlotte. On 28 November 1956 copies of the summons and petition were served upon defendant W. W. Caudle, business agent for the defendant Local Union 755 I. B. E. W. (A. F. of L.), in Winston-Salem, and on 30 November 1956 copies of the summons, petition and temporary injunction were served upon the Secretary of State of North Carolina.

On 10 December 1956 the defendant Local Union 755 made a special appearance before Judge Sharp, and filed what it termed a "motion to dismiss and special demurrer" upon the grounds that it is an unincorporated labor union and cannot be sued or served with lawful process, that no lawful service has been had upon it, and the court had no jurisdiction over it. Judge Sharp heard evidence upon the "motion to dismiss and special demurrer," and continued the hearing until 14 December 1956 at the same place.

On 11 December 1956 plaintiff filed with the court its complaint in the action, a copy of which with a copy of the temporary injunction was served upon the defendant Caudle, business agent of defendant Local Union 755 I. B. E. W. (A. F. of L.) on 14 December 1956, and a similar

service of process was had upon the Secretary of State of North Carolina on 19 December 1956.

This is a summary of the complaint: Plaintiff is a Delaware corporation, domesticated in North Carolina, with its principal office in Charlotte, and is engaged in the general construction business. Local Union 755 I. B. E. W. (A. F. of L.) is an unincorporated labor union, and is a duly chartered local union of I. B. E. W. (A. F. of L.) with jurisdiction by reason of its charter of its members for collective bargaining in the city of Winston-Salem, where it has its place of business, and a limited adjacent area, but said jurisdiction does not extend to the city of Charlotte. The defendant W. W. Caudle is the duly employed business agent of Local Union 755, and as such is charged with the direction of its business affairs. On 18 September 1956 plaintiff entered into a contract with the Ashe County Development Corporation for the construction of a manufacturing type of building at Jefferson, North Carolina. On 12 March 1956 plaintiff entered into a contract with the Wachovia Bank & Trust Company for the construction of a banking house and office building in Charlotte, North Carolina. Shortly after the signing of these contracts plaintiff began the construction of these buildings, and contracted with sub-contractors for part of the work to be done and with its employees for the work. These sub-contractors and its own employees desire to perform their contracts with plaintiff. Plaintiff contracted with Adams Electric Company of Reidsville, North Carolina, as a sub-contractor, to do the electrical work on the job at Jefferson. Adams Electric Company is an independent contractor, and plaintiff has no control over its affairs or employees. There is no dispute in respect to collective bargaining between plaintiff and any of its employees, or between plaintiff and any labor union, on either the job at Jefferson or Charlotte. On 12 November 1956 defendant Local Union 755 picketed the job at Jefferson, although there is no labor dispute between it and plaintiff. The picket line proved ineffective. Whereupon, the defendant Caudle and the members of defendant Local Union 755 agreed and conspired among themselves to force plaintiff into an agreement with them to violate the State Right to Work Statute, G.S. 95-78 through 95-84, to coerce its employees into joining a labor union as a condition of their employment, and to break its contracts with its sub-contractors, unless such sub-contractors would coerce their employees to join a labor union as a condition of their employment, and to interfere with, delay and destroy plaintiff's business, if it did not accede to such unlawful demands of said conspiracy: all of which conspiracy and acts were wrongful, unlawful, wilful and malicious and contrary to the Right to Work Statute of the State. Pursuant to and as a part of said conspiracy the defendants approached an officer of plaintiff charged with its labor relations, and threatened

to shut down plaintiff's construction jobs all over the State of North Carolina, unless plaintiff would force its sub-contractor, the Adams Electric Company, to coerce its employees into union membership contrary to the Right to Work Statute of the State, or unless plaintiff breached its contract with Adams Electric Company and entered into a contract for the work the Adams Electric Company was doing with an electric contractor employing union labor. Upon the refusal of plaintiff to comply with the defendants' unlawful demands, the defendants on 20 November 1956 established a picket line at the entrance to its construction job in Charlotte, with the pickets carrying signs inscribed "J. A. JONES CONSTRUCTION COMPANY UNFAIR L. U. 755 I. B. E. W., WINSTON-SALEM." The picketing in Charlotte did not grow out of any labor dispute between plaintiff and defendants, nor did it grow out of labor relations in any respect, but was part of defendants' conspiracy to interfere with and destroy plaintiff's business, and thereby coerce plaintiff into the unlawful conspiracy. As a result of the establishment of the picket line at Charlotte large numbers of plaintiff's employees and the sub-contractors of plaintiff left their jobs, refusing to cross the picket line as the defendants planned, conspired and anticipated, and plaintiff is unable to carry forward its work, and will be unable to do so, if defendants are permitted to carry out their unlawful conspiracy. The jurisdiction of the construction job in Charlotte is in Charlotte Local Union 379 I. B. E. W. (A. F. of L.), and there is no labor dispute between it and plaintiff. Unless defendants are restrained from their unlawful acts, plaintiff will be irreparably damaged by having its business unlawfully interfered with, hindered and destroyed, for plaintiff has no adequate remedy at law. Wherefore, plaintiff prayed for an injunction permanently restraining defendants from interfering with its business at its construction jobs in the State.

Upon the resumption of the hearing on 14 December 1956 defendants "reserving all rights under special appearance, motion to dismiss and special demurrer," filed a demurrer, which the court treated as responsive to plaintiff's petition and complaint. The grounds of the demurrer are these: One, the court has no jurisdiction of this civil action; two, the complaint fails to state facts sufficient to constitute a cause of action. The demurrer alleges that it appears upon the face of the complaint the action arises out of a dispute between plaintiff and a labor union whose operations affect commerce within the meaning of the Federal Labor Management Relations Act, and that the allegations and prayer for relief amount to allegations of unfair labor practices on defendants' part; such practices and acts being violative of Sections 8(b) and (4) of said Act, which is an Act of Congress regulating commerce, by which Act the U. S. Congress has pre-empted the field of enjoining

the acts complained of by vesting exclusive jurisdiction in the National Labor Relations Board and the Federal Courts.

Defendants filed with the court, and introduced in evidence, their answer verified by W. W. Caudle, to be treated as an affidavit, reserving all their rights under special appearance, motion to dismiss, special demurrer and demurrer. The answer in substance denies the allegations of the petition and complaint, and alleges there is a labor dispute between defendants and plaintiff, as well as with the Adams Electric Company. The answer then as a further defense and counterclaim alleges in substance: Plaintiff's operations, the size and nature of which are stated in some detail, affect commerce within the meaning of the Labor Management Relations Act, 1947, as amended, and it is subject to the jurisdiction of that Act and of the National Labor Relations Act. Local Union 755 is an unincorporated labor union and W. W. Caudle is its business agent and employee. Prior to 21 November 1956, and since, plaintiff did discriminate against members of defendant union, and favored non-members of the union in staffing certain construction jobs, which conduct is continuing. "Such conduct is unlawful and is damaging to the defendant union and its members." The quoted sentence is the sole allegation in the answer as to damages. The prayer for relief is that plaintiff be denied any relief, that the temporary restraining order be dissolved, that defendants be granted such relief as may be lawful.

Judge Sharp entered judgment denying defendants' motion to dismiss and special demurrer and overruling the demurrer to the petition and complaint, and continued the temporary injunction issued by Judge Huskins to remain in full force and effect until the issues arising between the parties can be tried before a jury and a final determination had. Upon motion of the defendants Judge Sharp found the facts upon which the temporary injunction was continued, as follows: The facts are found as set out in plaintiff's complaint, together with the following facts which plaintiff admits: "Plaintiff is a corporation organized and existing under the laws of Delaware and domesticated and doing business in North Carolina. It is a general construction contractor, and is engaged in building for others under contracts manufacturing and commercial buildings in this state valued at several million dollars, employing several hundred construction employees. It performs services both within and without the state in excess of $500,000.00 per year. It purchases goods from out of state valued at more than $500,000.00 per year. It purchases goods from other companies received from out of state valued at over $1,000,000.00 per year. Its annual gross volume of business exceeds $3,500,000.00 per year."

From the judgment entered defendants appeal.

Robert S. Cahoon and Carl E. Gaddy, Jr., for Defendants, Appellants.

H. Haywood Robbins and William H. Abernathy for Plaintiff, Appellee.

PARKER, J. The defendant Local Union 755 I. B. E. W. (A. F. of L.) assigns as error the failure of the court to dismiss the action as to it, because as an unincorporated labor union it cannot be sued, and further because no lawful service of process has been had upon it, as set forth in its "motion to dismiss and special demurrer."

On 10 December 1956 Judge Sharp heard evidence upon the "motion to dismiss and special demurrer" of defendant Local Union 755 I. B. E. W. (A. F. of L.), and continued the hearing until 14 December 1956 at the same place. At the hearing evidence to this effect was introduced: Local Union 755 I. B. E. W. (A. F. of L.) is an unincorporated labor union located in, and with headquarters in, Forsyth County, North Carolina, and it has failed to appoint any process agent. Defendant W. W. Caudle is business agent for defendant Local Union 755, is in charge of its affairs, and collects and disburses money for it. From this evidence and from defendants' joint answer introduced in evidence when the hearing was resumed, it clearly appears that defendant Local Union 755 is an unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed. It is, therefore, suable as a separate legal entity. G.S. 1-69.1; G.S. 1-97(6); *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268.

G.S. 1-69.1, which became effective on 1 July 1955, and was in force when this case was instituted, provides that an unincorporated labor union may hereafter sue or be sued under the name by which it is commonly known and called, or under which it is doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. The words "sue" and "be sued" used in this statute "normally include the natural and appropriate incidents of legal proceedings" (*Reconstruction F. Corp. v. J. G. Menihan Corp.,* 312 U.S. 81, 85 L. Ed. 595), and "embrace all civil process incident to the commencement or continuance of legal proceedings." 83 C.J.S., p. 775.

Defendant Local Union 755 has failed to appoint any process agent. The Record shows that the Sheriff of Wake County on 30 November 1956 served a copy of the summons, petition and temporary injunction of Judge Huskins on the Secretary of State of North Carolina, and on 19 December 1956 he served on the same official a copy of the complaint. By virtue of G.S. 1-97(6) such service of process—Local Union 755 doing business in this State by performing acts for which it was formed, and having appointed no process agent—is legal and binding on

defendant Local Union 755. There is no evidence that the Secretary of State of North Carolina did not forward to Local Union 755 a copy of the process served upon him. "There is a presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761. If the Secretary of State did not forward a copy of the process served upon him to defendant Local Union 755, the burden was on Local Union 755 to show it, and it has not done so. *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322.

The Record also shows that on 28 November 1956 the Sheriff of Forsyth County served on the defendant W. W. Caudle, business agent of the defendant Local Union 755, a copy of the summons and petition, and that on 14 December 1956 the Sheriff of Mecklenburg County served on the defendant Caudle a copy of the complaint and the temporary injunction of Judge Huskins. Certainly, W. W. Caudle's relationship to defendant Local Union 755 is such that it can reasonably be expected he would give notice of the action to Local Union 755. That Local Union 755 had full notice of the summons, petition, temporary restraining order and complaint cannot be doubted.

Judge Sharp did not find the facts in respect to the "motion to dismiss and special demurrer," but merely denied and overruled it. The defendant Local Union 755 did not ask Judge Sharp to find the facts, as it did to find the facts upon which the temporary restraining order was continued to the final hearing, which the Judge did, though after judgment the Local Union 755 excepted to Judge Sharp's failure to find the facts. There is no statute which required Judge Sharp to find the facts on this "motion to dismiss and special demurrer," and in the absence of a request that findings of fact be made, "it is presumed that the Judge, upon proper evidence, found facts to support his judgment." *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287.

Judge Sharp properly denied the "motion to dismiss and special demurrer," and the assignments of error in respect thereto are overruled.

Defendants assign as error the overruling of the demurrer to the complaint, because as they contend in their brief the court had no jurisdiction of the subject matter of the action, because jurisdiction is vested exclusively in the National Labor Relations Board and the Federal Courts by virtue of the Labor Management Relations Act, 1947, as amended.

G.S. 1-127(1) provides that the defendant may demur to the complaint when it appears upon the face thereof that the court has no jurisdiction of the subject of the action. A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face

of the pleading attacked. *Kennerly v. Town of Dallas,* 215 N.C. 532, 2 S.E. 2d 538; 41 Am. Jur., Pleading, sec. 208. A demurrer which requires reference to facts not appearing on the face of the pleading attacked is a "speaking demurrer," and is bad. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860, where numerous authorities are cited. In that case the Court said: "The Court will not consider the supposed fact introduced by the 'speaking demurrer' in passing on the legal sufficiency of the facts alleged in the complaint."

The Supreme Court of Vermont said in *Vermont Hydro-Electric Corp. v. Dunn,* 95 Vt. 144, 112 Atl. 223, 12 A.L.R. 1495: "It has been held that a demurrer is not aided by facts not appearing in the pleadings, even though conceded at the hearing."

Southerland v. Harrell, 204 N.C. 675, 169 S.E. 423, was an action by an administrator to recover damages for the wrongful death of his intestate. Both defendants in apt time filed pleas to the jurisdiction of the court alleging that the North Carolina Industrial Commission had exclusive jurisdiction of the claim of plaintiff against them, and that the Superior Court had no jurisdiction of the cause of action alleged in the complaint. The lower court dismissed the action. This Court reversed the judgment below saying the pleas to the jurisdiction of the court are, in effect, demurrers, and no facts alleged in the pleas can be considered in passing on the demurrer, and that a defect of jurisdiction does not appear on the face of the complaint. To the same effect, see *Hanks v. Utilities Co.,* 204 N.C. 155, 167 S.E. 560; *Ball v. Hendersonville,* 205 N.C. 414, 171 S.E. 622.

G.S. 1-133 states, "when any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer."

There is no allegation of fact in the complaint stating that plaintiff was, or is, engaged in a business affecting interstate or foreign commerce, and no allegation from which such fact can reasonably be inferred. Hence, nothing appears on the face of the complaint showing that the National Labor Management Relations Act of 1947, as amended, has any application.

In *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 83 L. Ed. 126, *Chief Justice Hughes* speaking for the Court, said: "Thus, the 'commerce' contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those affecting that commerce. Section 10(a). In determining the constitutional bounds of the authority conferred, we have applied the well settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion."

In 31 Am. Jur., Labor, sec. 140, it is written: "Notwithstanding the broad words of the preamble, the National Labor Relations Act may be, and is to be, construed so as to operate within the sphere of the constitutional authority of Congress. So construed, the act in empowering the National Labor Relations Board to prevent any person from engaging in any unfair labor practice 'affecting commerce' (Sec. 10(a), 29 U.S.C.A., Sec. 160(a)) merely reaches what may be deemed to burden or obstruct interstate and foreign commerce, aside from that within a territory or the District of Columbia."

In *Weber v. Anheuser-Busch,* 348 U.S. 468, 99 L. Ed. 546, 558, the Court said: "We realize that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State."

Here we are asked to pass on the question on the basis of the face of the complaint alone.

The court below properly overruled the demurrer to the complaint on the ground of lack of jurisdiction of the court over the subject matter of the action, for it does not appear upon the face of the complaint that the court has no jurisdiction over the subject of the action, nor does it appear on the face of the complaint that the exercise of any rights of the defendants protected by the National Labor Management Relations Act of 1947, as amended, is involved.

Defendants assign as error the overruling of their demurrer to the complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action for injunctive relief. In support of this assignment of error, based upon an exception, no reason or argument is stated or authority cited in defendants' brief, and it is taken as abandoned. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544, 563; G.S. Vol. 4A, Supreme Court Rules, p. 185; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *Robinson v. Thomas,* 244 N.C. 732, 94 S.E. 2d 911.

Upon motion of the defendants that Judge Sharp find the facts upon which the temporary restraining order of Judge Huskins was continued to the final hearing upon the merits, the Judge found the facts to be as set out in plaintiff's complaint. The defendants assign this as error as a broadside finding. This assignment of error is without merit. *Owen v. DeBruhl Agency, Inc.,* 241 N.C. 597, 86 S.E. 2d 197.

Upon the question as to whether the temporary injunction should be continued to the final hearing on the merits, it appears from the Record that defendants introduced no evidence, except their answer. We are of opinion that the facts set forth in the complaint, which the Judge

found as facts, are sufficient to support the continuance of the temporary injunction to the final hearing on the merits, and that the admission of plaintiff as to the size of its business, which the Judge found as a fact, together with the other facts found by the Judge, are not sufficient to show that a state court has enjoined the exercise of any rights of defendants, which the Federal Labor Management Act, 1947, as amended, protects. *Local Union No. 10, A. F. of L. v. Graham,* 345 U.S. 192, 97 L. Ed. 946, which affirmed a judgment of the Law and Equity Court of the City of Richmond restraining labor unions from peaceful picketing, which the Virginia Courts enjoined on the ground that it was carried on for purposes in conflict with the Virginia "Right to Work" Statute; *Pappas v. Stacey,* 151 Me. 36, 116 A. 2d 497 (appeal of this case to U. S. Supreme Court dismissed in a *Per Curiam* decision, 350 U.S. 870, 100 L. Ed. 776); *Vogt, Inc. v. International Brotherhood of Teamsters,* 270 Wis. 315, 74 N.W. 2d 749, which case was affirmed on appeal to the U. S. Supreme Court on 17 June 1957, ... U.S. ....., ... L. Ed. ..... When the case comes on for final hearing on the merits, defendants may, or may not, be able to show by evidence that the state court has no jurisdiction over the subject of the action by virtue of the Federal Labor Management Act, 1947, as amended. They have not done so by their meager evidence before Judge Sharp.

This Court said in *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116: "The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing."

The other assignments of error brought forward and mentioned in defendants' brief are supported by no citation of authority, have been considered, and are all overruled.

In this Court plaintiff filed a written motion to dismiss defendants' appeal for the alleged reason that pending the hearing and determination of the appeal all controversies arising in this case between the parties have become moot by reason of the completion of the construction job at Jefferson, and no relief can be granted by any court to either party respecting anything in this case. Defendants have filed a written reply to the motion opposing the dismissal of their appeal, and asserting that the questions and issues involved in the case are alive and as vigorously disputed as they ever have been, and are in no way moot. Plaintiff's motion to dismiss the appeal is denied.

The defendants' answer raises the question of whether the Superior Court has jurisdiction over the subject of the action by reason of the National Labor Management Relations Act, 1947, as amended, and also raises other issues. Whether the questions and issues in the case have

become moot, or are vigorously alive, can be determined when the case comes on for trial in the court below on the merits.

The judgment below is

Affirmed.

THE FIDELITY BANK OF DURHAM, TRUSTEE, v. I. F. BLOOMFIELD AND PEOPLES FRUIT AND PRODUCE MARKET, INC.

(Filed 28 June, 1957.)

1. Landlord and Tenant § 15—

A lessee signing a lease expressly covenanting to pay rent is not relieved of his obligation to do so by assignment of the lease in accordance with its terms, even though lessor agrees to the assignment, unless the lease by express terms absolves lessee of his obligation to pay rent upon assignment or the lessor expressly agrees to accept the assignee in substitution of the original lessee, and mere agreement by lessor to the assignment and acceptance of rent from the assignee do not amount to such agreement.

2. Trial § 36—

Exception to the issues will not be sustained when the issues submitted are sufficient to present to the jury all determinative facts in dispute and to enable the parties to present every phase of the controversy.

3. Appeal and Error § 45—

Where the answer of the jury to one of the issues submitted determines the rights of the parties, unrelated error in the submission of or relating to subsequent issues cannot be prejudicial.

4. Corporations § 4—

Evidence to the effect that the asserted corporation had less than three directors, G.S. 55-48, that no capital stock was issued, that its only assets were the business assets of the incorporator, and that the incorporation was a mere bookkeeping transaction transferring the business of the incorporator to the corporation, is sufficient to support a finding by the jury that the incorporator was sole beneficial owner and in sole control of its affairs.

5. Damages § 6—

The burden is upon lessee who has wrongfully breached his lease by failure to pay rent to show that lessor in the exercise of good business judgment could have leased to another and minimized his loss.

APPEAL by defendant I. F. Bloomfield from *Sink, E. J.*, January Civil Term 1957 of DURHAM.

Civil action to recover rent.

Mrs. Lee L. Lloyd, a widow, owns a store building on the Main Street of Durham. She is now a woman 95 to 97 years of age, feeble in body and mind, and is in a nursing home. I. F. Bloomfield leased the main floor and basement of this property from Mrs. Lloyd in 1930, and from that time until in March 1954 operated a fruit and produce market there. During that period he had several lease agreements with Mrs. Lloyd.

On 12 September 1951 Mrs. Lloyd and I. F. Bloomfield entered into a lease agreement in writing, whereby Bloomfield continued to rent this property from Mrs. Lloyd for a term commencing 1 September 1951 and expiring 31 August 1957 at a rent payable in advance on the first day of each month: the rent to be paid the first year was $75.00 a week, and was to increase $2.50 a week for each of the next five years of the lease. The lease contained the following provision: "The following lease is not transferable except that it is expressly agreed that in the event Mr. I. F. Bloomfield incorporates his business, which he has been conducting as an individual proprietorship, this lease can be transferred without my consent to said corporation. It is further expressly stipulated that any other transfer or assignment of this lease cannot be made without the express approval of myself, my heirs or assigns." This lease was executed by the parties, and is recorded in the Durham County Registry. The lease introduced in evidence at the bottom has these words: "This Lease is assigned and transferred to the Peoples Fruit and Pr. Co. This 1st day of Oct., 1953. I. F. Bloomfield (SEAL)."

On 14 January 1953 Mrs. Lloyd and Bloomfield entered into another lease agreement for this property for a term beginning on 1 September 1957 and ending on 31 August 1962. This lease at the bottom has this language: "I have read the above conditions and terms of the above lease agreement and hereby agree to same. /s/ I. F. Bloomfield. (SEAL)." This lease contains a provision for the transfer or assignment of the lease in the same words as the lease of 12 September 1951. Bloomfield got this 1953 lease, because someone was "trying to rent it out from under him."

On 10 February 1954 Mrs. Lloyd executed and delivered to plaintiff bank an irrevocable trust agreement, by which the bank as trustee was to have management and control of her property, to collect her rents, etc. Simultaneously with the execution of the trust agreement, Mrs. Lloyd executed and delivered to the bank a deed conveying to it as trustee this store property.

The rent was paid up to 6 April 1954. About that time the business operated in this store ceased, as "finances were getting mighty low." No rent has been paid since that time.

There is abundant evidence tending to show that the bank, and an agent of Bloomfield, tried to obtain another tenant for this property, but another permanent tenant was not obtained until 1 October 1955.

Each defendant filed separate answers to the complaint, and to the complaint as amended. The defendant Bloomfield filed answer to the complaint in which he alleged in substance that he had incorporated his business as Peoples Fruit and Produce Market, Inc., which corporation began business on 1 October 1953, that on that day he assigned and transferred the lease to the corporation, that the purpose of incorporating his business was to assign the lease to the corporation and to relieve him of any personal liability for rent, that the provision as to a transfer of the lease was inserted in the lease agreement with the understanding that if he incorporated his business, the lease would be transferred to it so as to relieve him from individual liability for rent, and that he is not indebted for any rent. The corporate defendant filed answer to the complaint in which it admits that the lease was transferred to it on 1 October 1953, that it paid the rent to 6 April 1954, and that it owes rent since that time.

The complaint asked for the recovery of rent from 6 April 1954 to the institution of the action. The Court, in its discretion, permitted an amendment to the complaint so that recovery of rent could be requested from the institution of the action. The corporate defendant filed answer to the amendment to the complaint admitting that it is indebted for rent from 6 April 1954 to the time of institution of the action, but denying that it is indebted for rent since, by reason of failure of plaintiff to minimize its loss by renting the property. The defendant Bloomfield in his answer to the amendment to the complaint denies that he is liable for any rent for the reasons set forth in his original answer, but if it should be determined that he is liable, then he is not liable for any rent after the time of the commencement of the action for the same reason alleged by the corporate defendant.

Plaintiff filed a reply to the original answer of the defendant Bloomfield in which it alleged in substance that, if the transfer or assignment provision in the lease of 12 September 1951 should be construed to have the effect of relieving the defendant Bloomfield of his personal obligation to pay rent, then the consent of Mrs. Lloyd thereto was procured by the fraud of Bloomfield, that Peoples Fruit and Produce Market, Inc., was incorporated 30 April 1951, that Bloomfield was its sole beneficial owner, and that the corporation was merely a dummy corporation and *alter ego* of Bloomfield.

These facts appear in Bloomfield's answer, or in his testimony in this trial, or in a former trial of the case, or in the testimony of his witnesses: The business was his up to the time he incorporated it. He operated under the trade name of Peoples Fruit and Produce Market.

He incorporated the business on 30 April 1951, and on 1 October 1953 the corporation began business. On that date he transferred to it his lease. The purpose of incorporation was to relieve him of liability for paying rent under the lease of 12 September 1951. This is the Balance Sheet of the corporate defendant on 30 September 1953:

"BALANCE SHEET

PEOPLES FRUIT AND PRODUCE COMPANY

September 30, 1953

ASSETS

CURRENT ASSETS		
Accounts receivable	$ 5,644.84	
Due from I. F. Bloomfield	3,820.55	
Inventory	8,672.53	
TOTAL CURRENT ASSETS		$18,137.92
PROPERTIES AND EQUIPMENT		
Furniture and fixtures	$ 5,424.78	
Automobiles and trucks	2,624.36	
Leasehold improvements	7,459.99	
	$15,509.13	
Less: Accumulated depreciation	12,392.48	
TOTAL PROPERTIES AND EQUIPMENT—NET		3,116.65
ORGANIZATION EXPENSE		100.30
TOTAL		$21,354.87

LIABILITIES AND PROPRIETOR'S EQUITY

CURRENT LIABILITIES		
Bank overdraft	$ 280.48	
Accounts Payable	6,556.65	
Notes Payable—equipment (due within one year)	600.00	
Notes Payable—borrowed money (due within one year)	6,755.11	
Social Security tax payable	57.79	
Withholding tax payable	125.90	
North Carolina unemployment tax payable	4.27	
Other taxes payable	212.64	
TOTAL CURRENT LIABILITIES		$14,592.84

LONG TERM INDEBTEDNESS		
Notes payable—equipment (due after one year)	$ 370.00	
Notes payable—borrowed money (due after one year)	6,092.03	
TOTAL LONG TERM INDEBTEDNESS		6,462.03
PROPRIETOR'S EQUITY		
I. F. Bloomfield—capital		300.00
TOTAL		$21,354.87"

Bloomfield and his wife were the officers of the corporation. At his former trial he was asked who were the directors. He replied "myself." He was then asked "who else"? He answered "No one." He was then asked "just you"? He replied "Yes Sir." At the trial of the present case Bloomfield testified: "I might have testified at the trial of this thing in January 1956 that I was the only director of the corporation. I don't know whether I did or didn't. So far as I know, me and my wife were the only directors; I really don't know. I don't think Mr. Meyer was. I don't know whether they in fact had any directors. . . . I was still the owner of the business through the owner of the corporation." He also testified his wife, Sigmund Meyer and himself were officers and directors of the corporation.

The defendants introduced in evidence twenty typewritten pages of what purported to be the minutes of the first meeting of the incorporators of the corporation, of the first meeting of the directors, and a copy of the corporate charter: all unsigned except by Meyer. These pages are not in the Record, but are summarized in 17 lines, except for ¾ of a page of By-Laws. Bloomfield testified: "I did not hold stockholders meetings to elect directors every year. I don't know whether I held one in 1952. I believe we did hold one in 1953. At that meeting, in 1953, they elected myself and my wife directors; just the two of us. I don't recall whether we held a meeting in 1954. . . . The corporation was more or less inactive."

The only assets put into the corporation were the assets of Bloomfield individually. Bruce Umstead, a certified public accountant, employed by Bloomfield and his witness testified, "the action involving any transfer of the business from Mr. Bloomfield to the corporation was simply a bookkeeping transaction."

After the Fidelity Bank became trustee, Bloomfield paid the rent to it by cheques. He testified: "I signed every one of them. The word 'corporation' or 'incorporated' does not appear on a single one of them."

He also testified after the lease was transferred to the corporate defendant, it paid the rent.

Bloomfield employed Allenton Real Estate Company to undertake to lease the property. It procured a temporary tenant, and collected rent in 1954 and 1955 of over $200.00. None of this was paid to plaintiff or Mrs. Lloyd.

Bloomfield testified: "On or about the first day of October, 1953, I had a conversation with Mrs. Lloyd. We talked about transferring the lease from Peoples Fruit and Produce Market to the Peoples Fruit and Produce Company, Inc. I advised her it had been done and explained it to her. She said it was all right."

Mrs. Lloyd was not a witness, and it does not appear that she was in the courtroom during the trial.

Eight issues were submitted to the jury. It was stipulated by the parties that the Trial Judge should answer the first three issues Yes. The first issue with the answer Yes was to the effect that Bloomfield leased the property from Mrs. Lloyd for the period described in the lease dated 12 September 1951 and at the rental therein set forth. The second issue with the answer Yes was that Bloomfield transferred this lease in accordance with its terms and provisions. The third issue with its answer was that Mrs. Lloyd executed and delivered to the bank the trust agreement of 10 February 1954. The remaining issues with the answers of the jury thereto are as follows:

"4. Was there default in the payment of the rent provided by said lease of September 12, 1951, for the week commencing April 6, 1954, and for all weeks thereafter up to October 1, 1955? Answer: Yes.

"5. Was the consent of Mrs. Lee L. Lloyd to the provision of said lease of September 12, 1951, permitting transfer of said lease to a corporation, procured by fraud and deception of said I. F. Bloomfield upon said Mrs. Lee L. Lloyd? Answer: No.

"6. Was the defendant I. F. Bloomfield the sole beneficial owner of the defendant Peoples Fruit and Produce Market, Inc., and in sole control of its affairs? Answer: Yes.

"7. What damages, if any, is plaintiff Mrs. Lee L. Lloyd entitled to recover of the defendant I. F. Bloomfield for non-payment of rent provided by said lease of September 12, 1951, from April 6, 1954, to October 1, 1955? Answer: $6,257.

"8. What damages, if any, is plaintiff Mrs. Lee L. Lloyd entitled to recover of defendant Peoples Fruit & Produce Market, Inc., for

non-payment of rent provided by said lease of September 12, 1951, from October 12, 1954, to October 1, 1955? Answer: None."

From judgment entered upon the verdict, the defendant Bloomfield appeals.

E. C. Brooks, Jr., and E. K. Powe for Defendant, Appellant.

Reade, Fuller, Newsom & Graham for Plaintiff, Appellee.

PARKER, J. The defendant Bloomfield assigns as error the failure of the court to allow his motion for judgment of nonsuit made at the close of all the evidence. G.S. 1-183. Bloomfield's contention is that having transferred the lease of 12 September 1951 to the "Peoples Fruit and Pr. Co." on 1 October 1953, he was from that time relieved from any personal obligation to pay rent.

In Annotation 36 A.L.R. 316, this is written: "It is established by an unbroken line of authority that where a lease containing an express covenant to pay rent has been assigned, the fact that the lessor thereafter accepts rent from the assignee does not release the lessee from his liability for rent during the remainder of the term, the assignment terminating the privity of estate between the lessor and the lessee, but not the privity of contract." Numerous cases are cited in support of the statement from 26 states of this nation and from England.

This Court said in *Pate v. Oliver*, 104 N.C. 458, 10 S.E. 709: "There can be no question but that a lessee, under an express contract, cannot discharge himself by his own act. 'Hence, as long as the lease continues, and as far as he has assets an executor is held liable in debt as well as in covenant for accruing rent, and the assignment of the term by himself or his decedent affords of itself no immunity.' Schouler's Ex. & Admrs. 376."

In *Alexander v. Harkins*, 120 N.C. 452, 27 S.E. 120, the plaintiff contended the whole term of Keller in the lease of a storehouse was purchased, and this made the purchasers tenants of the plaintiff. This Court said: "While it constituted the purchasers tenants, with the rights of the original lessees, as to the terms of the lease and estate granted, it did not release the original lessee from the obligation of his contract to pay the rent."

The assignment of a lease does not annul the lessee's obligation on his express covenant to pay rent, even though the lessor has consented to such assignment and collected rent, unless the lessor has made an agreement by which a new tenancy is created and the old ended or unless the lessor has accepted the surrender of the lease or released the lessee on a sufficient consideration. 52 C.J.S., Landlord and Tenant, sec. 528a(1); 32 Am. Jur., Landlord and Tenant, sec. 358.

In *Hamlen v. Rednalloh Co.*, 291 Mass. 119, 197 N.E. 149, 99 A.L.R. 1230, the Court said: "The mere assignment of a lease with the consent of the lessor who takes a covenant from the assignee to pay rent or thereafter collects rent from the assignee does not relieve the original lessee from his contract to pay rent expressed in the covenants of the lease."

In *S. S. Kresge Co. v. Sears*, 87 F. 2d 135, 110 A.L.R. 583, *certiorari* denied 300 U.S. 670, 81 L. Ed. 876, the Court said: "It appears from the cases cited above that the mere assignment of a lease, even with the consent of the lessor, does not relieve the original lessee from liability under his express covenants. To absolve the original lessee from liability in case of an assignment, it must appear in fact that the lessor has contracted that the lessee shall not be further liable."

"*The fact that the assignee is also liable for rent*, through privity of estate or express agreement to assume the obligations of the lease, will not discharge the lessee. Unless the lessor has accepted the assignee as a substitute in place of the original lessee, the lessor may, at his election, pursue either or both for payment, although he may have but one satisfaction." 52 C.J.S., Landlord and Tenant, p. 330.

Bloomfield signed the Lease Agreement of 12 September 1951, and to his signature added his seal. Above his signature and seal appears these words: "I have read the above conditions and terms of the above lease agreement and hereby agree to same." Included in which terms was a specified rent schedule payable monthly in advance. Bloomfield by express contract under his seal in plain and unambiguous words covenanted to pay the rent specified in the Lease Agreement, and individually paid the rent specified to 1 October 1953 according to his own testimony.

The Lease Agreement in plain language provided that if Bloomfield incorporated his business, the lease could be transferred to the corporation without the lessor's consent. Doubtless it is competent for a lessor to incorporate in a lease agreement a provision that the lessee can transfer the lease, that the assignee will be accepted as sole tenant and the lessee will be absolved from his contract to pay rent, but no such provision appears in the Lease Agreement of 12 September 1951, and such a meaning cannot be read into its clear and plain words. The fact that Bloomfield on or about 1 October 1953 told Mrs. Lloyd that he had transferred the lease to Peoples Fruit and Produce Company, Inc., and that she said it was all right does not even tend to show that Mrs. Lloyd agreed to release Bloomfield from his express covenant contained in his lease of 12 September 1951 to pay rent and to substitute the corporation in his place.

The trial court properly overruled the defendant Bloomfield's motion for judgment of nonsuit.

The defendant assigns as error the submission of Issues 4, 5, 6, 7 and 8 to the jury, and its failure to submit issues tendered by him. Defendant contends that the court by consent having answered the second issue, "Did the defendant I. F. Bloomfield assign and transfer said lease dated September 12, 1951 in accordance with the terms and provisions of said lease," Yes, it was error to submit Issues 4, 5, 6, 7 and 8. There is no merit to that contention for the mere assignment of the lease did not relieve defendant Bloomfield from his express covenant contained in his contract to pay rent.

The issues submitted were sufficient to present to the jury the determinative facts in dispute for decision, and to enable the parties to present every phase of the controversy. When such is the case, this Court has repeatedly held the parties have no ground to complain. *Gallimore v. Grubb,* 156 N.C. 575, 72 S.E. 628; *Cherry v. Andrews,* 231 N.C. 261, 56 S.E. 2d 703; *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 2d 763.

Conceding that the submission of the fraud issue, Issue 5, was error, because of lack of evidence, such error is not sufficiently prejudicial to justify a new trial.

Upon the facts in the Record the defendant Bloomfield was bound by his express covenant contained in his lease of 12 September 1951 to pay rent, and it was not necessary to submit the 6th Issue to the jury in order to hold him liable on the principle set forth in *Terrace, Inc., v. Indemnity Co.,* 243 N.C. 595, 91 S.E. 2d 584, of a one-man owned and dominated corporation. However, when the defendant Bloomfield's evidence shows that the only assets put into the corporate defendant were his alone, that the balance sheet statement of the corporate defendant of 1 October 1953 states "Proprietor's Equity, I. F. Bloomfield —capital $300.00," thus indicating no capital stock was issued, that no stockholders' meetings were held in 1952 and 1954, and that at the stockholders' meeting in 1953 only two directors were elected, that his certified public accountant and witness Bruce Umstead testified "the action involving any transfer of the business from Mr. Bloomfield to the corporation was simply a bookkeeping transaction," we are of opinion there was plenary evidence to support the jury's answer to the 6th Issue. A corporation must have at least three directors to manage its affairs. G.S. 55-48. The defendant Bloomfield testified the "corporation was more or less inactive." And it is significant when the defendant Bloomfield signed the lease agreement of 14 January 1953 for a term beginning 1 September 1957 and ending 31 August 1962, the lease was to him as an individual, and contained an express covenant for him personally to pay the rent, and this lease had a provision that "it is expressly agreed that in the event Mr. I. F. Bloomfield incorporates his business, which he has been conducting as an individual proprietorship,

the lease can be transferred without my consent to said corporation." Defendant Bloomfield incorporated his business on 30 April 1951.

We have examined the assignments of error to the charge, and error sufficiently prejudicial to justify setting aside the verdict and judgment and ordering a new trial is not shown. In parts the charge was more favorable to the defendants than they were entitled to. For instance, the court charged the jury that Mrs. Lloyd, or the bank after it took over her estate, had the legal duty to show that she, or it, had exercised due diligence to rent the property and minimize defendants' loss. The lease having been wrongfully breached by nonpayment of rent the burden was on the defendants who breached the contract to show that in the exercise of good business judgment the lessor could have leased to another and minimized the loss. *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12; *Produce Co. v. Currin,* 243 N.C. 131, 90 S.E. 2d 228.

It would seem the jury answered the last issue None, because they looked upon Peoples Fruit and Produce Company, Inc., as an *alter ego* of the defendant Bloomfield, and considered it insolvent.

The verdict and judgment below will not be disturbed.

No error.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, PETITIONER, v. E. E. PRIVETT AND WIFE, FANNIE PRIVETT; H. A. CLAYTON, MRS. NINA SUTTLES, WIDOW, H. G. COKER, HARVEY C. CARROLL, TRUSTEE; W. T. USSERY, C.Q.T., COUNTY OF RICHMOND, AND TOWN OF ROCKINGHAM, RESPONDENTS.

(Filed 28 June, 1957.)

1. Appeal and Error § 41—

Where the record fails to show what the witness would have testified had he been permitted to answer, exclusion of the testimony cannot be held prejudicial.

2. Eminent Domain § 18c—

Where, upon cross-examination of respondents' witness who had testified as to the value of respondents' land before and after the taking, petitioner brings out the witness' opinion as to the value of each structure on the land condemned before and after the taking and the statement that the witness based his estimates on the replacement cost of the buildings without allowance for depreciation, the cross-examination tends to impair the weight of the witness' testimony in chief but does not warrant the striking thereof.

3. Same—

Where each of two witnesses for respondents testifies that he was familiar with the property in question and the market values in the area and

that he had an opinion satisfactory to himself relative to the value of respondents' land before and after the taking, exception to the denial by the court of petitioner's motion for a preliminary examination of the witnesses on the ground that they may have taken into consideration improper elements and methods in forming their opinions of value, will not be sustained, counsel having taken full advantage of the opportunity of impairing the weight of their testimony by cross-examination.

4. Same—

Where petitioner's witnesses testify as to the value of respondents' property before and after the taking, it is proper for respondents to cross-examine them as to whether the witnesses had opinions or knowledge as to the value of other property in the area for the purpose of attacking the credibility of the witnesses and the weight, if any, to be given their testimony.

5. Same—

The exclusion of photographs of buildings on the property in question, tendered for the purpose of showing that respondents had stripped the buildings of certain parts which they considered of value before petitioner took possession, is not prejudicial when it is not made to appear from the evidence whether respondent or petitioner had so stripped the buildings.

6. Appeal and Error § 42—

Objection to the charge will not be sustained when the charge, considered contextually, is without prejudicial error.

7. Same—

Ordinarily, objection to the statement of contentions of a party will not be considered when the asserted misstatements are not brought to the trial court's attention in apt time.

8. Trial § 41—

The sole purpose of polling the jury is to ascertain whether the verdict as rendered is the verdict of each juror, and whether he then assents thereto, and the court properly refuses to permit questioning having for its purpose the impeachment of the jurors or their verdict.

9. Eminent Domain § 19—

Petitioner's exception to the judgment on the ground that, although the court described the lands condemned in accordance with a map which the parties stipulated showed the original boundaries of respondents' property and the part thereof condemned, the court deleted from the judgment drafted by petitioner an additional description, is untenable, since if the descriptions differ, the additional description should have been deleted, and if the two descriptions are in accord, the deletion is immaterial.

10. Same—

Where it appears that petitioner had taken land of respondents to widen a highway, and the proceedings are solely for the purpose of ascertaining the amount of compensation to be paid for the land taken, the judgment should describe the land by reference to the right-of-way of the highway

as it was on the date prior to the taking, rather than to its "present right-of-way."

11. Same—

The court properly refuses to incorporate in its judgment awarding damages for the condemnation of land a provision that the judgment should bear interest until paid, since G.S. 24-5 has no application to a judgment against the State Highway and Public Works Commission.

CROSS APPEALS from *Crissman, J.*, December Civil Term, 1956, of RICHMOND.

Proceedings in accordance with procedure prescribed by G.S. 40-11 *et seq.*, to condemn easement of right of way for highway purposes as authorized by G.S. 136-19.

The Privett property, located in Rockingham, N. C., some two blocks south of the Richmond County Courthouse, is involved.

The petition, after describing the entire Privett property, describes the portion condemned by metes and bounds as shown on map made by T. Berry Liles, registered surveyor, based on his survey of October 1, 1956. A copy of said map was attached to and made a part of the petition; and it was stipulated that this map was "a correct representation of the boundary lines of the property owned by E. E. Privett and affected by said taking, and that the area appropriated is indicated in red" on the copy thereof introduced in evidence as petitioner's Exhibit #1.

The Privett property, except for a small triangle right at the corner, comprises the southeast quadrant of the intersection of two principal highways, US #1 and US #74, with frontage on both highways. The portion condemned fronts only on US #1 and consists (as stipulated and as shown on said map) of "a strip across the front of the property measuring 25.45 feet wide at its narrowest (northern) and 25.8 feet wide at its widest (southern), 133.35 feet along the eastern side of US #1 and 137.47 feet long along the back."

The only answer was filed by the respondents Privett. It was stipulated that "the only persons who own any interest in the land are E. E. Privett and wife, Fannie Privett."

The commissioners' report, filed 25 October, 1956, was confirmed 10 November, 1956, by the clerk of the Superior Court, who entered judgment in accordance therewith. Petitioner and respondents appealed, demanding a jury trial in the Superior Court.

On 10 November, 1956, the clerk, by a separate order, granted petitioner's motion for immediate possession; and it was stipulated that "the time of the taking was on or about November 10, 1956."

Upon trial in the Superior Court, the only issue and the jury's verdict were as follows: "What sum, if any, are respondents entitled to recover

of petitioner as just compensation for the appropriation of their land, over and above all general and special benefits, if any, accruing to said lands, by reason of the widening and improving of US #1 under Project #6644? ANSWER: $38,500.00."

Petitioner's Project #6644 involved the *widening* and improvement of US #1, south of its intersection with US #74. Inside the city limits, the project required a right of way 80 feet wide.

While petitioner objected to the entry of any judgment in respondents' favor, petitioner's counsel drafted a form of judgment for use in the event the court should enter judgment in accordance with the verdict. The court, in signing the judgment on the verdict in respondents' favor, used the form drafted by petitioner's counsel after deleting this description of the land condemned, which preceded the particular description by metes and bounds as shown on the Liles map, to wit: "(An area) sufficient to give US No. 1, as widened, improved and reconstructed under Highway Improvement Project No. 6644, in front of said lands a parallel right of way width of 80 feet, measured 40 feet on each side of the center line thereof, as relocated approximately 10 feet eastwardly from the old center line under Project 6644, said area . . ."

Petitioner excepted and appealed, assigning errors.

Respondents, who also excepted *to the judgment* and appealed, assign as error the action of the court (1) "in not signing the judgment in form as tendered by respondents and in signing the judgment in form as tendered by the petitioner as modified," and (2) "in not including in the judgment a provision that after the lapse of reasonable time any unpaid amount thereof would draw interest."

R. Brookes Peters, General Counsel, Leath & Blount and H. Horton Rountree for petitioner, appellant and appellee.

Pittman & Webb and Jones & Jones for respondents, appellants and appellees.

BOBBITT, J. The front portions of two buildings were on the condemned portion of the Privett property. These buildings were (1) a 1½-story frame building, converted into a two family apartment, with four rooms and a bath on each floor and a connecting garage at the rear; and (2) a 2-story concrete block building, the ground floor of which had been used by Privett for his grocery and general merchandise business.

Other buildings on the Privett property, east of the condemned portion, are (1) the Privett residence, ten rooms and a bath, near the center of the Privett property; (2) a new 2-story concrete block building, fronting on US #74, the ground floor of which is now used by Privett for his grocery and mercantile business, with six rooms and a bath

upstairs; and (3) a new frame building, farther back from US #74, with nine rooms and two baths.

The Liles map shows the location of each of the several buildings and the portions of the two buildings fronting on US #1 within the condemned portion of the Privett property.

Petitioner and respondents offered opinion evidence as to the fair market value of the Privett land before and after the taking by petitioner of the portion condemned. The verdict indicates acceptance by the jury of the testimony that was more favorable to the respondents.

PETITIONER'S APPEAL

Petitioner brings forward 28 assignments of error based on 44 exceptions. They relate to (1) rulings on evidence, (2) the charge, and (3) sundry matters.

Each exception to a ruling on evidence has been given close attention. No prejudicial error has been shown. It is deemed unnecessary to discuss any of the assignments relating to rulings on evidence except those considered below.

Where the court sustained objections to questions by petitioner's counsel, the subject of assignments 3, 5, 7 and 8, it is sufficient to say: "The record fails to show what the witness would have testified had he been permitted to answer. Hence, there is no basis for a consideration of these exceptions." *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104, and cases cited.

The cross-examination of respondents' witness Cockman explored in detail the bases upon which the witness arrived at his opinion that the fair market value of the Privett property was $135,500.00 before the taking and $95,500.00 thereafter. The witness was questioned as to his valuation of the land itself and of each building thereon. In giving his opinion that the 2-story store building on the portion condemned should be valued at $27,500.00, he stated that he based this figure upon estimates he had obtained as to replacement cost; and the cross-examiner elicited testimony that the witness had made no allowance for depreciation of this replacement cost, notwithstanding the building had been there 20-25 years.

Petitioner's counsel moved that "his testimony there be stricken, because the courts have said replacement cost is not the proper measure of damages." Exception #5, upon which assignment #4 is based, is to the court's denial of said motion. The court aptly observed that petitioner's counsel had "brought it out." This testimony, it would appear, tends to impair the weight that should be given to the testimony of Cockman on direct examination as to over-all values; and, independent of the fact that it was elicited by petitioner's counsel, we detect nothing therein unfavorable to petitioner.

It must be kept in mind that *respondents* did not offer evidence as to the separate value of the land, considered alone, or of any building, considered alone. Nor did the court intimate that the replacement cost of any building was the proper measure of respondents' damage. The jury was given this instruction: ". . . the Court charges you that your measure of damages in this case is the difference between the fair market value of the entire tract of land, including the buildings thereon, immediately before the taking and the fair market value of what is left immediately after the taking. After weighing and considering all the evidence, you will determine by its greater weight, the burden being upon the landowner, the respondent, what amount, if any, would be just compensation for the appropriation of their land over and above all general and special benefits, if any, accruing to said lands." It is noted that petitioner does not assign the quoted instruction as error, nor the court's prior instructions as to fair market value and special and general benefits.

Before respondents' witnesses Haywood and McDonald had testified to their opinions as to the fair market value of the Privett property before and after the taking, petitioner's counsel moved that they be permitted to examine these witnesses to determine whether they "may have taken into consideration elements and followed methods" believed by counsel to be improper. Assignments #6 and #9, based on exceptions 7, 8, 9, 13 and 14, are based on the court's denial of these motions for such preliminary examination or cross-examination of respondents' said witnesses. Each witness had testified as to his familiarity with the Privett property and with market values in the area and that he had opinions satisfactory to himself relevant to the issue. Cross-examination was the available medium whereby the weight of the testimony might be impaired by showing that the witness "considered elements and followed methods" that did not reflect fair market value either before or after the taking. Suffice to say, petitioner's counsel fully embraced the opportunity so afforded by the privilege of cross-examination.

The eight exceptions on which assignments 13, 14 and 15 are based relate to the overruling of petitioner's objections to questions asked by respondents' counsel in their cross-examination of petitioner's witness Rice. Rice had testified to his opinions as to the fair market value of the Privett property before and after the taking. The cross-examiner wanted to know whether Rice knew the values of any other property in the area near the Privett property, or the prices at which such properties had been sold; and to all these questions the witness gave negative answers. The testimony so elicited was relevant solely to the credibility of the witness, and the weight, if any, to be given his testimony. Let it be noted that none of the questions undertook to elicit

testimony as to the valuations or sale prices of other properties, the questions being directed to whether the witness *had opinions or knowledge* with reference thereto.

Assignment #19 is to the refusal of the court to admit in evidence photographs of the buildings on the condemned portion of the Privett property, taken 15 November, 1956, after each building had been partially demolished. The argument in support of this assignment implies that these buildings had been partially demolished by Privett before the petitioner took possession; and it is submitted "that the pictures are themselves mute evidence that the respondent Privett was stripping the buildings of certain parts which he considered of value and that he had done so before possession was surrendered to the Commission."

Petitioner's witness Southall had identified these photographs as representing the condition of these buildings on 15 November, 1956, "the day the first work was done by the Commission." His testimony is silent as to whether the partial demolition of the buildings when the photographs were taken had been effected by Privett or by petitioner.

As to the charge: When considered contextually, it is quite clear that the instructions given were in accordance with the applicable rule as to measure of damages declared by this Court in *Proctor v. Highway Com.*, 230 N.C. 687, 55 S.E. 2d 479; *Highway Com. v. Black*, 239 N.C. 198, 79 S.E. 2d 778. Also, see *Statesville v. Anderson, supra.*

As to assignments directed to alleged errors in the statement of petitioner's contentions, the rule is that timely objection must be made, directing the court's attention to such inadvertencies so that correction thereof may be made at the time. As in *Coach Co. v. Motor Lines*, 229 N.C. 650, 50 S.E. 2d 909, nothing appears here to take this case out of the general rule.

Suffice to say, none of the assignments directed to the charge show prejudicial error.

As to other assignments, petitioner has not shown prejudicial error. It is deemed unnecessary to discuss any of these assignments except those considered below.

Assignment #25 relates to petitioner's request that the jury be polled. The court polled the jurors in the usual manner. The assignment is directed to the court's refusal, in polling the jury, to ask specifically as to whether they knew the amount of the commissioners' award before arriving at their verdict. The jury had returned the verdict. The polling of the jury is for one purpose only, to ascertain whether the verdict as returned is the verdict of each juror and whether he then assents thereto. "It would manifestly be improper for the judge or clerk to attempt to impeach the jurors or their verdict by seeking to ascertain by an examination of each of the jurors the grounds upon which the

jurors had agreed upon their verdict." *Oil Co. v. Moore,* 202 N.C. 708, 163 S.E. 879.

The deletion from the form of judgment drafted by petitioner's counsel of the portion of the description of the land condemned quoted in the statement of facts is the basis of assignment #27. Petitioner has failed to show prejudicial error. The description by metes and bounds in the judgment as signed is in accordance with the Liles map, which, by stipulation, correctly shows the original boundaries of the Privett property and the portion thereof condemned by petitioner. This description is sufficient. If the deleted (additional) description differs from the particular description by metes and bounds according to the Liles map, it should have been deleted. If the two descriptions are fully in accord, the deletion is immaterial.

On petitioner's appeal, we find no error of law deemed sufficiently prejudicial to justify a new trial.

RESPONDENTS' APPEAL

In their assignment #1, respondents assert that the court erred in failing to sign the judgment prepared and tendered by them.

It is noted that the judgment signed, as well as that tendered by respondents, provided that respondents recover from petitioner the sum of $38,500.00. Respondents' said assignment does not draw attention to any specific provision of the judgment signed. If, as contended in their brief, the judgment signed contains unnecessary or inappropriate recitals or purported findings, it does not appear that respondents are prejudicially affected thereby. However, the modification indicated below should be made.

The identical description by metes and bounds of the portion condemned appears in the petition and in the judgment. This description begins: "Beginning at an iron stake in the eastern edge of the sidewalk on the eastern side of US Highway No. 1 . . . at a point S. 25 deg. 21' W. 14.5 feet distant from the iron spike where the eastern edge of the *present* right of way of US Highway No. 1 intersects the southern line of the 100-foot right of way of US Highway No. 74, . . ." (Italics added.) The Liles map shows that "the present right of way of US Highway No. 1" as used in said description refers to the right of way as of 1 October, 1956, prior to Project #6644. Hence, it seems appropriate that the description in the judgment be modified by substituting in lieu of the words, "the present right of way of US Highway No. 1," the words, "the right of way of US Highway No. 1 as of October 1, 1956"; and it is so ordered.

Respondents' assignment #2 is based on their exception to the court's refusal to include in the judgment signed the following provision, viz.:

"It further appearing to the court that 60 days from the 13th day of December, 1956, the date of this judgment, is a fair and reasonable time in which to pay the amount of this judgment into the office of the Clerk of the Superior Court of Richmond County, it is hereby further considered, ordered and decreed that from and after February 13th, 1957, any unpaid balance of the principal of this judgment shall draw interest at the rate of 6% per annum until paid."

In *Yancey v. Highway Com.*, 222 N.C. 106, 22 S.E. 2d 256, this Court held that a judgment against the State Highway and Public Works Commission for the amount awarded by a jury to a landowner as compensation for the taking of his property under the right of eminent domain did not bear interest; specifically, that C.S. 2309, now G.S. 24-5, had no application to a judgment against the State Highway and Public Works Commission.

While the form of assignment of error is different, respondents present essentially the same question; and, recognizing the applicability of *Yancey v. Highway Com., supra,* respondents urge that we reconsider that decision. Attention is again called to results reached in other jurisdictions. 29 C.J.S., Eminent Domain sec. 333; 18 Am. Jur., Eminent Domain sec. 272; 96 A.L.R. 150 *et seq.;* 111 A.L.R. 1304 *et seq.;* 36 A.L.R. 2d 413. It is noted that *Devin, J.,* (later *C. J.*), in his opinion in *Yancey v. Highway Com., supra,* took full notice of the fact that divergent results had been reached in other jurisdictions; and that the stated bases of decision related primarily to a construction of North Carolina statutes.

The construction then placed upon the relevant North Carolina statutes has been accepted as authoritative since 1942. If not in accord with the legislative intent, the General Assembly may provide that the landowner in such case shall receive additional compensation in the event of delay in the payment of the judgment, either in the form of interest at some specified rate or according to such other formula as may be devised to compensate the landowner for his loss, if any, on account of delay in the payment of the judgment.

It is noted that respondents' assignment of error relates solely to the refusal of the court to provide that the judgment shall draw interest *at the rate of 6% per annum* from 13 February, 1957. On authority of *Yancey v. Highway Com., supra,* the refusal of the court to incorporate in its judgment the requested provision relating to interest was correct. The assignment of error does not purport to present a constitutional question.

Petitioner's appeal: No error.
Respondents' appeal: Modified and affirmed.

CHARLES H. KIRKMAN, ADMINISTRATOR OF THE ESTATE OF LOUIS WOLF, DECEASED, v. GEORGE H. BAUCOM, JR., TRADING AS ACME PRODUCE COMPANY, AND L. SNEED HIGH, ADMINISTRATOR OF THE ESTATE OF GEORGE H. BAUCOM, JR., NOW DECEASED.

EDWARD F. FULLER v. GEORGE H. BAUCOM, JR., TRADING AS ACME PRODUCE COMPANY, AND L. SNEED HIGH, ADMINISTRATOR OF THE ESTATE OF GEORGE H. BAUCOM, JR., NOW DECEASED.

JULIA WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF BELVIN WILLIAMS, DECEASED, v. CHARLES KIRKMAN, ADMINISTRATOR OF THE ESTATE OF LOUIS WOLF, DECEASED, AND EDWARD FULLER.

(Filed 28 June, 1957.)

1. Appeal and Error § 51—

Where motions to nonsuit are made at the close of plaintiffs' evidence and renewed at the close of all the evidence, only the motions made at the close of all the evidence are to be considered on appeal.

2. Trial § 22a—

On motion to nonsuit, the evidence, and all inferences that may be fairly drawn therefrom, must be considered in the light most favorable to plaintiffs.

3. Trial § 22c—

Discrepancies and contradictions, even in plaintiffs' evidence, must be resolved in their favor.

4. Trial § 22b—

Evidence offered by defendants which contradicts that offered by plaintiffs or which tends to establish a different state of facts, must be ignored.

5. Automobiles § 37—

What occurred immediately prior to and at the time of collision may be established by circumstantial evidence, either alone or in combination with direct evidence.

6. Automobiles § 41c—

Testimony of witnesses to the effect that at the time of impact they saw fire on the east side of the highway, together with testimony as to the physical facts at the scene immediately thereafter, including the position of the vehicles, and the indications thereon of the point of impact, marks and tire tracks, etc., *is held* sufficient to be submitted to the jury on the

theory that the collision between the north-bound and south-bound vehicles occurred on the east side of the highway while the vehicle traveling north was on its right side thereof.

7. Automobiles § 39—

The testimony of a witness as to the marks observed by him on the highway at the scene of the accident involves no expression of opinion, but relates to facts disclosed from actual observation.

8. Appeal and Error § 41—

The admission of testimony over objection cannot be held prejudicial when the witness thereafter testifies without objection to essentially the same facts.

9. Appeal and Error § 42—

The charge of the court upon the burden of proof on the numerous issues involved *held* without error when construed as a whole.

10. Trial § 31e—

The trial court properly refrains from commenting on the probative value, weight or effect of negative testimony.

11. Automobiles § 46—

Objection to the charge on the ground that it instructed the jury as to the law in overtaking and passing another vehicle on the highway, G.S. 20-150, but failed to explain the law applicable to evidence that the driver of a north-bound vehicle pulled to his left preparatory to passing a preceding vehicle and struck a south-bound vehicle while the north-bound vehicle was over the center line to the west, *held* untenable in the absence of special request when the court correctly charged that if the north-bound vehicle was driven to its left of the center of the highway, such action would constitute negligence *per se*. G.S. 20-146, G.S. 20-148.

12. Same—

Appellants' contention that their driver was confronted with a sudden emergency when the driver of the vehicle traveling in the opposite direction pulled to his left preparatory to passing a preceding vehicle, and that appellants' driver pulled to his left in an attempt to avoid a head-on collision, *held* submitted to the jury in a manner favorable to appellants, and their exception to the charge in this respect is untenable.

APPEALS from *Nimocks, J.*, November-December Term, 1956, of CUMBERLAND.

Three actions, consolidated for trial, growing out of a collision on 26 January, 1953, in Robeson County, between a tractor-trailer combination owned by Fuller and operated by Wolf as Fuller's agent, and an International straight body truck, owned by Baucom and operated by Williams as Baucom's agent, proximately causing the death of Wolf and of Williams and great damage to the vehicles.

The actions are: (1) by Wolf's administrator, to recover damages for the alleged wrongful death of his intestate, herein called the Wolf case; (2) by Fuller, to recover for the damage to his tractor-trailer, herein called the Fuller case; and (3) by Williams' administrator, to recover damages for the alleged wrongful death of his intestate, herein called the Williams case.

In the Wolf and Fuller cases, Baucom, the defendant, denied negligence, pleaded contributory negligence, and alleged a cross action for damages to his truck. In each case, the plaintiff, in replying to Baucom's said cross action, pleaded contributory negligence.

In the Williams case, Wolf's administrator and Fuller, the defendants, denied negligence and pleaded contributory negligence.

After filing pleadings, but before trial, Baucom, originally the defendant in the Wolf and Fuller cases, died; and Baucom's administrator, substituted as defendant, adopted his intestate's pleadings and defended.

Separate issues were submitted in each case. In the Wolf case and also in the Fuller case, six issues, negligence, contributory negligence and damages with reference to plaintiff's action, and negligence, contributory negligence and damages with reference to Baucom's cross action, were submitted. In the Williams case, three issues, negligence, contributory negligence and damages, were submitted.

Pertinent to liability, the issues in each case presented the same ultimate questions: Was the collision proximately caused by the negligence of Williams? Was it proximately caused by the negligence of Wolf? Was it proximately caused by the concurring and contributing negligence of both Williams and Wolf?

The verdicts established that the collision, death of Wolf and damage to Fuller's property were proximately caused by the negligence of Williams as alleged by the plaintiffs in the Wolf and Fuller cases; and that the collision and its tragic results were *not* proximately caused or contributed to by the negligence (alleged by appellants) of Wolf.

In accordance with the verdicts, judgments were entered: (1) in the Wolf case, judgment for plaintiff for $10,000.00; (2) in the Fuller case, judgment for plaintiff for $6,000.00; (3) in the Williams case, judgment that plaintiff therein recover nothing.

The defendant in the Wolf and Fuller cases, and the plaintiff in the Williams case, excepted and appealed.

Additional facts are set forth in the opinion.

Anderson, Nimocks & Broadfoot for appellants.

Oates, Quillin & Russ and Nance, Barrington & Collier for appellees.

BOBBITT, J. Baucom's administrator, the defendant-appellant in the Wolf and Fuller cases, insists that the court erred in refusing to allow his motions for judgments of involuntary nonsuit.

In considering this question, these well established rules apply: 1. Only the motions made at the close of all the evidence are to be considered. *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541. 2. The evidence, and all inferences that may be fairly drawn therefrom, must be considered in the light most favorable to the plaintiffs. *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327. 3. Discrepancies and contradictions, even in the plaintiffs' evidence, must be resolved in their favor. *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93. 4. Evidence offered by defendant, which contradicts that of plaintiffs or tends to establish a different state of facts, must be ignored. *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280.

The collision occurred between 6:15 and 6:30 a.m. on Highway #301, between St. Pauls and Fayetteville, in the area where this north-south highway traverses Buckhorn Swamp. In this area, the highway, as it approaches a bridge spanning "the run of the swamp," is on a fill. Wolf (Fuller tractor-trailer) was going north. Williams (Baucom truck) was going south. The collision occurred north of the bridge.

The parties (appellees) who alleged that Williams' negligence proximately caused the collision did so on the basis of factual allegations to the effect that as the two vehicles, proceeding in opposite directions, were about to meet, Williams, without signal or warning, operated Baucom's truck across the center of said highway into his left lane, the lane designated for northbound traffic, and drove it directly and violently into the Fuller tractor-trailer, the point of collision being on Wolf's right and proper side of the highway.

The parties (appellants) who alleged that Wolf's negligence proximately caused the collision did so on the basis of factual allegations to the effect that Wolf was proceeding behind another tractor-trailer, which he was attempting to pass, and that Wolf, immediately after crossing the bridge, drove to his left of the center of the highway, completely blocking the west side, directly in the path of the oncoming Baucom truck.

In the Fuller case, Baucom alleged that Wolf "pulled over and across the center line of said highway, onto his left side of the same in the direction he was traveling and directly into the truck of the defendant." In the Wolf and Williams cases, appellants' allegations are indefinite as to whether the collision occurred on the east or west side of the highway. Baucom, the defendant in the Wolf and Fuller cases, alleged that, *if the collision occurred on the east side,* Williams exercised due care to avoid a collision in the emergency situation created by Wolf's negligence. In the Williams case, Williams' administrator alleged that

his intestate exercised due care in doing what he did when suddenly confronted by the emergency created by Wolf's negligence.

The drivers were killed instantly. No witness saw the actual impact. The evidence consists of testimony as to what transpired up to within a few seconds of the collision and as to what was observed thereafter.

What occurred immediately prior to and at the moment of impact may be established by circumstantial evidence, either alone or in combination with direct evidence. *Bridges v. Graham, ante,* 371, 98 S.E. 2d 492, and cases cited; *Wyrick v. Ballard Co., Inc.,* 224 N.C. 301, 29 S.E. 2d 900; *Edwards v. Cross,* 233 N.C. 354, 64 S.E. 2d 6.

There was evidence tending to establish the facts narrated below.

Three vehicles, all northbound and in the east or right lane, entered the Buckhorn Swamp area in this order: (1) an oil tanker, operated by Cottle, appellants' witness, (2) the Fuller tractor-trailer, operated by Wolf, and (3) the Brigman car, operated by appellees' witness Brigman with whom appellees' witnesses Woodell and Schwartz were riding. Northward, the highway curved to the right. The bridge could not be observed until one reached the "big bend" in the curve. When the oil tanker and thereafter the tractor-trailer rounded the "big bend," the distance between these vehicles was 250 yards or more. When the tractor-trailer rounded the "big bend," the Brigman car was 200-250 yards behind it. The occupants of the Brigman car lost sight of the tractor-trailer, "for just a matter of seconds on account of the curve," until the Brigman car reached the "big bend."

The Brown house was some 150 yards south of the bridge. When Brigman entered the "big bend," some 50-75 yards south of the Brown house, he saw "a blaze of fire pop up on the east side of the highway, on the north end of the swamp." He testified: "The fire was on the front of the tractor-trailer." Woodell and Schwartz also testified that the blaze of fire observed by them was on the east side of the highway.

As stated in appellants' brief: "Undisputed testimony discloses that the primary evidence of impact damage on the southbound Baucom truck was on the right side of the cab, about at the door of the cab. The principal indication of impact damage to the Fuller tractor was the right front, extending across to the left headlight."

After the collision, the Fuller trailer, lying on its left side, blocked most of the highway. The Fuller tractor, facing east, was lying on its left side, over the east shoulder, "down the embankment." The Baucom truck was south of the tractor-trailer. Its front wheels were on the east shoulder, the rear wheels down the east embankment, the van or body "knocked off up into the woods."

The collision occurred shortly before daylight. The lights were burning on all vehicles.

In the area where the collision occurred, the base of Highway #301 was concrete; but, when repaired, the highway had been covered with black top. A white line in the center indicated the respective lanes of travel. The paved portion was 21½ feet wide.

The investigating State Highway Patrolman (Daniels) reached the scene shortly after the collision, while the respective drivers were pinned in the burning tractor and in the burning truck. He found no marks leading from the Baucom truck to any portion of the west side of the highway. He found a tire mark, "traceable in continuous sequence from the east shoulder," which extended to the right front of the Baucom truck. He found a black mark on the east side of the highway, leading to the left rear wheel of the tractor. He found two round indentations or markings in the tar on the east side of the highway, approximately 18 inches apart. The rear wheels of the trailer were dual tandem wheels approximately 18 inches apart. He found no markings or indentations on the west side of the highway except a mark (cut or scratch) that led to the rear of "the jackknifed trailer." He found, on the east side, south of where the black marks started, "two feet of skid marks of a dual-wheel vehicle, four tires skid marks." He testified: "I did not find any tire marks or skid marks on the west side of the highway." Again: "I found tire marks, skid marks on the east side." Again: "The majority of the debris was in the northbound lane on the east side. There were some dirt and some pieces of metal to the left, on the west side, but very little."

On Highway #301, proceeding south, Williams' approach *to the bridge* was "a long, drawn out curve," 800-900 feet, to his right.

It is unnecessary to set out the evidence in greater detail. After careful consideration of the testimony of each witness, the conclusion reached is that, when considered in the light most favorable to the plaintiffs in the Wolf and Fuller cases, the evidence is sufficient to support findings that the collision took place on the east side, Wolf's right side, of the highway, and that Williams failed to follow the curve as he neared the bridge but crossed over in front of the oncoming tractor-trailer, and to warrant the verdicts that the collision was caused by the alleged negligence of Williams.

True, the evidence offered by appellants, primarily the testimony of Cottle, tends to show an *entirely different state of facts.* In substance, it is to the effect that Wolf, close behind Cottle, had pulled out to the left to pass the oil tanker about the time the oil tanker and the Baucom truck met and passed, and that the collision occurred immediately thereafter. Suffice to say, the jury did not accept Cottle's version; and, without detailed discussion, it is noted that much evidence casts doubt upon the credibility of Cottle's testimony.

If Cottle's testimony were accepted, it would appear therefrom that the impact occurred on the west side of the highway. Even so, the court below gave Baucom the full benefit of his said conditional defense and contention by charging the jury as follows: "If you should find . . . that . . . Williams, suddenly confronted with a ravine or a drop-off of about four feet into the swamp on the right of the highway, his side of the highway, was blocked by the Fuller tractor-trailer unit driven by . . . Wolf, if you should find that he attempted to pass on the left side of the highway, and then while so confronted with this sudden emergency he acted as a prudent person would have acted under the same or similar circumstances, then you would find that . . . Williams was not negligent in so doing."

The remaining assignments, urged as ground for a new trial, are brought forward in behalf of all appellants.

The assignments relating to portions of the testimony of Daniels and of Guittard are untenable. Daniels' testimony as to marks on the highway involved no expression of opinion but was confined to facts disclosed by actual observation. Moreover, he testified later, without objection, to essentially the same facts. *Price v. Gray, ante,* 162, 97 S.E. 2d 844. As to Guittard's testimony, appellants' contentions go to its probative value, not its competency.

Eleven assignments are directed to the charge as related to the burden of proof. Early in the charge, the court meticulously and correctly instructed the jury as to the burden of proof as to each of the fifteen issues. Moreover, after doing so, the court cautioned the jury to bear in mind that in relation to each issue the burden of proof was upon the party who made the allegations to establish by the greater weight of the evidence the facts as alleged. Appellants contend, however, that the "Court laid greater stress upon the 'burden of proof' as to the issues involving the appellants than on those of the appellees when the charge is taken as a whole." Suffice to say, consideration of the charge as a whole does not disclose prejudicial error in this respect. Rather, our impression is that the trial judge performed this tedious task in an impartial manner.

Assignment #26 is directed to the court's failure to declare and explain the law arising on the evidence as required by G.S. 1-180 "concerning probative value, weight or effect of 'negative' testimony." This assignment is without merit. The applicable rule is stated in *Murray v. Wyatt, supra.*

Assignment #22 is directed to the failure of the court to explain and apply G.S. 20-150 "to the evidence of Wolf's attempt to pass a forward vehicle (the oil tanker) directly in face of oncoming traffic, the truck of Baucom, and the effect of attempting to pass, although not actually passing a forward vehicle which one (Wolf) had overtaken." It is

noted, first, that G.S. 20-150 was relevant only in relation to Cottle's testimony; and, second, that the court instructed the jury "that it is negligence *per se*, that is, negligence in itself, for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction unless the left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety." However, appellants assert that "it was not contended nor was there any evidence to the effect that Wolf had gotten along side of or actually reached the rear of the oil tanker," but "that Wolf, driver of the Fuller truck, came up behind the oil tanker proceeding ahead of him and swung out onto the left side of the highway PREPARATORY TO ATTEMPTING TO PASS." The error, appellants contend, was the failure to explain and apply G.S. 20-150 to a factual situation where the driver pulls out to his left *preparatory to attempting to pass.* Appellants did not request a special instruction on this subject, nor does the assignment indicate the instructions the appellants have in mind. To say that Wolf pulled out to his left, preparatory to attempting to pass the oil tanker, would seem but another way of saying that Wolf was wholly or partly on his left (west) side of the highway; and we think the court made it clear that if Wolf drove to the left of the center of the highway, such action constituted negligence *per se,* to wit, a violation of G.S. 20-146 and of G.S. 20-148.

In discussing assignment #22, appellants state: "One theory of the case was that it was through this opening or clearance between the tractor-trailer and the oil tanker that the Baucom truck sought to go to avoid a head-on collision with the Fuller tractor-trailer." It is noted that this *theory* of appellants was submitted to the jury in a manner favorable to them in the quoted instruction relating to the sudden emergency doctrine.

After careful consideration of the entire record, including each of appellants' assignments of error, the conclusion reached is that the case was one for jury determination on the issues submitted, and that appellants have failed to show error deemed sufficiently prejudicial to warrant a new trial.

No error.

STATE v. PHILLIP COOKE.

STATE v. LEON WOLFE.

STATE v. GEORGE SIMKINS, JR.

STATE v. JOSEPH STURDIVENT.

STATE v. SAMUEL MURRAY.

STATE v. ELIJAH H. HERRING.

(Filed 28 June, 1957.)

1. Trespass § 9—

While redress for unauthorized entry on lands of another was by civil action at common law, forcible trespass, G.S. 14-126, and trespass after being forbidden to enter, G.S. 14-134, are made crimes by the statutes, but in any criminal prosecution possession is an essential element of the offense, and it is required that the warrant or bill of indictment allege the rightful owner or possessor, and that proof correspond with the charge.

2. Criminal Law § 14—

On appeal from conviction in an inferior court to the Superior Court, defendants must be tried for the identical crime of which they were convicted in the inferior court, and the Superior Court may try them for a different crime only upon a bill found or waived.

3. Indictment and Warrant § 15—

While the Superior Court, on appeal from an inferior court, has power to amend the warrant to make accurate and sufficient the statement of the crime asserted or attempted to be asserted, the court has no power to permit an amendment which results in the charge of an entirely different crime from the one of which defendant was convicted in the lower court.

4. Same: Trespass § 10—

On appeal to the Superior Court from conviction on a warrant charging trespass on the property of one person after being forbidden, in violation of G.S. 14-134, the allowance of an amendment to charge the property was in the possession of a different person results in the charge of an entirely different crime and constitute a fatal variance.

5. Criminal Law § 56—

Where it appears upon the face of the record that the warrant was amended in the Superior Court on appeal from conviction in an inferior court so as to charge an entirely different crime, the record discloses a fatal defect of which the Court must take note *ex mero motu*.

6. Criminal Law § 23—

Where defendants are tried in the Superior Court upon a warrant amended to charge a different crime, without bill found or waived, the State may thereafter proceed upon new warrants.

PARKER, J., concurring.

STATE *v.* COOKE, WOLFE, SIMKINS, STURDIVENT, MURRAY, HERRING.

APPEALS by defendants from *Burgwyn, E. J.*, December 1956 Criminal Term of GUILFORD (Greensboro Division).

On 7 December 1955 six warrants issued from the Greensboro Municipal-County Court on affidavit of Ernest Edwards charging the defendants therein named "did unlawfully and willfully trespass upon the property of Gillespie Park Golf Course, Greensboro, North Carolina, after having been forbidden to do so." The cases were heard in the Municipal-County Court on 6 February 1956. Each defendant was found guilty, and from the sentence imposed each appealed to the Superior Court. The cases were by consent consolidated for trial in the Superior Court.

Ernest Edwards, on whose affidavit the warrants issued, testified: "I'm employed as a golf professional manager of the Gillespie Park Golf Club, Incorporated. The golf club is an 18-hole club with club house. It's located on Asheboro Street and Randolph Avenue on the new Super Highway. . . . Back on the 7th day of December, 1955, I was employed as manager of Gillespie Park Golf Course, Incorporated. At that time one of my functions was to operate the Gillespie Park Golf Course."

He was asked: "On that date, the 7th day of December, 1955, state whether or not the corporation was in possession of the Gillespie Park Golf Course. A. It was."

Witness testified that defendants, on the date named, over his protest, played golf on the course.

When the State rested, defendants moved for nonsuit. Before the motion was heard, the solicitor asked the court to reopen the case so that he might make a motion to amend the warrants. His request was granted; whereupon, over the objection of defendants, the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of *Gillespie Park Golf Club, Inc.*, after having been forbidden to enter said premises and not having a license to enter said premises against the statute in such cases made and provided and against the peace and dignity of the State." (Italics added.)

After the warrants were amended, defendants offered a lease by the City of Greensboro to Gillespie Park Golf Course, Inc., dated 7 April 1949, for a term of one year, of the city's club house and golf course. Renewals of this lease were offered in evidence, the last renewal bearing date 2 April 1953 extending lessee's term to 6 April 1958.

The jury returned a verdict of guilty as to each defendant. Judgments were entered on the verdicts and defendants appealed.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

J. Kenneth Lee, Major S. High, C. O. Pearson, and William A. Marsh, Jr., for defendant appellants.

RODMAN, J. The crime of which defendants stand convicted is the entrance without a *bona fide* claim of right on land in the possession of another after having been forbidden to so enter. The act is made a crime by statute, G.S. 14-134. The statute carries the heading "Trespass on land after being forbidden . . ."

". . . every unauthorized, and therefore unlawful, entry into the close of another, is a trespass." *Dougherty v. Stepp*, 18 N.C. 371; *Armstrong v. Armstrong*, 230 N.C. 201, 52 S.E. 2d 362; *Lee v. Stewart*, 218 N.C. 287, 10 S.E. 2d 804; *Brame v. Clark*, 148 N.C. 364.

By the common law an unauthorized entry on the lands of another was redressed by civil action, but where the entry was made by means of force or threats apt to disrupt the peace, the trespass was made a crime in England prior to Sir Walter Raleigh's ill-fated attempt to establish a colony on our shores. Such a disturbance of possession is a statutory crime under our laws. G.S. 14-126. To convict one of the crime of forcible trespass, it is essential for the State to establish an entry with such force as to be "apt to strike terror" to the prosecutor whose possession was disturbed. It is necessary to allege and establish actual possession in the prosecutor. *S. v. Simpson*, 12 N.C. 504; *S. v. McCauless*, 31 N.C. 375; *S. v. Ray*, 32 N.C. 39; *S. v. Laney*, 87 N.C. 535; *S. v. Davenport*, 156 N.C. 597, 72 S.E. 7. Whether the right to possession was a good defense at common law was left unsettled in *S. v. Ross*, 49 N.C. 315.

In 1866 the Legislature made it a crime to invade possession even though the forbidden entry was made without force or threats. Good faith in making the entry is a defense. *S. v. Wells*, 142 N.C. 590; *S. v. Crosset*, 81 N.C. 579; *S. v. Hause*, 71 N.C. 518; *S. v. Hanks*, 66 N.C. 612. But possession is an essential element of the crime. If the State fails to establish that prosecutor has possession (actual or constructive) no crime has been established. *S. v. Baker*, 231 N.C. 136, 56 S.E. 2d 424; *S. v. Faggart*, 170 N.C. 737, 86 S.E. 31; *S. v. Yellowday*, 152 N.C. 793, 67 S.E. 480; *S. v. Whitehurst*, 70 N.C. 85.

Where an interference with the possession of property is a crime, it is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance. Such has been the holding in forcible trespass, *S. v. Sherrill*, 81 N.C. 550; in trespass after being forbidden, *S. v. Baker, supra;* in malicious injury to property, *S. v. Hicks*, 233 N.C. 31, 62 S.E. 2d 497; *S. v. Mason*, 35 N.C. 341; in larceny, *S. v. Law*, 227 N.C. 103, 40 S.E. 2d 699; *S. v. Harris*, 195

N.C. 306, 141 S.E. 883; *S. v. Harbert,* 185 N.C. 760, 118 S.E. 6. See also *Adams v. State,* 119 So. 189 (Miss.); *Brown v. State,* 85 S.E. 262 (Ga.); 87 C.J.S. 1113; 42 C.J.S. 1054; 27 Am. Jur. 649.

On the appeal defendants could only be tried for the crime for which they were convicted in the Municipal-County Court, viz., disturbing the possession of Gillespie Park Golf Course. The Superior Court could try them for a different crime upon a bill found or waived. *S. v. Mills,* 242 N.C. 604, 89 S.E. 2d 141; *S. v. Banks,* 241 N.C. 572, 86 S.E. 2d 76; *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189; *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *S. v. Mills, ante,* 237.

The Superior Court has broad power to allow amendments to warrants. This power to amend is the power to make accurate and sufficient the statement of the crime asserted or attempted to be asserted. The court has no power to permit a warrant to be amended so as to charge an entirely different crime from the one on which defendant was convicted in the lower court. *S. v. McHone,* 243 N.C. 231, 90 S.E. 2d 536; *S. v. Clegg,* 214 N.C. 675, 200 S.E. 371; *S. v. Goff,* 205 N.C. 545, 172 S.E. 407; *S. v. Taylor,* 118 N.C. 1262.

When the court permitted the warrants to be amended so as to charge a trespass on property of a person (Gillespie Park Golf Club, Inc.) other than property of the person named in the original warrant, it substituted one criminal charge for another criminal charge. This different crime could only be charged by bill found or waived. The defendants have not waived bills.

The record discloses the fatal variance. It is our duty to note it. *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *S. v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781. Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment. *S. v. Strickland, supra; S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *S. v. Sherrill,* 82 N.C. 694.

The judgment is

Arrested.

PARKER, J., concurring: In considering the amendments to the warrants the difficulty is in determining whether the amendments are as to a matter of form or go to the substance of the charge. I find in Annotations in 7 A.L.R., p. 1526 *et seq.,* and in 68 A.L.R., p. 930 *et seq.,* the statement that "the allowance by the court of an amendment to an indictment as to the name of the person alleged therein to be the owner of the property which is the subject of the crime is generally authorized, as the correction of a defect in form." In support of the text, cases are

cited from Iowa, Louisiana, Mississippi, New York, Pennsylvania, Vermont, Canada and England. An examination of a number of the cases cited discloses that the decisions were based on statutes of the various jurisdictions permitting in substance an amendment when a variance develops between the allegations in an indictment and the testimony as to the ownership of property.

Our statute G.S. 15-148—Manner of alleging joint ownership of property—does not permit the amendments allowed in the instant case. Nor do I know of any statute of ours that does so.

Warrants are, in most instances, drafted by laymen who are not learned in the technicalities of the law, and are not familiar with the necessity of stating in the warrant the correct name of the owner of property. The essence of the offense here is a trespass upon land after being forbidden. G.S. 14-134. The correct name of the lessee of the golf course was not stated in the original warrants. A study of the Record and defendants' brief discloses that the amendment to the warrants so as to allege the correct name of the lessee of the golf course did not affect the defense, or take the defendants at a disadvantage in any respect, as shown by the fact that their brief does not contend the allowance of the amendments to the original warrants was error. Yet, because of the defect in the name of the lessee, and by reason of the fact that we have no statute to permit an amendment in such a case, the judgment is arrested. The time of the trial has been wasted, and if the State desires to proceed further, it must start anew with new warrants.

One test to determine whether the change made was material is whether a verdict of conviction or acquittal on the warrant as drawn would be a bar to a warrant in the form in which it stood after the amendment. *Com. v. Snow*, 269 Mass. 598, 169 N.E. 542, 68 A.L.R. 920. It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments. It follows from these considerations that the change made in the warrants was one of substance and not of form.

In my opinion, the General Assembly, in its wisdom, should consider the advisability of enacting a statute that warrants issued by Justices of the Peace, Municipal or County Criminal Courts, can be amended on or before the trial, when there shall appear to be any variance between the allegations in the warrant and the evidence in setting forth the ownership of property, if the court should be of opinion that the amendment will not prejudice the defendant in his defense. Various states have done so, as appears in the cases cited in the A.L.R. Annotations referred to above.

QUEEN CITY COACH COMPANY v. ROBERT EMERSON FULTZ AND MRS. ROBERT EMERSON FULTZ,

AND

RALPH C. LITTLE v. ROBERT EMERSON FULTZ AND MRS. ROBERT EMERSON FULTZ.

(Filed 28 June, 1957.)

1. Automobiles § 8—

If the defendant turns left across the highway to enter a driveway without giving the statutory signal, G.S. 20-154, such violation of the statute is negligence *per se*, and if it proximately causes the injury, entitles plaintiff to an affirmative answer to the issue of negligence.

2. Appeal and Error § 45—

Error, if any, in relation to an issue answered in favor of appellant cannot be prejudicial.

3. Automobiles § 7—

Apart from safety statutes, a person operating a motor vehicle must exercise proper care in the way and manner of its operation, proper care being that degree of care which an ordinarily prudent person would exercise under like circumstances and when charged with like duty.

4. Automobiles § 37—

Evidence that defendant driver gave signal of intention to turn left by an electrical signal device operated by a lever on the steering column, is competent to be considered by the jury on the issue of the contributory negligence of such operator, notwithstanding the absence of evidence that such signal device had been approved by the Department of Motor Vehicles, since, apart from G.S. 20-154, it is for the jury to decide whether the signal was in fact given, whether it indicated a left turn by the operator of the car, and whether the driver of the other car was negligent in failing to observe and heed such signal.

5. Automobiles § 46—

While an instruction that an electrical turn signal device on an automobile should be given the same attention and regard irrespective of whether it had or had not been approved by the Department of Motor Vehicles, may constitute technical error, when the charge read contextually is to the effect that it was for the jury to decide whether the signal was in fact given, and if so, whether it was sufficient to indicate an intended left turn by the operator of the automobile, and if so, whether the operator of the other car negligently failed to heed such signal, the charge will not be held prejudicial.

6. Appeal and Error § 40—

Mere technical error which could not have misled the jury or prejudiced appellant is insufficient ground for a new trial.

APPEAL by plaintiffs from *Rudisill, J.*, Regular "B" September Term, 1956, of MECKLENBURG.

Two civil actions growing out of a collision that occurred in Onslow County on 4 January, 1954, shortly before 11:30 a.m., between the Coach Company's bus, operated by Little, and Fultz' 1950 Mercury car, operated by Mrs. Fultz.

Plaintiffs alleged that the collision was caused by the negligence of defendants. Defendants, answering, denied negligence and pleaded contributory negligence; and defendants also alleged cross actions, based on the alleged negligence of plaintiffs. Plaintiffs, replying to said cross actions, denied negligence and pleaded contributory negligence.

The Coach Company's action was to recover for damages to the bus. Little's action was to recover for personal injuries. Fultz' cross action was to recover for damages to his car. Mrs. Fultz' cross action was to recover for personal injuries.

Both vehicles were proceeding in the same direction along Highway #258. The bus was overtaking and attempting to pass the Fultz car. The Fultz car, making a left turn, was attempting to enter a driveway to the Franks residence.

Plaintiffs' testimony tended to show that the bus was traveling 50-55 miles per hour; that the Fultz car was traveling 25-30 miles per hour; that Little, when 100 yards behind the Fultz car, blew his horn and then turned into the left or passing lane; that, when 50 yards behind the Fultz car, he blew his horn again and continued to do so until the collision; that the operator of the Fultz car gave no signal for a left turn; and that the bus was "right on" the Fultz car, which until then was traveling straight in its right lane, when the Fultz car "just whipped right across the road," making a left turn across the path of the bus.

Defendants' testimony tended to show that there were two driveways leading to the Franks residence, the second some 100-120 feet beyond the first; that, shortly after the Fultz car passed the first driveway, Mrs. Fultz slowed down from 20-25 miles per hour to 5 miles per hour and gave a left turn signal; and that the Fultz car, upon reaching the second driveway, was making a slow, gradual left turn when the collision occurred. Mrs. Fultz testified that the approach along Highway #258 to the area of the Franks driveways was uphill, "a very slow incline"; that when she reached the first driveway she observed, by her rear view mirror, that the bus was "down the incline quite a distance"; and that she heard no horn signal from the bus.

According to Little, he did not put on his brakes but cut sharply to his left, onto the shoulder, to avoid striking the left side of the Fultz car; and the right front wheel of the bus struck the Fultz car at or near its left front wheel. At that time, according to Little, at least half of the bus was "off of the hard surface, on the shoulder of the road."

As stated, plaintiffs' evidence was that Mrs. Fultz gave no signal for a left turn. Defendants' evidence relating to the left turn signal given by Mrs. Fultz was, in substance, as follows:

The Mercury, then a new car, was purchased by Fultz in 1950 from an authorized Mercury dealer. It was then and thereafter equipped with electrical turn signals, operated by a lever just below the steering wheel; that the lever, when pushed down, turned on blinking lights, one at the front and one at the rear, on the left side of the car, and an indicator arrow on the dashboard, pointed left, flashing a green light and accompanied by a clicking noise; that this lever, when pushed up, operated lights on the right side of the car in like manner; and that prior to 4 January, 1954, these electrical turn signals had been operating in the manner indicated.

The testimony of Mrs. Fultz was that, in giving the left turn signal, she pushed the lever down and observed the green indicator arrow pointing to the left as she approached the second driveway.

The two actions were consolidated for trial. The jury found, by identical answers to the issues in each case, that the property damage and personal injuries sustained by plaintiffs were caused by the negligence of defendants as alleged in the complaint, and that plaintiffs, by their own negligence, contributed thereto as alleged in the answers.

Whereupon, the court entered separate judgments, each adjudging that "the plaintiff have and recover nothing of the defendants and that the defendants have and recover nothing of the plaintiff on their counterclaims," and that the plaintiff pay the costs.

Each plaintiff excepted and appealed; and, the appeals being consolidated, the plaintiffs, jointly, assign errors.

Harris & Coble for plaintiffs, appellants.
Carpenter & Webb for defendants, appellees.

BOBBITT, J. All questions posed relate to the electrical signal device on the Fultz car. Appellants contend that, "without a prior showing that such signal was 'approved by Department' as required by G.S. 20-154(b)," the evidence relating to the use thereof should have been excluded. Their assignments of error challenge (1) the competency of such evidence, (2) the charge of the court relating thereto, and (3) the court's failure to give requested instructions.

If the Fultz car made a left turn without giving a signal as required by G.S. 20-154, this statutory violation would constitute negligence *per se;* and if such negligence proximately caused the collision, plaintiffs were entitled to affirmative answers to the negligence issues. *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891, and cases cited. In *Banks v. Shepard*, 230 N.C. 86, 52 S.E. 2d 215, the only case cited by

appellants, the alleged violation *by defendant* of G.S. 20-154 was considered with reference to *defendant's* negligence.

Here the jury's verdicts established the negligence of defendants. Error, if any, in relation to the negligence issues, was not prejudicial. *Anderson v. Office Supplies,* 236 N.C. 519, 73 S.E. 2d 141; *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846.

We consider the assignments of error as related to the contributory negligence issues. Defendants' allegations of contributory negligence include allegations to the effect that the collision was proximately caused by the plaintiffs' failure to exercise due care "to keep a proper lookout while operating the bus on a public highway" and "to heed and have due regard for the signal for a left turn given by Mrs. Fultz."

Apart from safety statutes prescribing specific rules governing the operation of motor vehicles, a person operating a motor vehicle must exercise proper care in the way and manner of its operation, proper care being that degree of care an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. *Henderson v. Henderson,* 239 N.C. 487, 491, 80 S.E. 2d 383; *Kellogg v. Thomas,* 244 N.C. 722, 727, 94 S.E. 2d 903; *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533.

In determining whether Little was negligent in overtaking and attempting to pass the Fultz car, evidence of *any* signal that indicated the intention of the operator of the Fultz car to make a left turn was relevant and competent. True, there was no evidence that this type of electrical signal device had been approved by the Department; nor was there evidence that it had not been approved by the Department. Even so, the relevancy and competency of the evidence relating to said electrical signal device, when considered in relation to the contributory negligence issues, did not depend upon prior approval by the Department. Apart from G.S. 20-154, it was for the jury to decide whether the signal was in fact given, whether it was sufficient to indicate an intended left turn by the operator of the Fultz car and whether Little was negligent in failing to observe and heed such signal. *Weavil v. Trading Post, supra.*

Appellants' contention in respect of the charge is most clearly presented by their assignment of error (No. 7) directed to a portion thereof in which the court, after noting that there was no evidence as to whether the electrical signal device on the Fultz car had been approved by the Department, instructed the jury, in part, as follows:

> ". . . if you find that such car was equipped with a signal device which permitted the operator of the car to cause a light to flash upon the left rear of the automobile, and if you further find that such device was in good working order immediately prior to the

collision so that it would cause a light to flash on the left rear of said automobile, which could be reasonably seen by the operator of the bus, and that such flashing light was of a kind which in the common experience of operators of motor vehicles in this State indicates the intention of the driver of the vehicle to make a left turn, then the Court charges you that such signal device would, when operated by the driver of the Fultz car, give notice to the bus driver that Mrs. Fultz intended to make a left turn. The Court further charges you that if you find such a signal was given, the operator of the bus would be required to pay just as much attention to it and to control his bus with due regard as to that signal to the same extent as though there was evidence before you that the signal was approved by the Department of Motor Vehicles, . . ."

It may be conceded that it was technical error to say, "if you find such a signal was given, the operator of the bus would be required to pay *just as much* attention to it and to control his bus with due regard as to that signal *to the same extent as though* there was evidence before you that the signal was approved by the Department of Motor Vehicles." (Italics added.) In the absence of evidence that the signal device either had or had not been approved by the Department, there was no occasion for the court or jury to consider what *would have been* Little's duty *if there had been* evidence that the signal device had been approved by the Department.

The real point was not whether this type of electrical signal device had been approved by the Department, but whether *in fact* the electrical signal given by Mrs. Fultz was sufficient to warn Little of her intention to make a left turn. When the charge is read contextually, as related to the signal device, the court made it clear that it was for the jury to decide: (1) whether the signal was in fact given; if so, (2) whether it was sufficient to indicate an intended left turn by the operator of the Fultz car; and if so, (3) whether Little negligently failed to observe and heed such signal.

There is no reasonable ground to believe that the indicated technical error misled the jury or otherwise prejudiced appellants. Such harmless error is insufficient ground for a new trial. *Price v. Gray, ante,* 162, 97 S.E. 2d 844.

As to the two instructions requested by appellants, one relates explicitly and solely to the negligence issues and was a request for a peremptory instruction in plaintiffs' favor thereon. The other was a request that the court instruct the jury to "disregard all testimony relating to turn signals" and "find the facts as though there were no

evidence that any signal was given by Mrs. Fultz to indicate her intention to turn," a request properly refused by the court.

No error.

BETTIE POWELL COX v. RAY W. COX.

(Filed 28 June, 1957.)

1. Divorce and Alimony § 17—

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. G.S. 50-13.

2. Same: Trial § 25—

In the wife's action for absolute divorce, the petition of the husband demanding custody of the child of the marriage injects demand for affirmative relief of a substantial nature, and it is error for the clerk thereafter to permit the wife to take a voluntary nonsuit, and thus divest the court of jurisdiction, while the issue of custody is *in fieri*.

3. Appeal and Error § 3—

As a general rule, interlocutory judgments and orders are not immediately appealable, and refusal of a motion to dismiss is not a final determination of a cause from which an appeal will lie. G.S. 1-277.

4. Same—

Where the clerk permits voluntary nonsuit in an action in which defendant has asserted his right to affirmative relief, order of the Superior Court reversing the clerk's judgment of nonsuit has the same effect as if plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before the judge, and attempted appeal from the order reversing the nonsuit is a nullity, notwithstanding the judge signs the appeal entries.

5. Appeal and Error § 12—

An attempted appeal from a non-appealable interlocutory order is a nullity and does not divest the Superior Court of jurisdiction to proceed in the action.

6. Appeal and Error § 21—

An exception to an order or judgment upon facts found presents only the questions whether the facts found support the judgment and whether error of law appears on the face of the record.

APPEAL by plaintiff from *Seawell, J.*, at Regular November Civil Term, 1956, and December Criminal Term, 1956, of WAKE.

Civil action by plaintiff wife for absolute divorce on the ground of two years separation.

The defendant filed answer admitting all the material allegations of the complaint and simultaneously filed a petition in the cause under G.S. 50-13, demanding custody of the three and one-half year old child of the marriage, Richard Allen Cox, then in the custody of the plaintiff mother.

Thereafter, on 21 November, 1956, the plaintiff obtained from the Clerk of the Superior Court a judgment of voluntary nonsuit. To the entry of this judgment the defendant excepted and appealed to the Superior Court. When the appeal came on for hearing before Judge Seawell at the Regular November Civil Term, 1956, these facts were found by him: that pursuant to the defendant's petition for custody, hearings were held before him on 17 October and 15 November, 1956; that on the latter date the judge intimated the nature of his decision as to custody of the child and directed that all affidavits in the cause be filed with the court not later than the following Monday, 26 November, 1956; that in the interim, on 21 November, 1956, the judgment of voluntary nonsuit was entered by the clerk. Judge Seawell concluded and adjudged that the plaintiff had no right to submit to a voluntary nonsuit and that the clerk was without authority to enter the judgment dismissing the action. The decree was entered 28 November, 1956, vacating the judgment of nonsuit, restoring the case to the civil issue docket, and continuing the custody hearing until Monday, 3 December, 1956.

To the entry of the foregoing order the plaintiff excepted and in open court gave notice of appeal to the Supreme Court. Appropriate appeal entries were signed by Judge Seawell.

At the appointed time for the further hearing on Monday, 3 December, 1956, the attorney for the plaintiff appeared and presented a letter to Judge Seawell advising him that the plaintiff would not participate in any further custody hearings "other than to take exception to and note an appeal from any order entered in the cause pending the disposition of her appeal from the order of November 28, 1956." Thereupon no hearing was held on 3 December, 1956.

Thereafter, on 4 December, 1956, Ray W. Cox instituted in the Superior Court of Wake County an action against Bettie Powell Cox for absolute divorce on the ground of two years separation, and therein filed his petition praying for custody of the infant child. Notice was served on Bettie Powell Cox that a hearing with respect to custody would be held on 11 December, 1956. When this, the new companion cause, came on for hearing, as scheduled, the attorney for Bettie Powell Cox, having previously filed a plea in abatement, requested that the court hear this plea, and the attorney for Ray W. Cox requested that

he be given time in which to file answer to the plea. Thereupon the court entered an order allowing the attorney for Ray W. Cox until 10 January, 1957, to answer the plea in abatement and continued the hearing thereon until after the filing of answer. The court, with a view of going forward in the meantime with the custody hearing, called upon the parties to submit in the action of Bettie Powell Cox *v.* Ray W. Cox, and in the companion action of Ray W. Cox *v.* Bettie Powell Cox, such affidavits with respect to the custody of the infant child as the parties deemed proper. The attorney for Bettie Powell Cox announced he would not file any affidavits. The attorney for Ray W. Cox proceeded to file affidavits with the court as to character and reputation of both parties.

Upon the affidavits so submitted and upon the pleadings in the cause, the court found facts and entered judgment, dated 13 December, 1956, awarding custody of the child to the mother, subject to part-time custody of the father for short designated periods.

To the entry of the foregoing judgment the plaintiff in apt time noted her exception, and after giving the statutory notice appealed to the Supreme Court. *Supersedeas* was entered pending appeal.

Ehringhaus & Ellis for plaintiff, appellant.
Emanuel & Emanuel for defendant, appellee.

JOHNSON, J. When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. G.S. 50-13. *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 183; *Winfield v. Winfield,* 228 N.C. 256, 45 S.E. 2d 259; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136.

Therefore, when the plaintiff wife instituted the instant action for divorce, the court became vested in this action with exclusive jurisdiction to enter orders respecting the care and custody of the infant child. This phase of the court's jurisdiction was properly activated when the defendant filed his petition in the divorce cause praying the court for a determination of his custodial rights with respect to the child. *Reece v. Reece, supra.*

The defendant in petitioning for the custody of the child was seeking affirmative relief of a substantial nature. This being so, was it within the power of the clerk to divest the Superior Court of its jurisdiction by allowing the plaintiff to submit to a voluntary nonsuit during the course of the hearings and while the issue of custody was *in fieri* before the presiding judge? We think not.

In McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1645, the principle applied in numerous authoritative decisions of this Court is well stated as follows:

> "While the plaintiff may generally elect to enter a nonsuit, 'to pay the costs and walk out of court,' in any case in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action."

See also: *Bolich v. Ins. Co.*, 206 N.C. 144, 173 S.E. 320; *Gatewood v. Leak*, 99 N.C. 363, 6 S.E. 706; *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170. We are constrained to the view that the defendant was entitled as a matter of right to have his claim for affirmative relief settled and concluded in this action. The court below correctly so ruled in its order of 28 November, 1956. The plaintiff's exception thereto is without merit.

We have not overlooked the decision in *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329, which may well have been interpreted by the plaintiff's counsel and by the clerk as authorizing the nonsuit. However, our study of the decision leaves the impression it is factually distinguishable and does not control the instant case.

The next question for decision is whether Judge Seawell's order vacating the clerk's judgment of nonsuit was immediately appealable. Not every order or judgment of the Superior Court is immediately appealable to the Supreme Court. The statute, G.S. 1-277, regulates the practice in respect to when an order or decree is subject to immediate review. This statute as construed and applied by numerous decisions of the Court is well analyzed and explained in detail by *Ervin, J.*, in *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377. It would serve no useful purpose to restate here the various propositions there elucidated. For the purpose of this hearing it is enough to say that as a general rule "orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment." McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1782(3).

Numerous authoritative decisions of this Court hold that a refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. *Johnson v. Pilot Life Ins. Co.*, 215 N.C. 120, 1 S.E. 2d 381; *Clements v. Southern Ry.*, 179 N.C.

225, 102 S.E. 399; *Plemmons v. Southern Improvement Co.*, 108 N.C. 614, 13 S.E. 188.

The ruling from which the plaintiff attempted to appeal was the same in legal effect as if the plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before Judge Seawell and by him refused. We conclude, therefore, that the Judge's order reversing the clerk's nonsuit was not appealable. The attempted appeal was a nullity, notwithstanding the Judge signed the appeal entries appearing of record. *Veazey v. Durham, supra.*

The decision in *Bailey v. McPherson*, 233 N.C. 231, 63 S.E. 2d 559, and the other cases cited by the plaintiff, wherein the lower court became *functus officio* pending appeal, are factually distinguishable. Here, then, there was no interruption in the court's jurisdiction to hear and determine the question of custody. The hearing was concluded and judgment was entered 13 December, 1956. The only exceptions brought up for review are the exceptions to the order dated 28 November, 1956, and the judgment of 13 December, 1956. These present only questions whether the facts found support the decrees and whether error of law appears upon the face of the record. *Goldsboro v. R. R., ante,* p. 101; *Weddle v. Weddle, ante,* p. 336. The findings of fact made by the court below support the decrees and no error appears on the face of the record. Both decrees will be upheld.

Affirmed.

RAY W. COX v. BETTIE POWELL COX.

(Filed 28 June, 1957.)

Abatement and Revival § 5—

A plea in abatement for pendency of a prior action between the parties is a plea in bar, and the court must dispose of such plea before considering other matters in issue.

APPEAL by defendant from *Seawell, J.*, in Chambers at December Criminal Term, 1956, of WAKE.

Ehringhaus & Ellis for defendant, appellant.
Emanuel & Emanuel for plaintiff, appellee.

JOHNSON, J. This is a companion case of *Cox v. Cox,* involving the same parties, this day decided in an opinion filed contemporaneously herewith. In the companion case the wife is suing the husband for

divorce on the ground of two years separation. In the instant case the husband is suing the wife for divorce on the same ground. The immediate controversy in both cases relates to the custody of the infant child of the marriage, Richard Allen Cox. All the essential facts are set out in the opinion in the companion case. In that case the wife noted an appeal to this Court from Judge Seawell's order of 28 November, 1956, vacating the clerk's previous judgment of voluntary nonsuit entered while the custody hearings were in progress. Thereafter the husband instituted this action on 4 December, 1956, and filed petition in the cause, similar to his petition in the companion case, praying the court to determine the custody of the child. The hearings were then resumed. Judge Seawell treated the hearings as being held in both cases. He acted on the theory that the attempted appeal in the companion case, being from a nonappealable interlocutory order, was a nullity. But to guard against the eventuality of error in this respect, the further hearings were treated as being held in both cases, and when the hearings were over he entered judgments, in substance precisely alike, dated 13 December, 1956, in each case, awarding custody of the child to the mother, with part-time privileges to the father.

Meanwhile, as soon as the second case was instituted by the husband, the wife filed a plea in abatement asking dismissal on the ground that another action was pending involving the same subject matter between the same parties. The wife requested that this plea be heard before the petition for custody. The request was denied, and the hearing on the plea in abatement was continued until after 10 January, 1957, to allow the husband to answer the plea. The wife did not participate in any of the further hearings respecting custody. However, she excepted to the judgment as entered and appealed. This is the only exception brought up with the appeal. We treat the exception as challenging the correctness of the court's refusal to hear the plea in abatement before going forward with the hearing on custody. The challenge will be sustained. The plea in abatement was a plea in bar. The court should have disposed of it before hearing the custody case on its merits. For this oversight the judgment as rendered in this case must be vacated. It is so ordered. Decision here in nowise affects the validity of the judgment rendered in the companion case.

Reversed.

THELMA J. PHILYAW, ADMINISTRATRIX OF WOODROW PHILYAW, DECEASED, v. THE CITY OF KINSTON, A MUNICIPAL CORPORATION.

(Filed 28 June, 1957.)

1. Death § 3—

In an action for wrongful death, plaintiff has the burden of establishing that defendant was guilty of a negligent act or omission, and that such act or omission was the proximate cause of the death of decedent.

2. Negligence § 9—

Foreseeability of injury is a requisite of proximate cause.

3. Electricity § 7—

The maintenance of high tension wires by a corporation engaged in the distribution of electricity is not wrongful, and its duty to insulate such wires and place warning signs thereof is limited to places where, in the exercise of ordinary prevision, the electric company could foresee that persons might come in contact therewith in the course of their legitimate pursuits of work, business, or pleasure.

4. Same—Evidence held insufficient to show that defendant could have reasonably foreseen that building would be constructed in proximity to its transmission line.

The evidence tended to show that a workman was electrocuted in the course of his employment when he stood up after sawing rafters of the roof of the building under construction, and came in contact with high tension wires some four or five feet above the height of the roof. There was no evidence that the municipality maintaining the wires was given notice of the construction of the building in proximity to the wire by either the owner or contractor or other person, except in the application for building permit which gave the location and dimensions of the building but revealed no data in reference to the location and proximity of the city electric lines. *Held:* The evidence fails to disclose facts sufficient to charge defendant city with notice that someone might erect a building under and up to its transmission line, and therefore, the death of intestate was not within the reasonable foresight of defendant, and nonsuit was proper.

APPEAL by plaintiff from *Parker, J.*, at September 1956 Civil Term of LENOIR.

Civil action to recover damages for alleged wrongful death of intestate of plaintiff.

The case on appeal shows substantially the following: The allegations of negligence on the part of defendant, and the defendant's denial of the allegations thereof, and defendant's allegations of contributory negligence on the part of plaintiff's intestate are set forth in the pleadings filed.

In substance plaintiff alleges negligence on the part of defendant in the maintenance of an electric line over which high voltage current was being transmitted in close proximity to a building under construction

just outside the corporate limits of said city,—the allegation being to the effect that defendant had notice of the fact that the building was under construction; that its said electric light line was so located as to pass within about four feet of the southeast corner of said building; and that it failed to notify plaintiff's intestate and others employed in the construction of said building of the danger incident to the presence of the said line,—the same being uninsulated and carrying high voltage.

On the other hand, defendant, in substance, denied the material allegations of plaintiff, and affirmatively alleges that plaintiff's intestate knew, or in the exercise of ordinary diligence should have known, of the danger incident to the presence of its electric line, extending over the roof and across the southeast corner of the said building, and pleads, as proximate cause, intervening acts of negligence on part of George DuBose, the contractor.

Upon trial in Superior Court evidence offered by plaintiff as shown in the case on appeal tends to show substantially the following: W. I. Herring let contract to George DuBose, general contractor, to construct on his land, a little less than one mile from the limits of the city of Kinston, a new one-story building, 120 x 124 feet, to connect with the building already there, facing Highway 258. The corners for this building were laid off and staked. As so staked it was ascertained later that an electric line of the city of Kinston carrying two wires was over the southeast corner of the new building. The wires on this line were about 25 feet above the ground level. The edges of the rafters at the southeast corner of the wall of the building were to be about 20 feet high. When the walls were constructed the wires on the line were about 4 or 5 feet above, and about 2 feet over the wall at the southeast corner. The contractor expressly stated that he made no request of the city of Kinston either to remove the line or to cut off the current, and there is no evidence that anyone else did, or that the city of Kinston had any knowledge thereof.

On 10 June, 1954, about 5 o'clock, quitting time, Woodrow Philyaw, plaintiff's intestate, standing on the wall of the building sawing off rafters at or near the southeast corner, raised up and came in contact with one of the wires on this city electric line, and was electrocuted.

Plaintiff offered in evidence the application made by the contractor to the city inspector for a building permit, and a permit, issued to construct such building on Highway 258, to be erected in accordance with the ordinances of the city of Kinston and the general building laws of the State, and to be used for a warehouse. The contractor did not have a set of plans for the building, but did have a plat plan showing the size of the building. Neither the application nor the permit revealed any data in reference to the location and proximity of the city electric lines to the building. There is evidence that the wires on this

particular electric line of the city of Kinston were uninsulated, and that there were no signs posted at or near the premises to indicate the voltage of electric current that was being carried over these wires.

W. I. Herring testified that he had not given any thought, or noticed that the city of Kinston's high-powered voltage transmission line was there until the next morning after Philyaw had his accident. Too, the contractor testified that he did not discover any transmission lines of the city of Kinston in close proximity to the building until the night of the accident; but did discover the next morning the city line that crosses the corners of the building where Philyaw was electrocuted. The foreman in charge of the work for the contractor testified that he first noticed the presence on or near the building of the city's electric line about three minutes after Philyaw was struck,—that he had not before that time seen the wires across the premises. Several of the workmen on the building testified to seeing the wires and being aware of the fact that they were over the building.

One Westbrook testified that he and Philyaw were working as a team, he marking the rafters and Philyaw coming behind with a scale saw and cutting them off. He said that he had noticed the distance of the wires from the roof of the building enough to be cautious on that corner and did not stand up on the rafters "as we normally would."

And there is evidence that Philyaw was about six feet tall; that he was an experienced carpenter; and that in connection with his work it is a fact that he used electric equipment, and had been accustomed to use, and used electric equipment for a period of time.

The general contractor carried Workmen's Compensation insurance and made a report of the accident to the North Carolina Industrial Commission, and compensation has been paid to the injured employee as provided in the Workmen's Compensation law; and it is not denied that a period of more than six months had elapsed subsequent to the death of plaintiff's intestate, and prior to the institution of this action, during which period neither the said George DuBose, as employer of plaintiff's intestate, nor United States Fidelity & Guaranty Company, his insurance carrier, had instituted an action for or on behalf of or jointly with the plaintiff for recovery of damages based upon alleged negligence on the part of the defendant.

At close of plaintiff's evidence, defendant moved for judgment as of nonsuit. The motion was allowed. Plaintiff excepted thereto, and, from judgment in accordance therewith, appeals to the Supreme Court and assigns error.

Whitaker & Jeffress, Larkins & Brock, and Jones, Reed & Griffin for Plaintiff Appellant.

Edmundson & Edmundson and George B. Greene for Defendant Appellee.

WINBORNE, C. J. The pivotal question here is whether judgment as of nonsuit was proper upon the evidence offered, taken in the light most favorable to plaintiff. Well settled principles, appropriate to the factual situation, require an affirmative answer. See *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Pugh v. Power Co.,* 237 N.C. 693, 75 S.E. 2d 766; *Davis v. Light Co.,* 238 N.C. 106, 76 S.E. 2d 378; *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915, and cases cited, and many others.

"In action for death by wrongful act based on negligence, the burden rests on the plaintiff to produce evidence sufficient to establish the two essential elements of actionable negligence, namely: (1) That the defendant was guilty of a negligent act or omission; and (2) that such act or omission was the proximate cause of the death of the decedent." *Davis v. Light Co., supra.*

Too, it is well settled in this jurisdiction that foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co., supra,* and cases cited.

And if it be conceded that the city of Kinston were negligent in maintaining an electric line of uninsulated wires, as alleged, it is apparent from the evidence that the injury to and death of plaintiff's intestate was independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person. *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; see also *Alford v. Washington, supra,* and cases cited.

Moreover, we find it stated in 18 Am. Jur. 491-2, subject Electricity, Sec. 97, as quoted in *Mintz v. Murphy, supra,* and *Alford v. Washington, supra,* "That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go. The same rule applies with equal, if not greater, force in regard to placing warning signs." This principle is also recognized by this Court in *Ellis v. Power Co.,* 193 N.C. 357, 137 S.E. 163.

The mere maintenance of high tension transmission line is not wrongful, and in order to hold the owner negligent, where an injury occurs, he must be shown to have omitted some precaution which he should have taken. Am. Jur. 490, Electricity, Sec. 96.

In the case in hand there would have been no injury to plaintiff's intestate but for the intervening wrongful act, neglect or default of those in control of constructing the building under and in close prox-

imity to the electric line, without notice to the city. And surely the city of Kinston was not charged with duty of foreseeing that such would be done. The evidence does not disclose facts sufficient to charge the defendant with notice that someone might erect a building under and up to its transmission line. In consequence injury to and death of intestate was not within the reasonable foresight of defendant. *Davis v. Light Co., supra,* and cases cited.

Other assignments of error have been considered, and prejudicial error is not found.

Affirmed.

BILLIE JAMES BARBEE v. THOMAS O. PERRY AND WIFE, HAZEL PERRY.

(Filed 28 June, 1957.)

Automobiles § 42k—

Evidence tending to show that plaintiff attempted to cross the street between intersections where there was no marked crosswalk, that he saw a car approaching from his right traveling at a lawful speed in its proper lane, that plaintiff, notwithstanding, continued on his way and speeded up a little bit because he wanted to cross in front of the oncoming car, and was struck by the car just before he reached the far curb, *is held* to disclose contributory negligence on his part barring recovery as a matter of law.

JOHNSON, PARKER, and BOBBITT, JJ., dissent.

APPEAL by plaintiff from *McKeithen, Special J.,* at November 1956 Civil Term of DURHAM.

Civil action to recover for personal injury resulting from alleged actionable negligence of defendants.

The case on appeal discloses that the occurrence out of which this action arises took place on Geer Street in the city of Durham. This street runs in general east-west direction, and is 28 feet wide and is straight in both directions from point in question.

Plaintiff, as witness for himself, gave this narrative: (Direct examination) "On November 16, 1951, I was working at Weeks Motor Company . . . on the north side of Geer Street. The used car lot is on the south side of Geer Street. I was working over there . . . in the used car lot—Well, they had a repossessed automobile over there . . . and they wanted me to go over and start it and I went over . . . I carried a bottle of gas over . . . I took the gas to pour in the carburetor because the car had set there a while. I found that the battery was dead on it and started back to get someone to carry a battery over there. I carried the gas back with me because that was orders we had . . . never to leave any setting on the used car lot.

"The first thing I did, I walked out to the curb there and looked to the left to see if there was anyone coming that way, and I looked up to the right then, took a step out, looked back to the left. I glanced back up to the right there and seen a car that was coming. It was something about 300 feet up the street, and I proceeded to go on across there and I looked back the next time after I got about middle way and it was somewhere, I would say, in the neighborhood of about 200 feet down the street there. The car was going west. I started on across going to the north side of the street . . . I never completed it . . . I got to the north curb and started to make a complete step. In other words, had my right foot placed on the curb when something hit my left leg on the inside just above the ankle in there, and turned me right around and I went up in the air. When I came down that's the last of it till after about four or five days. Well, it was about six days before I came to my senses like I ought to . . . I didn't hear any horn or anything of that sort. No, sir, no cross walk anywhere along there . . . I had a broken left leg, etc."

And on cross-examination plaintiff, after describing the locale, testified: "This happened between 1:30 and 1:55. The weather was clear, it was in the daytime, and the street was dry . . . There was no obstruction at all in Geer Street anywhere along there to obstruct my view of an automobile coming from the east on Geer Street . . . I had been over to the used car lot a dozen times that morning . . . There were no lines, either solid or dotted . . . for walking across Geer Street anywhere between Madison Street and Rigsbee Avenue . . . Rigsbee Avenue does not cross Geer Street, but if the line of Rigsbee Avenue were extended to the north side the Weeks Motor Shop is west of where Rigsbee Avenue would come into Geer Street . . . I attempted to cross Geer Street in the middle of the block, or near the middle . . . because it was more convenient going back. I was going to Weeks Motor Company, which is west of Rigsbee Avenue.

"When I started back to the shop . . . when I got to the curb on the south side of Geer Street after coming out of the used car lot, I stopped. I looked to my left, that is, down the street toward the west. I did not see anything coming up the street from the west. I then looked to the east. I saw a car up at the school house about two blocks away. I glanced back to the left. The car was 300 feet or better away when I was standing on the curb.

"I took a step out from the curb, glanced to the left and glanced back at that car, which was on my right and coming in my direction. The second time I glanced I was one step from the curb on the south side of Geer Street, and I would say that the car was about 275 feet up to the right on Geer Street when I looked back, 250 to 275 feet, then I walked on out in the street. The first time I looked at the car I was on the

curb. The second time I looked at it I was one step from the curb, and I would say . . . it was about 200 feet. The only time between the first time and the second time I looked was the length of time it took me to take one step off the curb, and I kept walking . . . right on across the street . . . I did not stop when I got to the middle of the street. When I got to the middle of the street I looked back up to the right . . . the car was about 150 feet away from me . . . I just kept walking right on across the street . . . toward the north side . . . The car was coming toward me on its right-hand side of the north side of the street . . . I never saw the car again after I saw it 150 feet away from me. I went right on to the curbing then. I didn't look at it any more after I saw it 150 feet away. The car was coming toward me, it was traveling in its proper lane or the north lane of Geer Street. I didn't see the car any more from the time I was half-way in the street until I was struck when I was stepping on the curbing . . . I walked in front of the lane in which the car was traveling . . .

"After I seen the car when I was in the middle of the street, I sort of stepped up and speeded up a little bit and then went on across . . . I hurried up a little because I wanted to get across in front of the oncoming car . . ."

Again referring to Mrs. Perry, plaintiff testified: "I wouldn't say she was violating any speed law . . . There was nothing to keep me from seeing her, or her from seeing me."

The witness Sam L. Holder testified that he saw the collision between Billie Barbee and a motor vehicle; that from where he was it was about 160 feet, and that the car was being driven within 12 inches of the curb.

Defendants, reserving exception to the overruling of their motion for judgment as of nonsuit when plaintiff concluded the offering of testimony, offered evidence tending to wholly controvert the plaintiff's theory as to how the collision took place, and rested their case. Plaintiff offered other witnesses. Then both plaintiff and defendants rested. Thereupon defendants renewed their motion for judgment as of nonsuit. The motion was allowed. And to judgment signed in accordance therewith, plaintiff excepted and appeals to the Supreme Court, and assigns error.

Arthur Vann for Plaintiff Appellant.

Bryant, Lipton, Strayhorn & Bryant for Defendants Appellees.

WINBORNE, C. J. The sole assignment of error presented on this appeal, other than those relating to exceptions to formal matters, is based upon exception to the action of the trial court in granting defendants' motion for judgment as of nonsuit.

In this connection, if it be conceded that the evidence shown in the case on appeal, taken in the light most favorable to plaintiff, as is done in considering its sufficiency to take the case to the jury on the issue as to negligence of defendants, as alleged in the complaint, the testimony of plaintiff clearly shows that he failed to exercise reasonable care for his own safety, under the circumstances, that is, that he was negligent, as a matter of law, and that such negligence contributed to, and was a proximate cause of any injury he sustained. *Tysinger v. Coble Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246; *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589.

It is provided by statute, G.S. 20-174(a) that "Every pedestrian crossing a roadway at any point other than within a marked crosswalk . . . shall yield the right of way to all vehicles upon the roadway." Here, though plaintiff saw defendant's automobile approaching, he concedes that in operating the automobile *feme* defendant was not violating any speed law, and was traveling in the proper lane. And, using plaintiff's language, he "speeded up a little bit and then went on across." He said "I hurried up a little bit because I wanted to get across in front of the oncoming car." Such conduct is not in keeping with the rule of the prudent man. He took his chance, and lost.

Hence the judgment as of nonsuit was properly entered, and is

Affirmed.

JOHNSON, PARKER, and BOBBITT, JJ., dissent.

J. HERMAN DENNING, ADMINISTRATOR OF LUTHER SHELTON DENNING, DECEASED, v. GOLDSBORO GAS COMPANY; TOWN AND COUNTRY GAS COMPANY; CITY OF GOLDSBORO; EDWARDS AND JERNIGAN FURNITURE COMPANY.

(Filed 28 June, 1957.)

Municipal Corporations § 12—

In the granting of a franchise to a public utility to operate a system for furnishing gas for cooking and heating to residents of the municipality, the municipality exercises a governmental function, and may not be held liable in tort to a person injured by a gas explosion, even if it be conceded that the city were negligent in continuing the franchise after the pipe lines and equipment of the licensee had become defective. G.S. 160-2(6).

APPEAL by plaintiff from *Parker, J.*, at August-September 1956 Civil Term of WAYNE.

Civil action to recover damages for alleged wrongful death of plaintiff's intestate, Luther Shelton Denning, heard upon demurrer *ore tenus* of the defendant, City of Goldsboro.

Briefly stated, plaintiff alleges in his complaint that Luther Shelton Denning came to his death on 12 April, 1954, at a point in an alleyway along the western boundary of the store and as he left the store of Edwards & Jernigan Furniture Company, "by reason of an explosion that originated from gas that had escaped from the mains and pipes, into the pit or basement under the store of Edwards & Jernigan Furniture Company, Inc., and which had extended under the alleyway aforementioned" in the complaint, through negligence of defendants.

Plaintiff also alleges that the Goldsboro Gas Company, Inc., is and on 12 April, 1954, was a public service corporation, duly organized under the laws of the State of North Carolina, with its principal office and place of business in Goldsboro, Wayne County, North Carolina; that it had been granted by the City of Goldsboro a franchise to distribute and sell gas for cooking and heating in the city; and that for many years prior to said date, as a public service corporation, it had been operating in distribution of manufactured gas by means of pipes and conduits to sell and deliver same to householders and businesses and people of said city.

The grounds of the demurrer are that the complaint does not state a cause of action against the defendant in that: "1. It alleges no negligence on the part of this defendant or any breach of duty owed by this defendant to the plaintiff's intestate.

"2. It alleges no wrongful act or conduct on the part of this defendant which was a proximate cause of, or in any manner contributed to, the injury and death of the plaintiff's intestate.

"3. It appears upon the face of the complaint that such cause of action, if any, as is alleged against this defendant is within the governmental immunity of this defendant as a municipal corporation and, hence, this defendant is not liable in damages therefor."

The demurrer was sustained, and defendant City of Goldsboro was dismissed as a party to the action. Plaintiff excepts to and appeals to Supreme Court from judgment in accordance therewith, and assigns error.

J. Faison Thomson & Son for Plaintiff Appellant.

Edwin C. Ipock and James N. Smith for Defendant Appellee.

WINBORNE, C. J. This is the question presented on this appeal: Is there error in the ruling of the trial court in sustaining demurrer to the complaint, and dismissing the action as to defendant City of Goldsboro?

Admitting the truth of the allegations of fact set forth in the complaint, as well as relevant inferences of fact reasonably deducible therefrom, but not conclusions of law alleged, as is done in testing the sufficiency of the complaint to state a cause of action against defendant, challenged by demurrer, this Court is of opinion, and concurs in the ruling of the trial court, to the effect that the complaint fails to state a cause of action against the defendant City of Goldsboro, a municipal corporation, by authority of whose governing body franchise was granted extending to Goldsboro Gas Company, Inc., a public service corporation, the right to distribute and sell within the city gas for cooking and heating purposes.

A city or town is authorized by statute, G.S. 160-2(6) to grant upon reasonable terms franchises to public utilities, not to exceed the period of sixty years, unless renewed at the end of period granted.

The exercise of such authority by the governing body of a city or town is a governmental function, for which the city or town may not be held liable in damages unless made so by statute. *McIlhenney v. Wilmington,* 127 N.C. 146, 37 S.E. 187; *Clinard v. Winston-Salem,* 173 N.C. 356, 91 S.E. 1039, and numerous other cases.

Indeed when the officers are discharging a governmental duty, or acting in a matter committed to their discretion the municipality is not liable.

In the *Clinard case, supra,* this Court quoted with approval and as accordant with law of this State, decision in *Burford v. Grand Rapids,* 53 Mich. 98, in which *Judge Cooley* said that the decision of the town authorities had been "made in the exercise of its power in its discretionary and governmental field over a subject confided by the State to its judgment, and is presumptively correct. But whether correct or not, no appeal from the judgment to court and jury has been provided for, and, therefore, none can be had. An indirect appeal by suit against the city to establish a liability against it for an erroneous legislative determination is not only not provided for, but it would be opposed to a principle as well settled and as familiar as any in government."

The gravamen of plaintiff's complaint against the city of Goldsboro is that in granting extension and renewal of franchise to the Goldsboro Gas Company, Inc., a public service corporation, to operate the gas system then existent, the city acted "carelessly and negligently," and its action was unlawful for that: "Defendant Goldsboro Gas Company, Inc., had on December 31, 1946, purchased from the Tidewater Power Company and had become the owner of the entire equipment, pipe lines, and other things of value of the Tidewater Power Company, Inc. . . ."; and "that at the time Goldsboro Gas Company, Inc., purchased and began to operate the pipe lines and to furnish gas for cooking and heating to residents of Goldsboro, the pipe lines and equipment were

more than forty years old . . . were worn, their joints loose and given to leakage, holes and other defects throughout the system; that electrolysis had caused a general deterioration of the mains; and that these lines with all of these defects, extended underground through the streets and alleyways of the city of Goldsboro" and "constituted a great and continuous hazard to those using the said streets . . ."

Even so, the city would not be liable in damages for the acts of the city officials extending and renewing franchise to operate such system. In the *Clinard case, supra,* where officials had refused to grant license for the erection of a building, a governmental function, this Court declared: "If the officials charged with the exercise of the duty should have corruptly or oppressively refused the license asked, an action might have been laid against them individually" . . . "the city, even in that event, would not be liable in damages for such conduct on the part of its officials." The Court said "These principles are elementary law, and need not be reiterated."

The judgment below is

Affirmed.

JESSE L. COLLINS, ADMINISTRATOR OF EUNICE COLLINS SMITH, v. GOLDSBORO GAS COMPANY; TOWN AND COUNTRY GAS COMPANY AND THE CITY OF GOLDSBORO.

(Filed 28 June, 1957.)

APPEAL by plaintiff from *Parker, J.,* in Chambers at August-September Term 1956 of WAYNE.

Civil action to recover damages for alleged wrongful death of Eunice Collins Smith, the intestate of plaintiff, heard in Superior Court upon demurrer *ore tenus* of the City of Goldsboro which was sustained, and the action dismissed as to the City of Goldsboro.

Plaintiff excepts to the judgment entered to that effect, and appeals to Supreme Court and assigns error.

J. Faison Thomson & Son and F. Ogden Parker for Plaintiff Appellant.

Edwin C. Ipock and James N. Smith for Defendant Appellee.

PER CURIAM. This is companion case to No. 307,—opinion in which is rendered contemporaneously herewith. The main difference is in the fact that here it is alleged that the plaintiff's intestate was an employee of Edwards & Jernigan Furniture Company, Inc., in the performance

of her duties in the store at the time of the explosion, as result of which she was injured and killed. The principles applied in that case are applicable to and control decision here.

Affirmed.

A. W. ARCHER, A TAXPAYER OF CLEVELAND COUNTY, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF CLEVELAND COUNTY, v. Z. V. CLINE, CHAIRMAN; KNOX SARRATT, F. L. ROLLINS, JOHN D. WHITE, AND H. B. BUMGARDNER, MEMBERS, BOARD OF COMMISSIONERS FOR CLEVELAND COUNTY, NORTH CAROLINA.

(Filed 28 June, 1957.)

Appeal and Error § 6—

Where it is made to appear on appeal that the election sought to be restrained had been held pending plaintiffs' appeal from order denying injunctive relief, the appeal must be dismissed as presenting only a moot question.

APPEAL by plaintiff from *Froneberger, J.*, resident of 27th Judicial District, in Chambers—CLEVELAND County, North Carolina, 26 April, 1957.

Civil action upon complaint of plaintiffs, seeking to enjoin defendants, as the Board of Commissioners of Cleveland County, North Carolina, from proceeding with election on questions of proposed issuance by said county of (1) $310,000 Water Bonds, and (2) $105,000 Sanitary Sewer Bonds pursuant to County Finance Act, as amended by act of the 1957 Session of the General Assembly of North Carolina, entitled: "AN ACT AMENDING THE COUNTY FINANCE ACT TO AUTHORIZE THE ISSUANCE OF BONDS BY COUNTIES FOR WATER SYSTEMS AND SANITARY SEWER SYSTEMS AND FIXING THE MAXIMUM MATURITIES OF SUCH BONDS, AND AMENDING SECTION 153-9 OF THE GENERAL STATUTES TO AUTHORIZE COUNTIES TO ACQUIRE, CONSTRUCT, OPERATE, LEASE AND DISPOSE OF WATER SYSTEMS AND SANITARY SEWER SYSTEMS AND TO CONTRACT FOR THE OPERATION AND LEASE OF SUCH SYSTEM AND FOR A SUPPLY OF WATER AND THE DISPOSAL OF SEWAGE."

Defendants, answering complaint of plaintiffs, admitted that they were proceeding with preparation for the holding of such bond election, on 8 June, 1957, and planned to continue with such preparation, and prayed that relief sought by plaintiff be denied.

The cause came on for hearing upon stipulated facts, upon which the court "ordered, adjudged, and decreed that: (a) The plaintiff's prayer for an injunction or restraining order should be and hereby is

denied; (b) the plaintiff's action should be and hereby is dismissed; and (c) the plaintiff is to be taxed with the costs by the Clerk."

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

L. T. Hamrick for Plaintiff Appellant.

C. C. Horn, J. A. West, and A. A. Powell for Defendants Appellees.

Attorney-General George B. Patton, Amicus Curiae.

PER CURIAM. The parties have stipulated, and filed with this Court under date 10 June, 1957, stipulation in which it is agreed (1) that the bond election, sought to be enjoined, was held on Saturday, 8 June, 1957, and (2) that on Monday, 10 June, 1957, the election returns were canvassed and the official results announced. Thus it appears that the act sought to be enjoined or restrained has been consummated. Hence whether defendants should have been restrained pending final hearing becomes and is now an academic or moot question, and the appeal will be dismissed. As stated in *Austin v. Dare County,* 240 N.C. 662, 83 S.E. 2d 702: "It is quite obvious that a court cannot restrain the doing of that which has been already consummated," citing cases, and "plaintiff's appeal must be dismissed." See also *Smith v. Freeman,* 243 N.C. 692, 91 S.E. 2d 925; *Walker v. Moss,* 246 N.C. 196, 97 S.E. 2d 836.

Appeal dismissed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1957

MARIETTA NEECE v. RICHMOND GREYHOUND LINES, INC.

(Filed 18 September, 1957.)

1. Carriers § 1—

Loss sustained as a result of a movement of goods in interstate commerce is controlled by the application of appropriate Federal statutes.

2. Carriers § 15—

The Interstate Commerce Act does not provide for limitation of liability of a passenger bus carrier for baggage of passengers, 49 USCA 20(11), but does grant to regulatory bodies the power to prescribe such limitation, 49 USCA 302, and certification by the Interstate Commerce Commission of a tariff providing for such limitation is sufficient to show that the Commission had expressly authorized such limitation.

3. Carriers § 1: Contracts § 10—

Common carriers may, by contract, limit their liability for negligence when expressly authorized to do so by statute or by a regulatory body with power to grant that privilege.

4. Same—

The law does not look with favor on provisions which relieve a party from liability for his own wrong, and any doubt as to the meaning of such contractual provision or its application will be resolved against the carrier.

5. Carriers § 1—

Before a motor carrier can limit its liability for negligent loss or damage to property entrusted to it, it must show that it received the property as a

common carrier, that it issued a written receipt which contained the asserted limitation, and that the Interstate Commerce Commission had expressly authorized the limitation based on a rate differential, and if any one of these conditions is not shown to exist the asserted limitation has no effect.

6. Carriers § 15—

A bus passenger has the right to carry on the bus with her and under her control her baggage, in which event it is in the custody of the passenger and the carrier has no responsibility with respect thereto, or she may check her baggage and impose on the carrier a liability up to $25 in the event of its loss, or she may declare a greater value than $25, and, by the payment of extra compensation, impose on the carrier a liability up to $225 in the event of its loss.

7. Same—

A bus carrier is under no duty to accept for transportation as baggage packages exceeding the dimensions given in the tariff, and when it receives from a passenger a package of dimensions in excess of those limited in the tariff, the carrier is a gratuitous bailee of the package and is liable for its full value for loss occasioned by its gross negligence, the limitation of liability specified in the tariff for baggage not being applicable when the package does not come within the specifications of baggage contained in the tariff.

8. Same—

Proof that a passenger delivered to a bus carrier a package not coming within the tariff definition of personal baggage, and that the carrier failed to return the package on demand, is sufficient to be submitted to the jury on the issue of the gross negligence of the carrier, or, if jury trial is waived, to require an affirmative finding on the issue by the court.

APPEAL by plaintiff from *Mallard, J.*, September 1956 Civil Term of ALAMANCE.

Plaintiff seeks to recover the sum of $619, the asserted value of a piece of personal baggage. Prior to 3 July 1954 plaintiff purchased a ticket from Greensboro to New York and return. The ticket entitled plaintiff to transportation on the buses of the defendant. On the trip from Greensboro to New York she carried with her three pieces of luggage, namely, a train case, a hat box, and a wardrobe bag or case. She carried all three of these articles on the bus in the rack over the seats, from Greensboro to New York. They contained wearing apparel belonging to plaintiff.

On 3 July 1954 she went to defendant's station in New York for the purpose of returning to Greensboro. She did not stop in the baggage room or make other stops in the station but went through the station to the point where the bus was awaiting passengers. As she started to enter the bus, she was advised by the bus driver that she could not take

her wardrobe case in the bus with her. A redcap, an employee of defendant, was standing by the bus. Plaintiff surrendered her wardrobe case to the redcap so that the baggage might be placed in the baggage compartment of the bus. She was given a check showing that the baggage was checked to Richmond where she would have to get it from the bus driver, that being the terminal of the bus on which she was riding and the point at which she would change to another bus. On the back of the baggage check which was given to her was a statement reading: ". . . the issuing carrier will *NOT* be liable for a greater amount than $25.00 to any one passenger in the event of loss or damage to property covered by this and/or other baggage checks issued to the same passenger, unless a greater amount is declared in writing at the time of checking, in which case charges for excess value will be collected, and a receipt issued." Plaintiff was not advertent to this provision when the check was delivered to her. The bus driver declined to permit plaintiff to take her wardrobe case on the bus with her on the return trip because of its size measuring approximately 26 inches square.

Defendant introduced in evidence excerpts from tariffs filed by it with the Interstate Commerce Commission. Rule 1 of the tariffs provides: ". . . the rules, regulations, rates, and charges published in this tariff apply in the checking, storage, and transportation of baggage . . ." Rule 2, captioned "BAGGAGE DEFINED," requires all property transported in baggage service to be packed in described containers and marked. It permits the transportation as baggage of (a) wearing apparel, toilet articles, and similar personal effects, (b) property for the commercial convenience of the passenger such as catalogues, sample merchandise, *et cetera*, (c) miscellaneous articles such as baby carriages, carpenters' or mechanics' tools. Rule 3 lists specific articles which will not be accepted as baggage. Rule 4, entitled "LIMITATIONS," provides: "No single piece of baggage will be accepted that, in its greatest dimensions, exceeds 24 inches in height, and 24 inches in width or breadth, or 45 inches in length, except that skis and/or ski poles may exceed 45 inches in length. . . . (b) Value: Baggage for one passenger declared to exceed two hundred and twenty-five ($225) dollars in value for one or more pieces will not be accepted for checking or transportation; nor will any single piece of baggage or property be accepted for checking and transportation that is valued at more than two hundred twenty-five ($225) dollars, regardless of the number of tickets presented for checking."

Rule 5, entitled "FREE BAGGAGE ALLOWANCE," provides: "Baggage, consisting of articles which may be handled in interstate baggage service, will be transported without additional charge, when not exceeding the free weight allowances or the free value allowances shown below . . .

"Free Baggage Allowance

Weight	Value
For each Adult Ticket	
150 pounds	— $25.00"

"Rule
No.
7 LIABILITY:

. . .

"(b) Carriers, parties hereto, will not be responsible for loss or damage to baggage in excess of the amounts shown below, and then only to the extent of the actual loss or damage sustained.

"(1) The maximum free value allowance, as authorized in Rule 5 and 6 herein, in the event no excess value has been declared and excess value charges paid thereon."

"(c) Carriers, parties to this tariff, will NOT accept liability for a greater value than two hundred and twenty-five (225) dollars on any single piece of baggage, nor for a greater value than two hundred and twenty-five ($225) dollars for each full fare ticket or one hundred and twelve dollars and fifty cents ($112.50) for each one-half fare ticket presented, regardless of the number of pieces of baggage, and in no event shall the liability exceed the actual value of the baggage, at the time of checking."

The plaintiff's wardrobe case has never been delivered to her. She filed claim therefor. Defendant asserts that its liability, if any, is limited to the sum of $25 as fixed in the tariff.

Basing its findings on the tariff, the court concluded that plaintiff was limited in the amount that she could recover to $25. Judgment for that amount was entered in favor of plaintiff, and she appealed, asserting that she was entitled to compensation for the full amount of her loss.

C. C. Cates, Jr., and W. R. Dalton, Jr., for plaintiff appellant.

Jordan & Wright and Perry C. Henson for defendant appellee.

RODMAN, J. The loss which plaintiff sustained results from a movement of goods in interstate commerce; hence, the rights of the parties must be determined by the application of appropriate Federal statutes. *St. Sing v. Express Co.*, 183 N.C. 405, 111 S.E. 710; *Scott v. Express Co.*, 189 N.C. 377, 127 S.E. 252; *Crompton v. Baker*, 220 N.C. 52, 16 S.E. 2d 471.

Congress, by the Interstate Commerce Act (Part I, 49 USCA 1-37) enacted in 1906, sanctioned a limitation of liability by carriers subject

to the Act. *Adams Exp. Co. v. Croninger,* 226 U.S. 491, 57 L. Ed. 314; *Boston & M. R. Co. v. Hooker,* 233 U.S. 97, 58 L. Ed. 868; *Galveston H. & S. A. R. Co. v. Woodbury,* 254 U.S. 357, 65 L. Ed. 301. The Cummins Amendment adopted in 1915 prohibited carriers from limiting their liability. *Adams Express Co. v. Darden,* 265 U.S. 265, 68 L. Ed. 1010. Neither of these statutory provisions seemed to Congress to accord equitable treatment to both carrier and shipper.

In 1916 the second Cummins Amendment was adopted. It forbids limitation of liability except as there expressly provided for. These several provisions are now codified as 49 USCA 20(11). The provisions of that section material to this case read: "Any common carrier . . . receiving property for transportation . . . shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability imposed; . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: . . . *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury . . . shall not apply, first, to baggage carried *on passenger trains or boats, or trains or boats carrying passengers* (emphasis supplied); second, to property . . . received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . . and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon . . ."

When these statutory provisions were enacted, the term "common carrier" did not include a motor carrier. In 1935 Congress enacted the Motor Carrier Act, now Part II of the Interstate Commerce Act (49 USCA 301-327). The Act, by its terms, applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. (49 USCA 302) It imposes on the Commission the duty "To regulate common carriers by motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect

to continuous and adequate service, transportation of baggage and express . . . and safety of operation and equipment." 49 USCA 304.

49 USCA 316 provides: "It shall be the duty of every common carrier of passengers by motor vehicle . . . to establish, observe and enforce just and reasonable . . . fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce . . ." Other portions of sec. 316 impose responsibility for establishing reasonable rates and facilities substantially in conformity with the provision of other common carriers subject to Part I of the Interstate Commerce Act (49 USCA 6). Transportation without the filing of tariffs is forbidden.

Provision was made for motor carriers to limit their liability by sec. 319 which provides: "The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable."

Sec. 20 of Part I authorizing carriers other than motor carriers to limit their liability permits limitation with respect to "baggage carried on passenger trains or boats, or trains or boats carrying passengers." When the Motor Carrier Act was adopted in 1935 and sec. 20 was written as quoted above, the language permitting limitation of liability with respect to baggage of passengers was not expressly enlarged to include baggage carried on motor buses. Did Congress, by making sec. 20 applicable to motor carriers, intend to enlarge the first provision permitting limitation of liability by adding "or motor carriers" so as to read "to baggage carried on passenger trains or boats *or motor vehicles,* or trains or boats *or motor buses* carrying passengers?"

We have found no Federal decision or rule which gives a definite answer. *Mr. Justice Clark,* in a footnote to his opinion in *New York, N. H. & H. R. Co. v. Nothnagle,* 346 U.S. 128, 97 L. Ed. 1500, quotes from the report of the Congressional Committee accompanying the 1916 amendment to the Interstate Commerce Act thus: "Further the commission has held that *baggage carried on passenger trains upon the ticket of a passenger* is within the terms of law. Whether this construction is correct or incorrect, it is palpable that *baggage so transported on a passenger fare* ought not to be subject to the rule which controls ordinary freight, and in the bill now reported it is excepted in express terms." The report explained the aim of the 1916 legislation: "to restore the law of full liability as it existed prior to Carmack amend-

ment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This is done for obvious reasons."

The Ohio courts hold the Act was in effect amended so as to read "or motor buses" as contended by defendant. *Patton v. Pennsylvania Greyhound Lines,* 60 N.E. 2d 945. We reach a different conclusion. Common carriers may, by contract, limit their liability for negligence when expressly so authorized by statute. That was the holding in *Boston & M. R. Co. v. Hooker, supra.* That case arose under the Carmack Amendment and prior to the adoption of the Cummins Amendments. The rule there enunciated is of course still applicable when the provisions of the Cummins Amendments have been complied with. A carrier may also limit its liability when authorized so to do by a regulatory body with power to grant that privilege. *Knight v. Coach Co.,* 201 N.C. 261, 159 S.E. 311; *Russ v. Telegraph Co.,* 222 N.C. 504, 23 S.E. 2d 681. The law does not look with favor on provisions which relieve one from liability for his own wrong. Any doubt as to the meaning of the contract or its application will be resolved against the carrier. *Union Pacific R. Co. v. Burke,* 255 U.S. 317, 65 L. Ed. 657; Carriers, 13 C.J.S. sec. 89; 10 Am. Jur. sec. 1752, p. 456.

The fact that the first permission for limitation of liability in the Federal statute is not applicable to baggage transported by motor carriers does not mean that they are not permitted to limit their liability under other portions of the Act. The statute, 49 USCA 319, by express terms declares that motor carriers may do so. The authority of motor carriers to limit their liability is found in the second portion of the provision. Cases recognizing the right of motor carriers and air carriers to limit their liability point to the provisions of the statutes giving the regulatory bodies, Interstate Commerce Commission and Civil Aeronautics Authority, power to regulate rates and conditions of travel as supporting limitation of liability granted in duly filed tariffs. *Argo v. Southeastern Greyhound Lines,* 33 S.E. 2d 730 (Ga.); *Cray v. Pennsylvania Greyhound Lines,* 110 A. 2d 892 (Pa.); *Kellett v. Alaga Coach Lines,* 37 So. 2d 137 (Ala.); *Wilkes v. Braniff Airways,* 288 P. 2d 377 (Okla.); *Lichten v. Eastern Airlines,* 189 F. 2d 939, 25 A.L.R. 2d 1337, and annotations; *Herman v. Capital Airlines,* 104 F. Supp. 955; *S. Toepfer, Inc. v. Braniff Airways,* 135 F. Supp. 671.

Before a motor carrier can limit its liability for negligent loss or damage to property entrusted to it, it must show: (1) it received the property as a common carrier; (2) it issued a written receipt which contained the asserted limitation; (3) the Interstate Commerce Com-

mission has expressly authorized the limitation which is based on a rate differential.

If each of these conditions is not shown to exist, the asserted limitation has no effect. *New York, N. H. & H. R. Co. v. Nothnagle, supra; Caten v. Salt City Movers & Storage Co.*, 149 F. 2d 428; *Union Pacific R. Co. v. Burke, supra; Southeastern Exp. Co. v. Pastime A. Co.*, 299 U.S. 28, 81 L. Ed. 20, 57 S. Ct. 73; *Sambur v. Hudson Transit Lines, Inc.*, 112 N.Y.S. 2d 514, 116 N.Y.S. 2d 500.

The excerpts from the tariff do not expressly show that it was authorized or approved by the Interstate Commerce Commission, but since it was certified by the Commerce Commission as "issued December 15, 1951, effective February 15, 1952, except Intrastate in Kansas January 1, 1952," we treat it as sufficient to show that the Commission had expressly authorized the tariff on which defendant relies.

Under the common law, carriers were, as an incident of the transportation of passengers, required to carry without additional cost a reasonable amount of a passenger's wearing apparel called baggage. *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 20 L. Ed. 423; *Bacon v. Pullman Co.*, 159 Fed. 1, 14 Ann. Cas. 516, and annotations, *cert.* denied 210 U.S. 433, 52 L. Ed. 1136; 13 C.J.S. 1683. Properties in excess of the reasonable requirements of the passenger were not baggage for which the carrier was liable as an insurer. *N. Y. C. & H. R. R. Co. v. Fraloff*, 100 U.S. 24, 25 L. Ed. 531.

Plaintiff, under the provisions of her ticket, had a right to carry on the bus with her under her control her baggage. *Santa Fe Trail Transp. Co. v. Newlon*, 159 P. (2d) 713 (Okla.). When so carried, baggage is in the custody of the passenger and no responsibility with respect thereto is imposed on the carrier.

The tariff gave plaintiff the right to check her baggage and to impose on the carrier a liability up to $25 in the event of its loss. The carrier received compensation for this service when it sold plaintiff her ticket. If plaintiff deemed her baggage of greater value than $25, she had a right, by the payment of extra compensation, to impose a liability on the carrier up to $225 in the event of its loss.

Defendant could not deprive plaintiff of any one of the three options which her ticket, the contract of carriage, gave her with respect to her baggage as that term is defined in the tariff. Hence, it is necessary to examine the tariff to see what baggage the tariff deals with. The baggage to which the tariff relates is defined in Rule 4, headed "LIMITATIONS": "No single piece of baggage will be accepted that, in its greatest dimensions, exceeds 24 inches in height, and 24 inches in width or breadth, or 45 inches in length . . ." These dimensions have a pertinency to the limitation of liability. Generally those who travel by bus take relatively short journeys; hence, they need but limited quantities

of apparel to serve their needs on the journey. A limitation of $225 might reasonably apply to a bag 24 inches square.

The carrier was under no duty to accept for transportation as baggage packages exceeding the dimensions given in the tariff. Defendant had a right under its tariff to prohibit plaintiff taking on the bus with her the wardrobe bag, because of its size. Having availed itself of its right under the tariff and prohibited plaintiff from retaining personal custody of her property, it cannot now use the tariff as a shield to protect it against its negligence. The tariff is not a cloak to be worn or discarded as carrier may elect. Both carrier and passenger are bound by its terms.

Where a carrier of passengers receives and handles a package for a passenger which does not qualify as baggage which the passenger is entitled to have transported free, the carrier is a gratuitous bailee of the package. As a gratuitous bailee, it is liable only if the loss be occasioned by its gross negligence. *Perry v. R. R.*, 171 N.C. 158, 88 S.E. 156; *Kindley v. R. R.*, 151 N.C. 207, 65 S.E. 897; *Brick v. A. C. L.*, 145 N.C. 203; *Trouser Co. v. R. R.*, 139 N.C. 382; 6 Am. Jur. 358.

Plaintiff alleges that her loss is due to defendant's negligence. Defendant denies each of the asserted acts of negligence. There has been no finding with respect to this basic issue. Defendant admits receipt of plaintiff's bag and its failure to return it on demand. This admission is sufficient to take the case to the jury or to require a finding by the court if a jury trial be waived. *Perry v. R. R., supra; Beck v. Wilkins*, 179 N.C. 231, 102 S.E. 313; 9 A.L.R. 545; *Hunter Trucking Co. v. Glatzer*, 136 N.Y.S. 2d 857, 6 Am. Jur. 459.

If it be found that plaintiff's property was lost by the gross negligence of defendant as alleged, she is entitled to full compensation for her loss.

Error.

THE WIDOWS FUND OF SUDAN TEMPLE v. CHARLOTTE NIXON UMPHLETT AND DANIEL CHARLES UMPHLETT.

(Filed 18 September, 1957.)

1. Appeal and Error § 49—

Asserted error relating to a finding of fact which is immaterial to the decision of the case cannot be prejudicial.

2. Same—

Where documentary evidence before the court is not included in the record, it cannot be determined that a finding of the court, based on such documents, was not supported thereby, and therefore appellant has failed to carry the burden of establishing error.

3. Insurance § 36b(1)—

Where insured has the right to change the beneficiary, the beneficiary has no vested right in the contract during the life of insured, but has a mere expectancy.

4. Insurance § 13c—

Insurer has the right to waive provisions inserted in the insurance contract for its benefit.

5. Insurance § 36b(2)—Original beneficiary having no vested right may not attack validity of change of beneficiary as between insurer and substituted beneficiary.

A fraternal order, under statutory provisions, G.S. 58-281, and its bylaws, permitted insured members, upon written notice, to change the beneficiary in a certificate within the relationships specified, and with the consent of its board of directors, to change the beneficiary to persons not coming within the specified relationships. The insured member requested change of beneficiary from his wife to his father, his father not being within the relationships specified in the certificate. Upon death of the insured member, insurer interplead and admitted that its secretary issued a second certificate substituting the father as beneficiary without calling a meeting of the board of directors and without notification to the directors, but that the secretary acted in good faith upon belief that he was authorized to do so. *Held:* If the father had instituted action on the certificate, the allegations of insurer would have been insufficient to defeat recovery, there being no allegation of fact sufficient to establish the invalidity of the certificate naming the father beneficiary, and therefore on the facts alleged and admitted, the father is entitled to the proceeds of the funds as against the widow.

APPEAL by the defendant Charlotte Nixon Umphlett from *Parker, J.*, January 1957 Term of PERQUIMANS.

On 28 July 1956 plaintiff instituted suit in the Superior Court of Perquimans County against Charlotte Nixon Umphlett (hereafter designated as appellant) and Daniel Charles Umphlett (hereafter designated as appellee). It filed its complaint when summons issued. The complaint in brief alleges: Plaintiff is a fraternal benefit society incorporated under the laws of North Carolina. On 27 January 1949 Marvin Hoyle Umphlett (hereafter referred to as insured), a member of Sudan Temple, applied for membership in its Widows Fund designating his wife, appellant, as beneficiary. Pursuant to the application, plaintiff's secretary issued a membership certificate which by its express terms was subject to the laws and bylaws of the Fund. Article III of plaintiff's bylaws provides that the Fund shall be under the general control of a board of directors composed of nine of its members. Article V of the bylaws relating to certificates and beneficiaries provides:

"Sec. 1. A certificate of membership shall be issued to each member of the Widows Fund signed by the Secretary and setting forth the

name of the member and the name and relationship of the beneficiary.

"Sec. 2. The beneficiary shall be the wife, mother, sister or issue of the member or the OXFORD ORPHAN ASYLUM or THE MASONIC AND EASTERN STAR HOME, *Provided,* that in exceptional cases and with the consent of the Board of Directors other persons may be named.

"Sec. 3. The beneficiary may be changed at the pleasure of the members, in accordance with Section 2, Article 5, and consent of the Board of Directors, upon surrender of the certificate of membership and written notice to the secretary."

The amount payable to a beneficiary upon the death of the insured was $1,000. On 16 November 1955 insured, then in good standing and the holder of the certificate issued in 1949, requested the secretary of the Fund to issue a duplicate, as the original had been lost, and to change the beneficiary to his father, appellee. The secretary of the Widows Fund, without calling a meeting of the board of directors and without notification to the board, but acting in good faith and as he thought he was authorized to do, issued a certificate to insured similar in all respects to the original except it designated appellee as beneficiary. Insured died 29 December 1955. Each of the defendants asserted a claim against the plaintiff for the amount of money due less any unpaid assessments. Insured was, at the time of his death, indebted to the Fund in the sum of $2.20 on account of unpaid assessments. Plaintiff, desiring to have the ownership of the money determined, paid into court the sum of $997.80 for such person or party as the court should adjudge entitled thereto. It prayed that the court determine the ownership of the deposit, and that it be relieved of all liability to the parties.

On 15 August 1956 the defendant appellee filed his answer, admitting all of the allegations of the complaint except the allegation that the secretary of the Fund acted without specific direction from the board of directors, and averred that the insured had during his lifetime done everything in his power to effectuate the change, that insured and the answering defendant had a right to rely on the certificate issued by the secretary naming the father as the beneficiary as having been issued in conformity with the regulations and bylaws of plaintiff. He asserted his ownership of the deposit.

On 19 September 1956 appellant filed her answer to the complaint. It specifically admits, or by failure to deny admits, the allegations of the complaint. It avers that the request for change of beneficiary was not made in writing as required by the bylaws, that at the time of making the request insured was suffering with cancer, was in constant pain, easily influenced in making decisions, and the secretary of the Fund knew or should have known his condition and should have exercised extreme care and caution which he failed to do. The answer

asserts that appellant is entitled to the deposit, and asks that it be so adjudged.

At the January Term 1957 there was a pretrial conference at which time it was adjudged "that the plaintiff be, and it is discharged from all further liability to the defendants, or either of them, and any right which either had against the plaintiff is transferred to the money in the hands of the Clerk of the Superior Court of Perquimans County, paid to him by the plaintiff for the use of such party as the court may decree is entitled thereto." No exception was taken to this judgment.

Thereafter, during the term, the defendants waived a jury trial and submitted the controversy to the court, to find the facts, make conclusions of law, and enter judgment thereon.

The case on appeal was not settled by the court. It states: "No witnesses testified on the trial, but from the pleadings and other documents and statement of attorneys for the parties, informally before the Court, there was evidence tending to show . . ." The documents and statements made by counsel are not included as a part of the case on appeal. The summary of what the evidence tended to show is substantially in accord with the allegations of the complaint.

The court made findings of fact which, with two exceptions, are supported by the admissions in the appellant's answer. The court, in its findings, referred to appellant as "the estranged wife" of insured. This is alleged by appellee. The court found as a fact that the request made by insured on 16 November 1955 was in writing. Apppellant's answer does not so admit.

Based on its findings, the court concluded insured had expressed a clear, unequivocal intent to change the beneficiary in the certificate and had performed every act in his power to perform, that for a period of six weeks from receipt of the new certificate naming appellee as beneficiary until insured's death, he was without knowledge "of any defect in such transaction," and the change of beneficiary was valid.

Based on its findings and conclusions the court adjudged that appellee was the owner of the deposit held by the clerk and directed payment to appellee.

Appellant excepted to the findings of fact, to the conclusions of law, and to the judgment and appealed.

Walter G. Edwards for defendant appellant.

C. R. Holmes for defendant appellee.

RODMAN, J. When the findings of fact are compared with the solemn admissions in the answer of appellant, it develops that the only facts found by the court and not admitted by appellant in her answer are

the findings that she and her husband were estranged in November 1955 and the request for change of beneficiary was in writing.

We deem the finding that insured and his wife were estranged immaterial to the decision of the case; hence, any exception to the finding in that respect, even if erroneous, is harmless.

The statement in the case on appeal that the pleadings "and other documents" were submitted to the court suffices to support the finding that the request for change of beneficiary was in writing since the documents are not included in the record, and we are therefore unable to determine what the "other documents" do show. The statement in the case on appeal that the evidence submitted tended to establish certain facts is not a statement that the evidence did not suffice to establish additional facts found by the court. The burden of establishing error is on appellant. *Hodges v. Malone & Co.*, 235 N.C. 512, 70 S.E. 2d 478; *Shelly v. Grainger*, 204 N.C. 488, 168 S.E. 736. If it should be conceded that the finding was not supported by the evidence, we would not regard it as material to the decision of this case.

Plaintiff was meticulous in its compliance with the rule of impartiality required of an interpleader. *Knights of Honor v. Selby*, 153 N.C. 203, 69 S.E. 51.

The right of the insured to change the beneficiary, in conformity with the requirements of plaintiff's bylaws, is not challenged. Not only was the right granted by the bylaws, it was declared and guaranteed by statute. G.S. 58-281. Hence anyone named as beneficiary had, during the life of the insured, no vested right in the certificate. It was a mere expectancy. *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68; *Wooten v. Order of Odd Fellows*, 176 N.C. 52, 96 S.E. 654; *Walser v. Insurance Co.*, 175 N.C. 350, 95 S.E. 542; *Pollock v. Household*, 150 N.C. 211, 63 S.E. 940; 29 Am. Jur. 952.

The statute defines the class who may be beneficiaries in a certificate issued by a fraternal benefit society. G.S. 58-281. An attempt to name a beneficiary outside of the class limited by the statute confers no right on the person so designated. *Junior Order American Mechanics v. Tate*, 212 N.C. 305, 193 S.E. 397; *Trust Co. v. Widows Fund*, 207 N.C. 534, 177 S.E. 799; *Andrews v. Masons*, 189 N.C. 697, 128 S.E. 4; *Applebaum v. Commercial Travelers*, 171 N.C. 435, 88 S.E. 722.

Appellee is within the class permitted by statute. He is not within the class which the insured had, under the bylaws, an unconditional right to name as his beneficiary. The statute expressly grants to the insurer the right to circumscribe the statutory permissive class. Having the right to circumscribe, the insurer of course had the right to make its limitation absolute or it could, as in this case, fix a permissive class of beneficiaries. Manifestly the person originally named as beneficiary had no right to prohibit the insurer from selecting one in the

permissive class. The provision with respect to obtaining consent of the board of directors to designate someone other than wife, mother, sister, or issue was inserted in the bylaws not for the benefit of the original beneficiary but for the insurer. The provision requiring a request for change of beneficiary to be in writing was likewise for the protection of the insurer. It had a right to waive provisions inserted for its benefit and prescribe the conditions under which the consent of the board of directors would be given. *Wooten v. Order of Odd Fellows, supra; Swygert v. Durham Life Insurance Company,* 92 S.E. 2d 479; *Arrington v. Grand Lodge,* 21 F. 2d 914; *Home Mut. Ben. Asso. v. Rowland,* 244 S.W. 719, 28 A.L.R. 86, and cases cited in the annotation, pp. 95-6; *Cantala v. Travelers Ins. Co.,* 107 N.Y.S. 2d 24; 29 Am. Jur. 991.

It has been broadly stated in many cases that an insurer waives compliance with policy provisions inserted for its benefit by interpleading the original and substituted beneficiary and payment of the sum owing into court. *Equitable Life Insurance Company v. Fourman,* 135 N.E. 2d 878; *Metropolitan Life Ins. Co. v. Sandstrand,* 82 A. 2d 863; *Mutual Life Ins. Co. of New York v. Patterson,* 15 F. Supp. 759; 19 A.L.R. 2d 108, and cases cited in note 42. As pointed out in *McDonald v. McDonald,* 102 So. 38, 36 A.L.R. 761, this does not impair any vested right which the original beneficiary had. It is but a recognition that insurer had, in the lifetime of the insured, consented to a change in its contract between them.

The court, in *New York Life Insurance Company v. Lawson,* 134 F. Supp. 63, speaking with respect to the effect to be given to an interplea, said: "The clear wishes of a dead woman should be respected, especially where a corporate insurer has by the nature of the institution of its own litigation insulated itself from a duality of liability."

The undisputed facts in this case permit us to decide it without determining the effect of an interplea by an insurer when, as here, it has acted on the request of the insured and issued to him a certificate or policy naming a new beneficiary.

We are not dealing with a case where the beneficiary is beyond the statutory permitted class, *Trust Co. v. Widows Fund, supra,* nor a case where the bylaws positively restrict the class. *Junior Order American Mechanics v. Tate, supra.*

Here the insured had the right to change the beneficiary by the express provisions of the bylaws. The certificates are issued by the secretary. A certificate was issued to insured, naming appellee as beneficiary, by the secretary, who was acting in good faith. The insurer so asserts. Insured held the certificate some six weeks before his death. He was never notified that the secretary acted without authority. Although it had the opportunity both before and since

the death of the insured, insurer has not denied that the secretary was in fact lacking in authority. It does not seek to void the contract. It does not allege that it is invalid. It has never asserted that the contract is invalid. It merely alleges: ". . . the Secretary of the Widows Fund, without a meeting of the Board of Directors and without notification of the Board of Directors, but acting in good faith . . ." issued the certificate. It might well be that in factual situations similar to the case presented the board of directors had expressly authorized the secretary to act for them and to permit the naming of the father as beneficiary. It is not suggested that the board of directors were not, during the lifetime of insured, informed of the act of the secretary.

If appellee had brought suit on the certificate issued to him and insurer had admitted the issuance of the certificate, insurer would have to plead facts sufficient to establish its invalidity. The allegations of the complaint would not have sufficed to defeat such an action by appellee. His rights cannot be diminished by changing the position of insurer from defendant to plaintiff. *Wright v. Ins. Co.*, 244 N.C. 361, 93 S.E. 2d 438; *Tolbert v. Ins. Co.*, 236 N.C. 416, 72 S.E. 2d 915; *Strigas v. Ins. Co.*, 236 N.C. 734, 73 S.E. 2d 788; *Griffin v. Ins. Co.*, 225 N.C. 684, 36 S.E. 2d 225; *Green v. Casualty Co.*, 203 N.C. 767, 167 S.E. 38; 46 C.J.S. 1020-1.

Affirmed.

STATE v. HERBERT GATTIS ANDREWS, JR.

(Filed 18 September, 1957.)

1. Indictment and Warrant § 9—

Where time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date during the month on which the crime was committed.

2. Same: Burglary § 2½—

An indictment charging all the essential elements of a felonious breaking or entry within the purview of G.S. 14-54 is not subject to quashal on the ground that defendant should have been charged with a nonfelonious entry under the statute, since the sufficiency of the evidence to support the felony charge cannot be challenged by motion to quash, but must ordinarily be raised by motion to nonsuit or by prayer for special instructions.

3. Indictment and Warrant § 13—

A motion to quash will lie only for fatal defect appearing on the face of the indictment, and upon such motion the court may not consider extraneous evidence or matters *dehors* the record proper.

4. Criminal Law § 107—

The failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error in the absence of request for such instruction, since the matter is a subordinate and not a substantive feature of the case.

5. Larceny § 2—

The common law rule that the stealing of property of any value is a felony has been changed by statute so that the stealing of property of the value of not more than $100 is a misdemeanor. G.S. 14-72.

6. Burglary § 5—

In a prosecution under an indictment charging a felonious breaking and entering, an instruction that if the jury should find that defendant broke or entered the room in question with intent to commit the crime of larceny of "any examination papers," defendant would be guilty of feloniously breaking or entering, must be held for error as assuming as an established fact that the papers possessed such value as to make the intent to steal any of them an intent to commit the crime of felonious larceny.

7. Burglary § 1—

Where the State relies upon intent to steal specific property to sustain the charge of felonious breaking or entering, the State must prove and the jury find beyond a reasonable doubt that defendant intended to steal property of sufficient value to make the taking thereof a felony.

8. Criminal Law § 169—

Where it is apparent from the record that error in the trial of the felony counts may have influenced the verdict on the misdemeanor count, a retrial of the whole case will be awarded, notwithstanding that the error does not pertain directly to the misdemeanor count.

9. Larceny § 2—

G.S. 14-401.1 applies to examinations given by State licensing boards and can have no application in a prosecution for the theft of college examination papers.

10. Criminal Law § 166—

Where a new trial is awarded on one exception, questions raised by other assignments of error which may not recur on retrial need not be considered.

APPEAL by defendant from *Mallard, J.*, and a jury, at December Criminal Term, 1956, of ORANGE.

The defendant was tried on three bills of indictment (Nos. 892, 893 and 894) charging him with feloniously breaking into or entering administrative offices of the University of North Carolina, at Chapel Hill, with intent to steal personal property, in violation of G.S. 14-54. Indictment No. 892 contains a second count charging the defendant with larceny of examination papers belonging to Professor Gordon Cleveland and the University of North Carolina of the value of less than $100.

Before pleading to the bills, the defendant moved to quash each of them. The motions were overruled, and thereupon the bills were consolidated for trial.

The State's evidence discloses that during the summer of 1956 mimeographed copies of examinations to be given in the department of Political Science were kept in the office of Professor Gordon Cleveland at 201 Caldwell Building. It was the custom in the department of Political Science for the instructors to prepare the examinations in long hand and deliver them to the departmental secretaries in Professor Cleveland's office for mimeographing several days before the examinations were to be given. The secretaries would type the stencils and run off copies on a mimeograph machine. The mimeographed copies were then placed in a file, with built-in lock, located in the office. On examination day, the instructor would go by, pick up his papers, and take them to the examination room. Professor Carl C. Moses was a part-time instructor during the summer session of 1956, and was giving a course called Political Science 87. Mimeographed copies of the examination to be given by him were prepared in the customary manner sometime before examination day and were left in the file in 201 Caldwell Building.

The defendant, a nonstudent at the time, had ways and means of gaining access to quiz and examination papers after they were mimeographed. He would obtain copies and sell them to students for fees. Max Icenhour was taking the course in Political Science 87. Charlie Stevens was taking Political Science 41. Each desired to secure a copy of the examination he was to take. At separate times they discussed the matter with the defendant. He agreed to get copies for both students. At a late hour on a night in June the defendant, accompanied by Icenhour and Stevens, entered Caldwell Hall. The defendant, using a key to the door, entered room 201 while Icenhour and Stevens stood watch at different places in the building. A few minutes later the defendant came out of the room with a copy of the examination paper in Political Science 87 and handed it to Icenhour. Stevens was advised that his paper had not been prepared. However, some weeks later the room was re-entered by the defendant, with Icenhour and Stevens again standing watch. This time, the defendant obtained and gave to Stevens a mimeographed copy of the examination to be given in Political Science 41.

Thereafter, Icenhour learned that he was under investigation by the Honor Council. The disciplinary records in the case were on file in the suite of offices occupied by Dean Weaver and S. H. McGill, Director of Student Activities, at 206 South Building. This was known to the defendant. He told Icenhour there were some things he wanted to check. So, on the night of 2 August they entered 206 South. The

defendant went into an inner office while Icenhour waited in the outer room. In a few minutes the defendant returned with a manila envelope in which the records in the Icenhour case were tied up. The records were opened and examined and then were taken back where they were found.

The foregoing summary is taken in the main from the testimony of Icenhour and Stevens, who were called as State's witnesses. The defendant, protesting his innocence, went upon the stand and denied all incriminatory portions of the State's evidence.

The jury by their verdict found the defendant guilty of the felony charges of breaking or entering with intent to commit larceny as alleged in each of the three bills of indictment, and guilty of stealing an examination paper as charged in the second count of bill No. 892. Judgments were entered imposing concurrent prison sentences as to each of the three felony convictions. On the second count in bill No. 892, judgment was entered imposing a suspended probationary prison sentence. From the judgments so entered, the defendant appeals.

L. H. Mount and Claude V. Jones for defendant, appellant.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

JOHNSON, J. The defendant by his first assignment of error challenges the court's refusal to quash the first count in bill No. 892. In this count it is alleged that the defendant "on or about the.....day of June, A.D. 1956 . . . unlawfully wilfully and feloniously did break and enter . . . Room 201, Caldwell Hall . . . with intent to steal, take, and carry away . . . chattels" of Gordon Cleveland, Carl C. Moses, and the University of North Carolina. The defendant in his motion to quash alleges that the challenged count is fatally defective for failure to describe the charge attempted to be alleged with sufficient exactness to enable him to prepare his defense or avail himself of conviction or acquittal as a bar to subsequent prosecution for the same offense.

The only defect of description asserted by the defendant is the failure to allege the exact date when entry into Room 201 Caldwell is claimed to have been made. The defendant contends that the indictment is fatally defective because the offense is alleged to have occurred on or about the blank day of June instead of a specified day in June. The contention is without merit. Time not being of the essence of the offense charged, it was not necessary that the exact date be specified. G.S. 15-155; *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623.

The defendant also contends that the first count in bill No. 892 should have been quashed because it charges an entry into 201 Caldwell Hall

with felonious rather than nonfelonious intent. The defendant takes the position he should have been indicted for no more than a nonfelonious entry under the 1955 amendment to G.S. 14-54 (C. 1015, S. L. 1955), and that it was error to charge him with violating the felony provisions of the statute. The contention is untenable. The fallacy on which the argument is based is obvious. The defendant is seeking, on appeal, to use his motion to quash for the purpose of challenging the insufficiency of the proofs to support the felony charge. Such evidentiary defects ordinarily must be raised by motion for nonsuit or by prayer for instructions to the jury. *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311. A defect of this sort may not be challenged by motion to quash. A motion to quash will lie only for fatal defect appearing on the face of the indictment. It must appear from an inspection of the bill that no crime is charged or that the bill is otherwise so defective that it will not support a judgment. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. The court, in ruling on the motion, is not permitted to consider extraneous evidence or matters *dehors* the record. Therefore, when the alleged defect must be established by evidence *aliunde* the record, the motion must be denied. "Record" as here used means the record proper. It does not include the case on appeal or transcript of the evidence. *S. v. Cochran, supra.* Here, there was no motion for nonsuit or prayer for instructions. The bill, No. 892, charges in the first count all the essential elements of a felonious breaking or entry within the purview of G.S. 14-54. See *S. v. Allen,* 186 N.C. 302, 119 S.E. 504. The language of this count is also sufficient to charge the lesser offense of nonfelonious entry under the recent amendment, C. 1015, S. L. 1955, now codified as part of G.S. 14-54. The motion to quash the felony count in bill No. 892 was properly overruled.

As to the defendant's motion to quash bills Nos. 893 and 894, it suffices to point out that these bills follow substantially the same form as the felony count in No. 892. This being so, the motions in Nos. 893 and 894 were properly overruled.

The defendant also points to the fact that all the crucial testimony offered against him was given by the two accomplices, Icenhour and Stevens. As to this, the defendant excepts and assigns error for failure of the trial judge to instruct the jury that the testimony of these witnesses should be received with caution and scrutinized carefully. Request for such instruction was not made at the trial. The rule is that in the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error, the matter being a subordinate and not a substantive feature of the case. *S. v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409. This assignment is overruled.

Assignment of error No. 27.—This assignment relates to the charge. The jury were instructed that if they found from the evidence and beyond a reasonable doubt that "the defendant broke into or entered Room No. 201, Caldwell Hall Building, at the University of North Carolina, in Chapel Hill, . . . *and that the defendant broke into, or entered said building and room, with the intent to commit the crime of larceny of any examination papers therein situate and being,* . . . the defendant would be guilty of breaking or entering the building in question, other than burglariously, with the intent to commit the felony of larceny therein, and if you so find beyond a reasonable doubt, it will be your duty to render a verdict of guilty of feloniously breaking or entering, as charged in the first count in the bill of indictment, No. 892. . . ." (Italics added.)

The italicized portion of the foregoing instruction is the crucial portion thereof. By it the State, in order to convict the defendant of felonious entry, was required to prove only that he entered the room with intent to steal *any* examination papers therein situate.

At common law the stealing of any property of value was a felony. 32 Am. Jur., p. 886; 52 C.J.S., p. 851. However, our statute, G.S. 14-72, which divides larceny into two degrees, one a misdemeanor, the other a felony, expressly makes it only a misdemeanor to steal property of the value of not more than $100.

The challenged instruction presupposed, and required the jury to assume as an established fact, that the examination papers possessed such value as to make the intent to steal *any* of them an intent to commit the crime of felonious larceny, as distinguished from larceny of misdemeanor grade.

The defendant was charged with breaking or entering Room 201 Caldwell Hall in violation of G.S. 14-54. In order to satisfy the felony requirement of this statute it must be made to appear that there was a breaking or entering into a designated building or room "with intent to commit a felony or other infamous crime therein." In the case at hand all the incriminating evidence tends to show that the defendant's intent to steal related solely to the examination papers inside the room. The question whether this intent was an intent to commit some infamous crime other than that of felonious larceny was not raised in the trial below. The case was tried and presented to the jury solely on the theory that if the defendant intended to steal *any* of the examination papers, such intent was an intent to commit a felony, *i.e.*, the felony of larceny.

However, to justify a conviction of the felony charge as alleged under G.S. 14-54, it was necessary for the State to prove and for the jury to find beyond a reasonable doubt that the defendant intended to steal property of sufficient value to make the taking thereof a felony. See

12 C.J.S., Burglary, Sec. 2, p. 666; 9 C.J., p. 1030. The evidence offered at the trial placed no specific pecuniary value on the examination papers. Nevertheless, it may be conceded that the evidence was sufficient to justify the inference that the examination papers possessed the requisite value to make the stealing of *any* of them larceny of misdemeanor grade. "In order to satisfy this requirement it is not necessary that the thing taken have any special, appreciable, or market value, or that it should be valuable to anyone except the owner; the law draws no fine distinctions in favor of one who takes an article from the true and lawful owner by criminal trespass except to determine the grade of the offense. It is sufficient if it is of any value at all, although less than the smallest coin." 52 C.J.S., Larceny, Sec. 2c. See also *Commonwealth v. Weston* (Mass.), 135 N.E. 465; *Jackson & Dean v. The State,* 69 Ala. 249; *Gouled v. United States,* 255 U.S. 298, 310, 41 S. Ct. 261, 265, 65 L. Ed. 647; Annotation: 88 Am. St. Rep. bot. p. 594. We conclude, however, that the evidence does not justify the trial court's instruction which required the jury to assume as an established fact that the papers possessed such value as to make the intent to steal *any* of them an intent to commit the crime of felonious larceny, as distinguished from larceny of misdemeanor grade.

It follows that the court erred in instructing the jury to return a verdict of guilty of the felony charge if they found that the defendant broke into or entered the room with intent to steal "any examination papers." The instruction to which the assignment of error No. 27 relates must be held for prejudicial error entitling the defendant to a new trial on the first count in bill No. 892.

For similar errors in charging on bills Nos. 893 and 894, the defendant is also entitled to new trials.

As to the second count in bill No. 892, on which the defendant was convicted of larceny of misdemeanor grade for stealing an examination paper, our study of the record leaves the impression that the trial of this count was so related to that on the three felony counts that the verdict may have been influenced to the defendant's prejudice by the results in the felony counts. The ends of justice seem to require a retrial of the whole case. It is so ordered. See *S. v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617.

Since the case goes back for retrial, we deem it appropriate to discuss the defendant's contention that the court below erred in failing to apply C. 147, S.L. 1917, now codified as G.S. 14-401.1. This statute is as follows:

> "Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of

any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court." (Italics added.)

The portion of the statute in italics above expressly limits the application of the statute to examinations "provided and prepared by law," *i.e.*, examinations given by the State Board of Medical Examiners, the State Board of Law Examiners, and other examining boards of this class. The statute has no application to college examination papers like those involved in the case at hand. Therefore, the court below properly refrained from applying the provisions of the foregoing statute. The allegations and proofs relating to larceny were governed by common law principles, except as modified by the statute, G.S. 14-72, which divides common law larceny into two degrees.

Since the questions raised by the defendant's other assignments of error may not recur on retrial, we refrain from discussing them.

New trial.

JOE GARRIS AND WIFE, GEORGIANNA GARRIS, v. LEO L. SCOTT AND WIFE, MARY T. SCOTT.

(Filed 18 September, 1957.)

1. Cancellation and Rescission of Instruments § 10½—

Where, in an action to cancel a deed for fraud, defendants admit that plaintiffs had title at the time of the execution of the deed in controversy, an instruction to the effect that at the time of executing the deed attacked plaintiffs had only an option to repurchase because of their prior execution of a fee simple deed to third parties with option to repurchase from such third parties, is highly prejudicial, since if plaintiffs had only an option to repurchase no question of inadequacy of consideration could arise.

2. Cancellation and Rescission of Instruments § 10—

Evidence that the land conveyed was a 125-acre farm having a tobacco allotment of five and one-half acres, and that the consideration for the deed attacked was not greatly in excess of the value of the tobacco allotment alone, is evidence of inadequacy of consideration.

3. Evidence § 5—

It is a matter of common knowledge that the value of farms in the tobacco section of Eastern North Carolina is dependent to a very large degree upon the size of their tobacco allotments.

4. Cancellation and Rescission of Instruments § 10—

While plaintiffs, in an action to cancel a deed for fraud, have the burden of proving the fraud relied on, it is not required that it be proved by direct and positive evidence but may be proved by circumstances surrounding the transaction establishing fraud as a reasonable inference.

5. Same—

Inadequacy of consideration is a circumstance tending to show fraud in procuring the execution of a deed, and while standing alone it is ordinarily insufficient to justify setting aside the deed, if the inadequacy of consideration is so gross as to show that practically nothing was paid, it is sufficient to be submitted to the jury without other evidence.

APPEAL by plaintiffs from *Frizzelle, J.*, February Term 1957 of CRAVEN.

Civil action to annul a deed of conveyance on the ground of fraud.

Plaintiffs undertook to sustain the allegations of their complaint by the evidence summarized below:

The plaintiffs, Joe Garris and Georgianna Garris, are husband and wife. In January 1956 Joe Garris was 75 years old, and Georgianna Garris was 68. He cannot read, and "can't write except to mess up" his name. His wife cannot read, and cannot write, "she can mess at her name." They alleged in paragraph 2 of their complaint that on 20 January 1956 they "were the owners in fee simple of a certain farm in Craven County, hereinafter described in paragraph 5, subject to indebtednesses which were encumbrances in the amount of approximately $6,000.00." The defendants in paragraph 2 of their answer admit the truth of the above allegation.

The farm has 125 acres, 25 acres of which were cleared in January 1956. On this farm were two dwelling houses, one an old five-room house, and the other a six-room house built in 1953, two tobacco barns in pretty good shape, two little houses used for putting tobacco in, and a small building on the creek bank leased to some tobacco men from Wilson for use in fishing. In 1956 the tobacco allotment on the farm was 5.5 acres "before it was cut." The fair market value of this farm in January 1956 was between $12,000.00 and $15,000.00.

Joe Garris and the defendant Leo L. Scott entered into an oral agreement to the effect that in consideration of Scott's paying off all of their indebtedness, plaintiffs were to sign a paper releasing to the defendants their tobacco allotment on the farm, and that when the plaintiffs paid defendants the money they had used to pay their debts, the plaintiffs were to get back the tobacco allotment. Leo L. Scott told Joe Garris he wanted to carry the tobacco allotment to his land, he didn't want their farm, they could have the benefit of all the land, except the tobacco allotment.

Leo L. Scott had a paper writing prepared, and told the plaintiffs to sign it. He told Joe Garris "it was a paper just to release the tobacco allotment, so he could tend the tobacco allotment." The paper was not read to the plaintiffs. The plaintiffs signed the paper writing, and acknowledged its execution. Joe Garris testified: "I signed it for the lease of the tobacco allotment, that's what I signed it for. They told me that was to release the tobacco allotment." The paper writing was a deed dated.....January 1956 conveying the farm in fee to the defendants. The grantors acknowledged the due execution of the deed before a Notary Public in the Office of the Sheriff of Craven County on 20 January 1956. The deed is recorded in the Office of the Register of Deeds for Craven County in Book 528, page 408.

In April 1956 Joe Garris learned that the paper he signed was a deed of conveyance, and instituted this action in November 1956.

The defendants' evidence is in substance as follows: In January 1956 Joe Garris and Leo L. Scott entered into an oral agreement by which Joe Garris agreed to convey to the defendants their farm upon consideration of the defendants paying to Joe Garris $500.00 and paying all of his debts. Leo L. Scott inquired of W. I. Bissette of Grifton, to whom Joe Garris was indebted, how much Garris owed him and others on the farm, and Bissette replied about $6,500.00. Scott employed Mark Dunn, a lawyer, to check the title. Mark Dunn found a deed recorded in Book 528, page 189, in the Register of Deeds Office of Craven County, by which the plaintiffs had conveyed their farm in fee to Mark Phillips, a bookkeeper of W. I. Bissette, and said by Bissette, according to Leo L. Scott's testimony, to be his son-in-law. Plaintiffs acknowledged the due execution of this deed on 7 January 1956, and the deed was ordered to be recorded on 12 January 1956, though the deed is dated 24 December 1955.

Leo L. Scott, one of the defendants, testified as follows:

> "Mr. Mark Dunn, in checking the title, found the deed from Joe Garris to Mark Phillips and wife; it was made between December 15 and January 20. It was during that time, I imagine, about the 13th or 14th, I imagine, along in that time. Mr. Dunn wrote a deed. He prepared a deed for four signatures: Mr. Phillips', Mrs. Phillips', and Joe and Georgianna Garris'. That's the deed there. The names of Mark Phillips and his wife were placed on the deed because he had a deed ahead of this. I took it over to Mr. Bissette and left it over there that afternoon. Mr. Bissette said his lawyer won't there at the time; that he would keep it and have him to check it that night and went down to the Register of Deeds the next day. That was Saturday at 10 o'clock. He said his lawyer was Mr. Bob Wheeler.

"Mr. Bob Wheeler brought the deed to me. That is Mr. Wheeler right there. He is the lawyer appearing in this case for Joe Garris. I left the deed in Grifton all night long Friday. The next time I saw this deed was when Mr. Bob Wheeler and Mr. Bissette brought it to me. Mr. Wheeler handed this deed to me; he gave it to me down in the Register of Deeds of Craven County. He took it and actually handed it to me. When I left the deed in Grifton with Mr. Bissette and his lawyer, Mr. Wheeler, none of the chop marks were in it. At the time when Mr. Wheeler brought it back to me the next day, those cross-marks were in it. It was chopped up so badly I carried it to my lawyer, Mr. Dunn, and we checked it and it seems that Mr. Phillips and Mrs. Phillips had been checked out of it and another deed issued. Mr. Bob Wheeler gave me another paper, that deed there from Mark Phillips back to Joe Garris."

The deed referred to was marked as defendants' Exhibit A, and the case on appeal states it was read into the record by Mr. Beaman. However, this deed marked defendants' Exhibit A is not in the statement of the case on appeal.

Scott further testified: "I gave Mr. Wheeler a check for the deed. That is the check I gave Mr. Wheeler; it is for $10.00; that was for the deed from Mark Phillips back to Joe Garris."

Mark Dunn is a practicing lawyer in New Bern. About 20 December 1955 he was employed by Leo L. Scott to examine the title to Joe Garris' farm. His examination disclosed there were some deeds of trust against the farm, two years taxes due, and several judgments. He reported this to Scott. Dunn testified as follows:

"The next contact I had with Leo L. Scott was about the 19th or the 20th of January, 1956, when he said that Joe Garris had agreed to sell the land and he wanted me to prepare a deed for it and to make sure there was nothing further against it. I made further examination and found that since I had first searched the title, a deed had passed from Joe Garris and wife to Mark Phillips and that there had also been an option given back from the Phillipses to the Garrises. I reported that to Mr. Scott. As a result of that, I prepared the deed from Joe Garris and his wife to sign and for Mark Phillips and his wife to sign to Leo Scott and his wife.

"I gave the deed to Leo Scott on January 20, about noon. I told him it would have to be signed by all four of them, and he stated that he was going to take it to them for their signatures. The next morning Mr. Scott called me and said Mr. Phillips and the Garrises were going to be at the Courthouse that morning. When they

arrived, he called me and I came up here to the Courthouse. I think the Garrises were already here and shortly after I arrived, Mr. Wheeler and Mr. Bissette came in. Mr. Leo Scott showed the deed with reference to the 'X's' marking out Mark Phillips' name and his wife's name. He won't sure it would be good with 'X's' on the instrument. At the same time he had the deed from Mark Phillips to Joe Garris, so I told him it would just be the expense of recording this deed, too. Those present when the deed was handed to me by Mr. Leo L. Scott, in the Register of Deeds Office, were: the Garrises, Mr. Wheeler, and Mr. Bissette. Concerning the question about the 'X's', I told Mr. Scott it would be all right as long as both deeds were recorded and this was recorded first. We then went down to the Sheriff's office with Georgianna and Joe Garris to have this deed acknowledged."

The defendants introduced in evidence an agreement entered into on 7 January 1956 between Mark Phillips and wife, and Joe Garris, and wife, the execution of which was duly acknowledged by all four parties to it on the same date. On 13 January 1956 the instrument was ordered to be registered, and is of record in Book 528, page 192, in the Public Registry of Craven County. This agreement granted plaintiffs an option until and including 2 January 1960 to purchase the farm they had conveyed to Mark Phillips upon the payment of $1,675.27 in five installments over a period of five years, the first payment to be on or before 1 November 1956. The agreement further provides: *"Third:* It is specifically understood and agreed that the parties of the second part shall have the full right and privilege to live on and operate and tend the said farm during the term of this option; provided that said right shall exist so long as the aforesaid payments of principal and interest are promptly made, and no longer."

When plaintiffs had executed the deed conveying their farm to defendants, defendant Leo L. Scott paid W. I. Bissette plaintiffs' indebtedness to him in the sum of $1,830.35.

The deed of plaintiffs to defendants was read to plaintiffs before they signed it. The defendants paid for the farm a total consideration of $7,134.18, according to Leo L. Scott's testimony. The fair market value of the farm in January 1956 was between $5,000.00 and $8,000.00. Leo L. Scott testified: "You couldn't buy the tobacco allotment without the place." Scott transferred the tobacco allotment to another farm owned by him.

On cross-examination Leo L. Scott said the farm was not worth over $7,000.00. He was asked "would you sell it now for $12,000.00?", and he replied, "it's not for sale." He was then asked, "would you sell it for $15,000.00?", and he replied, "it's not for sale."

L. P. Taylor, a witness for the defendants, testified "the tobacco allotment is worth $750.00 to $800.00 per acre."

Robert D. Wheeler, an attorney at law, withdrew as counsel for plaintiffs during the trial, and became a witness for them in rebuttal. He testified: "I have a deed in my hand dated the 20th day of January 1956 from Mark Phillips to Joe Garris. Mr. Phillips asked me to draw that deed. . . . I knew it conveyed a fee simple title. . . . Certainly I knew I had to draw that deed from Mark Phillips before Joe Garris could give good title. He had to get title back to give a deed of trust or a deed." This deed is not copied in the statement of the case on appeal.

The following issue was submitted to the jury: "Did the defendants procure the execution by the plaintiffs of the deed in Book 528, page 408, Craven County Registry, by fraud as alleged in the Complaint?" Before the issue was submitted to the jury, counsel for both sides entered into this stipulation: "That if and in the event the jury should answer the first issue 'Yes,' the defendants are entitled to be reimbursed by the plaintiffs the sum of $6,996.68, which is the purchase price paid by the defendants to the plaintiffs for the land in controversy."

The jury answered the issue No. Whereupon, the court entered judgment that the defendants are the owners of the land described in the complaint, and taxed plaintiffs with the costs.

Plaintiffs appeal to the Supreme Court.

Owens & Langley for Plaintiffs, Appellants.
John W. Beaman and Lee & Hancock for Defendants, Appellees.

PARKER, J. Plaintiffs have two assignments of error, both relating to the court's charge to the jury.

Their assignment of error Number One is to this part of the charge:

> "I don't think they're entitled to but I'll give it. Gentlemen, counsel for the defendants requests the Court to give this instruction which I give now. That the legal effect of the deed from Joe Garris and his wife, Georgianna Garris, to Mark Phillips, dated December 24, 1955, and recorded in the Office of the Register of Deeds of Craven County in Book 528, page 189, and the agreement and option between Mark Phillips and wife, Lorene Osborne Phillips, parties of the first part, and Joe Garris and wife, Georgianna, parties of the second part, dated January 7, 1956, and recorded in the Office of the Register of Deeds of Craven County in Book 528, page 192, would be to place fee simple title to the lands in controversy and the entire tobacco allotment on said land in the said Mark Phillips pending the exercise of said option by Joe Garris and his wife, Georgianna Garris."

The defendant Leo L. Scott testified, "Mr. Bob Wheeler gave me another paper, that deed there from Mark Phillips back to Joe Garris." The case on appeal has this statement immediately after this testimony of Scott: "The deed referred to was marked as defendants' Exhibit A and was read into the record by Mr. Beaman." However, this deed does not appear in the case on appeal. Scott further testified: "I gave Mr. Wheeler a check for the deed. That is the check I gave Mr. Wheeler; it is for $10.00; that was for the deed from Mark Phillips back to Joe Garris." Mark Dunn, a witness for defendant, speaks of the deed from Mark Phillips to Joe Garris.

Robert D. Wheeler, a witness in rebuttal for plaintiffs, testified that he drew a deed dated 20 January 1956 from Mark Phillips to Joe Garris conveying a fee simple title. This deed is not in the case on appeal.

Plaintiffs alleged in paragraph 2 of their complaint "that on or about the 20th day of January 1956, the plaintiffs were the owners in fee simple of a certain farm in Craven County, hereinafter described in paragraph 5, subject to indebtednesses which were encumbrances in the amount of approximately $6,000.00." The defendants in paragraph 2 of their answer say, "that the allegations of paragraph 2 of the complaint are admitted."

It seems clear from defendants' admission in their answer and from the evidence that Mark Phillips and his wife conveyed back to plaintiffs by deed the farm before the plaintiffs executed the challenged deed to the defendants. It is unreasonable to believe that Leo L. Scott represented by Mark Dunn, a lawyer, paid plaintiffs $500.00 and paid their indebtedness, unless Mark Phillips and his wife had conveyed the farm back to plaintiffs. And yet with the solemn admission in defendants' answer that plaintiffs owned on 20 January 1956 the farm in fee simple, subject to indebtedness, the judge instructed the jury that the legal effect of the deed from plaintiffs to Mark Phillips and of the option to repurchase from Mark Phillips and his wife to plaintiffs placed fee simple title to the farm and the entire tobacco allotment on the farm in Mark Phillips pending the exercise of the option by plaintiffs. This part of the charge was highly prejudicial to plaintiffs, for it was to the effect plaintiffs had nothing to sell, but only an option to repurchase, and if plaintiffs had nothing to sell, no question of inadequacy of consideration could arise.

It is plain from the evidence that a principal reason, if not the main one, for Leo L. Scott's desire to purchase plaintiffs' farm was to get their tobacco allotment thereon. Scott testified, "you couldn't buy the tobacco allotment without the place." One of defendants' witnesses testified a tobacco allotment is worth $750.00 to $800.00 per acre. Whether that value is too small or not, the evidence before us does not

disclose. However, it is a matter of common and general knowledge that the fair market value of farms in the tobacco section of Eastern North Carolina is dependent to a very large degree upon the size of their tobacco allotments. Plaintiffs have evidence tending to show inadequacy of consideration.

No fiduciary or confidential relationship is alleged. The general rule is that fraud is not presumed, but must be proved by the party alleging it. *Poe v. Smith,* 172 N.C. 67, 89 S.E. 1003; 24 Am. Jur., Fraud and Deceit, secs. 256 and 257. This does not mean that fraud in a transaction can only be proved by direct and positive evidence. It is not ordinarily the subject of such proof. Fraud in a transaction may be proved by inferences which may reasonably be drawn from evidence respecting the transaction itself, or circumstances surrounding the transaction. *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202; *Halsey v. Minnesota-South Carolina Land and Timber Co.,* 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1; 24 Am. Jur., Fraud and Deceit, sec. 257.

Such a circumstance surrounding a transaction is inadequacy of consideration. The controlling principle established by our decisions is that inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on an issue of fraud, but inadequacy of consideration standing alone will not justify setting aside a deed on the ground of fraud. However, if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence. *Leonard v. Power Co.,* 155 N.C. 10, 70 S.E. 1061; *Knight v. Bridge Co.,* 172 N.C. 393, 90 S.E. 412; *Butler v. Fertilizer Works,* 195 N.C. 409, 142 S.E. 483; *Hill v. Ins. Co.,* 200 N.C. 502, 157 S.E. 599; *Hinton v. West,* 207 N.C. 708, 178 S.E. 356. See 24 Am. Jur., Fraud and Deceit, secs. 266 and 284.

It is but fair to the learned trial judge to say that in giving the challenged instruction at the request of defendants' counsel for which a new trial must be ordered, he said he did not think they were entitled to it.

New trial.

EVA MORGAN PILKINGTON AND HUSBAND, G. J. PILKINGTON, v. T. W. WEST.

(Filed 18 September, 1957.)

1. Husband and Wife § 12e: Trusts § 3a—

The conveyance by a married woman of her property to a trustee without any findings of fact or conclusions of law by the notary taking her acknowledgment that the instrument was not unreasonable or injurious to her as

required by G.S. 52-12, renders void any estate or trust attempted to be set up in favor of the husband.

2. Trusts § 3b—

A trust is active only when there is some duty or responsibility resting on the trustee.

3. Appeal and Error § 61—

A decision determining the rights of the parties as they had vested prior to an amendment of the Constitution is *obiter dicta* in its discussion of such rights under the constitutional amendment, and as to such *dicta* is entitled only to such consideration as its reason may impel.

4. Trusts § 3c—

While spendthrift trusts may be created when they conform to G.S. 41-9, a person cannot remove his property from liability for his debts or restrict his right of alienation by a conveyance of his own property to a trustee for his sole use and benefit.

5. Trusts § 13—The fact that a trust is for the separate use of a married woman does not make it an active trust.

Where a married woman conveys her separate property to a trustee for the benefit of herself during her life with provision that upon her death the trustee should convey the property to her heirs, and in the event of his failure to do so that the property should revert to her heirs, and it is apparent from the instrument that the word "heirs" was used in its technical sense and it is admitted that the possibility of issue of trustor is extinct, the trust is a passive trust executed by the Statute of Uses, since under Art. X, section 6, of the State Constitution the continuance of the trust is not necessary to preclude the husband of any interest in the property, nor is a continuance of the trust necessary to protect the wife against his importunities.

APPEAL by defendant from *Froneberger, J.*, May Civil Term 1957 of HAYWOOD.

Controversy without action under Art. 25, c. 1, G.S., to adjudicate the title to a parcel of land in Haywood County described in a deed from plaintiffs to defendant, dated 15 April 1957, which he has refused to accept and pay for in accordance with a contract between the parties. He asserts the deed will not convey good title in fee.

E. L. Loftin for plaintiff appellee.
Ward & Bennett for defendant appellant.

RODMAN, J. The agreement of the parties on which judgment was rendered establishes these facts:

(1) *Feme* plaintiff was, on and prior to 18 October 1943, "the sole owner of all right, title and interest in" twelve acres which includes the land described in the deed of 15 April 1957 tendered by plaintiff to

defendant. *Feme* plaintiff "was on said date in possession of said tract of land, and is and has been in possession of said land continuously since October 18, 1943 . . ."

(2) On 18 October 1943 plaintiffs executed a paper writing purporting to be a deed conveying said land to R. E. Sentelle as trustee. The deed is recorded in Haywood County in Book 118, p. 517.

(3) On 14 June 1944 plaintiffs executed what is designated as a deed of revocation undertaking to revoke the trust created and described in their deed to Sentelle as trustee, recorded Book 118, p. 517. The deed of revocation is duly recorded in the register's office of Haywood County in Book 119, p. 596.

(4) ". . . the plaintiffs had one child who died in infancy, but have no child at this time, and it is agreed that as to Eva Morgan Pilkington the possibility of issue is extinct."

(5) The deed of 18 October 1943 in the premise describes Eva Morgan Pilkington and husband G. J. Pilkington as "parties of the first part" and R. E. Sentelle "as trustee only . . . party of the second part, and EVA MORGAN PILKINGTON, party of the third part." It recites that the parties of the first part "desire to make provisions for the preservation of the property hereinafter described, for the use and benefit of the said Eva Morgan Pilkington, her heirs and assigns." The granting clause conveys "to the party of the second part irrevocably, for and during the lifetime of the said Eva Morgan Pilkington."

The *habendum* is to the party of the second part, his heirs and assigns "in trust, however, for the sole use, behoof and benefit of the said Eva Morgan Pilkington and her heirs, and the party of the second part hereby covenants and agrees with the said Eva Morgan Pilkington that he will suffer and permit her and such person as she may desire, without let or molestation to have, hold, use and occupy and enjoy the aforesaid premises with all rents, issues and products arising therefrom for her sole use and benefit, separate and apart from all other persons, and wholly free from interference, debts and liabilities, and all other interests whatsoever; and that he will at the death of said Eva Morgan Pilkington, convey the said lands and premises and all profits or proceeds therefrom remaining to the lawful heirs of the said Eva Morgan Pilkington.

"If, at the time of her death the said Eva Morgan Pilkington should leave surviving her a husband residing with her as such husband, then and in that event the rents, use and profits of said property shall go to the said husband for and during his lifetime if no children survive. In the event children survive and husband, the rents, use and profits shall go for the use and benefit of the husband and children jointly, during his lifetime, and thereafter to her lawful heirs.

"The trust and holding of said property by the party of the second part shall continue under said circumstances during the lifetime of said husband.

"If the party of the second part shall fail or neglect to make said conveyance to the lawful heirs of the said Eva Morgan Pilkington at and after her death, or the death of the husband, as herein provided, then the said property shall automatically revert to and become the property of the said heirs at law of the said Eva Morgan Pilkington in as full and ample manner as if this conveyance had not been made."

This deed was acknowledged by the plaintiffs. Private examination of *feme* plaintiff was taken. The notary public who took the examination did not, however, make any findings of fact or conclusions of law as required by G.S. 52-12 that the instrument was not unreasonable or injurious to the *feme* plaintiff, the owner of the property. The absence of such conclusions and findings renders any estate or trust attempted to be set up in favor of the husband void. *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624; *Fisher v. Fisher,* 217 N.C. 70, 6 S.E. 2d 812; *S.c.,* 218 N.C. 42, 9 S.E. 2d 493.

The statutory avoidance of any beneficial interest in the husband by the conveyance to Sentelle as trustee, coupled with the stipulation that *feme* plaintiff now has no children and will not hereafter have a child, leaves Sentelle as trustee having legal title for the sole use, behoof and benefit of the said Eva Morgan Pilkington for her life and then to her heirs.

Is the trust an active trust or a passive trust? A trust is active only when there is some duty or responsibility resting on the trustee. *Finch v. Honeycutt, ante,* 91; *Fisher v. Fisher, supra; Chinnis v. Cobb,* 210 N.C. 104, 185 S.E. 638; *Bank v. Sternberger,* 207 N.C. 811, 178 S.E. 595; *Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572; *Fowler v. Webster,* 173 N.C. 442, 92 S.E. 157; *Lummus v. Davidson,* 160 N.C. 484, 76 S.E. 474; *Kirkman v. Holland,* 139 N.C. 185; 54 Am. Jur. 30.

Does the fact that the trust is for the sole and separate use of a married woman make it an active trust not executed by the statute? This question has not heretofore been decided by this Court. Under the common law existing prior to the adoption of our Constitution in 1868, a husband was seized of an estate in the land of his wife during coverture which gave him the right to possession and control thereof. He could appropriate all the rents and profits to his own use and could sell and convey the land for a period not exceeding the coverture. *Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512; *Bloss v.* ....., 3 N.C. 223; 26 Am. Jur. 684.

Hence trusts created for the sole and separate use of a married woman prior to the adoption of the Constitution of 1868 were active.

To permit the execution of the trust by the statute and vest both the legal and equitable estate in the wife would have defeated the very purpose of the trust. *Kirby v. Boyette,* 116 N.C. 165, affirmed on rehearing 118 N.C. 244, correctly adjudged that the instrument then under consideration created an active trust, but *Judge Avery,* both in his original opinion and in his opinion on rehearing, states that section 6 of Art. X of the Constitution did not change the law as it was, in his opinion, still necessary to protect the wife against importunities of the husband. The case involved a conveyance made in 1867. The husband's property rights had accrued when the constitutional property protection accorded married women became the law. The opinion as it relates to the effect of the Constitution on such trusts was *dicta* entitled to such consideration as its reasoning may furnish.

In weighing the opinion as it relates to conveyances subsequent to 1868, it is, we think, pertinent to note that the Court took the first opportunity to express its disapproval of the *dicta* in *Kirby v. Boyette. Justice H. G. Connor,* speaking with respect to the effect of Art. X, section 6, on such trusts, said: "Hence, it would seem that the reason which formerly controlled the courts in holding that a trust, when no duty was imposed, for the benefit of a married woman was active rather than passive, no longer exists in North Carolina." *Perkins v. Brinkley,* 133 N.C. 154. The opinion is noteworthy because, as *Justice Connor* points out, the observation with respect to such trusts was not necessary to the decision of that case.

Kirby v. Boyette was again adverted to in *Cameron v. Hicks,* 141 N.C. 21, but the Court then said it was not called upon to expressly decide the question. *Justice Connor* said: "Whether the rule should have been modified by reason of our constitutional provision, in regard to the status of married women, as suggested in *Perkins v. Brinkley,* 133 N.C. 154, it is useless to discuss."

Disagreement with the *dicta* in *Kirby v. Boyette* was again expressed in *Freeman v. Lide,* 176 N.C. 434, 97 S.E. 402. *Walker, J.,* said: "One of the powers conferred by the Constitution and assured by it to married women, and confirmed by statute, is the power to devise and bequeath her property, real and personal, and the statute has prescribed a method of executing this power—the same as for men. In view, therefore, of the changes made by the Constitution of 1868, art. 10, sec. 6, and the cases above cited, decided since *Kirby v. Boyette, supra,* the doctrine of that case ought not to be applied to trusts declared by deed or will made since the adoption of the Constitution, unless the trust is an active trust, and the mere use of the words 'sole and separate use,' without other words imposing some active duties upon the trustee or creating contingent estates to be preserved, ought not to prevent the statute from executing the use."

The activity of married women in the business world of today demonstrates the baselessness of *Judge Avery's* fear that the wife would, notwithstanding the constitutional guaranty, be so subject to the influence and dominance of her husband that she could not in fact exercise sole and separate use of her property without the intervention and protection of a third person.

We give our approval to this statement in 26 Am. Jur. 676: "A trust for the sole and separate use of a married woman, where the husband's common-law rights to her property have been abolished, cannot, of course, be sustained as an active trust on the theory that the trust is necessary in order to prevent such rights to the husband from attaching to the *corpus* . . ." The statute converts the trust into the legal separate estate of the wife.

The language of the covenant is specific in the declaration that trustee will hold "for her (settlor's) sole use and benefit." The clause immediately following, "and wholly free from interference, debts and liabilities, and all other interests whatsoever," was manifestly not intended as restricting Mrs. Pilkington's right to use the property or to free it from liability for her debts. While valid spendthrift trusts may be created when they conform to our statute, G.S. 41-9, one cannot remove his property from liability for his debts or restrict his right of alienation by a conveyance to a trustee for the sole use and benefit of the owner, grantor. *Schwren v. Falls,* 170 N.C. 251, 87 S.E. 49; *Vaughan v. Wise,* 152 N.C. 31, 67 S.E. 33; *Wool v. Fleetwood,* 136 N.C. 460; *Mebane v. Mebane,* 39 N.C. 131; *Nelson v. California Trust Co.,* 202 P. 2d 1021 (Cal.); *Schenck v. Barnes,* 50 N.E. 967 (N.Y.); Scott on Trusts, 2d Ed., sec. 156; Bogert, Trusts & Trustees L. A. p. 495; 89 C.J.S. 745; 54 Am. Jur. 134.

A passive trust for the *feme* plaintiff for her natural life is created. It is executed by statute. The only valid trust in remainder is to the heirs of the life tenant. By express language the trust is self-executing if the trustee fail to convey. It is passive; hence, the instrument conveys an estate for the *feme* plaintiff for her natural life with remainder in fee to her heirs. It is apparent that the word "heirs" is descriptive of those who take the fee and is used in its technical sense and not as meaning children. The distinction between children and heirs in its technical sense is clearly recognized in the instrument itself. It follows that the *feme* plaintiff has and can, with the written assent of her husband, convey an estate in fee simple. *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Edgerton v. Harrison,* 230 N.C. 158, 52 S.E. 2d 357; *Rawls v. Roebuck,* 228 N.C. 537, 46 S.E. 2d 323; *Rose v. Rose,* 219 N.C. 20, 12 S.E. 2d 688.

For the reasons given it is unnecessary to consider the validity and effect of the deed of revocation.

Affirmed.

JOHN H. HARDY, FATHER; ESSIE HARDY, MOTHER; WILLIAM H. HARDY, DECEASED, v. MARIE J. SMALL, ADMX. OF ESTATE OF CLAUDE E. SMALL (EMPLOYER); NATIONWIDE INSURANCE COMPANY (CARRIER).

(Filed 18 September, 1957.)

1. Master and Servant § 39b—

A general farm laborer is an employee and not an independent contractor.

2. Master and Servant § 55d—

Whether an injury by accident arises out of or in the course of the employment is a mixed question of law and of fact.

3. Master and Servant § 40c—

The words "out of" as used in the Workmen's Compensation Act refer to the origin or cause of the accident.

4. Master and Servant § 40d—

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place and circumstances under which an accident occurs.

5. Master and Servant § 40c—

An injury does not arise out of and in the course of the employment unless it is fairly traceable to the employment as a contributing proximate cause, and an accident from a hazard to which the public in general is subject does not arise out of the employment.

6. Same—

Accidental injury to an employee while on a public street or highway does not arise out of the employment unless the employee at the time of the accident is acting in the course of his employment.

7. Master and Servant § 40d—

Ordinarily an injury by accident is not compensable if sustained by the employee while on the way to or returning from the place where his employment is performed unless the employer provides the means of transportation.

8. Master and Servant § 37—

The Workmen's Compensation Act should be liberally construed to the end that its benefits should not be denied upon technical, narrow and strict interpretation, but the rule of liberal construction cannot be employed to enlarge the meaning of the Act beyond its plain and unmistakable terms.

9. Master and Servant § 40c—Under facts of this case injury to employee while crossing highway was a risk incident to the employment.

Deceased employee lived on the farm of the employer in a house furnished rent free by the employer to the employee's father so that the members of the family would be available for farm labor. The employee was employed as a general farm laborer with duty to feed the livestock at the barn. A highway traversed the farm and lay between the barn and the employee's home. The employee was fatally injured while crossing the highway on his way from the barn to his home. *Held:* The employee was in the course of his employment from the time he left the area of his home to perform his duties until he returned to the area of his home, the highway not being used as a means of travel to and from his work but being a hazard necessary to be crossed in going from one part of the farm to the other, and therefore, the accident arose out of and in the course of the employment.

APPEAL by defendants from *Parker, J.*, April Term, 1957, of CHOWAN.

Defendants' appeal is from a judgment affirming the Industrial Commission's award of compensation in plaintiffs' proceeding under Workmen's Compensation Act (G.S. Ch. 97, Art. 1).

Jurisdiction under G.S. 97-13(b) is based on these stipulated facts: On November 30, 1955, William H. Hardy, the deceased employee, sustained an injury by accident resulting in his immediate death; and when this occurred an insurance policy, purchased by defendant employer from defendant insurance carrier, covering defendant employer's compensation liability incident to her farm operations, was in full force and effect.

The findings of fact and conclusions of law relevant on this appeal are as follows:

"FINDINGS OF FACT

"1. On 30 November 1955 and prior thereto the deceased, a thirteen-year-old boy, lived at the home of his mother and father located on the farm of the defendant, Marie J. Small, Administratrix of the Estate of Claude E. Small. During the summer when he was not in school the deceased was employed on the farm as a general farm laborer, and during the fall and winter season of 1955, while he was attending school the deceased was employed by such defendant to feed livestock on the farm.

"2. The deceased had been employed to feed livestock on the farm by Mr. Claude Small, Jr., manager of the farm, and Mr. Small told the deceased where and when to do the work.

"3. The defendant's farm was located on both sides of N. C. Highway 32 and approximately two miles north of Edenton. The deceased lived on the farm approximately 120 feet to the east of the hard surfaced portion of N. C. Highway 32. The deceased fed the defendant's livestock at a barn located 350 to 400 feet from his home and on the

west side of N. C. Highway 32, across the highway from his home. The deceased fed the livestock seven days a week, once in the morning before he went to school and once in the afternoon after he returned from school. The defendant paid the deceased $1.50 per week for performing such job.

"4. On 30 November 1955 the deceased, after returning home from school, told his mother that he was going to feed the defendant employer's livestock, as was his regular job with the defendant during such season of the year. The deceased thereafter crossed Highway 32 and went to the defendant's barn where he fed the livestock. After performing such work he started to cross Highway 32 in order to return from the barn to his home. While so crossing the highway and near the west edge of the highway, the deceased was struck by a car and killed.

"5. The deceased employee sustained, as described above, an injury by accident arising out of and in the course of his employment which resulted in his death.

"6. At the time of the injury by accident giving rise hereto the deceased was not engaged in an independent business, calling or occupation. He did not have the independent use of his skill, knowledge or training in the execution of the work. He was subject to discharge if he adopted one method of doing work rather than another. He was in the regular employ of defendant. He was not free to use such assistance as he thought proper. And he did not select his own time. The defendant had control over the work of the deceased employee and had the authority to direct his activities. At the time of the death of the deceased he was an employee of the defendant employer and not an independent contractor.

"7. . . .

"8. . . .

"9. . . .

"The above Findings of Fact and Conclusions of Law engender the following additional—

"CONCLUSIONS OF LAW

"1. The employer-employee relationship existed between the deceased employee and the defendant employer at the time of the injury by accident giving rise hereto.

"2. On 30 November 1955 the deceased employee sustained an injury by accident arising out of and in the course of his employment.

"3. . . ."

The quoted findings of fact and conclusions of law were made initially by the Hearing Commissioner. Upon defendants' appeal from the award based thereon, these findings of fact were adopted by the

Full Commission; and the Full Commission adopted the Hearing Commissioner's conclusions of law. Thereupon, the Full Commission awarded compensation to plaintiffs.

Defendants excepted to the judgment affirming said award and appealed.

John W. Graham for plaintiffs, appellees.

Teague, Johnson & Patterson for defendants, appellants.

BOBBITT, J. The findings of fact, amply supported by competent evidence, establish, *inter alia*, that the deceased was an employee. Defendants' contention that this thirteen year old boy was an independent contractor in respect of the farm chores assigned to him when fatally injured is without merit. It is clear that the employer had the right to direct him in his work and to discharge him with or without cause. It is unnecessary to restate the factors that distinguish an independent contractor from an employee. *McCraw v. Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658, and cases cited.

Defendants' primary position is that, upon said findings of fact, the court was in error in its conclusion that the employee's death was by accident arising out of and in the course of his employment.

Whether an injury by accident arises out of and in the course of the employment is a mixed question of law and of fact. *Horn v. Furniture Co.*, 245 N.C. 173, 176, 95 S.E. 2d 521, and cases cited.

Decision on this appeal turns on whether the specific findings of fact, considered in the light most favorable to plaintiffs, afford a sufficient factual basis for the determination that the employee's death was by accident arising out of and in the course of his employment. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596.

The basic rule is that the words "out of" refer to the origin or cause of the accident, and that the words "in the course of" refer to the time, place and circumstances under which it occurred. *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266; *Alford v. Chevrolet Co.*, 246 N.C. 214, 217, 97 S.E. 2d 869.

The question presented is one of first impression in this jurisdiction. Here the farm employee, who lived on the farm, sustained an injury by accident when returning from the barn, to which he had gone to feed the livestock, to the area of the house in which he lived.

An injury does not arise out of and in the course of the employment unless it is fairly traceable to the employment as a contributing proximate cause. Hence, injury by accident is not compensable if it results from a hazard to which the public generally is subject. *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89; *Marsh v. Bennett College*, 212

N.C. 662, 194 S.E. 303, tornado cases; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370, mad dog case.

In early cases in other jurisdictions, compensation was generally denied where the injury occurred upon a public street or highway on the ground that the hazard to which the employee was exposed was not peculiar to the employment but a risk common to all persons using the public street or highway. Annotation: 51 A.L.R. 509. In later decisions, injury on a public street or highway is generally held compensable if at the time the employee is acting in the course of his employment. Annotation: 80 A.L.R. 126, and supplemental decisions; 58 Am. Jur., Workmen's Compensation sec. 226.

It is established in this jurisdiction that an injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto. *Massey v. Board of Education*, 204 N.C. 193, 167 S.E. 695; *Davis v. Mecklenburg County*, 214 N.C. 469, 199 S.E. 604; *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220; *Guest v. Iron & Metal Co., supra.*

Ordinarily, the rule is that an injury by accident is not compensable if sustained by the employee while on his way to or returning from the premises where the work of his employment is performed. *Hunt v. State*, 201 N.C. 707, 161 S.E. 203; *Bray v. Weatherly & Co.*, 203 N.C. 160, 165 S.E. 332; *Lassiter v. Telephone Co.*, 215 N.C. 227, 1 S.E. 2d 542; *McKenzie v. Gastonia*, 222 N.C. 328, 23 S.E. 2d 712; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751. Such an injury is compensable when it is established that the employer, as an incident of the contract of employment, provides the means of transportation to and from the place where the work of the employment is performed. *Dependents of Phifer v. Dairy*, 200 N.C. 65, 156 S.E. 147; *Edwards v. Loving Co.*, 203 N.C. 189, 165 S.E. 356; *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540.

The crucial question posed for decision on this appeal is this: Was the employee acting in the course of his employment and in the performance of some duty incident thereto during the period while walking between the area of the house where he lived and the barn where he fed the livestock? In our view, under the circumstances here presented, this question must be answered in the affirmative.

The Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation," *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; but "the rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched." *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760.

Deceased lived with his parents, two brothers and a sister. The father did no farm work. His work was elsewhere. He testified: "I rented the house from Claud Small, Jr. I did not pay him rent, my folks worked with them." It seems clear that occupancy of this house by the Hardy family was permitted by the operator of the farm so that the wife and children would be available for farm labor as the need therefor arose.

Deceased was employed to help with the crops when his services were needed and when he (out of school) was available for the work. It would seem unrealistic and unduly restrictive to say that deceased would be in the course of his employment while in a particular field where he was directed to perform labor on a particular day but not while going back and forth across the farm between the area of the house and such field.

The feeding of the livestock was just as much a part of the operation of the farm as tending the crops. In respect of the particular work he was employed and directed to do when fatally injured, the circumstances impel the conclusion that the real nature of his employment was to go to the barn and feed the livestock. The feeding of the livestock being a part of the operation of the farm as a whole, the trip (across the farm) between the area of the house and the barn may reasonably be considered within the terms of his employment. So considered, the period of his employment commenced when he left the area of his house for the barn; and, in the absence of evidence of deviation, terminated upon his return from the barn to the area of the house. The fact that he was injured while in such employment and on a mission for his employer affords sufficient factual basis for the determination that his injury arose out of and in the course of his employment.

It is noteworthy that the public highway was neither necessary nor used as a means of access to the barn, *i.e.*, in the sense of travel *along* the highway. The fact that he had to *cross* the highway on his way to and from the barn constituted an additional hazard of his employment; for if the house and barn had not been separated by the public highway, means of access between the area of the house and the barn would have been equally available and safer.

Affirmed.

STATE v. JOHN HUGHES WHITE.

(Filed 18 September, 1957.)

1. Criminal Law § 16—

Where the inferior courts of a particular county are given exclusive original jurisdiction of general misdemeanors, any jurisdiction of the Superior Court to try a defendant for a general misdemeanor must be derivative.

2. Criminal Law § 19—

Where the record fails to show jurisdiction in the Superior Court in the trial of a general misdemeanor within the exclusive jurisdiction of an inferior court, appeal to the Supreme Court must ordinarily be dismissed, but where, on motion of the Attorney General for diminution of the record, it is made to appear by certified copies of the original papers that defendant was originally tried on a warrant in the recorder's court and the cause transferred to the Superior Court in accordance with law (Chapter 115, Public Laws of 1929) upon defendant's demand for jury trial, jurisdiction is established.

3. Same—

Where a cause is transferred from the recorder's court upon defendant's demand for a jury trial, trial in the Superior Court must be upon a bill of indictment.

4. Same: Automobiles § 75: Criminal Law § 134—

Where the warrant in the recorder's court charges defendant with driving while under the influence of intoxicants and further alleges that the offense was a second offense, and upon transfer of the cause to the Superior Court upon defendant's demand for jury trial, the indictment charges the substantive offense, with further averment that it was a third offense, *held:* the Superior Court acquires jurisdiction of the substantive offense, since the statute, G.S. 20-179, with respect to second, third and subsequent offenses, relates only to punishment. However, the Superior Court cannot impose a penalty greater than that provided for a second offense.

5. Criminal Law § 169—

Where the warrant in the inferior court charges that the substantive offense was the second offense, and on appeal to the Superior Court judgment is entered upon indictment charging the offense to be a third offense, but no incompetent evidence is admitted during the trial in regard to repeated offenses, a new trial will not be awarded, but the cause will be remanded for proper judgment.

6. Same—

Where the warrant in the inferior court charges that the substantive offense was the second offense, and on appeal to the Superior Court judgment is entered upon indictment charging the offense to be a third offense, the judgment may not be allowed to stand even though the sentence imposed is no greater than that permissible for a first or second offense, since

the court may have taken into consideration that the conviction was for a third offense in fixing the punishment.

APPEAL by defendant from *Frizzelle, J.*, June Term 1957 of CRAVEN.

This defendant was tried at the June Term 1957 of the Superior Court of Craven County on a bill of indictment charging him with the following offenses: (1) That on the 24th day of February 1956, he unlawfully operated a motor vehicle upon the public highways of Craven County after his operator's license had been revoked. (2) That on the same date he operated a motor vehicle upon the highways of Craven County while being under the influence of intoxicating liquors or narcotic drugs, this being his third such offense, he having theretofore been convicted of the same offense on September 19, 1949 in the Superior Court of Jones County, and the 8th day of February 1954, in the Superior Court of Craven County. (3) That on the same date he did unlawfully operate a motor vehicle upon the public highways of Craven County in a careless and reckless manner.

The jury returned a verdict of guilty on the first and second counts. On the second count, the presiding judge entered the following sentence. ". . . the defendant having been convicted of driving under the influence of alcohol for the third time, and the jury found the defendant guilty as charged in the bill of indictment: It is now CONSIDERED, ORDERED AND ADJUDGED that the defendant be confined in the common jail of Craven County for a period of twelve (12) months to be assigned to work the roads of the State under the supervision of the State Highway and Public Works Commission." On the first count a sentence of six months was imposed, to begin at the expiration of the sentence imposed in count two.

From the judgment entered the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Love, for the State.

Charles L. Abernethy, Jr., and Larkins & Brock for defendant appellant.

DENNY, J. The sole question presented by the appellant in his brief is whether or not the Superior Court of Craven County had jurisdiction to try this case.

Craven County is one of our counties in which exclusive original jurisdiction of general misdemeanors is vested in its inferior courts. *S. v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312; *S. v. Morgan, post,* 596; G.S. 7-64. Consequently, any jurisdiction the Superior Court of Craven County obtains in such cases is derivative. *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267; *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

The case on appeal does not show jurisdiction in the Superior Court. Hence, nothing else appearing, the appeal would be dismissed. *S. v. Banks,* 241 N.C. 572, 86 S.E. 2d 76; *S. v. Morris,* 235 N.C. 393, 70 S.E. 2d 23; *S. v. Thomas, supra; S. v. Patterson, supra.* However, the Attorney-General filed a motion in this Court suggesting a diminution of the record. The motion was allowed and we now have before us a certified copy of the original warrant dated 24 February 1956, returnable before the Craven County Recorder's Court, charging that the defendant, on or about 24 February 1956, did (1) operate a motor vehicle upon the public highways of North Carolina after his operator's license had been revoked; (2) operate a motor vehicle upon the public highways of North Carolina while under the influence of intoxicants or narcotics, it being the second offense; and (3) drive a motor vehicle in a careless and reckless manner. A certified copy of the minutes of the Recorder's Court with respect to the disposition of this case, which the Attorney-General brought here pursuant to his motion, is to the effect that on 19 March 1957 a jury was demanded and a bond fixed in the sum of $500.00. This made it incumbent upon the Recorder of said court to transfer the case to the Superior Court of Craven County for trial pursuant to the provisions of Chapter 115, Public Laws of 1929, the pertinent part of which reads as follows: "In all trials in the Recorder's Court for Craven County, upon demand for a jury by the defendant or the prosecuting attorney representing the State, the Recorder shall transfer such trial to the Superior Court of Craven County, and the defendant shall execute a new bond in such amount as named by the Recorder for his appearance at the next term of the Superior Court for Craven County." When a case is transferred to the Superior Court pursuant to the provisions of this or a similar statute, the trial in the Superior Court must be upon a bill of indictment. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *S. v. Bailey,* 237 N.C. 273, 74 S.E. 2d 609; *S. v. Pitt,* 237 N.C. 274, 74 S.E. 2d 608; *S. v. Owens,* 243 N.C. 673, 91 S.E. 2d 900.

We likewise have before us a certified copy of a bill of indictment found by the Grand Jury at the April Term 1957 of the Superior Court of Craven County, in which the three counts appearing in the warrant are included in the bill, but the time of the alleged commission of these offenses is stated as 24 February 1957. Moreover, this bill does not show the drunk driving violation set out therein as being a second offense, as alleged in the warrant.

When this case was called for trial, counsel for defendant moved to quash the bill on the ground that the alleged violations, according to the original warrant, occurred on 24 February 1956 and not on 24 February 1957, as alleged in the bill of indictment. The trial judge denied the motion, continued the case, and suggested that the Solicitor procure a

new bill since the date appearing in the bill might have considerable bearing on the count charging the defendant with driving a motor vehicle upon the public highways of the State after his operator's license had been revoked. A new bill was obtained as hereinabove set out. The Attorney-General also brought up, pursuant to his motion, a certified copy of a stipulation entered into by the Solicitor and counsel for the defendant, in open court in the trial below, to the effect that the warrant and both bills of indictment involve the same set of facts.

In light of the above facts, the defendant contends that, since the warrant alleged only a second offense with respect to the charge of drunk driving, while the bill of indictment alleged such violation to be a third offense, he is entitled to a new trial.

In the case of *S. v. Miller*, 237 N.C. 427, 75 S.E. 2d 242, the bill of indictment did not allege that either of the offenses charged was a second or subsequent offense. The defendant entered a plea of guilty. It was then determined that he had been convicted four or five times theretofore on similar charges. The court, therefore, proceeded to pronounce judgment as provided in G.S. 90-111 for subsequent offenses. Upon appeal to this Court we held that, "Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty." The conviction was sustained on both counts but the cause remanded for a judgment on each count not in excess of that prescribed by G.S. 90-111 for a first offense.

In *S. v. Stone*, 245 N.C. 42, 95 S.E. 2d 77, the defendant was tried upon a bill of indictment charging that on 13 July 1956 he "did unlawfully and willfully drive a motor vehicle upon the public highways within the County and State aforesaid while then and there being under the influence of intoxicating liquor or narcotic drugs, same being his third offense he having been *convicted* thereof in the County Criminal Court of Lee County, N. C., at Sanford, N. C., on the 10th day of January, 1950, and in the County Criminal Court of Lee County, N. C., at Sanford, N. C., on the 10th day of April, 1956 . . ." The State, over objection by the defendant, was permitted to introduce in evidence the record of the County Criminal Court of Lee County tending to show that on 10 January 1950, the defendant entered a plea of *nolo contendere* to a charge of "drunk driving" and judgment was pronounced thereon. We held "the admission in evidence of the record of the plea of *nolo contendere* entered 10 January, 1950, was prejudicial error. Since it did not support the allegation as to a prior *conviction* on 10 January, 1950, evidence offered initially by the State tending to show that the defendant had been previously charged with an unrelated prior

criminal offense and of the disposition thereof under plea of *nolo contendere* was incompetent." Consequently, a new trial was granted.

In the instant case there is no contention that any incompetent evidence was introduced to establish the previous convictions on similar charges of "drunk driving." The defendant testified that he had been previously convicted on the occasions alleged in the bill of indictment. Hence, in our opinion, the verdict of guilty for driving a motor vehicle upon the public highways of the State while under the influence of an intoxicating liquor should be sustained. G.S. 20-179, with respect to second, third, and subsequent offenses relates only to punishment. Therefore, we hold that the Superior Court of Craven County had jurisdiction to try the offense charged under G.S. 20-138. No more evidence is required to convict a defendant for "drunk driving" pursuant to the provisions of G.S. 20-138 for a second, third, or subsequent offense than is required for a conviction for a first offense, the only difference being that the State in such cases is required to allege and prove the second, third, or subsequent offenses before it is entitled to subject the accused to the higher penalty. Furthermore, in such cases, the defendant is entitled to know whether or not the State is seeking to exact a higher penalty because of a previous conviction or convictions.

Even so, the jurisdiction of the Superior Court was derivative and it had no power to impose a penalty greater than that provided for a second offense, since the violation charged in the original warrant alleged such violation as being a second offense. *S. v. Miller, supra.* It is true that under the provisions of G.S. 20-179 a penalty as great as that inflicted in the court below might be imposed for a first or second offense. *S. v. Stone, supra.* However, it appears from the judgment entered in the court below that his Honor took into consideration this conviction as being a third offense in determining what sentence should be imposed. Consequently, the judgment on the second count is hereby set aside and the cause is remanded for sentence as for a second offense as provided in G.S. 20-179. We find no error in the verdict on the first count; however, the court below will designate when the sentence thereon is to begin in relation to the new sentence or judgment that will be imposed in accord with this opinion.

Remanded.

MAE SNYDER BUCHANAN v. G. D. SMAWLEY.

(Filed 18 September, 1957.)

1. Abatement and Revival § 4—

A demurrer on the ground of the pendency of a prior action must be overruled when it appears upon the face of the complaint that even though the prior action involves the same subject matter it is not between the same parties. G.S. 1-127(3). If the identity of the actions does not appear upon the face of the complaint, objection may be raised only by answer. G.S. 1-133.

2. Eminent Domain § 26: Pleadings § 19c—Complaint held not to disclose as matter of law that title to property in question had passed to Highway Commission.

It appeared from the complaint that the State Highway and Public Works Commission had filed motion for immediate possession of the land in controversy, that the clerk entered order on the hearing that the property involved was not embraced in the boundaries set out in the courthouse map of the highway project, and denied the Commission possession of the property, from which order the Commission appealed, and that while the appeal was pending the Commission moved for appointment of commissioners to determine the amount of compensation, that the clerk affirmed the award of the commissioners and appeal was entered by the Commission, and that while the appeals were pending the Commission purported to sell buildings located on plaintiff's land to defendant, and that defendant entered upon plaintiff's property and took and carried away the buildings, shrubs, plants, trees, and cut down valuable shade trees, etc. *Held:* Demurrer to the complaint on the ground that it failed to state a cause of action should have been overruled. G.S. 1-127(6).

3. Pleadings § 15—

A demurrer tests the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom.

4. Pleadings § 19c—

Demurrer for failure of the complaint to state a cause of action should be overruled if any portion of the pleading is good and states a cause of action, since a pleading must be fatally defective before it will be rejected.

APPEAL by plaintiff from *Clarkson, J.*, at January 1957 Term, of RUTHERFORD.

Civil action to recover property of plaintiff wrongfully taken, and for damage to other property of plaintiff in the taking—heard upon demurrer to complaint.

Plaintiff alleges in her complaint substantially the following:

That plaintiff, at the times hereinafter mentioned, was, and now is the owner and in possession of a certain specifically described tract of land located in Rutherford County.

That for condemnation of a portion of said land, as being necessary to construction of Project 8812, for the relocation of Highway #221 in Rutherford County, the State Highway and Public Works Commission began action in Superior Court of Rutherford County, before the Clerk of that court on 8 October, 1956, and attached a map purporting to show that a portion of said land lay within the said Project 8812, as shown on duly posted courthouse maps as required by law.

That on 19 June, 1956, after answer was duly filed in said proceeding, the State Highway and Public Works Commission served on plaintiff notice and motion stating that it would appear before the Clerk of said court and ask for immediate possession of the lands which they claimed to be embraced within the boundaries of said Project 8812.

That pursuant thereto a full and complete hearing was had before the said Clerk on 25 June, 1956, and thereafter the Clerk entered an order in which it was held that the property involved in the motion of the State Highway and Public Works Commission lay outside the right of way boundary of said Project 8812 and was not embraced in the boundaries thereof as set out in the courthouse map of said project, and, thereupon, denied the State Highway and Public Works Commission possession of the property.

That from this order the Commission gave notice of appeal.

And while the appeal was pending, "as it still is as of the present date," the Commission served notice and motion for the appointment of commissioners to determine the amount of compensation which should be paid for the property of plaintiff which the Clerk had decided lay outside the boundaries of Project 8812; and pursuant to the notice and motion therefor the Clerk of Superior Court appointed certain commissioners who made their report on 9 August, 1956, to which the State Highway and Public Works Commission filed exceptions on 15 August, 1956.

That the Clerk affirmed the award of the commissioners, and State Highway and Public Works Commission entered the following appeal entries: "To the signing and entering of the above judgment by the Clerk affirming the report of the commissioners, petitioner State Highway and Public Works Commission objects and excepts and in open court gives notice of appeal to the Superior Court of Rutherford County and demands a trial by the jury of the issues of fact involved in this proceeding. Further notice waived."

That while the said appeal from the said order of the Clerk was still pending, the State Highway and Public Works Commission purported to sell the buildings located on the land of plaintiff to defendant G. D. Smawley, at which time the buildings were the property of plaintiff, had been judicially declared to be outside the boundary of Project 8812, and were in possession of plaintiff.

That defendant entered upon the property of plaintiff and took and carried away (plaintiff's) buildings to land belonging to him, and is presently using them,—claiming to be owner thereof.

That in taking the buildings from the property of plaintiff defendant cut down valuable shade trees, and completely destroyed the yard and lawn of plaintiff. And that in addition thereto, defendant took and carried away a large number of shrubs, plants, trees and flowers to which he had no claim or color of title—knowing at the time that they did not belong to him, and were the sole property of plaintiff. That by these acts of defendant plaintiff has been greatly damaged, etc.

Defendant demurs to plaintiff's complaint, and, for causes, says:

"1. That the plaintiff's complaint fails to state a cause of action against this defendant in this action.

"2. That on the face of plaintiff's complaint it shows that another action is pending between the plaintiff and the State Highway and Public Works Commission which involves all of the matters and controversies as to the condemnation of the property involved for highway purposes; that commissioners were duly appointed by the Clerk of the Superior Court to appraise the damages making report therefor which has been appealed by the State Highway and Public Works Commission, and is now pending for trial in the Superior Court, Rutherford County, North Carolina.

"3. That in plaintiff's complaint it is alleged: (a) That the State Highway and Public Works Commission made the entries of appeal from the Clerk's order confirming the commissioners' report; and (b) that the plaintiff (defendant) herein purchased the property from the State Highway and Public Works Commission."

The cause was heard at term, and the demurrer sustained, and the action dismissed, on the first two grounds stated. Plaintiff excepts thereto and appeals to Supreme Court and assigns error.

Hamrick & Hamrick for Plaintiff Appellant.
Stover P. Dunagan and Hamrick & Jones for Defendant Appellee.

WINBORNE, C. J. This appeal challenges, and properly so, the judgment sustaining the demurrer from which appeal is taken.

The applicable statute, G.S. 1-127, provides in sub-section 3 thereof that defendant may demur to the complaint when it appears upon the face of it that "there is another action pending between the same parties for the same cause." And applying this statute it is uniformly held by this Court that if the fact of the pendency of such prior action appears on the face of the complaint, it is ground upon which defendant may demur to the complaint. But if the fact does not so appear, objection may be raised by answer, G.S. 1-133, and treated as a plea in

abatement. See *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690, and cases cited. Also *Boney v. Parker,* 227 N.C. 350, 42 S.E. 2d 222; *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Allen v. McDowell,* 236 N.C. 373, 72 S.E. 2d 746; *McDowell v. Blythe Bros. Co.,* 236 N.C. 396, 72 S.E. 2d 860.

Indeed, a speaking demurrer is not permitted. *Reece v. Reece, supra.*

In the light of the statute and these decisions applied to the allegations of the complaint here challenged it is seen that the prior action referred to is not between the same parties. Hence the pendency of it is not ground for demurrer.

And the applicable statute G.S. 1-127 also provides, in sub-section 6 thereof, that defendant may demur to the complaint when it does not state facts sufficient to constitute a cause of action.

In this connection "The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, and also admitted . . .," *Stacy, C. J.,* in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *Andrews v. Oil Co.,* 204 N.C. 268, 168 S.E. 228; *Toler v. French,* 213 N.C. 360, 196 S.E. 312; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570, and numerous other decisions to same effect.

In the light of this principle it is the established rule that where a general demurrer is filed to a complaint as a whole, if any portion of the pleadings is good and states a cause of action, the demurrer should be overruled. A complaint must be fatally defective before it will be rejected as insufficient. See *Meyer v. Fenner & Beane,* 196 N.C. 476, 146 S.E. 82; *Griffin v. Baker,* 192 N.C. 297, 134 S.E. 651; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874.

Applying these principles to the facts alleged in the complaint, admitted for the purpose, to be true, it may not be held that the allegations are so fatally defective.

Hence the demurrer must be overruled, and "the cause remanded for further proceedings . . . as to right and justice appertain, and as the law directs." *S. v. Rhodes,* 208 N.C. 241, 180 S.E. 84.

For reason set forth, the judgment from which appeal is taken is

Reversed.

STATE v. HENRY MORGAN.

(Filed 18 September, 1957.)

1. Criminal Law § 16—

G.S. 7-64 is not applicable to Craven County, and therefore in such County the Superior Court has no original jurisdiction of prosecutions for general misdemeanors. G.S. 7-222.

2. Intoxicating Liquor § 2—

G.S. 18-50 making the possession of illicit liquor for the purpose of sale a general misdemeanor, and G.S. 18-48 making it a misdemeanor to possess whisky upon which requisite taxes have not been paid, create separate offenses, and the one is not included in the other.

3. Criminal Law § 18—

Where, in the recorder's court having exclusive original jurisdiction of general misdemeanors, defendant is convicted of possession of nontaxpaid liquor for the purpose of sale, and on appeal to the Superior Court is charged in one count with unlawful possession of intoxicating liquor upon which the requisite taxes had not been paid and in the second count with unlawful possession of the same quantity of nontaxpaid liquor for the purpose of sale, and is found guilty on the first count and not guilty on the second, the judgment must be arrested, since the jurisdiction of the Superior Court is derivative and defendant may not be convicted therein of an offense of which he had not been convicted in the recorder's court.

4. Criminal Law § 139—

The jurisdiction of the Supreme Court on appeal is derivative, and when the Superior Court is without jurisdiction, the Supreme Court can acquire none by appeal.

5. Criminal Law § 121—

Where it appears on the face of the record that the Superior Court was without jurisdiction, the judgment entered therein will be arrested by the Supreme Court *ex mero motu*.

APPEAL by defendant from *Fountain, S. J.*, Special April Criminal Term 1957 of CRAVEN.

Criminal prosecution.

These facts appear on the face of the record proper and of the *addendum* to the record proper:

The defendant was tried, convicted and sentenced in the County Recorder's Court for Craven County on a warrant charging that he did in Craven County, Number 3 Township, on 29 October 1956 "unlawfully, willfully have in his possession one-half gallon and one pint of non tax paid liquor for the purpose of sale." The defendant appealed to the Superior Court.

The defendant was tried in the Superior Court upon a bill of indictment containing two counts: The first count charged the defendant on 29 October 1956 with the unlawful possession of one-half gallon and one pint of intoxicating liquor, upon which the taxes imposed by the Congress of the United States and the State of North Carolina had not been paid, and the second count charged the defendant at the same time and place with the unlawful possession for the purpose of sale of the same quantity of non-tax-paid liquor.

The State's evidence shows—the defendant offered none—that Albert Russell, an A.B.C. officer of Craven County, on 29 October 1956, had a search warrant to search for intoxicating liquor the dwelling house of the defendant situate in Number 3 Township, near the village of Dover, Craven County, which dwelling house is some twenty miles or more from the corporate limits of the City of New Bern. Upon his arrival the defendant opened the door. The officer took the search warrant from his pocket, and told him, "I have a search warrant; I want to search your house for whisky." The defendant replied, "Go ahead and search." In the house the officer found non-tax-paid whisky. During the trial the defendant's counsel admitted that it was non-tax-paid whisky, but denied that defendant had anything to do with it.

The defendant pleaded Not Guilty. The verdict of the jury was that the defendant was guilty on the first count in the indictment, and not guilty on the second count.

From judgment of imprisonment, defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Charles L. Abernethy, Jr., for Defendant, Appellant.

PARKER, J. Article I, Section 13 of the North Carolina Constitution provides that "the Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal." This Court said in *S. v. Hall*, 240 N.C. 109, 81 S.E. 2d 189, that Sections 12 and 13 of Article I of the State Constitution provide, "in essence, that the Superior Court has no jurisdiction to try an accused for a *specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor.*" In support of such statement the Court cites *S. v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283.

G.S. 15-177.1 provides that in cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury.

S. v. Meadows, 234 N.C. 657, 68 S.E. 2d 406; *S. v. Williamson,* 238 N.C. 652, 78 S.E. 2d 763.

This Court said in *S. v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312—a case involving conflicting statutory provisions in respect to the jurisdiction within the corporate limits of the City of New Bern, or within a radius of five miles thereof, of the County Recorder's Court for Craven County and the Municipal Recorder's Court for the City of New Bern—: "In 1919 the General Assembly enacted this statute" (Ch. 277, P.L. 1919, now G.S., Ch. 7, Subchapter VI, Art. 24 and 25, which authorizes the creation of Municipal Recorders' Courts and County Recorders' Courts) " 'to establish a uniform system of recorders' courts for municipalities and counties . . .' Proceeding under this Act, the Board of Commissioners of Craven County, in 1921, created a County Recorder's Court for Craven County."

The County Recorder's Court for Craven County is a court inferior to the Superior Court in a constitutional sense. The question as to conflicting jurisdiction between the County Recorder's Court for Craven County and the Municipal Recorder's Court for the City of New Bern, as decided in *S. v. Sloan, supra,* does not arise, because the non-tax-paid whisky was found in the house where the defendant lived, which house is situate in Number 3 Township, Craven County, near the village of Dover, and is outside the territorial limits of the jurisdiction of the Municipal Recorder's Court for the City of New Bern.

G.S. 7-64 as to concurrent original jurisdiction between the Superior Court and courts of inferior jurisdiction is not applicable to Craven County. Therefore, by virtue of G.S. 7-222 the County Recorder's Court for Craven County had, and has, exclusive, original jurisdiction of violations of G.S. 18-48 and G.S. 18-50 in the house where defendant was living near the village of Dover, Craven County, if any such violations occurred there.

G.S. 18-50 makes the possession for the purpose of sale of illicit liquor a general misdemeanor. G.S. 18-48 provides that the possession of whisky upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State have not been paid is a general misdemeanor. Each statute creates a specific criminal offense, and a violation of G.S. 18-48 is not a lesser offense included in 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; *S. v. Hall, supra; S. v. Daniels,* 244 N.C. 671, 94 S.E. 2d 799.

The defendant was tried, convicted and sentenced in the County Recorder's Court for Craven County upon a warrant charging a violation of G.S. 18-50. He appealed to the Superior Court. In the Superior Court he was tried upon a bill of indictment charging in the first count a violation of G.S. 18-48, and in the second count a violation of G.S.

18-50. The jury convicted him on the first count in the indictment, and acquitted him on the second count. From the judgment imposed, he appeals.

The defendant has not been tried, convicted and sentenced in the County Recorder's Court for Craven County for a violation of G.S. 18-48. The Superior Court of Craven County has no original jurisdiction of the offense for which the defendant was convicted. *S. v. Lytle,* 138 N.C. 738, 51 S.E. 66.

The jurisdiction of the Supreme Court is derivative. As the Superior Court of Craven County was without original jurisdiction to try the defendant on a bill of indictment charging a violation of G.S. 18-48, we have none. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143.

S. v. Daniels, supra, is distinguishable, because G.S. 7-64 is applicable to Wayne County, and the County Court of Wayne County and the Superior Court of Wayne County had concurrent original jurisdiction of statutory misdemeanors.

"In this Court, where the lack of jurisdiction is apparent, the Court may, and will, on plea, suggestion, motion or *ex mero motu,* stop the proceeding." *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241.

Since it appears on the face of the record proper that the sentence and conviction are void, because the Superior Court of Craven County had no original jurisdiction to try the defendant for an alleged violation of G.S. 18-48, the judgment is arrested.

Judgment arrested.

SAM W. JONES v. LOUISE H. BAILEY.

(Filed 18 September, 1957.)

1. Automobiles § 37: Evidence § 41—

Testimony of a witness as to a declaration made by an officer in a conversation with defendant at the hospital sometime after the accident to the effect that the officer said defendant did not have the right of way at the intersection is incompetent and its admission constitutes prejudicial error, the declaration not being a part of the *res gestae* and not coming within any exception to the hearsay rule.

2. Automobiles § 38: Evidence § 49—

Where the question of the right of way at an intersection is the crucial question in dispute, testimony of a declaration by an officer to the effect that the defendant did not have the right of way is incompetent, since such conclusion clearly invades the province of the jury.

8. Appeal and Error § 41—

While ordinarily an exception to the admission of evidence is waived when the same evidence is theretofore or thereafter admitted without objection, this rule does not preclude a party from attempting to explain such evidence or destroy its probative value or even contradict it with other evidence, and an objection to testimony of an incompetent declaration is not waived by the party's cross-examining the declarant and by testifying that she had no recollection of the conversation in which the declaration was made.

APPEAL by defendant from *Froneberger, J.*, April Term 1957, of CHEROKEE.

This is a civil action instituted by the plaintiff to recover for damage to his automobile arising out of a collision between his 1955 Buick sedan and the 1952 Buick sedan driven by the defendant, which collision occurred about 1:00 p.m. on 21 September 1955, at the intersection of Park and State Streets in the Town of Hendersonville.

Park Street runs approximately east and west and State Street north and south. At the intersection there were no stop signs or other traffic control devices or warnings on either street; the intersection is in a residential area. Both streets are paved, State Street being approximately 18 feet wide and Park Street 16 feet wide. The view at the northeastern intersection of these streets was limited at the time of the accident due to the growth of bushes, briars and weeds on a vacant lot at such intersection.

The plaintiff approached the intersection from the east on Park Street and the defendant from the north on State Street. The cars entered the intersection and collided, resulting in substantial damage to both cars. The plaintiff approached the intersection from the defendant's left. He offered evidence tending to show that he entered the intersection first. On the other hand, the defendant offered evidence tending to show that both cars entered the intersection at approximately the same time.

The issues of negligence, contributory negligence and damages were answered by the jury in favor of the plaintiff.

From the judgment entered on the verdict the defendant appeals, assigning error.

Uzzell & DuMont for appellee.

Meekins, Packer & Roberts for appellant.

DENNY, J. The defendant's first assignment of error is based on an exception to the admission of certain testimony in the trial below over the defendant's objection. The plaintiff was permitted to testify that after the accident he heard a conversation between the defendant, Mrs.

Bailey, and an officer, at the hospital. The testimony of the plaintiff, to which objection was made and exception entered, was as follows: "Q. What did Mrs. Bailey say? A. As we walked in the hospital, Mrs. Bailey and Mrs. Patton were sitting there and she asked the officer if she had the right of way and the officer said she didn't." Defendant objected and moved to strike the answer. The objection was overruled and the defendant excepted. "Q. Anything else? A. The officer told her she didn't have the right of way and she also said, 'I usually wear my glasses and I didn't have my glasses on at that time.' I believe that was all she said." Defendant moved to strike that portion of the purported statement to the effect that the officer said she didn't have the right of way. The objection was overruled and the defendant excepted.

This evidence was inadmissible on two grounds. In the first place, it was hearsay evidence to the extent that its value or truthfulness depended in part upon the veracity and competency of some other person. 20 Am. Jur., Evidence, section 451, page 400; *Teague v. Wilson,* 220 N.C. 241, 17 S.E. 2d 9; *Greene v. Carroll,* 205 N.C. 459, 171 S.E. 627; *S. v. Blakeney,* 194 N.C. 651, 140 S.E. 433; *S. v. Lassiter,* 191 N.C. 210, 131 S.E. 577; *S. v. Springs,* 184 N.C. 768, 114 S.E. 851; *Chandler v. Jones,* 173 N.C. 427, 92 S.E. 145; *King v. Bynum,* 137 N.C. 491, 49 S.E. 955. Moreover, it is quite clear that the officer to whom the witness referred was not at the time and is not now a party to the action. Neither was he an agent of the defendant. Furthermore, the purported statement is not of such character as to make it a part of the *res gestae* or to bring it within the rule of a dying declaration or other exception to the hearsay rule. *S. v. Blakeney, supra.*

In the case of *S. v. Blakeney, supra,* one W. S. Coursey was permitted to testify over objection with respect to the defendant's alleged shortage based on a report given to him by Mr. Latham, chief bank examiner. In granting a new trial based on the admission of the hearsay evidence, *Stacy, C. J.,* in speaking for the Court, said: "True the defendant, when he came to testify, was asked about the report of the State bank examiner, and two of the directors of the bank also gave evidence in regard to it, but this did not cure the original error, as the testimony of W. S. Coursey was the keystone in the arch of the State's case."

In the second place, the purported statement of the officer was inadmissible because it was a declaration of an opinion or conclusion which he would not have been permitted to state as a witness. 20 Am. Jur., Evidence, section 548, page 462. We think this evidence clearly invaded the province of the jury. *Broom v. Bottling Co.,* 200 N.C. 55, 156 S.E. 152; *Cheek v. Brokerage Co.,* 209 N.C. 569, 183 S.E. 729; *Trust Co. v. Store Co.,* 193 N.C. 122, 136 S.E. 289; *In re Craig,* 192 N.C. 656, 135 S.E. 798; *Marshall v. Telephone Co.,* 181 N.C. 292, 106 S.E. 818.

Whether the plaintiff or the defendant had the right of way at the time they entered the intersection of Park and State Streets was the crucial question to be resolved by the jury from the evidence before they could correctly and properly answer the issues submitted to them.

The appellee contends, however, that when the defendant went upon the stand and denied that she made any inquiry of the officer as to whether or not she had the right of way at the time of the accident and called the officer as a witness in her behalf, who testified that he had no recollection of having said anything to Mrs. Bailey at the hospital, that their testimony made the testimony of the plaintiff competent for the purpose of contradicting or impeaching the testimony of the defendant and her witness, citing *Hopkins v. Colonial Stores,* 224 N.C. 137, 29 S.E. 2d 455.

Consequently, the appellee contends that when the defendant offered evidence to contradict his testimony, she lost the benefit of her exception to the admission of such evidence. We do not concur in this view. Moreover, any statement in the opinion of *Hopkins v. Colonial Stores, supra,* that may be inferred to be in conflict with this opinion, on this particular point, is disapproved. It is the well established rule with us that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but as stated by *Brogden, J.,* in *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232: "The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception." *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Tew,* 234 N.C. 612, 68 S.E. 2d 291.

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

New trial.

IN THE MATTER OF THE ESTATE OF LULA COGDILL, DECEASED.

(Filed 18 September, 1957.)

1. Executors and Administrators § 2b—

The appointee of some of the heirs has no interest in the estate sufficient to entitle him to challenge the issuance of letters of administration by the clerk to another in the absence of a showing by the appointee that he is legally entitled to have the letters of administration issued to himself.

2. Same—

The clerk of the Superior Court has the power to refuse to issue letters of administration to the nominee of the heirs, notwithstanding the nomi-

nee's personal competency, when the nominee's relation to the interested parties and the estate is such that the clerk in the exercise of a sound discretion does not consider him a proper party to administer the estate. G.S. 28-6(b).

3. Appeal and Error § 22—

Upon exception to a judgment or order, without exception to any finding of fact, the findings set forth by the trial court will be accepted as established.

APPEAL by W. M. Styles from *Froneberger, J.*, February Term, 1957, of JACKSON.

The record discloses these facts:

Lula Cogdill, a resident of Jackson County, died June 12, 1956, intestate, survived by six children and also by the children of two daughters who had predeceased her. Five of said surviving children, to wit, Georgia M. Dietz, Edna H. Case, Faye Jones, Amy J. Worsham and Mattie L. Womack, renounced their rights to administer and nominated W. M. Styles for appointment as administrator. On June 21, 1956, Styles applied to the clerk for letters of administration.

On July 16, 1956 (no administrator having been appointed), Styles, by petition to the clerk, requested that a collector be appointed under G.S. 28-25 or that the clerk proceed under G.S. 28-15 "to declare a renunciation of such right to administer as any person may have." On July 30, 1956, the clerk issued a notice to Ray Cogdill, also a surviving child, to show cause, within twenty days after service of such notice, why he should not be deemed to have renounced his right to administer. On August 11, 1956, Ray Cogdill renounced his right to administer and nominated W. C. Hennessee for appointment as administrator.

The clerk, on account of the delay incurred in granting letters of administration due to the inability of the six children to agree, appointed Lacy Thornburg as collector; and Lacy Thornburg qualified as such collector.

On November 13, 1956, Styles, as said nominee, upon notice to Ray Cogdill, moved before the resident judge for a rule or order requiring the clerk to issue letters of administration to him. Upon hearing said motion, the judge, by order dated December 15, 1956, remanded the cause to the clerk "for the appointment of an Administrator for the Estate of Lula Cogdill, deceased." On December 22, 1956, the clerk issued letters of administration to Thornburg. Upon receiving notice thereof, Styles appealed.

On said appeal, the matter was heard by Froneberger, J., the presiding judge of the district. His order dated February 21, 1957, based on findings of fact, "sustained" the clerk's action.

The findings of fact set forth in said order are as follows: "and it appearing to the Court that five heirs had renounced their right to administer in favor of W. M. Styles and that one of said heirs renounced his right to administer in favor of W. C. Hennessee; and it further appearing to the Court and the Court finding as a fact that W. M. Styles along with his father, J. Scroop Styles, represent certain heirs in a civil action pending to set aside certain deeds and other conveyances which will be involved in this Estate, therefore, the Court finds that W. M. Styles is not the proper party to administer in this estate. The Court finds as a fact that the applicant otherwise is eminently qualified."

Styles excepted and gave notice of appeal. The appeal entries, dictated by Styles, include the following: "It is stipulated that the record of appeal shall consist of the record proper as it appears in the office of the Clerk of the Superior Court of Jackson County, North Carolina."

W. M. Styles, appellant, in propria persona.

BOBBITT, J. The record discloses no action or appearance by any of the six children subsequent to their renunciation in favor of the respective nominees. Styles as nominee is the sole applicant, petitioner, movant and appellant in the successive proceedings stated above.

It would seem that as between Styles and Hennessee, nothing else appearing, the clerk had authority in his discretion to issue letters of administration to either Styles or Hennessee. *In re Saville,* 156 N.C. 172, 72 S.E. 220. Instead, she issued letters of administration to Thornburg. The record discloses no data concerning Thornburg's relation to the estate or any of the next of kin. His fitness to serve as administrator is not challenged.

There was no proceeding under G.S. 28-32 for the revocation of Thornburg's letters of administration. It does not appear that Thornburg had notice of or appeared in connection with any hearing or proceeding. He makes no appearance in this Court as appellee or otherwise. In so far as the record discloses, both G.S. 28-32 and Thornburg were completely ignored.

If the decision below had been adverse to Thornburg, we would face the question as to whether he was subject to removal, *i.e.,* to have his letters of administration revoked, except in a proceeding before the clerk in accordance with G.S. 28-32. See, *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562; *In re Palmer's Will,* 117 N.C. 134, 23 S.E. 104; *Edwards v. Cobb,* 95 N.C. 5; *Murrill v. Sandlin,* 86 N.C. 54.

Styles' rights, if any, to letters of administration arise solely from his status as said nominee. Absent a showing that he is *legally entitled* as such nominee to letters of administration, he has no interest in the

estate sufficient to entitle him to challenge the issuance of letters of administration to Thornburg.

The status of a nominee for letters of administration is now defined by G.S. 28-6(b) (Ch. 22, Session Laws of 1949), viz.: "Any person who renounces his right to qualify as administrator may at the same time nominate in writing some other qualified person to be named as administrator, and such designated person shall be entitled to the same priority of right to qualify as administrator as the person making the nomination. Provided, that the qualification of the appointee shall be *within the discretion* of the clerk of court." (Italics added.)

We construe the proviso to mean that the clerk in his sound discretion may refuse to issue letters of administration to a nominee if and when it is made to appear that, regardless of his personal competency, the nominee's relation to the interested parties and the estate is such that the clerk does not consider him a proper party to administer the estate. Obviously, the word "appointee" as used in the proviso refers to a person nominated for appointment in accordance with the prior provisions of this statute.

Appellant's only assignment of error is based on his exception to the court's said order of February 21, 1957. There is no exception to any finding of fact. Hence, we must accept as established the facts set forth in the court's findings. *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421.

Upon the facts found, appellant failed to show that the clerk abused her discretion in refusing to issue letters of administration to him; hence, he failed to show that he was entitled to letters of administration as a matter of law.

In relation to this record, and bearing upon the exercise of discretionary power, this statement of *Ruffin, C. J.,* in *Pratt v. Kitterell,* 15 N.C. 168, 171, is appropriate: "If the litigants cannot agree upon a person, it is manifestly proper to appoint one who stands indifferent between them and will be acceptable to the creditors."

Judge Froneberger's order is

Affirmed.

DONALD MILTON POWELL AND WIFE, THELMA POWELL, CHARLES E. POWELL, BETTIE O. POWELL, REBA PATTERSON, ELLEN MITCHELL, ALMA BEARD AND HUSBAND, JULIAN BEARD v. A. O. ROBERSON, GILBERT SMITH AND I. L. SMITH, JR.

(Filed 18 September, 1957.)

1. Deeds § 11—

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

2. Same—

An effective deed must contain operative words of conveyance.

3. Deeds § 18b—

The Rule in Shelley's Case is recognized in this jurisdiction, and, when applicable, it is not only a rule of law, but also a rule of property without regard to the intent of the grantor or devisor.

4. Same—

The premises of the deed in question stated that the conveyance was to grantee during her natural life and at her death to her children, but the granting clause and the *habendum* recited that the conveyance was to grantee during her natural life and then to her heirs. *Held:* The Rule in Shelley's Case is applicable and the grantee took a fee simple.

APPEAL by plaintiffs from *Bone, J.*, May Civil Term 1957 of MARTIN.

Civil action to recover land, rents and damages for cutting timber.

Upon the stipulated facts the decision of the court below was properly made to depend upon the construction of a deed executed and delivered by William K. Eborn and A. E. Eborn on 30 July 1908, and of record in the Register of Deeds Office for Martin County in Book SSS, page 444. The parties are designated in the premises as "William K. Eborn and A. E. Eborn of Martin County, and State of North Carolina, of the first part, to Annie G. Powell during her natural life and at her death to her children of Martin County, and State of North Carolina, of the second part." The granting clause is as follows: "W. K. Eborn and A. E. Eborn in consideration of ONE DOLLAR and the love and affection we have for A. G. Powell and her heirs paid by A. G. Powell, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell and convey to said Annie G. Powell during her natural life and then to her heirs and all of tract of parcel of land"—the land is situate in Martin County, North Carolina, and the description is not in dispute. The deed recites a reservation of a life estate to the grantors. The *habendum* clause is TO HAVE AND TO HOLD the tract of land "to the said A. G. Powell during her natural life then to her heirs and assigns."

A. E. Eborn was the wife of William K. Eborn, and both are dead. Annie G. Powell died 16 January 1957, and left her surviving six children, who with their spouses are the plaintiffs.

The parties stipulated and agreed "that if the Rule in Shelley's Case is applicable to the limitations to the plaintiffs in this case, then the plaintiffs have no interest in the land and that the defendants own the land in fee simple; and that if the plaintiffs received the remainder under the deed in question, then the cause to be calendared for trial."

Plaintiffs' brief states that the defendants "own whatever interest Annie G. Powell owned in and to said land conveyed in said deed."

The judgment below recites that plaintiffs contend that under the deed Annie G. Powell took only a life estate, and that the defendants contend that under the deed Annie G. Powell was granted a fee simple title, and that the parties agreed that judgment should be entered according to the opinion of the court as to the proper construction of the deed.

The trial court adjudged that under the Rule in Shelley's Case the deed conveyed to Annie G. Powell a fee simple title, that the plaintiffs have no interest in the land, and that the defendants own the land in fee simple.

Plaintiffs appeal.

Critcher & Gurganus for Plaintiffs, Appellants.
Paul D. Roberson for Defendants, Appellees.

PARKER, J. In *Martin v. Knowles,* 195 N.C. 427, 142 S.E. 313, the deed designated the parties in the premises as "Albert D. Dail and his wife, Lucy W. Dail, parties of the first part, and Sallie Jane Martin and her children, parties of the second part." The granting clause conveys "unto said party of the second part a life estate therein, and then to her heirs, executors, administrators and assigns, a certain tract of land." The deed recites "it is the purpose of this deed to convey the above tract of land to Sallie Jane Martin during her lifetime, then to her heirs in fee simple, forever." The *habendum* clause is "to the said parties of the second part, their heirs and assigns." This Court held that, under the Rule in Shelley's Case, the deed conveyed to Sallie Jane Martin a fee simple estate to the land described in the deed.

In *Mayberry v. Grimsley,* 208 N.C. 64, 179 S.E. 7, the deed, according to the premises, was made "to Nonnie A. Mayberry and her children," the granting clause conveyed the property "to said Nonnie A. Mayberry, her heirs and assigns" and the *habendum* clause is "To have and to hold . . . to the said Nonnie A. Mayberry, her heirs and assigns." This Court held that the deed conveyed the estate to Nonnie A. Mayberry in fee.

The heart of a deed is the granting clause. *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 288; *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157; 16 Am. Jur., Deeds, page 567. An effective deed must contain operative words of conveyance. *Griffin v. Springer, supra; Pope v. Burgess,* 230 N.C. 323, 53 S.E. 2d 159; *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687.

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." To the same effect see also: *Dull v. Dull,* 232 N.C. 482, 61 S.E. 2d 255; *Artis v. Artis, supra.*

The "children" appear only in the introductory recitals of the deed, giving the names of the parties, while the operative words of conveyance, as contained in the granting clause convey the tract of land "to said Annie G. Powell during her natural life and then to her heirs." The *habendum* clause is in harmony with the granting clause. This Court by repeated decisions has held that the Rule in Shelley's Case is still recognized in this jurisdiction, and when applicable, it is not only a rule of law, but also a rule of property, without regard to the intent of the grantor or devisor. *Hammer v. Brantley,* 244 N.C. 71, 92 S.E. 2d 424; *Edwards v. Faulkner,* 215 N.C. 586, 2 S.E. 2d 703.

It is manifest, we think, viewing the deed in its entirety, that, under the Rule in Shelley's Case, the deed here conveyed to Annie G. Powell a fee simple estate to the land described therein. The deed conveys nothing to the children of Annie G. Powell. *Artis v. Artis, supra; Ingram v. Easley, supra; Mayberry v. Grimsley, supra; Martin v. Knowles, supra.*

We agree with the decision below.

Affirmed.

STATE v. CHARLES MILLER.

(Filed 18 September, 1957.)

1. Criminal Law § 79: Searches and Seizures § 1—

Where it appears that defendant not only consented to but invited a search of his car without a warrant, he may not complain of the introduction in evidence of nontaxpaid whisky found therein, and his motion to suppress the evidence and motion for nonsuit on the ground that all the evidence was obtained in the course of the illegal search, are properly denied.

2. Intoxicating Liquor § 9d—

Evidence that in excess of one gallon of nontaxpaid whisky was found in defendant's automobile is sufficient to be submitted to the jury in a prosecution for possession of whisky upon which the requisite taxes had not been paid and possession of whisky for the purpose of sale, the absence of tax stamps being *prima facie* evidence that the whisky was nontaxpaid and the possession of more than one gallon being *prima facie* evidence of possession for the purpose of sale. G.S. 18-32.

3. Criminal Law § 135—

Where active sentence is imposed on one count and suspended sentences are imposed on the other two counts in the indictment, and the defendant gives notice of appeal immediately after entry of judgment, in the absence of error in the trial the cause must be remanded for proper sentence on the counts upon which sentences were suspended, since suspended sentences cannot stand in the absence of defendant's consent thereto.

APPEAL by defendant from *Clarkson, J.*, and a jury, at May Term, 1957, of RUTHERFORD.

Criminal prosecution tried on appeal from the County Recorder's Court upon a warrant charging the defendant with (1) possession of nontaxpaid whisky, (2) possession of nontaxpaid whisky for the purpose of sale, and (3) transportation of nontaxpaid whisky.

The defendant moved to suppress the State's evidence on the ground that it was obtained in the course of an illegal search of the defendant's automobile without a search warrant. Motion overruled. Defendant excepted.

When the State rested the defendant offered no evidence but moved for judgment as of nonsuit. Motion overruled. Defendant excepted.

The jury returned a verdict of guilty as charged. The judgment pronounced imposed (1) an active prison sentence on the first count, charging possession of nontaxpaid whisky, and (2) a prison sentence suspended upon specified conditions on the other two counts charging possession of nontaxpaid whisky for the purpose of sale and transportation of nontaxpaid whisky, the suspended sentence to begin at the expiration of the active sentence. From the judgment so pronounced, the defendant appeals.

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

Hamrick & Hamrick for defendant, appellant.

JOHNSON, J. The defendant's assignments of error challenge the correctness of the rulings of the trial court in (1) refusing to suppress the State's evidence and (2) overruling the motion for judgment as of nonsuit. Since the motion for nonsuit was based on the contention that

all the evidence was obtained in the course of an illegal search and therefore incompetent, the pivotal question presented by the appeal is whether the defendant's automobile was illegally searched.

The pertinent evidence may be summarized as follows: Highway Patrolman J. G. Wilson said he met the automobile driven by the defendant, recognized him, and knew he did not have a driver's license; that he stopped the defendant "and asked him if he had ever got a driver's license"; that the defendant said he had not; that he then told the defendant he "would have to take him in." Wilson testified further that he asked the defendant if he had "anything in the car"; that the defendant answered: "Go ahead and look; and I said, 'No, I will get a search warrant,' and I got them out of the car and put them in my car and was going to call somebody to come and drive the car in, and I told Charles (the defendant) I was going to bring him in and get a search warrant and he offered me the key(s) again to the car and I didn't take it, and after he got in my car, he said, 'Give me the key and I will open it,' and he opened the trunk and I saw two cases of whiskey in it, and after we brought the car in, there was a third case; it was in an old sack and I didn't notice it when he opened the trunk up. He was in my car, and he said, 'Give me the key and I will open it up.'" Further testimony of Patrolman Wilson disclosed that each of the three cases of whisky contained six gallons; that it was nontaxpaid whisky, with no stamps on any of the containers. The whisky was offered in evidence.

Sheriff Wilkins testified that in response to a call he went to the place where Patrolman Wilson had stopped the defendant's car; that he looked in the back of the car and saw the three cases, one with a sack over it.

It is manifest that the defendant consented to the search. In fact, it appears that he expressly invited the search. Under these circumstances, he cannot be heard to complain that his constitutional or statutory rights were violated. The case is controlled by the principles explained and applied in *S. v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501; *certiorari* denied, 351 U.S. 919, 100 L. Ed. 1451, 76 S. Ct. 712.

The testimony of the officers was competent. The motion to suppress was properly overruled. There was ample evidence to carry the case to the jury over the defendant's motion for nonsuit. The evidence of absence of tax stamps was *prima facie* evidence that the whisky was nontaxpaid, and the possession of more than one gallon constituted *prima facie* evidence of possession for sale. G.S. 18-32. The trial and verdict will be upheld.

However, where, as here, the defendant appeals immediately from a judgment imposing an active prison sentence on one count and a suspended sentence on two other counts, and there is no error in the trial of any count, the cause must be remanded for proper judgment on the

two counts to which the suspended sentence relates. This is so for the reason that the suspended sentence cannot stand in the absence of defendant's consent thereto. *S. v. Ritchie,* 243 N.C. 182, 90 S.E. 2d 301; *S. v. Ingram,* 243 N.C. 190, 90 S.E. 2d 304. *Cf. S. v. Lakey,* 191 N.C. 571, 132 S.E. 570; *S. v. Canady, post,* 613. Here it appears that the defendant gave notice of appeal immediately after the entry of judgment, thus indicating he did not consent to the suspended sentence entered below.

Therefore the portion of the judgment imposing the suspended sentence will be stricken out and the cause remanded for a proper judgment on the last two counts. The active prison sentence imposed on the first count will remain in full force and effect.

Remanded.

STATE v. DESMOND A. ROGERS, JR.

(Filed 18 September, 1957.)

Robbery § 3—

Where defendant is charged with armed robbery, an instruction to the effect that defendant would be guilty as charged if the jury should find that he took property from the person of the prosecuting witness by violence or intimidation, must be held for prejudicial error in failing to instruct the jury as to the elements of armed robbery as distinguished from robbery at common law. G.S. 14-87.

APPEAL by defendant from *Parker, J.,* and a jury, at May Term, 1957, of DARE.

Criminal prosecution tried upon indictment charging the defendant with armed robbery in violation of G.S. 14-87.

The bill charges that on 29 October, 1956, the defendant "with the use of a dangerous weapon and implement, to wit, a long, metal, 5-cell flashlight," did endanger and threaten the life of Marvin E. Daniels and did rob him of the sum of $940.

The State's evidence tends to show that on the night in question the prosecuting witness Daniels was lying on a cot in his office near the wharf in Manteo; that his 5-cell flashlight was on a cabinet near the door; that the defendant suddenly came into the office, jumped on Daniels, hit him with the flashlight, choked him, threatened to kill him, and took from him his pocketbook containing about $940.

The jury returned a verdict of guilty as charged. From judgment imposing a prison sentence the defendant appeals.

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

LeRoy & Goodwin, McCown & McCown, and F. V. Dunstan for appellant.

JOHNSON, J. The defendant excepts to the following portion of the charge:

"So the Court instructs you that if the State of North Carolina has—which has the burden of proof to satisfy you from the evidence and beyond a reasonable doubt, has so satisfied you that at the time and place in question the defendant Desmond A. Rogers, Jr. took a certain amount of personal property, to wit, money, lawful money of U. S., from the person of Marvin Daniels or took the same in his presence without his consent or against his will, by violence, intimidation or putting him in fear, then it would be your duty to return a verdict of guilty as charged."

The vice in this instruction is that it directed the jury to return a verdict of guilty of armed robbery as charged in the bill of indictment upon a mere finding that he was guilty of common-law robbery. Armed robbery under our statute, G.S. 14-87, superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed "with the use or threatened use of . . . firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, . . ." See *S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364. True, an indictment for armed robbery will support a conviction of common-law robbery or assault where there is evidence of guilt of such lesser offenses. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; G.S. 15-169 and 15-170. See also *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733. However, in the case at hand the trial court failed to instruct the jury as to the elements of armed robbery as distinguished from robbery at common law, and the jury were told to return one of only two verdicts, namely, guilty as charged or not guilty.

The defendant is entitled to a new trial. This being so, it is not necessary to discuss other exceptions brought forward by the defendant.

New trial.

STATE v. FAROY CANADY.

(Filed 18 September, 1957.)

Criminal Law § 143—

Where suspended sentence is entered and defendant does not except or give notice of appeal during the term, but complies with certain of the terms of suspension, he waives his right to appeal and may not thereafter appeal, even though written notice of appeal is served within ten days from the adjournment of the term.

APPEAL by defendant from *Fountain, Special Judge,* April 22nd Special Criminal Term, 1957, of CRAVEN.

Criminal prosecution for operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor in violation of G.S. 20-138.

Defendant was first tried and convicted in the Recorder's Court of Craven County. On appeal, he was tried *de novo* in the Superior Court on the original warrant.

Upon the jury's verdict of guilty, the court pronounced judgment as follows:

> "Judgment of the Court is that the defendant be confined in the common jail of Craven County for a period of ninety (90) days to be assigned to work the roads of the State under the supervision of the State Highway and Public Works Commission. Sentence suspended upon the condition that defendant pay a fine of $100.00 and court costs and remain on good behavior for two (2) years. The defendant surrendered his license to the court. The above sentence was suspended by and with the consent of the defendant, through his counsel, in open court given."

During the term, defendant did not except to the judgment or give notice of appeal. On April 26, 1957, defendant paid the $100.00 fine and court costs in the amount of $51.85 to the clerk of the Superior Court.

On May 4, 1957, after adjournment of the (one week) term, but within ten days from the date of adjournment, defendant's counsel, who had represented defendant at the trial, served a written notice of appeal on the district solicitor; and defendant's purported appeal is based thereon.

The assignments of error defendant attempts to bring forward are based on exceptions to rulings made in the trial in the Superior Court.

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

Charles L. Abernethy, Jr., for defendant, appellant.

PER CURIAM. While the record on defendant's purported appeal fails to disclose prejudicial error, any discussion of defendant's assignments of error would be irrelevant; for, under the facts stated, the appeal must be and is dismissed on authority of *S. v. Lakey*, 191 N.C. 571, 132 S.E. 570.

Appeal dismissed.

STATE v. WILLIE WILLIAMS.

(Filed 18 September, 1957.)

1. Intoxicating Liquor § 9d—

Evidence that officers found whiskey in defendant's home in a container not having the requisite tax stamps on it, is sufficient to be submitted to the jury on the charge of unlawful possession of nontax-paid whiskey for the purpose of sale.

2. Searches and Seizures § 4—

Evidence tending to show that the officer read the search warrant to the defendant as soon as he could do so in the light of defendant's conduct, and thereafter proceeded to examine the premises, fails to disclose illegal search.

CERTIORARI allowed upon petition of defendant to review the proceeding in the Superior Court, presided over by *Frizzelle, J.*, January Term 1957, of CRAVEN.

This defendant was originally tried in the Recorder's Court of the City of New Bern on 12 July 1956 upon a warrant dated 11 June 1956 charging him with the unlawful possession of one-half gallon of nontax-paid whiskey for the purpose of sale. Verdict: guilty. Judgment was imposed and the defendant appealed therefrom to the Superior Court of Craven County.

In the Superior Court the defendant was tried upon the original warrant at the January Term 1957. The evidence discloses that two officers of the City of New Bern, clothed with a search warrant, went to the home of the defendant on 11 June 1956 for the purpose of searching for illegal whiskey. The defendant was at the back door of his kitchen and when informed by one of the officers that he had a search warrant, the defendant ran into an adjoining room and grabbed a fruit jar from a table and threw it down on a cot and most of its contents ran out on the cot. The officer testified that he saw the jar before the defendant grabbed it and that it was approximately full. The officer then read the search warrant to the defendant and thereafter proceeded to examine

the fruit jar which was not broken and still contained a small quantity of nontax-paid whiskey. The jar had no State or Federal stamps on it. The defendant denied that the whiskey belonged to him. The jury returned a verdict of guilty. From the judgment entered on the verdict the defendant appeals to the Supreme Court, assigning error.

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

Charles L. Abernethy, Jr., for defendant appellee.

PER CURIAM. The defendant's exception to the refusal of the court below to sustain his motion for judgment as of nonsuit is without merit.

The fact that nontax-paid whiskey was found in the home of the defendant was sufficient to take the case to the jury. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481.

It appears that the search warrant was read to the defendant as soon as the officer could do so in light of the defendant's conduct. The defendant's contentions otherwise are not supported by the record.

In the trial below we find

No error.

STATE v. TOMMY TESSNEAR.

(Filed 18 September, 1957.)

Criminal Law § 101: Intoxicating Liquor § 9d—Circumstantial evidence held sufficient to sustain conviction of violation of liquor control statutes.

Evidence tending to show that defendant was seated beside the driver of a car, the owner being in the back seat, when the driver attempted to run over officers walking along a road not a public road, that a roadblock was set up, that all the occupants, when confronted with the roadblock, abandoned the car and ran, and that the officers, armed with a search warrant, found five gallons of nontaxpaid liquor in the car, with further evidence that the officers backtracked the car to a place at or near where they first heard it and there found tracks leading off to an illicit distillery that was still warm from recent use, *is held* sufficient to be submitted to the jury and support conviction of defendant of unlawful possession of intoxicating liquor and unlawful possession of intoxicating liquor for the purpose of sale, and to warrant consolidation of the prosecution with the prosecution of the driver of the vehicle.

APPEAL by defendant from *Clarkson, J.,* May, 1957 Term, RUTHERFORD Superior Court.

The defendant was tried in the Superior Court for three offenses against the liquor laws: (1) Unlawful possession, (2) unlawful possession for the purpose of sale, and (3) unlawful transportation. The court directed a verdict of not guilty on the third count and the jury returned a verdict of guilty on counts (1) and (2). The court imposed a prison sentence to begin at the expiration of sentences previously imposed and suspended on condition the defendant not violate the criminal laws. The prior sentences were ordered into execution because of the conviction in the instant case. The defendant appealed, assigning as error (1) the refusal of the court to enter a directed verdict of not guilty at the close of the evidence, and (2) the consolidation, over his objection, of the instant case with a like charge against Howard Martin.

George B. Patton, Attorney General, and Harry W. McGalliard, Asst. Attorney General, for the State.

Hamrick & Hamrick,
By: J. Nat Hamrick, for defendant, appellant.

PER CURIAM. From the bare record it is difficult to follow all steps, both in this case and in the prior hearings in which the suspended sentences were imposed. However, the defendant makes it clear that he relies altogether on his objection to the sufficiency of the evidence to take this case to the jury and to the consolidation. The State concedes that if the conviction in this case is set aside execution of the suspended sentences is not justified.

On the day of the arrest, four Rutherford County officers were making a search near the Polk County line. As they walked along an old woods road (not public) they heard a car start a few hundred yards away and as it passed them the driver attempted to run over them. The car was driven by Howard Martin. The defendant sat beside him on the front seat and Arthur Pritchard, the owner, was in the back seat. By means of a "walkie-talkie" other officers further along the old road were notified and they placed a roadblock in front of the car. When confronted with the roadblock, the occupants abandoned the car and ran. In the trunk of the car the officers found five gallons of nontaxpaid white liquor. They were armed with a search warrant. The officers backtracked the car to a place at or near where they first heard it and there found tracks leading off about 300 yards to an illicit distillery that was still warm from recent use.

The three men were together in a car hauling whisky on an old woods road, near the place where it was probably manufactured. The defendant ran at the same time and apparently as fast and as far as the driver and the owner. The evidence in this case is much stronger than in

S. v. Ferguson, 238 N.C. 656, 78 S.E. 2d 911, on which the defendant relies. The evidence was sufficient to warrant the consolidation and to take the cases to the jury.

No error.

JOE WILLIE WALSTON, ADMINISTRATOR OF THE ESTATE OF ALLEN LEON WALSTON, DECEASED, v. RICHARD GREENE AND J. C. SPENCE, GUARDIAN AD LITEM.

(Filed 18 September, 1957.)

Trial § 52—

The action of the trial court in setting aside the verdict in its discretion upon its opinion that equity and justice so required is not subject to review on appeal in the absence of abuse of discretion.

APPEAL by defendant from *Parker, J.*, February Term, 1957, of PASQUOTANK.

Administrator's action to recover damages for wrongful death. Plaintiff's intestate, a six year old boy, was killed when struck by an automobile operated by defendant.

Issues of negligence, contributory negligence and damages, raised by the pleadings, were submitted. The jury answered the first (negligence) issue, "No." Whereupon, plaintiff moved to set aside the verdict. The court allowed said motion; and, "IN THE DISCRETION OF THE COURT," it was "ORDERED, CONSIDERED AND DECREED that the VERDICT be, and it is hereby SET ASIDE, and that this action be reinstated upon the civil issue docket of Pasquotank County for disposition at some future term of Court."

Defendant excepted to said order and appealed. The only assignment of error is based on this exception.

Forrest V. Dunstan and Frank B. Aycock, Jr., for plaintiff, appellee.

LeRoy & Goodwin for defendant, appellant.

PER CURIAM. Whether a verdict should be set aside, otherwise than for error of law, rests in the sound discretion of the trial judge. Here the trial judge, "being of the opinion that justice and equity" required that he do so, exercised such discretion and set the verdict aside. The record discloses no abuse of discretion; hence, the order is not subject to review on appeal. *Brink v. Black*, 74 N.C. 329; *Bird v. Bradburn*, 131 N.C. 488, 42 S.E. 936; *Goodman v. Goodman*, 201 N.C. 808, 161 S.E. 686; *In re Blair*, 230 N.C. 753, 55 S.E. 2d 504; *Williams v. Stumpf*, 243 N.C. 434, 90 S.E. 2d 688.

The appeal is without substance, and will be dismissed. *Goodman v. Goodman, supra.*

Appeal dismissed.

MRS. RUBYE A. LOWRY v. SCOTT DILLINGHAM.

(Filed 18 September, 1957.)

Appeal and Error § 16—

In order to preserve the right to review a judgment overruling a demurrer other than a demurrer for misjoinder of parties and causes or demurrer to the jurisdiction, appellant must move for *certiorari* within thirty days from the entry of such judgment. Rule of Practice in the Supreme Court 4(a).

DEFENDANT appeals from an order, overruling a demurrer to the complaint, entered by *Sink, E. J.*, May 27, 1957 Term, BUNCOMBE.

The complaint in substance alleges: Defendant procured Hazel Rice to execute a negotiable note to him in 1954 for $50,000, purporting to be for the purchase of real estate in Buncombe County, and secured by deed of trust on the land; on 13 May 1955 plaintiff was induced to purchase the note by the false and fraudulent representations of defendant's agent (a) that Hazel Rice was solvent, (b) that the note was in fact a purchase money note, (c) that prior encumbrances on the property were not in default, (d) that the property had originally sold for $150,000, (e) that defendant was a man of large means and financially responsible; that defendant guaranteed payment of the note; that the note has matured but has not been paid, though demands have been made for payment on both the maker and the defendant. Plaintiff seeks to recover the sum of $50,000 with interest, with the right to have execution against the person.

Defendant demurred for that: (1) the complaint states a cause of action against the defendant and his agents and the agents have not been made parties defendant; (2) plaintiff has attempted to assert distinct causes of action without stating each as a separate cause of action; (3) the note referred to did not in fact disclose that defendant had guaranteed payment; (4) the allegations of the complaint were vague and indefinite and did not set out the time when and place where the fraudulent representations were made; and (5) the complaint did not allege that plaintiff had listed and paid taxes on the note.

Horner & Gilbert for plaintiff appellee.

Styles & Styles for defendant appellant.

PER CURIAM. The statute, G.S. 1-127, enumerates the cases in which a demurrer may be appropriately interposed. Rule 4(a) of the Court, 242 N.C. 766, fixes the time when a litigant may, by appeal, review a judgment overruling a demurrer. *Winston-Salem v. Coach Lines*, 245 N.C. 179. The rules are mandatory and when ignored an appeal will be dismissed. *S. v. McNeill*, 239 N.C. 679, 80 S.E. 2d 680; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126. This appeal is not permitted by the rule. The appeal is

Dismissed.

EARL BURLESON v. CHARLES C. FRANCIS, SAM FERGUSON AND THOMAS H. ROGERS, BUNCOMBE COUNTY REVIEW COMMITTEE.

(Filed 18 September, 1957.)

Agriculture § 11—

The finding of fact of the Superior Court that there was substantial evidence supporting the determination by the review committee of the tobacco allotment of the petitioner's farm is binding on the Supreme Court if there be evidence to support it.

APPEAL by petitioner from *Sink, E. J.*, at the May 1957 Civil Term of BUNCOMBE.

Civil action brought under provisions of Agricultural Adjustment Act of 1938, 7 USCA Sec. 1301 *et seq.*, particularly Secs. 1365, 1366, for judicial review of the determination of the Buncombe County Review Committee which established the burley tobacco farm acreage allotment on petitioner's farm No. 1804 for the year 1956. This Committee made findings of fact and rendered conclusions of law in respect thereto by which petitioner's allotment for 1956 was reduced in accordance with Section 725.719(e) of the tobacco marketing quota regulations, 1956-57 marketing year.

Petitioner excepted to each of the findings of fact for that "there is not sufficient competent evidence upon which to base same," and for like reason petitioner excepts to the conclusions of law as "erroneous in fact and in law."

When the cause came on for hearing in Superior Court "upon the application of the plaintiff for review of the determination of the Review Committee with respect to plaintiff's 1956 burley tobacco farm acreage allotment," the Presiding Judge entered judgment, in which after reciting that "it appearing to the court and the court finding it as a fact that the determination of the Review Committee in this matter is supported by substantial evidence and the law applicable thereto," "ordered, adjudged and decreed that the determination of the Review

Committee be hereby confirmed in every respect and the plaintiff taxed with the costs of this action."

To the signing and entering of the foregoing judgment plaintiff objects and excepts and appeals to Supreme Court, and assigns as error the same matter as was set forth in exception to the determination by the Review Committee.

James S. Howell and McLean, Gudger, Elmore & Martin for Plaintiff Appellant.

J. Stephen Doyle, Jr., Neil Brooks, J. M. Baley, Jr., Robert H. Lacey, and Emily A. Kindel for Defendants Appellees.

PER CURIAM. Pertinent Section No. 1366 of the Agricultural Adjustment Act declares that "the review by the Court shall be limited to questions of law, and the findings of fact by the Review Committee if supported by evidence shall be conclusive."

In the light of this provision the finding of fact by Judge of Superior Court that the determination by the Review Committee is supported by substantial evidence is binding on this Court if there be evidence to support it. And in exceptions thereto, and to the legal conclusion reached error is not made to appear to this Court. See *Lee v. Berry*, 219 S.C. 382, 65 S.E. 2d 775.

Hence the judgment from which appeal is taken is

Affirmed.

MARIAH JORDAN AND CLESIE JORDAN v. N. E. CHAPPEL.

(Filed 18 September, 1957.)

1. Mortgages § 30I (3)

This action for the recovery of certain real estate from the mortgagee in possession and for an accounting for rents *held* barred by the lapse of more than ten years. G.S. 1-47(4).

2. Equity § 2—

Judgment that plaintiffs were guilty of *laches* in failing to assert their rights, sustained under the facts of this case.

APPEAL by plaintiff Mariah Jordan from *Parker, J.*, January Term 1957, of PERQUIMANS.

This is a civil action for the recovery of certain real estate from the defendant as mortgagee, and for an accounting for rents.

The parties waived a jury trial and submitted the case to the trial judge upon an agreed statement of facts and authorized him to make his conclusions of law therefrom and to enter judgment accordingly.

The facts are as follows: (1) On 10 November 1913, Susan Thatch and Mariah Jordan owned in fee simple the land in controversy. (2) On the above date, Susan Thatch, Mariah Jordan and her husband Clesie Jordan, executed and delivered to the defendant, N. E. Chappel, for a consideration of $500.00, that certain mortgage filed in the office of the Register of Deeds of Perquimans County, on 11 November 1913, and recorded in Mortgage Book 10, page 299. (3) After the above date, Susan Thatch died intestate, leaving as her only heir at law Mariah Jordan. Clesie Jordan is now deceased. (4) During the month of November 1913, the aforesaid mortgagors delivered the possession of the land in controversy to the defendant as mortgagee, and the defendant has been in exclusive and continuous possession thereof since that time, collecting the rents therefrom, paying the taxes thereon, making all repairs to the buildings located thereupon, and having renovated and rebuilt one building. No demand for possession or for an accounting for rents was made upon the defendant until the institution of this action on 2 February 1955. (5) The said indebtedness was due and payable on 10 October 1915, but no payments have been made thereon. The defendant's possession has been only as a mortgagee. The mortgage is uncanceled of record.

Upon the foregoing facts the court held the right of redemption is barred by the statute of limitations and that the plaintiffs were guilty of laches in failing to assert their rights in the land described in the complaint for an unreasonable and unexplained length of time.

Plaintiff Mariah Jordan appeals, assigning error.

P. H. Bell and Chas. V. Bell for appellant.

LeRoy & Goodwin for appellee.

PER CURIAM. The judgment of the court below is supported by the provisions of G.S. 1-47(4) and the decisions of this Court construing said statute. *Anderson v. Moore*, 233 N.C. 299, 63 S.E. 2d 641; *Hughes v. Oliver*, 228 N.C. 680, 47 S.E. 2d 6; *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784.

Likewise, the conclusion of law with respect to laches is sustained. *Stell v. Trust Co.*, 223 N.C. 550, 27 S.E. 2d 524; *Peedin v. Oliver*, 222 N.C. 665, 24 S.E. 2d 519.

The judgment of the court below is

Affirmed.

A. T. JACKSON v. JAY CLARK AND WHITFORD MOTOR COMPANY, INC.

(Filed 18 September, 1957.)

APPEAL by defendant Clark from *Frizzelle, J.*, and a jury, at February Term, 1957, of CRAVEN.

Ward & Tucker for defendant, appellant.
Raymond E. Sumrell for plaintiff, appellee.

PER CURIAM. This is a civil action brought by the plaintiff to recover for damage to his automobile resulting from a rear-end collision. The plaintiff was driving his car across the State highway bridge over Neuse River at New Bern. He was being followed by a car driven by the defendant Clark. The plaintiff slowed down when he was about half-way across the bridge. When he did so, the rear of his car was hit and damaged by the front of the car driven by the defendant Clark. The plaintiff alleged several phases of negligence against the defendant Clark as proximate causes of the collision, including excessive speed, failure to maintain a proper lookout, and failure to exercise proper control over his car. All allegations of negligence were denied by the defendant. Both sides offered evidence. Issues of negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict awarding the plaintiff damages in the sum of $400 against the defendant Clark, he appeals, assigning as the only error the refusal of the court to allow his motion for judgment as of nonsuit at the close of the evidence.

We have reviewed carefully the evidence and find it amply sufficient to sustain the ruling of the trial court. The appeal presents no question requiring extended discussion. See *Insurance Co. v. Motors, Inc.*, 241 N.C. 67, 84 S.E. 2d 301.

No error.

MACK THOMAS ROBBINS, ADMINISTRATOR OF MACK THOMAS ROBBINS, JR., DECEASED, v. EMMETT L. CRAWFORD, FRANK JONES AND ALMA JONES.

(Filed 25 September, 1957.)

1. Trial § 22b—

On motion to nonsuit, defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered.

2. Automobiles §§ 39, 41a—

Where plaintiff relies upon the physical facts at the scene of the accident to establish negligence on the part of defendant driver, the facts and circumstances relied on must be established by direct evidence and warrant the inference of negligence as a reasonable and logical conclusion, considering the evidence in the light most favorable to plaintiff, and such evidence which raises a mere conjecture or surmise of the determinative issue is insufficient.

3. Automobiles § 36: Negligence § 17—

Negligence is not to be presumed from the mere fact of injury.

4. Automobiles § 41c—

Where plaintiff's evidence and defendant's evidence in explanation and clarification thereof disclose that as defendant's tractor-trailer, traveling north, rounded a curve below an overpass, the car driven by intestate came out from the east shoulder of the road on the tractor driver's right and cut immediately in front of the tractor, such evidence fails to show that the accident resulted from negligence on the part of defendant, and nonsuit is proper.

APPEAL by plaintiff from *Fountain, Special Judge,* at December Special Term, 1956, of BEAUFORT.

Civil action brought by the plaintiff to recover damages for the alleged wrongful death of his intestate son, Mack Thomas Robbins, Jr., resulting from a collision between a tractor-trailer and an Oldsmobile passenger car.

The collision occurred around 1:30 o'clock on the morning of 13 May, 1956, on U. S. Highway No. 301 about eight miles north of Weldon, just north of the highway bridge over the Atlantic Coast Line Railroad tracks. Looking north downgrade from the top of the overpass bridge, the highway curves gradually to the right. The curve ends near where the descent from the overpass levels off. This is about 1,000 feet from the overpass. There is a drop of about 20 feet in elevation from the top of the overpass down and along the curve to the foot of the hill. A pine thicket flanks the curve on each side. From atop the overpass one can see north along the curve approximately 350 feet. The pavement is 26 feet wide with dirt shoulders on each side.

The two vehicles were traveling in opposite directions. The tractor-trailer, owned by the defendant Alma Jones, was being driven by the defendant Crawford. It was going north. The Oldsmobile, driven by the intestate, was headed south. Two male companions were in the car with him. The tractor-trailer had crossed the overpass and was approaching the foot of the hill and the end of the curve when the collision occurred. The two vehicles met near the center of the pavement. In the collision the Oldsmobile was wedged against and partially under the front of the tractor, and as so wedged it was pushed sidewise up the

highway in front of the tractor to where the vehicles came to rest, approximately 73 feet beyond where debris scattered on the highway indicated the apparent point of impact. The intestate and one of his companions were killed instantly. The other died of injuries some hours later. The defendant Crawford was knocked unconscious for a few minutes.

At the trial below, the plaintiff relied on the testimony of witnesses who testified respecting the physical facts and explanations made by the defendant Crawford to the patrolman at the scene of the wreck.

Patrolman B. Q. McDonald, called by the plaintiff, testified in part: "When I arrived at the scene it was approximately 2 o'clock A.M. . . . The automobile, which I found to be a 1955 Oldsmobile, was setting off the pavement on the left shoulder—the left shoulder traveling north—and the tractor and trailer was setting partially off the pavement and partially on the pavement. . . . I observed some skid marks which were to the right-hand lane traveling north—the beginning of the skid marks was 4 feet and 7 inches to the right of the center line traveling north. The skid marks continued for 142 feet to what I determined as the point of impact.

"The skid marks extended down the road and crossed the center line and on up to some debris—142 feet. At a point 142 feet from where the skid marks started there was a considerable amount of dirt and debris from automobiles; dirt was the majority of it. There was glass also. The center of the debris, or the majority of the debris, was 18 inches to the left of the center line traveling north. It was 73 feet and 3 inches . . . from the debris to the front of the Oldsmobile, where it stopped. . . . The truck and the car came to rest 73 feet farther north from the debris in the left-hand lane. . . . It is downgrade all the way from where it crosses the railroad to where this collision occurred. This occurred partially in the curve. I had a conversation with Mr. Crawford, the driver of the truck, and he told me that he was driving at a reasonable speed, I believe it was 43 miles per hour to be exact, . . . and that when he first crossed the crest of the hill, which was the overhead bridge, that he observed some headlights on his right on the right shoulder of the road. He stated that the lights appeared to be on bright and, due to that fact, he was not certain whether the automobile was sitting still or whether it was barely moving at that time. He stated he blinked his lights, . . . and also that he blew his horn once, and that the automobile was traveling—at the next instant he said he noticed that the automobile appeared to be moving in his lane, which would be the right lane traveling north, and that he tied on his emergency brakes of the truck, that is the way he phrased it. . . ."

Cross-Examination: "Yes, there is an area north of the scene of the accident, on the right hand side, going north, wherein cars and trucks

can park; there is a 9-foot shoulder there. . . . however there is one particular spot that is north of where the vehicles were that is a little wider than the ordinary shoulder. . . . that is the area from which the defendant Emmett L. Crawford told me that car drove out from; . . . where Mr. Crawford said the car was stopped or moving slowly at the time he first saw it. . . . I looked into the 1955 Oldsmobile. The coroner and I found an empty whisky bottle. . . . It had the odor of some type of alcohol in it. We also found some paper cups, . . . Dixie cups, small size, which also had the odor of alcohol. . . .

"Q. You testified on direct examination that you had a conversation with Mr. Crawford and that he told you a car came, that this car came from what would be his right side and cut out immediately in front of him from this parking area, is that right? A. Yes, sir."

Redirect Examination: ". . . I told Mr. Braswell that the skid marks continued on to the center line and no farther. We were looking at the picture at that time; I don't recall them extending beyond that but my measurement of 142 feet was from the beginning of the skid marks to the debris. The debris was 18 inches to the left of the center line, going north. That would be to the left of the center line of the operator of the truck. The debris was completely out of the truck operator's lane."

Recross Examination: ". . . I am not now testifying that all the debris was over on the left side of that road; . . . There was some scattered in quite a wide area; however, the center of the debris seemed to be . . . 18 inches to the left of the center line (looking north)."

Redirect Examination: ". . . There were skid marks from 142 feet south of the debris and there were also skid marks from the debris north to where the vehicle came to rest."

Recross Examination: ". . . there were two distinct and different types of skid marks . . . Yes, there was a different type of skid mark from there (the debris) to where the cars came to rest. I have testified that the left front wheel of the tractor was up on the engine or hood of the car."

At the close of the plaintiff's evidence, the motion of the defendant Frank Jones for judgments as of nonsuit was allowed. A like motion made by the defendants Alma Jones and Emmett L. Crawford was overruled. Whereupon the defendants offered evidence.

The defendant Emmett L. Crawford testified in part: "I was driving a 1953 White tractor. . . . I had a 1956 Dorsey trailer. My cargo was fresh cabbage. . . . The gross weight of . . . the cargo and the tractor-trailer was 50,630 pounds. . . . as I went over the bridge . . . I observed lights coming south, approaching me, and I noticed they did not come on immediately, they did not keep coming . . . and when I got in the curve where I could see I observed the car was either stopped or

moving slow on my right, which was his left. I blew the horn and blinked the lights a couple or three times to attract his attention and get him to dim his, as they were on bright. He never dimmed. His car was partly on and partly off the pavement, as best I observed it. I could tell the car was moving by the lights going up and down like that (indicating) and I knew he was hitting the washed out places on the shoulder, making the lights wave back and forth like that. I seen the car was moving and I tried to attract his attention . . . I seen he was coming right on and I applied the brakes attempting to stop and he came right on up on my right, his left, and when he got right up just in front of me he tried to make it to his side of the road and we had an accident. At the time of the collision I had on all brakes on the tractor-trailer combination. I was on my right-hand side of the road at the time of the collision. The right front wheel struck right in the door jamb on the left side of the car and the left wheel of the tractor struck right in the left front wheel of the car and kind of crawled up on the fender. The impact tore up the right front wheel of the tractor. After we collided we went from the point of impact over to the left-hand side of the road . . .

". . . The Oldsmobile was coming across my right-hand side of the road at about a 45-degree angle. I was traveling at a speed of around 40 to 43 miles per hour when I first applied my brakes. I don't know my speed at the point of impact; I had already slowed down then. . . . When he went across the road it seemed like the car was in a spin. He tried to whip it across the road to beat me over. . . . At the time my left front wheel went up onto the Oldsmobile my tractor and the Oldsmobile were on my side of the road."

Cross-Examination: ". . . I first saw the car when I got fully in the curve and could see down. I think about half way down. I assume it is true that it is as far as 1000 feet from the overpass to where my truck came to a stop. It is just a gradual decline going downhill. . . . I would say the car was around 75 or 100 yards away from me when I first saw it and observed it was moving. . . . he was at that time clear off the road on the wrong side of the road. He was either moving slowly or stopped when I first saw him. I would say he traveled 150 feet before his car and (the) truck collided. I believe the patrolman measured off 142 feet that I traveled while he was traveling 150 feet. I put on my brakes as soon as I saw the car and knew he was on the wrong side of the road. . . . I blew my horn once, and then put on my brakes; and then skidded 142 feet before I struck the car. . . . all that happened within approximately 225 to 300 feet."

Carlton L. Brogden, witness for the defendants, testified in part: ". . . On May 13th of this year I was employed as a truck driver . . . On that date I was traveling north on Highway 301 in the vicinity of

Weldon, N. C. I stopped at the Three Scales Truck Stop and saw Emmett L. Crawford there. I was operating a White tractor at that time. I had a trailer and was loaded . . .

"Sometime after I left the Three Scales, I run up on the truck about a mile before I got to the overpass. I followed him. Going over the overpass I run up on him pretty close. I was fixing to go around him when I got clear of the curve and out of the No Passing zone. I observed car lights, so I fell back in behind him and immediately his brake lights come on. I saw the car parked on the wrong side of the road and it come out in front of him. So I braked down pretty good, got back behind him, and the collision happened. I went on down the road and parked at this wide spot on the shoulder, come back up to the scene of the accident . . . Yes, I observed the car when it pulled out from the right shoulder, after I got over the overpass and was going down the hill. . . . the first time I saw this car it was on the right shoulder of the road. My right side; the right-hand side of the road going north. I could not tell whether the automobile was on the right-hand side of the road at the point of impact because the truck was in front of me. No, the Crawford tractor and trailer did not leave the right-hand side of the road at any time before the wreck. . . ."

Cross-Examination: ". . . I crossed the overpass right behind him (Crawford) and followed him on down the hill. . . . I don't know exactly how close I was. I was going to pass him as soon as he got around the curve. . . . Coming over that grade he was going slower than 43 miles per hour. . . . I stopped when the accident happened and eased around him. . . . At that time all of the truck and the car was over in the left-hand lane."

Defendants rest.

Allen Griffin testified for the plaintiff in rebuttal that he in company with others went to the scene of the collision, reaching there about noon, after the vehicles had been moved. He said: "We found skid marks starting, I would say, approximately 4 feet from the center of the road. The skid marks did not make any curve after he applied his brakes. He skidded 146 feet, crossed the center line 13 feet before we found the debris and scratches on the road, which continued on to where the wreck stopped 83 feet further. After it crossed the center line 13 feet from there the debris fell off the car, the chrome, the glass and several things that were identified from the wreck. . . . I measured the marks I found with a steel tape. . . ."

Cross-Examination: ". . . Yes, they (the skid marks) started four feet on the right-hand side of the road and bore gradually to the center of the road. . . ."

Redirect Examination: "I saw the other mark there. Where this collision took place, and the debris fell, 20 inches from the yellow line

was another mark that took place and skidded for about 3 feet and disappeared. . . . Yes, I said skid marks continued on across the center line, 13 feet before the debris started falling from the car. . . ."

At the close of all the evidence the defendants Alma Jones and Emmett L. Crawford renewed their motion for judgment as of nonsuit. The motion was allowed. From judgment in accordance with this ruling, the plaintiff appealed.

S. M. Blount and John A. Wilkinson for appellant.
Roland C. Braswell for appellees.

JOHNSON, J. Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered on motion to nonsuit. *Nance v. Hitch,* 238 N.C. 1, 76 S.E. 2d 461.

When the whole of the evidence in the case at hand is read in the light of this rule, it is apparent that the plaintiff's evidence is not at material variance with the defendants' version of how the wreck occurred. Both versions disclose that as the defendant's tractor-trailer rounded the curve below the overpass, the Oldsmobile driven by the intestate came out from the east shoulder of the road, on the tractor driver's right, and cut immediately in front of him.

The plaintiff relies on the physical facts to make out his case. However, as was said by *Barnhill, C. J.,* in *Whitson v. Frances,* 240 N.C. 733, 737, 83 S.E. 2d 879, 881, "When, in a case such as this, the plaintiff must rely on the physical facts and other evidence which is circumstantial in nature, he must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendant. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670, and cases cited; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406.

"The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence when considered in the light most favorable to the plaintiff. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Sowers v. Marley, supra.* It cannot be made to rest on conjecture or surmise. It must be 'a permissible conclusion drawn by reason from a premise established by proof.' *Sowers v. Marley, supra.*"

Negligence is not to be presumed from the mere fact of injury or from the fact that the intestate was killed. *Sechler v. Freeze,* 236 N.C. 522, 73 S.E. 2d 160; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

Viewing the evidence adduced below in its light most favorable to the plaintiff, we find no support for any reasonable inference of negli-

gence on the part of tractor-driver Crawford as a proximate cause of the collision.

In this view of the case it is not necessary to discuss the question of contributory negligence.

The judgment below is

Affirmed.

EUGENE RIDDLE v. PERCY JAMES ARTIS, HARRY LEE MORRIS, JR., AND MRS. HARRY LEE MORRIS (AND RAYMOND McMILLAN, ADDITIONAL PARTY DEFENDANT).

(Filed 25 September, 1957.)

1. Pleadings § 15: Trial § 21—

A demurrer to the complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are distinct; the first challenges the sufficiency of the pleading, the second challenges the sufficiency of the evidence.

2. Automobiles § 43: Torts § 4—

Drivers of separate cars may be held liable as joint tort-feasors only if their separate acts of negligence concur in producing a single and indivisible injury, and plaintiff's evidence must be sufficient to warrant the inference that the negligence of the second driver caused or contributed to his injuries in order to hold the second driver as a joint tort-feasor.

3. Automobiles § 43—Evidence held insufficient to show that second defendant was liable to plaintiff as a joint tort-feasor.

Plaintiff's evidence tended to show that he was knocked unconscious in a collision between a car driven by himself and a car driven by the first defendant in the oppcsite direction, that shortly thereafter his car was struck from the rear by a car driven by the second defendant, and that the condition of the vehicles after the collisions and the evidence as to their speed shortly before the accidents indicated that the impact of the first collision was much the more violent. Plaintiff's evidence further disclosed that the second defendant was uninjured and was present at the scene of the collisions when the patrolman arrived, and plaintiff testified to the effect that as far as he knew all of his injuries were received as a consequence of the first collision. *Held:* Whether the second collision caused or contributed to the personal injuries received by plaintiff is left in the realm of conjecture and surmise by plainti's evidence, and therefore judgment of nonsuit was properly entered as to the second defendant.

APPEAL by plaintiff from *Bundy, J.*, April Term, 1957, of NORTHAMPTON.

At Spring Term, 1956, the allegations of the complaint then summarized, considered on demurrer *ore tenus* interposed by defendants

Morris, were held sufficient; and the judgment sustaining said demurrer was reversed. *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894.

At trial, when plaintiff had offered his evidence and rested, the court allowed the motion of defendants Morris for judgment of involuntary nonsuit. Judgment of involuntary nonsuit was entered and plaintiff appealed.

Allsbrook & Benton by J. E. Knott, Jr., for plaintiff, appellant.

Kelly Jenkins and Eric Norfleet for defendants Harry Lee Morris, Jr., and Mrs. Harry Lee Morris, appellees.

BOBBITT, J. Artis, an original defendant, and McMillan, an additional defendant, are not parties to this appeal. The judgment recites that plaintiff had obtained a judgment by default and inquiry against defendants Artis and McMillan. We are concerned only with the sufficiency of the evidence to warrant submission to the jury of the issues arising on plaintiff's alleged cause of action against defendants Morris.

"A demurrer to a complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence." *Barnhill, J.* (later *C. J.*), in *Lewis v. Shaver,* 236 N.C. 510, 512, 73 S.E. 2d 320.

Plaintiff's action is to recover damages on account of (1) personal injuries, and (2) damage to his clothing, camera, camera equipment and watch. Plaintiff was operating his father's 1953 Ford automobile. No claim for damages to it is for determination in this action.

Plaintiff's evidence tended to support his allegation that his personal injuries consisted of "a punctured right lung into which a piece of metal was driven by the force of the collision, a bad laceration of his left hand and arm, a puncture wound of the right leg, multiple rib fractures and lacerations of the scalp."

Two collisions on Highway #117 are referred to in the evidence. The first collision was between the 1953 Ford, headed south, operated by plaintiff, and a 1951 Pontiac, headed north, operated by Artis. The second collision occurred shortly thereafter when a 1950 Chevrolet, operated by Harry Lee Morris, Jr., hereinafter called Morris, headed south, struck the rear of the 1953 (Riddle) Ford.

As to the (Artis) Pontiac, there was evidence that "three of the four tires were completely slick without any tread whatsoever; no semblance of a tread on them." Suffice to say, there was plenary evidence (1) that the first collision was proximately caused by the negligence of Artis, and (2) that the first collision so caused seriously injured plaintiff.

Plaintiff's action is based on allegations that his serious injuries were proximately caused by the concurrent negligence of Artis and Morris. To prove his case against defendants Morris, plaintiff must show (1) that the second collision was proximately caused by the negligence of Morris, and (2) that the second collision so caused proximately caused or contributed to the injuries upon which plaintiff's action is based. *Lane v. Bryan, ante,* 108, 97 S.E. 2d 411.

The evidence, considered in the light most favorable to plaintiff, tends to show these facts:

On December 25, 1953, about 2:15 p.m., plaintiff, accompanied by his wife, was traveling south in his right lane. "A light misty rain was falling," and the two lane black top highway was wet. As he started into a gradual curve (3 or 4%) to his right, he noticed the 1951 Pontiac then approaching in its right lane. When these cars were some 75-100 feet apart, the Pontiac suddenly skidded directly across plaintiff's lane of travel. It turned some 90 degrees and was at right angles to the front of plaintiff's car. Confronted with this emergency, plaintiff immediately applied his brakes, threw his hands in front of his face and "practically instantly . . . rammed" the Pontiac car. The collision occurred in his lane of travel. He had no opportunity to swerve from his original course.

Prior to said collision, plaintiff had been driving at a speed of 35-45 miles per hour. He estimated that his speed was 5 miles per hour less at the moment of impact. As to the speed of the Pontiac, plaintiff thought it probable that its speed prior to the collision was approximately the same as his own.

At the time of collision, the right side of the Pontiac was broadside to plaintiff. The front of plaintiff's car struck the right side of the Pontiac "almost in the center of the front right door." Plaintiff thought it probable that the Pontiac had skidded toward him a short distance "in that broadside condition" before the cars collided.

Plaintiff alleged that the second collision occurred "immediately following the collision between the front of plaintiff's car with the right side of defendant Artis' car and while plaintiff was in a seriously injured condition and unable to extricate himself." Plaintiff testified: "When I struck the car ahead of me I was knocked unconscious temporarily, and remember nothing after striking the car until I was being helped out of the car by some passers by. When helped out of the automobile I did not have presence of mind enough to observe whether or not my car had been struck from the rear by another car, because I was in severe pain . . ."

He testified further: "The road approaching this curve was straight for some distance behind me. At the time I approached the Artis car I had no knowledge there was a car behind me. So far as I know there

was no car behind me immediately before or after my car came in contact with the Artis car."

Plaintiff's wife testified that she was knocked unconscious by the collision and knew nothing about it. She was "dozing" when it happened. The injuries she received "were facial, scalp and to the front of (her) body." Her testimony contains no reference to a second collision.

W. G. Wright, a member of the State Highway Patrol, received a call at approximately 2:20 p.m. and shortly thereafter (about 10-15 minutes) reached the scene of the collisions. When he arrived, "Mr. and Mrs. Riddle were not there, and neither were any of the occupants of the Artis car." Morris was there. "Morris was not hurt."

As to the physical damage to the three automobiles, Wright testified: "The center right side of the Artis car was damaged. Dead center front and right rear of the Riddle car was damaged. The left front just a little past center of the Morris car was damaged. . . . The right rear of the Riddle car was smashed in, bumper, trunk lid, tail light and fender smashed forward. The front of the Morris car, grill mashed in, bumper was damaged, radiator knocked back against fan and fender bent."

Wright testified further that Morris explained the rear end collision in which he was involved as follows: "That shortly back he (Morris) pulled out with intention of passing (the Riddle car), and they were approaching a curve and he changed his mind and pulled back in behind the Riddle car, and shortly thereafter the collision occurred between the Riddle and the Artis cars."

Luby Edwards and Hugh H. Gurley helped move the wrecked cars.

Edwards testified: "The best I remember the rear of the Riddle car, boot lid, right quarter panel was smashed in pretty bad; that is the rear of the Ford on right side. By smashed in I mean it was pushed towards the front end. I don't remember just how bad the Chevrolet or Morris car was damaged, but do know the bumper was messed up a little bit, grill and radiator, and bumper mashed in toward the back." He testified further: "The wheels on Chevrolet were not damaged, but think we had to pull off one of the fenders so they could drive it, and also had to disconnect the fan belt. All four of tires were standing up. The Chevrolet could have been driven away except for the fact something was wrong with fan and radiator. I think the radiator was hitting the fan."

Gurley testified: "The Chevrolet could have been driven. The tires and wheels were all right. I think we pulled off the fan belt before it could be moved. I know we pulled off a fender that was hitting a tire, and took fan belt aloose so the fan would not turn."

E. N. Riddle, Sr., plaintiff's father, testified: "I could not give any details about damage to the car; just completely wrecked . . . It was torn all to pieces and damaged in front and rear."

Dr. W. C. Sealy, by deposition, testified as to plaintiff's injuries, his treatment thereof, and the results. The injuries described in his testimony are those alleged in the portion of the complaint quoted above. None of his testimony is directed to whether in his opinion any of plaintiff's injuries were caused by the second collision.

We pass as unnecessary to decision the serious question as to whether the evidence would be sufficient for jury consideration on an issue as to whether the damage done to the rear of the Riddle car was caused by the negligence of Morris. Decision on this appeal hinges on whether the evidence for plaintiff is sufficient to show any causal relation between the alleged negligence of Morris and the serious injuries sustained by plaintiff.

In relation to the facts of this case, the liability of defendants Morris as joint tort-feasors depends upon whether Morris' alleged separate acts of negligence concurred with the negligence of Artis in producing a single and indivisible injury. *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648. Specifically, the question is whether plaintiff offered evidence sufficient to warrant the inference that the second collision caused or contributed to plaintiff's injuries.

Since the physical damage to the right rear of the 1953 (Riddle) Ford and to the left front of the 1950 (Morris) Chevrolet is the principal if not the sole evidence upon which plaintiff must rely, we have set it forth in detail.

We do not discount the possibility that the second collision *might have* injured plaintiff or might have aggravated the serious injuries received by plaintiff in the first collision. Certainly, as suggested, the second collision did not benefit plaintiff. Too, we are well aware that serious injuries often result from what appear to be minor collisions while often persons involved in collisions of terrific impact escape without injury.

These facts appear from plaintiff's evidence:

1. The two vehicles involved in the first collision met and collided when each was traveling approximately 35 miles per hour.

2. Both plaintiff and his wife were knocked unconscious by the impact of the first collision; and plaintiff, according to his allegations and evidence, was seriously injured before the second collision occurred.

3. Plaintiff was asked this question: "And, as far as you know, all of the injury you received was in consequence of coming in contact with the Artis car?" His answer was: "So far as I know, yes sir."

4. Morris, uninjured, was present at the scene of the collisions when the patrolman arrived.

Careful consideration of plaintiff's evidence impels the conclusion that it is insufficient for submission to the jury on the question as to whether the second collision caused or contributed to the injuries received by plaintiff or to the damage in respect of the articles of personal property referred to in the complaint. It leaves the crucial question in the realm of conjecture and surmise. Hence, the judgment of involuntary nonsuit was proper. *Lane v. Bryan, supra.*

Affirmed.

CHARLIE EDMONDSON AND WIFE, ALICE EDMONDSON; HERMAN EDMONDSON AND WIFE, ETTA EDMONDSON; GEORGE T. EDMONDSON AND WIFE, FRANCIS EDMONDSON; JOHNNY EDMONDSON AND WIFE, BERTHA LYNN EDMONDSON; CATHERINE DAIL AND HUSBAND, LARRY E. DAIL; VIOLA BRADY AND HUSBAND, JOHN ALLEN BRADY; CHARLIE EDMONDSON, JR., AND WIFE, FRANCES EDMONDSON; BENJAMIN HARRELL (UNMARRIED); HARVEY HARRELL AND WIFE, GERTRUDE HARRELL; PAUL CLARENCE EDMONDSON AND WIFE, MYRTLE EDMONDSON; MILTON LEE EDMONDSON, MINOR, BY HIS NEXT FRIEND, VIOLA BRADY; LILLIE MAY HARRELL, MINOR, BY HER NEXT FRIEND, HARVEY HARRELL; BECTON HARRELL AND WIFE, BETTIE HARRELL; HATTIE BUTLER AND HUSBAND, BILL BUTLER, V. C. H. HENDERSON AND WIFE, GERTRUDE M. HENDERSON; TOM EDMONDSON AND WIFE, ALLIE EDMONDSON (AND C. H. HENDERSON, JR., ADDITIONAL PARTY DEFENDANT).

(Filed 25 September, 1957.)

1. Parties § 3—

A person is a necessary party to an action when a valid judgment cannot be rendered therein completely and finally determining the controversy without his presence as a party.

2. Wills § 39—

Where the determinative matter in dispute is whether the devisees named in the will took a fee or only a life estate, a grantee in a fee simple deed from one of the devisees named is a necessary party to the action.

3. Declaratory Judgment Act § 3—

The court should refuse to deal with the merits of an action brought under the Declaratory Judgment Act when it appears that a judgment finally settling and determining the question in dispute cannot be entered until a person not a party is brought in as a party to the action.

4. Appeal and Error § 55—

Where it appears on the face of the record that a person who is a necessary party to a final determination of the action has not been made a party, the Supreme Court will remand the action for appropriate procedure *ex mero motu.*

EDMONDSON *v.* HENDERSON.

APPEAL by plaintiffs and defendant C. H. Henderson from *Moore (Clifton L.), J.*, at November Term, 1956, of EDGECOMBE.

Civil action under the Declaratory Judgment Act for adjudication of the rights of the parties in respect to the title to a tract of land in Edgecombe County containing 726.49 acres. The land was owned by Henry Harrell at the time of his death in 1929.

In the complaint it is alleged that the plaintiffs (other than Charlie Edmondson and wife, Alice Edmondson; Herman Edmondson and wife, Etta Edmondson; Harvey Harrell and wife, Gertrude Harrell; and Benjamin Harrell) own the land in fee simple, subject only to the life estates provided in the will of Henry Harrell. The pertinent parts of the will are as follows:

"SECOND: I loan the following real estate to Tom Edmondson, Charlie Edmondson and Herman Edmondson (¼) one-fourth each of all my real estate for and during their natural life.

"THIRD: I loan to the following Benjamin Harrell and Harvey Harrell (⅛) one-eighth each of my real estate for and during their natural life.

"FOURTH: I give to Hattie Butler and Becton Harrell the sum of ($5.00) Five Dollars each. This being their share of my estate as they have already had theirs."

"SIXTH: After the death of either Tom Edmondson, Charlie Edmondson or Herman Edmondson, they without legal heirs the real estate bequeathed in this will, will revert to their heirs proportionately as stated in item second and third item, with the exception of Hattie Harrell and Becton Harrell."

The plaintiffs further allege that the defendant C. H. Henderson purchased the interests of certain of the life tenants named in the will of Henry Harrell and has treated the land as being owned by him in fee simple and has wrongfully cut and removed timber therefrom to the damage of the plaintiffs' freehold interests in the land in a substantial sum, for which they seek treble damages and injunctive relief.

The defendants filed answer denying the material allegations of the complaint, and alleging that they own in fee simple the lands occupied by them. The defendants allege title deraigned through *mesne* conveyances from the devisees named in the will of Henry Harrell. They also allege that the plaintiffs are estopped to assert title by reason of matters of record and *in pais*.

At the November Term, 1954, a compulsory reference of the case was ordered. At the conclusion of the hearings the referee made up and filed his report. He concluded upon the facts found that the plaintiffs were entitled to no relief and that the defendants' motion for nonsuit should be allowed. The plaintiffs filed exceptions to part of the findings and to all the adverse rulings of the referee.

When the cause came on for hearing in the Superior Court on the plaintiffs' exceptions, Judge Moore after reviewing the evidence and the record upheld all the referee's findings of fact, but concluded that his conclusions of law should be modified.

The judgment entered by Judge Moore contains a restatement in brief form of the material facts, followed by a statement of his conclusions as to the law of the case, fixing the rights of the parties. Among the facts found and stated are these: that in 1930 the devisees named in the Second and Third Items of the will caused the land to be partitioned among them; that lot No. 5 containing 119.90 acres was allotted to Benjamin Harrell; that in 1933 he conveyed this lot to John T. Williams by deed purporting to convey same in fee simple with general warranties; that Williams later conveyed the lot to C. H. Henderson, Sr., by deed purporting to convey a fee simple title; and that Henderson thereafter conveyed the lot to T. O. Manning, subject to reservation of timber rights. The record discloses that T. O. Manning is not a party to the action.

To the judgment as entered the plaintiffs and the defendant C. H. Henderson, Sr., excepted, and appealed.

Peel & Peel and H. D. Hardison for plaintiffs, appellants and appellees.

Henry C. Bourne for defendant C. H. Henderson, appellant, and defendants, appellees.

JOHNSON, J. We are confronted at the outset with the question whether T. O. Manning is a necessary party to the action.

In *Gaither Corp. v. Skinner,* 238 N.C. 254, 256, 77 S.E. 2d 659, the Court said, quoting from McIntosh, North Carolina Practice and Procedure, Sec. 209, p. 184: " 'Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the Court.' "

In *Assurance Society v. Basnight,* 234 N.C. 347, 352, 67 S.E. 2d 390, it is said: "The term 'necessary parties' embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. . . . A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must

be ascertained and settled before the rights of the parties to the suit can be determined."

In *Garrett v. Rose,* 236 N.C. 299, 307, 72 S.E. 2d 843, it is said: "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party."

When the facts here are tested by the foregoing principles, it is manifest that T. O. Manning is a necessary party to the action. He purchased Benjamin Harrell's share of the land and now holds a deed purporting to convey a fee simple estate. His interest is such that no decree can be entered construing the will and settling the rights of the parties without affecting his interest and claim in the land.

We have given consideration to the fact that the case was brought under the Declaratory Judgment Act. G.S. 1-256 to 1-267. The Act has this provision respecting the joinder of parties (G.S. 1-260): "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings."

Does this section liberalize the practice in cases brought under the Declaratory Judgment Act? In short, does it mean that the provision requiring that "all persons shall be made parties who have or claim an interest which would be affected by the declaration" is not mandatory in view of the further provision that "no declaration shall prejudice the rights of persons not parties to the proceedings"?

Regardless of how this may be, and conceding without deciding that the practice as to parties may be somewhat liberalized under the Declaratory Judgment Act, nevertheless where it appears, as here, in a case involving the construction of a will that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, we think the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. See 16 Am. Jur., Declaratory Judgments, Sec. 55; Annotation: 87 A.L.R. 1205, 1244. For oversight in this respect the case will be remanded to the trial court with direction that T. O. Manning be brought in as a party. This accords with the procedure followed in our recent decision in *Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491, where, as here, the defect of parties was not formally raised in the court below. See also *Wagoner v. Saintsing,* 184 N.C. 362, 114 S.E. 313; *Brinson v. McCotter,* 181 N.C. 482, 106 S.E. 215; *Waters v. Boyd,* 179 N.C. 180, 102 S.E. 196; *Thomas v. Reavis,* 196 N.C. 254, 145 S.E. 226. *Cf. Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458; 39 Am. Jur., Parties, Sec. 111.

The defendant appellant claims in his brief that the five children of Hattie Harrell Butler and the two adopted children of Tom Edmondson have or may claim interests which will be affected by final decree construing the Henry Harrell will. We express no opinion as to these questions, raised for the first time in this Court. It suffices for us to remand the case for fatal defect resulting from the failure to join T. O. Manning as a party. When the case goes back to the trial court these additional questions respecting joinder of parties, and any other questions which any of the parties may deem relevant for consideration by the court, may be raised and determined.

The case is remanded for such further proceedings as the law directs and the rights of the parties require.

Remanded.

LUCILLE TYER v. ASHLEY G. LEGGETT.

(Filed 25 September, 1957.)

1. Libel and Slander § 10: Pleadings § 28—

Motion for judgment on the pleadings in an action for slander may not be entered when the answer denies each allegation of that cause of action except as admitted in the further answer and defense, and such further answer and defense, although containing purely evidentiary matter, nevertheless does not admit the crucial allegations of the complaint or merely plead matter in mitigation or justification.

2. Libel and Slander §§ 5, 13—

In order to recover for slander plaintiff must allege and prove publication, and in an action for separate slanders, proof of a mere possibility that someone might have overheard the conversation between plaintiff and defendant constituting the basis of one of the slanders is insufficient, and the court correctly excludes those particular words in submitting the case to the jury.

APPEAL by plaintiff from *Bone, J.*, February Term 1957 of BEAUFORT.

This action was instituted to recover compensatory and punitive damages from the defendant for an alleged assault in the first cause of action and for slander in the second cause of action.

The plaintiff had, for a number of years prior to 15 October 1955, been in the employ of the defendant, who operated a dry cleaning plant in the Town of Washington, North Carolina. On 15 October 1955, about 10:30 a.m., plaintiff was refused a raise in pay by the defendant and she accordingly, in her capacity of bookkeeper, paid herself off. She took the money from the cash register and put a slip of paper therein showing the amount of money she had taken. She then, accord-

ing to her testimony, returned to the office and said, "Mr. Leggett, I am quitting and I have paid myself off." He said, "You are quitting now. You paid yourself off, didn't you?" She said, "Yes." Mr. Leggett said, "That is what I call stealing."

The testimony of defendant with respect to his use of the word "stealing" was as follows: "As we met right in the center of the office, Lucille said, 'Mr. Leggett, I am quitting, I have paid myself off.' At that time I noticed she had a pay envelope like the ones we use regularly to pay off and she also had some paper money in her hand, I don't know how much. . . . I felt that she had paid herself off through the day and I asked her, 'You mean that you are paying yourself off now without finishing the payroll.' She says, 'Yes.' I said, 'Lucille, under those conditions, if you are paying yourself off through the day and not going to finish the day, that is the same thing as stealing.' She said, 'Don't you think I am worth a little something extra for the extra work I have given you.' I made no reply." No one was in the office during this conversation except the plaintiff and the defendant.

The plaintiff testified that the defendant spoke in a loud tone of voice. A portion of the office was enclosed by a counter, four or five feet high. Plaintiff testified that machinery in the laundry made a lot of noise; that there were some customers along with some employees in other parts of the establishment but she did not know who they were.

Later, the plaintiff went to the cold storage vault in the basement of the building and got out some of her clothes. When the defendant saw her leaving the vault, he inquired as to what she was going to do with the clothes. She informed the defendant that they belonged to her and that she was going to take them home. Defendant told her she owed him $35.00 for money she had taken in May 1955 and that she had to pay him before she took the clothing. She admitted taking the money from a cash box in the vault and said she had left her signed receipt therefor; that the defendant had authorized her to borrow money from the cash drawer any time she needed money and he was absent. Defendant denied he had given the plaintiff any such authority. The plaintiff promised to pay the $35.00 but refused to leave the clothes with the defendant until she had done so. The defendant and an employee of the defendant took the clothes from her by force. Plaintiff went home and returned with her mother. She offered testimony to the effect that the defendant, in the presence of her mother and another employee of the defendant, charged her with stealing the $35.00 she took from the cash box in May 1955. The defendant denied that he made any such accusation.

On the first cause of action the jury returned a verdict in favor of plaintiff on the assault issue and awarded compensatory damages, but denied any recovery on the issue of punitive damages.

On the second cause of action the jury answered the first issue in favor of the defendant.

Plaintiff appeals, assigning error.

LeRoy Scott and John A. Wilkinson for appellant.

Junius D. Grimes, Jr., and W. B. Carter for appellee.

DENNY, J. There is no appeal from the verdict and judgment in the first cause of action.

The plaintiff insists that her motion for judgment on the pleadings in the second cause of action should have been allowed. She contends the answer is evasive and that it is impossible to determine which allegations in the complaint are admitted and which are denied, and, as a consequence, she was entitled to judgment in the court below for want of an answer.

It appears from the record that before the introduction of any evidence in the trial below, the plaintiff moved to strike the defendant's answer as to the second cause of action and for judgment on the pleadings. The motion was overruled and an exception noted. However, no exception to the failure to strike has been preserved. The assignment of error based on the ruling is directed only to the refusal of the court to render judgment on the pleadings.

The answer admitted or denied the allegations of the complaint in the first cause of action except as to paragraph three in which, and in the answer to each and every paragraph in the second cause of action, there is a denial, "except that part thereof which may be admitted in the further answer and defense."

The further answer and defense was not stated separately as to the first and second causes of action, but consists of the defendant's version of what occurred in connection with the matters and things alleged in both causes of action. It contains to a large extent purely evidentiary matter that might have been stricken. However, in our opinion, the answer is not so evasive and indefinite that it fails to deny the pertinent allegations of the complaint, and we so hold. Neither do we construe the further answer and defense to plead mitigation or justification of the alleged slanderous words set forth in the second cause of action, as contended by the plaintiff. This assignment of error is overruled.

In the second cause of action the plaintiff alleges two statements or sets of words which she contends were slanderous, but which were not uttered during the same conversation. Therefore, each set of words should have been pleaded in separate causes of action. The failure to do so, however, did not, in our view of this case, prejudice the rights of the parties. *Cf. Elmore v. R. R.*, 189 N.C. 658, 127 S.E. 710. More-

over, the plaintiff is not in a position to complain about the form of her own pleadings.

The words which she alleges charged her with stealing in connection with paying herself off, were not submitted to the jury. On the first issue in the second cause of action, the court instructed the jury as follows: "There are two sets of words referred to in the complaint. One set is as follows: 'That is what I call stealing, paying yourself off when you have not earned the money.' But, gentlemen, because of the evidence in this case, I instruct you that the issue is not referring to those words, for this reason. There is no evidence showing that those words were spoken in the presence and hearing of any person other than the plaintiff and the defendant." To this portion of the charge there is no exception. The appellant does except, however, to that portion of the charge which was given immediately thereafter, to wit: "There was some evidence to the effect that there were employees working in there and other folks in there but there is no evidence from which it could be said that anybody else heard those words. And, therefore, I instruct you that as to that incident, that alleged incident and those alleged words, that would not be sufficient, the evidence is not sufficient to support the cause of action for slander, based upon the utterance of those words."

We have carefully reviewed the evidence bearing on the question as to whether or not there was any publication of the accusation allegedly made against the plaintiff by the defendant in the conversation between them which took place in the office of the defendant immediately after the plaintiff paid herself off. In our opinion, the evidence with respect to publication is not sufficient to support a finding that anyone other than the plaintiff and the defendant heard the conversation. A mere possibility that someone might have heard the alleged conversation is not enough. *Wright v. Credit Co.*, 212 N.C. 87, 192 S.E. 844; *McKeel v. Latham*, 202 N.C. 318, 163 S.E. 747. There must be competent evidence from which the jury might find that there was a publication of the alleged slanderous words before the plaintiff is entitled to go to the jury on the issue as to defamation and publication. 33 Am. Jur., Libel and Slander, section 90, page 103; 53 C.J.S., Libel and Slander, section 79, page 127; *Hedgepeth v. Coleman*, 183 N.C. 309, 111 S.E. 517, 24 A.L.R. 232; *McKeel v. Latham, supra; Alley v. Long*, 209 N.C. 245, 183 S.E. 294; *Wright v. Credit Co., supra; Satterfield v. McLellan Stores*, 215 N.C. 582, 2 S.E. 2d 709; *Taylor v. Bakery*, 234 N.C. 660, 68 S.E. 2d 313. Hence, the action of the court below in refusing to submit to the jury the excluded set of words as a cause of action will be upheld.

The slanderous words as set out in the second cause of action, to the effect that the defendant, in the presence of plaintiff's mother and

another employee of defendant, said to the plaintiff, "You stole $35.00 of my money," were submitted to the jury upon an appropriate charge in substantial accord with our decisions, and the exceptions thereto are without merit.

We have examined the remaining exceptions and assignments of error, and, in our opinion, no prejudicial error has been made to appear that would justify disturbing the result of the trial below.

No error.

STATE v. OTIS RAYMOND BLACKWELL.

(Filed 25 September, 1957.)

1. Indictment and Warrant § 6½—

A warrant of arrest of a defendant on a charge of crime may be issued only by an officer authorized by law to do so.

2. Statutes § 16—

An act purporting to amend a section of an act is a nullity when the section sought to be amended has been expressly repealed by an intervening statute.

3. Indictment and Warrant § 6½—

Chapter 703, Session Laws of 1949, purporting to authorize police sergeants of the City of High Point to issue warrants of arrest is an act amending Chapter 359, section 27(5), Public Laws of 1909, which section was expressly repealed by Chapter 569, section 33, Public Laws of 1913, and therefore the act of 1949 is a nullity and cannot authorize the issuance of a warrant of arrest by a police sergeant of this City.

4. Appeal and Error § 1: Criminal Law § 139—

The constitutionality of a statute will not be considered and determined by the Supreme Court as a hypothetical question, but constitutional questions will be decided only when properly presented, and even then will not be determined if there is also present some other ground upon which the case may be disposed of.

5. Same—

The question for decision on appeal is whether the ruling of the court below is correct and not whether the reason given by the lower court for its judgment is sound or tenable, and therefore where judgment quashing the warrant is correct, the judgment will be affirmed, and wrong or insufficient or superfluous reasons assigned by the lower court for its decision will be treated as surplusage.

APPEAL by the State of North Carolina from *Rousseau, J.*, at 21 January, 1957, Criminal Term of GUILFORD (High Point Division).

STATE *v.* BLACKWELL.

The defendant was charged in a warrant with reckless driving (G.S. 20-140), and was tried in the Municipal Court of the City of High Point. From a verdict of guilty and prison sentence imposed, he appealed to the Superior Court. Before pleading to the merits of the case, the defendant moved both in the Municipal Court and in the Superior Court to quash the warrant, on the ground that Chapter 703, Session Laws of 1949, under which the warrant was issued by a police sergeant of the City of High Point, is unconstitutional. The motion was overruled in the Municipal Court but was granted in the Superior Court. From judgment entered quashing the warrant and adjudging the statute unconstitutional, the State of North Carolina appeals.

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

Harriss H. Jarrell and Sim A. DeLapp for defendant, appellee.

JOHNSON, J. It is elemental that a warrant of arrest may be issued only by an officer authorized by law to do so. *S. v. McGowan*, 243 N.C. 431, 90 S.E. 2d 703; 22 C.J.S., Criminal Law, Sec. 318, p. 470.

The power to issue warrants is conferred generally upon certain designated judicial officers and other persons by G.S. 15-18. Other judicial officers are authorized to issue warrants by G.S. 7-198. The foregoing statutes do not confer upon police sergeants the power to issue warrants.

In the case at hand the State contends that the police sergeant who issued the warrant was specifically authorized to do so by C. 703, S.L. 1949. This act is an amendatory act purporting to amend the charter of the City of High Point (C. 395, P.L. 1909) so as to authorize police sergeants to issue warrants returnable before the Recorder's Court of the City of High Point. Our examination of the pertinent statutes discloses that the amendatory act of 1949 does not confer such authority upon police sergeants. These are the relevant facts: By the terms of C. 395, P.L. 1909, a new charter was granted the City of High Point. Section 27, subsection 5, of this act, created a Recorder's Court. However, the section of the act of 1909 which created the Recorder's Court was expressly repealed by C. 569, s. 33, P.L. 1913. And the present Municipal Court of the City of High Point was established by this repealing act. The act of 1913 which established the present court does not purport to confer on police sergeants power to issue warrants of arrest. It thus appears that the amendatory act of 1949, on which the State relies as authority for the issuance of warrants by police sergeants, purportedly amends a statute which had been repealed. Thus the amendatory act of 1949 is a nullity. This is so for the reason that where, as here, an entire independent section of a statute is wiped out of existence by repeal, there is nothing to amend. It is as though the

statute, or section, had never been enacted. *Lampkin v. Pike,* 115 Ga. 827, 42 S.E. 213; *Pindell v. State,* 196 Ind. 175, 147 N.E. 711; *Tiger Creek Bus Line v. Tiger Creek Transp. Ass'n.,* 187 Tenn. 654, 216 S.W. 2d 348.

Since the act of 1949 was ineffectual and failed to confer on the desk sergeant authority to issue warrants, the warrant on which the defendant was arrested and tried is a nullity, and we so hold. Consequently, the constitutional question discussed in the briefs and debated upon the argument is not presented for decision. The constitutionality of a statute will not be considered and determined by the Court as a hypothetical question. *S. v. Muse,* 219 N.C. 226, 13 S.E. 2d 229. Nor will the Court anticipate a question of constitutional law before the necessity of deciding it arises. *S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198. Moreover, a constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided. *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22.

The ruling of the court below in allowing the motion to quash will be upheld. The court reached the right decision. The reason assigned by the court, namely, that the act of 1949 was unconstitutional, will be treated as surplusage. The rule is that a correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned. *Temple v. Temple, ante,* 334, 98 S.E. 2d 314. The question for review and decision in this Court is whether the ruling of the court below was correct, and not whether the reason given therefor is sound or tenable. *Hayes v. Wilmington,* 243 N.C. 525, 539, 91 S.E. 2d 673, 684.

Modified and affirmed.

STATE v. SAM E. DOW.

(Filed 25 September, 1957.)

Criminal Law § 120—

Where the record does not affirmatively establish that each juror assented to the verdict entered upon the poll of the jury upon motion of defendant, a new trial must be awarded.

APPEAL by defendant from *Rudisill, J.,* April 1957 Term of GASTON.

Defendant was tried on bill charging an assault with a deadly weapon with intent to kill inflicting a serious injury. The jury returned a verdict of guilty of an assault with a deadly weapon inflicting serious injury. The record shows:

"Mr. Dolley: Your Honor, I would like to move to have the jury polled, please.

"Judge: All right. Stand up. Call the roll of the jurors, Mr. Clerk.

"Clerk: Garland W. Stroup.

"Judge: Stand up, Mr. Stroup. Have you agreed on your verdict in this case, Mr. Juror?

"Mr. Stroup: (Indicated in the affirmative.)

"Judge: What is your verdict as to the defendant, Sam E. Dow?

"Mr. Stroup: Same as stated.

"Judge: Guilty of assault with a deadly weapon inflicting serious injury?

"Mr. Stroup: Yes, sir.

"Judge: That your verdict?

"Mr. Stroup: Yes, sir.

"Judge: All right, sir.

"Clerk: R. W. Ervin.

"Judge: Mr. Ervin, what is your verdict in the Sam E. Dow case?

"Mr. Ervin: Guilty of assault inflicting serious injury.

"Judge: Assault with a deadly weapon inflicting serious injury. Is that your verdict then, Mr. Juror?

"Mr. Ervin: Yes, sir.

"Clerk: John Helms.

"Judge: Mr. Helms, what is your verdict in the Sam E. Dow case?

"Mr. Helms:

"Judge: That is your verdict? All right, sir.

"Clerk: C. J. Costner, Jr.

"Judge: What is your verdict?

"Mr. Costner:

"Judge: That is your verdict?

"Clerk: Russell Costner.

"Judge:

"Mr. Costner:

"Judge: . . . inflicting serious injury?

"Clerk: William L. Baker.

"Judge: And your verdict:

"Mr. Baker:

"Clerk: Carl M. Carpenter.

"Mr. Carpenter:

"Judge: Assault with a deadly weapon inflicting serious injury. Is that your verdict against Sam E. Dow?

"Mr. Carpenter: (Indicated in the affirmative.)

"Clerk: Clarence Bumgardner.

"Mr. Bumgardner:

"Judge: That is your verdict?
"Clerk: James A. Bridges.
"Mr. Bridges:
"Judge: . . . inflicting serious injury. Is that your verdict?
"Mr. Bridges: (Indicated in the affirmative.)
"Judge: All right.
"Clerk: Lee Roy Toomey.
"Mr. Toomey:
"Judge: That is your verdict?
"Clerk: N. C. Hammack.
"Judge: That is your verdict?
"Clerk: John D. Rhyne.
"Mr. Rhyne: Assault with a deadly weapon inflicting serious injury."

Thereupon the jury was discharged and thereafter sentence was imposed and defendant appealed.

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

Steve Dolley, Jr., and Ernest R. Warren for defendant appellant.

PER CURIAM. Our Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of good and lawful persons in open court." Art. I, sec. 13.

When requested in apt time, a party is entitled to have the jury polled; that is, an inquiry directed to each juror in order to ascertain his assent to the announced verdict. When so polled and the verdict is challenged, the record must affirmatively establish that each juror assented to the verdict entered. *S. v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70; *S. v. Boger,* 202 N.C. 702, 163 S.E. 877; *Oil Co. v. Moore,* 202 N.C. 708, 163 S.E. 879; *Lipscomb v. Cox,* 195 N.C. 502, 142 S.E. 779. The verdict now challenged does not, on the record, meet the test.

New trial.

STATE v. SARAH BELL.

(Filed 25 September, 1957.)

APPEAL by defendant from *Bundy, J.,* May, 1957 Term, BERTIE Superior Court.

Criminal prosecution first tried in the Recorder's Court of Bertie County upon a warrant which charged the defendant with three separate violations of the liquor laws: (1) Possession; (2) possession for

the purpose of sale; and (3) sale. From a verdict of guilty and sentence, she appealed to the Superior Court. Upon a trial *de novo* there she was convicted by the jury and from the judgment imposed, appealed to this Court, assigning as error (1) the admission of evidence over her objection, (2) the refusal of the court to direct a verdict of not guilty, and (3) the failure of the trial judge to apply the law to the evidence.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

John R. Jenkins, Jr., for defendant, appellant.

PER CURIAM. Two officers testified they were doing undercover work for the North Carolina Alcoholic Beverage Control Board. They went to the defendant's home at about 10:30 p.m. on February 16, 1957, where a number of people were then gathered, some of whom were drinking. The defendant sold the officers a pint of nontaxpaid whisky for which they paid her $2.00.

The defendant testified she was not at home on the night of February 16, did not see the officers on that occasion, and had never sold them any liquor. Her husband and other witnesses testified she was not at her home on the date charged. Both the defendant and her husband admitted to previous convictions for violation of the liquor laws.

The issue was simple. The evidence was in conflict. The jury accepted the State's version. The court's charge covered all essential aspects of the case. The punishment imposed was within the limits permitted under the law. No reason appears why the result should be disturbed.

No error.

T. A. RAMSEY, A TAXPAYER OF CLEVELAND COUNTY, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF CLEVELAND COUNTY, v. F. L. ROLLINS, CHAIRMAN; KNOX SARRATT, JOHN D. WHITE, H. B. BUMGARDNER, AND M. A. SPANGLER, SR., MEMBERS, BOARD OF COMMISSIONERS FOR CLEVELAND COUNTY, NORTH CAROLINA.

(Filed 9 October, 1957.)

1. Appeal and Error § 21—

Upon a sole exception to the signing of the judgment it will be presumed that the facts found by the lower court are supported by competent evidence, and the findings are binding on appeal.

2. Counties § 1—

Counties are agencies of the State and are subject to almost unlimited legislative control within constitutional limitations.

3. Taxation § 5—

A county may levy taxes for public purposes only. Constitution of North Carolina, Art. V, sec. 3.

4. Taxation § 4—

No county or municipal corporation may levy a tax except for a necessary expense without the approval of its qualified voters. Constitution of North Carolina, Art. VII, sec. 7.

5. Counties § 2—

Ch. 266, Session Laws of 1957, conferring on counties the power to construct and maintain water and sewer systems, is constitutional and valid, and the fact that the statute requires that bonds for the construction of such systems by a county be approved by its qualified voters, notwithstanding that such purpose is a public one, does not impair the constitutionality of the grant of such power.

6. Taxation § 1a—

The fact that the construction of a water and sewer system by a county may not benefit some sections of the county or all of its inhabitants equally does not render the tax levied to pay the bonds issued for such purpose unconstitutional as a deprivation of property without due process of law or as a denial of the equal application of law, since the requirement of uniformity and equality of burden in taxation relates to the imposition of a tax and not to the distribution of the proceeds. Constitution of North Carolina, Art. I, secs. 5 and 17; Fourteenth Amendment to the Constitution of the United States.

APPEAL by plaintiff from *Froneberger, J.*, in Chambers, at Shelby, North Carolina, 22 August 1957. From CLEVELAND.

This is a civil action brought by a taxpayer of Cleveland County in which, as plaintiff, he seeks to restrain the Board of Commissioners of said County (hereinafter called Board of Commissioners) from issuing and selling bonds in the amount of $310,000 for the purpose of constructing a water distribution system, and the issuance and sale of bonds in the amount of $105,000 for the purpose of constructing a sewer system, pursuant to the provisions of the County Finance Act as set out in Article 9 of Chapter 153 of the General Statutes of North Carolina, as amended by Chapter 266 of the Session Laws of 1957.

A special bond election was duly called, to be held on 28 September 1957, and the plaintiff, in the court below, also sought to restrain the holding of the election.

The plaintiff alleges that Chapter 266 of the Session Laws of 1957 is unconstitutional and invalid for that: (a) it authorizes bonds for the construction of water and sewer systems, and that these are not proper county purposes; (b) the statute violates Article I, Section 17, of the Constitution of North Carolina, by depriving persons in Cleveland County of their property without due process of law; (c) the

statute violates the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 5, of the Constitution of North Carolina; (d) the statute is invalid on its face because it authorizes a bond issue for purposes other than a public purpose; and (e) the statute is unconstitutional on its face.

The Board of Commissioners, in its answer, admitted its intention to issue the bonds described herein and for the purposes set out in the complaint, and denied the allegations of the complaint to the effect that it is without legal authority to do so. It alleges further that there are areas in Cleveland County without proper water and sewer service; that such condition is jeopardizing the health, safety, and welfare of its inhabitants.

The parties waived a jury trial and agreed that his Honor should hear the matter in Chambers and make his findings of fact and conclusions of law based on the pleadings and any other evidence that might be offered.

The court made the following findings of fact:

"1. That certain rural areas in Cleveland County are at the present time without proper water and sewer service.

"2. That the lack of proper water and sewer service is jeopardizing the health, safety, and welfare of the County and its inhabitants.

"3. That it would be to the public interest for Cleveland County to provide the necessary water and sewer facilities.

"4. That in 1957 the General Assembly of North Carolina in regular session passed House Bill No. 462 entitled: 'AN ACT AMENDING THE COUNTY FINANCE ACT TO AUTHORIZE THE ISSUANCE OF BONDS BY COUNTIES FOR WATER SYSTEMS AND SANITARY SEWER SYSTEMS AND FIXING THE MAXIMUM MATURITIES OF SUCH BONDS AND AMENDING SECTION 153-9 OF THE GENERAL STATUTES TO AUTHORIZE COUNTIES TO ACQUIRE, CONSTRUCT, OPERATE, LEASE AND DISPOSE OF WATER SYSTEMS AND SANITARY SEWER SYSTEMS AND TO CONTRACT FOR THE OPERATION AND LEASE OF SUCH SYSTEMS AND FOR A SUPPLY OF WATER AND THE DISPOSAL OF SEWAGE.'

"5. That since the passage of the said 1957 Act by the General Assembly of North Carolina the defendants, as the Board of Commissioners, have acted in reliance on it, in reliance on Section 153-9 as amended of the General Statutes of North Carolina, and in reliance on the County Finance Act, as amended (G.S. 153-69, *et seq.*), and have set out to determine the will of the people concerning the issuance of bonds for the purpose of providing proper water and sewer facilities for certain areas of Cleveland County.

"6. That all of the actions of the said Board of Commissioners leading up to the final passage of an order authorizing $310,000 Water

Bonds and an order authorizing $105,000 Sanitary Sewer Bonds, and all of their actions in calling for an election on September 28, 1957, to determine the will of the qualified voters of the County regarding the issuance and sale of such bonds have been in accordance with the General Statutes of North Carolina.

"7. That there are no controverted issues of fact in this case and the only issues are issues of law."

From the foregoing findings of fact, the court concluded as a matter of law: (1) That the construction of the proposed waterworks and sewer systems is a proper county purpose. (2) That the issuance of bonds for the construction of the aforesaid systems would not deprive the citizens of Cleveland County of their property without due process of law or deprive them of the equal protection of the law. (3) That the authority pursuant to which the Board of Commissioners is acting does not violate Section 5 or Section 17 of Article I of the Constitution of North Carolina or the Fourteenth Amendment to the Constitution of the United States. (4) That Chapter 266 of the 1957 Session Laws of North Carolina authorizes the issuance of bonds for purposes which are public purposes. That the aforesaid amendment to the County Finance Act is valid and constitutional on its face. Whereupon, judgment was entered denying the plaintiff's prayer for an injunction to restrain the Board of Commissioners from holding the proposed bond election and issuing the proposed water and sewer bonds, dismissing the action, and directing that the plaintiff pay the costs to be taxed by the Clerk.

The plaintiff appeals, assigning error.

L. T. Hamrick for plaintiff appellant.

C. C. Horn, J. A. West, and A. A. Powell for defendant appellees.

Attorney-General Patton and Assistant Attorney-General Moody, Amicus Curiae.

DENNY, J. The bond election sought to be restrained was held on Saturday, 28 September 1957, and the election returns have been canvassed and the official results thereof announced. The results of the election have been duly certified and filed with this Court, which show that the voters of Cleveland County voted overwhelmingly in favor of issuing the proposed bonds. Since no question has been raised with respect to the procedure in authorizing the issuance of the bonds, or in the calling of the bond election, the question as to whether the defendants should have been restrained from holding the election has now become academic or moot. *Archer v. Cline, ante,* 545, 98 S.E. 2d 889. Consequently, the validity of these bond issues depends upon whether

or not the plaintiff is successful in his attack upon the constitutionality of Chapter 266 of the Session Laws of 1957.

The plaintiff has but one assignment of error and that is based on his exception to the signing of the judgment. Therefore, the facts found by the court below are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R. R., ante,* 101, 97 S.E. 2d 486.

We think the attack on the constitutionality of the above Act may be resolved by determining whether or not the General Assembly may grant to a county the authority to issue bonds for the construction of water and sewer systems, when the voters of the county have approved the issuance thereof.

Counties are agencies of the State, and in the exercise of ordinary governmental functions, unless directed or restrained by a constitutional provision or provisions, are, for all practical purposes, subject to the unlimited control of the Legislature. *Day v. Commissioners,* 191 N.C. 780, 133 S.E. 164; *S. v. Jennette,* 190 N.C. 96, 129 S.E. 184; *Commissioners v. Commissioners,* 157 N.C. 514, 73 S.E. 195; *Dare County v. Currituck County,* 95 N.C. 189.

In the last cited case, this Court, in considering the creation, powers and functions of counties, said: "They are instrumentalities of the State government, and subject to its legislative control; they possess such corporate powers and delegated authority as the Legislature may deem fit to confer upon them, and such power and authority must be exercised in the way, and only for the purpose prescribed by legislative enactment; and moreover, they are always subject to legislative control, and their powers may be abolished, enlarged, abridged, or modified." *Bd. of Education v. Commissioners,* 113 N.C. 379, 18 S.E. 661; *Jones v. Commissioners,* 143 N.C. 59, 55 S.E. 427; *Trustees v. Webb,* 155 N.C. 379, 71 S.E. 520; *Woodall v. Highway Commission,* 176 N.C. 377, 97 S.E. 226; *Sparkman v. Commissioners,* 187 N.C. 241, 121 S.E. 531; *O'Neal v. Wake County,* 196 N.C. 184, 145 S.E. 28.

A county may levy taxes for public purposes only. Article V, Section 3, of the Constitution of North Carolina; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209. Also, in Article VII, Section 7, of our Constitution, it is provided: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose." Article VII, Section 13, further provides: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine and thirteen."

The appellant seriously contends that the construction of the proposed water and sewer systems is not a proper county purpose and is not for a public purpose. We do not concur in this view. "In the absence of authority conferred by law, counties have no power to construct, operate, or maintain public improvements. The Legislature may, however, and at times does, confer on counties power to construct and operate public improvements, such as electric power plants, hospitals, sewer systems, and incinerators." 20 C.J.S., Counties, section 50, page 804.

The Act under consideration clearly gives a county the power to "acquire, construct, reconstruct, extend, improve, operate, maintain, lease and dispose of water systems and sanitary sewer systems, to contract for the operation, maintenance and lease of such systems, and to contract for a supply of water and the disposal of sewage." We know of no constitutional inhibition limiting the exercise of these powers.

It is true that counties in this State have not heretofore constructed and maintained water and sewer systems for the simple reason our Legislature has not seen fit to grant them such powers until it enacted the statute under consideration. We have many congested areas in this State outside the corporate limits of our cities and towns, which have no access to water and sewer systems. The hazards to health in such areas may be as acute as they would be in municipalities if the municipalities did not make adequate provisions for water and sewer systems. Doubtless, the Legislature took into consideration the changing conditions in our rural communities in giving the counties these additional powers, as well as the fact that many industrial plants and residential developments are being located in areas beyond the perimeter of the service of any municipality or water or sewer district.

Since the decision in *Fawcett v. Mt. Airy*, 134 N.C. 125, 45 S.E. 1029, 63 L.R.A. 870, 101 Am. St. Rep. 825, decided in 1903, this Court has uniformly held that expenses incurred for the construction of water and light plants, as well as sewer systems, are for a public purpose and that the cost of such construction is a necessary expense. *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440; *Rhodes v. Asheville*, 230 N.C. 134, 52 S.E. 2d 371; *Green v. Kitchin*, 229 N.C. 450, 50 S.E. 2d 545; *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90; *Power Co. v. Elizabeth City*, 188 N.C. 278, 124 S.E. 611; *Reed v. Engineering Co.*, 188 N.C. 39, 123 S.E. 479; *Swindell v. Belhaven*, 173 N.C. 1, 91 S.E. 369; *Greensboro v. Scott*, 138 N.C. 181, 50 S.E. 589; *Davis v. Fremont*, 135 N.C. 538, 47 S.E. 671.

The mere fact that the General Assembly has now delegated the authority to counties to construct water and sewer systems, as well as to cities and towns, does not change the construction of such systems

from being for a public purpose. Neither does the limitation upon the counties, requiring that bonds for the construction thereof be approved by the voters in such county, impair the constitutionality of the grant of such power in any respect.

The contention that Chapter 266 of the Session Laws of 1957 violates Article I, Section 17, of the Constitution of North Carolina, by depriving persons of Cleveland County of their property without due process of law, and that the statute violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 5, of the Constitution of North Carolina, is untenable. *S. v. Bd. of Commissioners of Allen County,* 124 Ohio St. 174, 177 N.E. 271; *S. v. Carney,* 163 Ohio St. 159, 126 N.E. 2d 449; *Keene v. Jefferson County,* 135 Ala. 465, 33 So. 435; *Welch v. Coglan,* 126 Md. 1, 94 A. 384; *Thomas v. Gay,* 169 U.S. 264, 42 L. Ed. 740; *Nashville, C. & St. L. R. Co. v. Wallace,* 288 U.S. 249, 77 L. Ed. 730.

In *Holton v. Commissioners of Mecklenburg County,* 93 N.C. 430, a statute authorized a tax for public roads to be imposed upon all property in Mecklenburg County, and that no part of the tax be expended in the City of Charlotte for that purpose. The plaintiff, a taxpayer in Charlotte, contended the provision that no part of the tax should be expended in Charlotte was unequal and unjust. This Court said: "The Constitution does not prohibit such inequality. While it is very true that there must be equality and uniformity in imposing the burden of taxation upon property subject to it, so that each taxpayer shall pay the same proportionate tax on the same species of property taxed that every other taxpayer pays . . . this rule of equality does not apply to the distribution of the revenue arising from such taxation. . . . The necessities, wants, purposes, and interests of government are such that it is practically impossible to distribute its revenues equally among those who pay taxes. Indeed, this cannot in most instances be approximately done, not even to the localities from which most of it is taken. The State may, sometimes must, expend large sums of money in one section for proper and necessary purposes while it expends very little in another, when perhaps the greater part of the taxes were paid by taxpayers in the latter. This is an essential inequality, arising from the diversified and multiplied wants and necessities of government. Its very nature renders such inequality necessary. A constitutional provision forbidding it would defeat, at all events greatly hinder, the purposes and aims of government."

In the case of *Brown v. Commissioners,* 100 N.C. 92, 5 S.E. 178, it is said: "The Legislature may direct how the ordinary county revenues shall be applied within the county for any lawful purpose."

Likewise, in *Newell v. Green,* 169 N.C. 462, 86 S.E. 291, this Court said: ". . . the provision of the Constitution requiring uniformity

applies to the levy of taxes and not to the distribution of the revenue derived therefrom." This same principle was applied in *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904.

It is said in 20 C.J.S., Counties, section 261, page 1176, "The particular provision for which the Legislature may authorize counties to issue bonds, and which in many cases have been held to do so either expressly or impliedly, include . . . construction of a sewage system although all persons in the county are not directly benefited . . ."

In the case of *S. v. Bd. of Commissioners of Allen County, supra,* the Commissioners had issued bonds to construct a sewer system outside a municipality in a sanitary district, and the general credit of the county had been pledged for the payment thereof in addition to certain assessments levied in the sanitary district, where the sewer system was constructed. Certain citizens of the county resisted payment of the taxes levied for the payment of the principal and interest due on the bonds which remained unpaid after the assessments collected had been insufficient to pay said indebtedness. The Supreme Court of Ohio said: "The county is the unit through which many of the important functions of the government are carried on. . . . The fact that there may be residents in remote portions of Allen County who will receive no possible benefit from these improvements, and who are in no apparent danger from those contagions which are usually caused by pollution, cannot stand in the way of a general governmental policy declared by the Legislature in the interest of public health and public welfare. . . . The decisions of our own State, while not dealing with sewer systems outside of municipalities, have frequently dealt with other improvements outside of municipalities, and the same principles must necessarily apply. The power to levy a general tax throughout the county is authorized by Section 7, Article X, of the Ohio Constitution, and is not dependent upon the receipt of direct benefit by the taxpayers of the county or equal distribution of the potential benefits in proportion to the burdens of the taxes levied. Cooley on Taxation (4th Ed.), section 20 . . ." See *Welch v. Coglan, supra,* in which the Court reached a similar conclusion where the facts were substantially the same.

In *S. v. Carney, supra,* the Court said: "It is well established that county improvements may be authorized, constructed, and maintained by the county, although they may directly benefit only a part of the taxpayers of the county, and the fact that the cost of the construction and management of such improvements is borne by county taxes, does not contravene the rule of uniform taxation according to value contained in Section 2, Article XII of the Ohio Constitution."

The foregoing section of the Ohio Constitution provides that property shall be taxed by uniform rule according to value.

In the case of *Keene v. Jefferson County, supra,* the county had been made a sanitary district, but the area in which the proposed improvements were to be made constituted only a part of the county. At the same session of the Legislature, the county was authorized to issue its bonds to pay for the proposed improvements, and to levy a county-wide tax for the payment of interest on said bonds and to create a sinking fund for their redemption. The validity of the bonds as a county obligation was attacked on the ground that the proposed improvements were not such an enterprise as would be beneficial to all the people of the county. The Court said: "The Acts, if that were important, are not fairly subject to such objection."

In *Thomas v. Gay, supra,* the Court said: "It is no objection to a tax that the party required to pay it derives no benefit from the particular burden; *e.g.,* a tax for school purposes levied upon a manufacturing plant. . . . In Cooley on Taxation, 16, the result of a wide examination of the cases is thus stated: 'If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible.' "

In this jurisdiction, we have heretofore held that the General Assembly has the authority to grant to a county the right to construct and operate an airport in its proprietary capacity. *Rhodes v. Asheville, supra.*

In light of the provisions of our Constitution, and our decisions and cited authorities, we hold that the General Assembly may grant to a county the authority to issue bonds for the construction of water and sewer systems when "approved by a majority of those who shall vote thereon in any election held for such purpose." We further hold that Chapter 266 of the 1957 Session Laws of North Carolina is constitutional, and the proposed bonds, when issued, will be valid obligations of Cleveland County.

The judgment of the lower court is

Affirmed.

J. HARRY GURGANUS v. GUARANTY BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF MARY GURGANUS, DECEASED.

(Filed 9 October, 1957.)

1. Appeal and Error § 19—

Exceptions to the testimony of several witnesses as to declarations made by a particular person are properly grouped under one assignment of error when all the exceptions relate to the single question of law as to whether the testimony was incompetent as hearsay.

2. Evidence § 41—

In an action on notes against the estate of the deceased maker, defended on the ground that intestate did not execute the notes, testimony of defendant's witnesses as to declarations made by decedent in plaintiff's absence to the effect that plaintiff was trying to borrow money from her, is incompetent as hearsay, since the testimony is offered to prove as a fact matter recited in the declarations of a person not a witness, and the admission of such testimony over plaintiff's objections is prejudicial for the reason that it tends to show that intestate was not indebted to plaintiff on promissory notes or otherwise.

3. Evidence § 43a—

The rule that testimony of a declaration accompanying an act may be competent to explain the legal effect of the act does not permit the introduction of testimony of a declaration to prove as a fact matters recited in the declaration in violation of the hearsay rule, nor does the rule apply when the declaration does not accompany the conduct sought to be explained.

4. Same—

Testimony of declarations of the maker of notes, made in the absence of the payee and subsequent to the execution of the notes, to the effect that she was not indebted to the payee, cannot be competent under the verbal act doctrine.

5. Evidence § 27—

The relevancy of evidence, as distinguished from its competency, is determined in relation to the issues on which the case is tried.

APPEAL by plaintiff from *Frizzelle, J.*, April Term, 1957, of PITT.

Civil action instituted 7 December, 1955, against the administrator *d.b.n.* of the estate of Mary Gurganus, plaintiff's sister, who died in April, 1953, in which plaintiff seeks to recover a balance of $19,036.18, plus interest, on two promissory notes dated 5 August, 1946, bearing interest from date at 6% per annum, one for $13,286.18 and the other for $5,750.00.

Plaintiff alleged that defendant's intestate, for value, had executed and delivered to plaintiff the said two promissory notes, under seal, and that she had made payments on each note.

Answering, defendant categorically denied plaintiff's said allegations, and each and every part thereof. By way of further answer and defense, defendant alleged that the estate of its intestate was not indebted to plaintiff; and, as bars to plaintiff's action, defendant pleaded designated statutes of limitation and laches.

Two issues were submitted to the jury. The first issue and the jury's answer thereto were as follows: "Did Mary Gurganus execute and deliver the notes sued on? Answer: No." The second issue, which

concerned the amount, if any, plaintiff was entitled to recover on said notes, was not reached.

Judgment was entered for defendant in accordance with the verdict. Plaintiff excepted and appealed, assigning errors.

John F. Crossley, Isaac C. Wright, and Sam B. Underwood, Jr., for plaintiff, appellant.

James & Speight for defendant, appellee.

BOBBITT, J. The two papers sued on, purporting to be promissory notes as alleged, were offered by plaintiff and admitted in evidence. On each the name "Mary Gurganus" appears as maker, after her name the word "(Seal)" appears and under the caption "Witness" the name "J. I. Gray" appears. On the back of each purported credit entries appear.

It was admitted by plaintiff's counsel "that the body of the notes, other than the signatures, as well as the alleged credits written on the back of the notes, are all in the handwriting of the plaintiff."

The first issue was directed solely to the alleged execution and delivery of the notes by Mary Gurganus. The precise question to which conflicting evidence was directed was whether the name "Mary Gurganus" appearing as maker on each note was in fact written thereon by Mary Gurganus.

On this appeal, there is no need to discuss the evidence in detail. Suffice to say, plaintiff's evidence tended to show that the name "Mary Gurganus" on each note was in fact her genuine signature; and defendant's evidence tended to show that her name on each note was not her genuine signature but was a tracing made from her signature to an agreement dated 20 April, 1925, between her and plaintiff.

Plaintiff's assignment of error, directed to the admission, over his objection, of the following testimony of witnesses offered by defendant, is well taken.

S. Lloyd Tucker, who married Mary Gurganus' niece, testified that Mary Gurganus visited his home quite frequently and discussed her affairs with him. He was permitted to testify that Mary Gurganus *told him* "that her brother Jim (plaintiff Harry Gurganus) would come down and try to borrow money and that he nearly worried her to death"; and further, that in 1946 Mary Gurganus *stated* to him that the plaintiff had tried to borrow money from her over a period of years.

Carol Whichard, who tended Mary Gurganus' farm from 1950 until her death, testified that on a certain occasion plaintiff came to the house looking for Mary Gurganus and left upon learning that she was not at home. He was permitted to testify that Mary Gurganus, when

told of plaintiff's visit, *said* that "she was glad she didn't see him because all he ever came for (was) to borrow money from her."

B. F. Fleming, who was engaged in building a house for Mary Gurganus in 1934, testified that while this work was in progress plaintiff came to the job and talked with Mary Gurganus. Fleming did not testify as to what was said by either plaintiff or Mary Gurganus in *their* conversation. His testimony as to what occurred after plaintiff left was as follows: "I happened to be working alone that afternoon and Miss Mary came out to where I was working and *said* to me, 'Well, I finally got rid of him'; that's the way she expressed herself. She *said*, 'I guess you know what he came for,' and I said, no, and she *said*, 'Well, he never comes but what he wants to borrow money,' and she *said* they told him she had the money and he wanted to borrow $500. She *said* she had the money but she was saving it to rebuild the house." (Italics added.)

Plaintiff's exceptions to the admission of the foregoing testimony were properly grouped under one assignment of error. All relate to a single question of law, namely, whether testimony as to such declarations of Mary Gurganus was competent. *Dobias v. White,* 240 N.C. 680, 688, 83 S.E. 2d 785.

If plaintiff made persistent efforts to *borrow* money from Mary Gurganus as indicated by the quoted testimony, it may be clearly inferred from this that she was not *indebted* to plaintiff on promissory notes or otherwise. Unquestionably this evidence was calculated to weigh heavily against plaintiff in the minds of the jurors.

Since the probative value of the quoted testimony depends wholly upon the truth of the matters asserted by Mary Gurganus in the declarations attributed to her, it is clear that it was incompetent as hearsay and should have been excluded. *Pettiford v. Mayo,* 117 N.C. 27, 23 S.E. 252; *Improvement Co. v. Andrews,* 176 N.C. 280, 96 S.E. 1032; *Lister v. Lister,* 222 N.C. 555, 24 S.E. 2d 342. Its admission, over plaintiff's objection, was prejudicial and entitles plaintiff to a new trial.

These facts are noted: (1) The declarations attributed to Mary Gurganus were not made in plaintiff's presence. *Chandler v. Jones,* 173 N.C. 427, 92 S.E. 145. (2) Plaintiff did not testify; nor did he offer evidence as to statements made by Mary Gurganus. (3) The testimony as to plaintiff's visits was brought out by defendant from its witnesses. Moreover, nothing in the cross-examination of defendant's said witnesses related to the declarations attributed to Mary Gurganus.

"Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury, North Carolina Evidence, sec. 138, and cases cited.

"Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 A. & E. (2 Ed.) 520. This definition, repeated often in our decisions, appears to have been quoted first in *King v. Bynum*, 137 N.C. 491, 495, 49 S.E. 955. *Judge Brown's* comment in that case seems appropriate here, viz.: "The most ingenious mind can hardly bring the testimony pointed out within any recognized exception to the general rule excluding hearsay evidence."

It is noted that *Bank v. Stack*, 179 N.C. 514, 103 S.E. 6, cited by appellee, related to the relevancy, not to the competency, of the evidence then considered.

Appellee cites cases based on G.S. 8-51, *e.g., Batten v. Aycock*, 224 N.C. 225, 29 S.E. 2d 739, which hold, in substance, that when the representative of a deceased person testifies in his own behalf or offers the testimony of the deceased person in evidence as to a transaction or conversation between the deceased person and an adverse party, he thereby "opens the door" so as to make competent the testimony of his adversary concerning the same transaction or conversation. Appellee argues that plaintiff *could* have taken advantage of this rule by testifying to what, if anything, occurred between him and Mary Gurganus on the occasions of the visits referred to by defendant's said witnesses. It is futile to speculate as to what extent, if any, testimony by plaintiff would have been competent had he elected to stand by and permit the admission without objection of said testimony as to declarations of Mary Gurganus. Plaintiff did not elect to take this course. On the contrary, by objections aptly made, he challenged the competency of this testimony when proffered by defendant. Suffice to say, G.S. 8-51 gave defendant no right to "open the door," over plaintiff's objection, by incompetent evidence.

On oral argument, and by supplemental memorandum, appellee advanced the contention that Mary Gurganus' declarations were competent as "utterances forming a verbal part of an act." Wigmore on Evidence, 3rd Ed., Vol. VI, sec. 1772, cited by appellee, sets forth in detail the limitations of the verbal act doctrine. The distinguished author is careful to point out that the doctrine refers to an utterance or declaration which "accompanies conduct to which it is desired to attach some legal effect."

Illustrations of the type of factual situation to which the doctrine applies will be found in *Moore v. Gwyn*, 26 N.C. 275, and *Collier v. Poe*, 16 N.C. 55, cited by appellee. In each the issue was whether plaintiff, the owner of certain slaves, delivered possession thereof as a loan or as a gift. His delivery of the slaves was the act or conduct to which it was desired to attach legal effect. Plaintiff's declarations at the time

of such delivery (Collier) or shortly before such delivery (Moore), were held competent to show that the slaves were delivered as a loan rather than as a gift.

Here the only transaction to which it is desired to attach legal effect is the alleged execution and delivery by Mary Gurganus of the notes sued on. There is no contention that her declarations throw any light upon the nature or legal effect of this alleged act; for defendant's basic position is that Mary Gurganus did not sign the notes. Too, the probative force of evidence admissible under the verbal act doctrine depends wholly upon the fact that the declarations *were made,* without regard to the truth or falsity of the matters asserted therein.

As stated by Wigmore: "Thus the words are used in no sense testimonially, *i.e.* as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the Hearsay rule interposes no objection to the use of such utterances, because they are not offered as assertions (*ante,* sec. 1766). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay rule. In short, the utterances enter *irrespective of the truth of any assertion they may contain;* and they neither profit nor suffer by virtue thereof."

On this appeal, it is unnecessary to consider all limitations of the verbal act doctrine. Suffice to say, the doctrine has no application here because (1) the declarations did not accompany conduct to which it was desired to give legal effect, and (2) the probative value of the quoted testimony, as stated above, depends wholly upon the truth of the matters asserted by Mary Gurganus in the declarations attributed to her.

Since a new trial is awarded on the ground stated, we do not consider plaintiff's other assignments of error. They are directed largely to the admission of evidence challenged by plaintiff as irrelevant. The questions raised, as now presented, may not arise when the case is tried again. The relevancy of evidence, as distinguished from its competency, is determined in relation to the issues on which a case is tried. *DeBruhl v. Highway Com.,* 245 N.C. 139, 95 S.E. 2d 553, and cases cited.

New trial.

EMMA COFFIELD, ESSIE COFFIELD AND HUSBAND, CHARLIE COFFIELD, v. NOAH PEELE AND WIFE, LIZZIE PEELE, MATTIE RUFFIN, EDWARD S. PEELE AND WIFE, FARROW PEELE, LIZZIE RUFFIN AND HUSBAND, ROOSEVELT RUFFIN, ROOSEVELT PEELE AND WIFE, LOU EMMA PEELE, EDWARD S. PEELE, EXECUTOR OF THE EDWARD PEELE ESTATE, HENRY PEELE AND WIFE, CARRIE MAE PEELE, VIOLA HUDGINS AND HUSBAND, (BUCK) WILLIE HUDGINS, JULIANA WHITE AND HUSBAND, JOSEPH WHITE, MAMIE BARNES AND HUSBAND, ERNEST BARNES, L. B. PEELE AND WIFE, LOUVENIA PEELE, PERCY PEELE AND WIFE, ISOLENE PEELE, HENRY PEELE AND WIFE, LOUISE PEELE, LOUISE WHITE AND HUSBAND, AVINE WHITE, MAGGIE TAYLOR AND HUSBAND, SHELBY TAYLOR, LEALER BARCLIFT AND HUSBAND, CURTIS BARCLIFT, O'NEAL FIELDS AND HUSBAND, ROSCOE FIELDS, FLOYD EUGENE PEELE AND WIFE, LORAINNE PEELE, EDWARD S. PEELE, JR., HOWARD EARL PEEL, ELVER LOIS PEELE, LOSSIE MAE PEELE, JULIUS M. PEELE, JAMES S. PEELE, BERNICE (BONNIE) PEELE, LEARMA PEELE, HERBERT PEELE AND WIFE, VONZELIA PEELE, FANNIE MAE SMITH AND HUSBAND, WILLIE A. SMITH, ROOSEVELT RUFFIN, JR., AND WIFE, BLANCHE RUFFIN, MARTHA THOMPSON AND HUSBAND, WILLIE THOMPSON, ESTHER RUFFIN, ETHEL RUFFIN, WILLIAM RUFFIN AND WIFE, MARGARET RUFFIN, VIVIAN LOU POWELL AND HUSBAND, PAUL POWELL, CHRISTOPHER RUFFIN AND WIFE, MRS. CHRISTOPHER RUFFIN, MARIE RUFFIN, JAN RUFFIN, JOHN RUFFIN, JAMES RUFFIN, HAROLD RUFFIN, JAMES EARL PEELE AND WIFE, MINNIE ASKEW PEELE, WILBERT LEE PEELE, ROBERT PEELE, AGNES BARFIELD, NOLA HAYES COFFIELD, CLARENCE COFFIELD AND WIFE, RETHA MAE COFFIELD, WILLIE BEATRICE COFFIELD, JOHN D. COFFIELD, ESSIE V. COFFIELD, ALICE COFFIELD, AND H. O. PEELE, GUARDIAN AD LITEM.

(Filed 9 October, 1957.)

1. Wills § 31—

While recognized rules of construction and canons of interpretation are a guide in the construction of a will, each will must be largely construed by itself and its words interpreted in accordance with the circumstances and contexts of their use.

2. Same—

The primary rule in the construction of a will is to ascertain the intent of testator as expressed in the whole instrument.

3. Same—

Apparently conflicting provisions in a will should be reconciled if possible and effect be given to all its words, but where its provisions are inconsistent, the primary intent will control that which is secondary.

4. Wills § 34b—

The will in question devised and bequeathed to testator's seven children, naming them, all testator's real and personal property, and immediately thereafter used the words, "to be equally divided among the seven children

of mine, and their children." *Held:* The dispositive clause of the will is to testator's seven named children alone, and the repugnant provision for distribution equally among testator's children and grandchildren must yield to the primary intent expressed in the instrument that the property should go to the children alone.

5. Same—

In the absence of a manifest intention to the contrary, a will is to be construed in favor of beneficiaries appearing to be the natural or special objects of the testator's bounty.

APPEAL by Herbert O. Peele, Guardian *ad litem* of the minor respondents, from *Bone, J.*, June Term 1957 of MARTIN.

Special proceeding before the Clerk of the Superior Court of Martin County for a partition sale of real property situate in Martin County.

Edward Peele died testate on 20 December 1955. His last will and testament executed by him on Christmas Day 1950 was probated on 29 December 1955, and is recorded in Will Book 9, page 21, in the office of the Clerk of Court for Martin County.

The decision in this proceeding depends upon the construction of Item 2 in his brief will of three Items. Item 1 provides for the payment of his debts and funeral expenses. Item 2 is as follows: "After the payment of such funeral expenses and debts—I give, devise and bequeath unto my seven children, namely: Noah Peele: Mattie Ruffin: Edward S. Peele: Essie Coffield: Lizzie Ruffin: Emma Coffield and Roosevelt Peele—All of my real and personally (*sic*) property, to be divided equally among the seven children of mine, and their children." Item 3 appoints his son Edward S. Peele executor, and revokes all former wills.

The *feme* petitioners are daughters of Edward Peele. They made as respondents the other five children of Edward Peele, the spouses of those married, and Edward S. Peele as executor. The petition, so far as relevant on this appeal, in substance alleges that the petitioners and respondents are tenants in common and seized in fee simple of two described tracts of land in Martin County, that the seven children of Edward Peele named in Item 2 of his will are each the owner of a one-seventh undivided interest in the two tracts of land, and then follows the usual allegations for a partition sale.

The respondents Lizzie Ruffin and husband, and Mattie Ruffin filed an answer in which they admit they own an interest in the real property described in the petition, the size of which they do not know, and assert that under Edward Peele's will there is a possibility that their children own an interest in the real property, and request that they be made parties.

The answer of the respondents Roosevelt Peele and wife and Noah Peele and wife is in substance similar to the answer of the Ruffin respondents.

The answer of the respondents Edward S. Peele, individually and as executor, and of his wife is in substance this: They admit that the respondents own an interest in the real property, but deny that the testator's children own each a one-seventh undivided interest. They request an actual partition. Further answering the petition they allege that under Item 2 of the will the children of the respondents own in equal shares with the respondents the real property, and that they are necessary parties to the proceeding.

The proceeding was transferred to the Civil Issue Docket. At the April Term 1957 of the Superior Court of Martin County Judge Bone entered an order making the children of Edward Peele's children enumerated in Item 2 of his will, and their spouses, parties defendant: they number 65.

On 24 April 1957 the Clerk of the Superior Court of Martin County appointed H. O. Peele Guardian *ad litem* for the 17 infants, who had been made parties defendant by Judge Bone's order. Upon petition of the Guardian *ad litem,* the Clerk on 30 April 1957 appointed Messrs. Critcher and Gurganus as attorneys to represent him.

The Guardian *ad litem* filed an answer in essence this: That under Item 2 of the will the children of Edward Peele's seven children named in that Item own an equal interest in the real property with the seven children of Edward Peele.

The 48 adults made parties defendant by Judge Bone, and served with process, filed no answers.

At the trial petitioners offered evidence—the respondents none. This is a summary of the evidence: Edward Peele's will was introduced in evidence. Edward Peele died on 20 December 1955. He had seven children, who are named in Item 2 of his will, and all are living. His son Noah has 4 children, his daughter Mattie Ruffin has 3 children, his son Edward S. Peele has 12 children, his daughter Essie Coffield has 3 children, his daughter Lizzie Ruffin has 12 children, his daughter Emma Coffield has 7 children, his son Roosevelt has 3 children, and all of these 44 grandchildren of Edward Peele were living at the time of his death, and are still living. No grandchild has been born since his death. Edward Peele at his death owned two farms, one of 214 acres and one of 37 acres.

The following Issue was submitted to the jury: "1. Are the petitioners Emma Coffield and Essie Coffield, and the respondents, Noah Peele, Mattie Ruffin, Edward S. Peele, Lizzie Ruffin, and Roosevelt Peele, owners in fee simple as tenants-in-common of the two tracts of

land described in the petition in the proportion of one-seventh each, as alleged in the petition?"

The judge instructed the jury as follows:

> "If you believe the evidence and find the facts to be as all the evidence tends to show, I instruct you that it would be your duty to answer the issue, 'Yes.' If you do not believe the evidence or do not find the facts to be as all the evidence tends to show, then you would answer it, 'No.' "

The jury answered the Issue, Yes.

Judgment was entered adjudging that the seven children of Edward Peele named in Item 2 of his will own the real property described in the petition in fee simple as tenants in common in the proportion of one-seventh each, and remanding the proceeding to the Clerk of the Superior Court on the question as to whether the real property should be actually partitioned or sold for partition.

The Guardian *ad litem* for the 17 infant respondents appealed *in forma pauperis* to the Supreme Court.

Charles H. Manning, H. M. Martin, Peel & Peel and Clarence W. Griffin for Petitioners, Appellees.

Critcher & Gurganus for Herbert O. Peele, Guardian ad litem for Minor Respondents, Appellants.

PARKER, J. This appeal presents for decision the construction of Item 2 of the Will of Edward Peele.

Every will, in a sense, is unique. The same words, or those nearly similar, used under different circumstances and contexts may express different intentions, and for that reason decisions in previous cases are rarely helpful, except as they state the application of certain rules of construction, or certain broad canons of interpretation, which have become so thoroughly established by judicial pronouncement that they may be said to have passed into the definite law upon the subject. Every will is so much a thing of itself, and, generally, so unlike other wills, that it must be construed by itself as containing its own law. *Morris v. Morris, ante,* 314, 98 S.E. 2d 298; *Patterson v. McCormick,* 181 N.C. 311, 107 S.E. 12. *Mr. Justice Holmes* said in *Towne v. Eisner,* 245 U.S. 418, 62 L. Ed. 372: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The first and great rule in the construction of wills is to ascertain the intent of the testator as expressed in the whole will, attributing due

weight to all its words, and then to give effect to that intent, provided it be consistent with the rules of law, or not at variance with public policy. Such an instrument is the legal declaration of a man's intentions, which he wills to be performed after his death. *Morris v. Morris, supra; Trust Co. v. Wolfe,* 245 N.C. 535, 96 S.E. 2d 690; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888.

Apparently conflicting provisions should be reconciled, and effect given to all the words of the will, where possible. *Morris v. Morris, supra; Trust Co. v. Wolfe, supra; Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *Edens v. Williams,* 7 N.C. 27. *Denny, J.,* said for the Court in *Coppedge v. Coppedge, supra:* "But, where provisions are inconsistent, it is a general rule in the interpretation of wills, to recognize the general prevailing purpose of the testator and to subordinate the inconsistent provisions found in it."

Marshall, C. J., said on the same subject in *Smith v. Bell,* 6 Pet. 68, 8 L. Ed. 322: "It is stated in many cases that where there are two intents inconsistent with each other, that which is primary will control that which is secondary."

The words in Item 2 of the Will "I give, devise and bequeath unto my seven children, namely: Noah Peele: Mattie Ruffin: Edward S. Peele: Essie Coffield: Lizzie Ruffin: Emma Coffield and Roosevelt Peele—All of my real and personally (*sic*) property," standing alone, constitute a clear devise of the real property in fee simple to the testator's seven children. G.S. 31-38; *Buckner v. Hawkins,* 230 N.C. 99, 52 S.E. 2d 16; *Elder v. Johnston,* 227 N.C. 592, 42 S.E. 2d 904; *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626. Certainly, no parts of the will, nor any words of it, show that the testator intended to convey an estate of less dignity.

The testator after an unequivocal devise of his real property in fee simple to his seven named children, immediately thereafter used the words, "to be equally divided among the seven children of mine, and their children." The dispositive clause of the will is to testator's seven named children alone. The general expression for equal division among testator's children, and their children, contains no words like give, lend, devise, etc., and is not in as strong terms as the words giving the estate in fee simple to his children. The provisions are repugnant. If testator's seven children were devised his realty in fee simple, they own a one-seventh interest therein each. If testator's seven children, and their children, were devised his realty in fee simple, the share therein of his seven children is far less. The evidence shows that at the time of testator's death, his children had forty-four children living. If appellants' contention as to the construction of the Will were correct, Edward

Peele's seven children own a one-fifty-first interest each in the real property, and their forty-four children, the grandchildren of Edward Peele, own a one-fifty-first interest each in the realty, which would result in the grandchildren of the testator owning a much larger share than the children of the testator.

A man's widow and his children are the primary objects of his bounty. *In re Crozer's Estate,* 336 Pa. 266, 9 A. 2d 535. In the absence of a manifest intention to the contrary, a will is to be construed in favor of beneficiaries appearing to be the natural or special objects of the testator's bounty. *Mangum v. Trust Co.,* 195 N.C. 469, 142 S.E. 711; 95 C.J.S., Wills, p. 845.

Considering Item 2 of Edward Peele's Will, and all the words thereof, it is our opinion that the primary intent of the testator is shown by his clear and decisive words devising his real property to his seven children alone, whose names are stated in the Will, and who are the natural objects of his bounty rather than his grandchildren, and that such primary intent controls the inconsistent provisions for a division of his realty between his children, and their children.

We, therefore, agree with the Trial Court that under the Will of Edward Peele his seven named children took a fee simple to his real property as tenants in common in the proportion of one-seventh each.

No error.

NELLE WALKER BOLIN, v. DR. PAUL BOLIN.

(Filed 9 October, 1957.)

1. Husband and Wife § 12d(1)—

A separation agreement between husband and wife which provides for the support of the wife is a contract between them required to be executed in conformity with G.S. 52-12, notwithstanding that it does not purport to divest the wife of dower or the husband of curtesy, and where the agreement is executed without the examination of the wife and the finding by the probate officer that it is not unreasonable or injurious to her, the agreement is void *ab initio.*

2. Husband and Wife § 12d(3)—

Payments made by the husband in accordance with a separation agreement void for failure to comply with G.S. 52-12 cannot estop him from attacking the agreement.

3. Estoppel § 5—

A void contract will not work an estoppel.

4. Estoppel § 11a—

An estoppel must be pleaded.

BOLIN *v.* BOLIN.

APPEAL by plaintiff from *Paul, J.*, December Term 1956 of DUPLIN.

This is a civil action, instituted in the Superior Court of Cumberland County on 31 December 1955, to recover the sum of $2,000 alleged to be due the plaintiff under the provisions of a separation agreement entered into by and between the plaintiff and the defendant on 2 June 1952. By order of the Clerk of the Superior Court of Cumberland County, the case was removed to Duplin County on a motion made by the defendant for change of venue.

The separation agreement is set out in the complaint. Its execution purports to have been acknowledged by the parties in Germany before an officer of the United States Army. The acknowledgment does not purport to comply with the requirements of G.S. 52-12.

It is alleged in the complaint that the plaintiff is a citizen and resident of the City of New York, N. Y., and that the defendant is a citizen and resident of Duplin County, N. C.; that plaintiff and defendant were married in 1943; that after the execution of the separation agreement in 1952, the defendant paid to this plaintiff the sum of $200.00, as provided therein, for each and every month thereafter, until and including February 1955; that in March 1955 the defendant notified the plaintiff by letter that he would make no further payments under the separation agreement and none has been made. The defendant herein filed an action against the plaintiff in July 1954 for an absolute divorce. The defendant was granted such divorce on 7 December 1955.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action for that, it appears from the face of the complaint that the deed of separation upon which the cause of action is based was not acknowledged as required by law; that the officer who attempted to take the acknowledgment was without jurisdiction to do so, and, if he had authority under the statute to take the acknowledgment, he did not make the necessary findings of fact as required by G.S. 52-12.

This cause came on for hearing at the December Term 1956 of the Superior Court of Duplin County upon the demurrer filed by the defendant. The parties desired to file briefs, and stipulated and agreed that the court might sign the judgment in the cause out of term and out of the county and district. Judgment sustaining the demurrer was entered on 11 June 1957. The plaintiff appeals, assigning error.

Seavy A. Carroll and Lemuel M. Williford for plaintiff.
Grady Mercer for defendant.

DENNY, J. The sole question posed on this appeal is whether or not the court below was correct in sustaining the demurrer interposed by the defendant.

The plaintiff contends that since the defendant, under the terms of the separation agreement, agreed to pay her the sum of $200.00 per month, in full satisfaction of his obligation for her support and maintenance, during the remainder of her natural life, without requiring her to release her dower or any other interest in his real or personal property, the agreement is enforceable, irrespective of the manner of its execution.

We have universally required separation agreements to be executed in conformity with statutory requirements governing contracts between husband and wife. (Rev. 2107; C.S. 2515; N. C. Code of 1939, section 2515, now G.S. 52-12.) This requirement is logical and sound in view of the fact that the right of a married woman to support and maintenance is held in this jurisdiction to be a property right. *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913D, 261; *Walton v. Walton,* 178 N.C. 73, 100 S.E. 176; *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Daughtry v. Daughtry,* 225 N.C. 358, 34 S.E. 2d 435.

In the last cited case the appellant likewise insisted that the agreement was not such a contract between the husband and the wife as to require the separate examination of the wife, and a finding by the probate officer examining the wife that it was not unreasonable or injurious to her, as required by G.S. 52-12, since the agreement did not purport to divest the wife of dower or the husband of curtesy in any real property owned by them or that might be acquired thereafter. It was pointed out by this Court that the provision for support brought the agreement within that class of contracts which in order to be valid and binding on the parties must be executed in the manner and form required by G.S. 52-12.

In view of our decisions in this respect, it is not necessary to consider whether or not the officer of the United States Army was vested with authority to take such acknowledgments.

Furthermore, this Court has uniformly held that a contract between husband and wife, which must be executed in the manner and form required by G.S. 52-12, is void *ab initio* if the statutory requirements are not observed. *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *Pearce v. Pearce,* 225 N.C. 571, 35 S.E. 2d 636; *s.c.,* 226 N.C. 307, 37 S.E. 2d 904; *Daughtry v. Daughtry, supra; Fisher v. Fisher,* 217 N.C. 70, 6 S.E. 2d 812; *s.c.,* 218 N.C. 42, 9 S.E. 2d 493; *Bank v. McCullers,* 201 N.C. 440, 160 S.E. 494; *Garner v. Horner,* 191 N.C. 539, 132 S.E. 290; *Barbee v. Bumpass,* 191 N.C. 521, 132 S.E. 275; *Whitten v. Peace,* 188 N.C. 298, 124 S.E. 571; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Wallin v. Rice,* 170 N.C. 417, 87 S.E. 239; *Butler v. Butler,* 169 N.C. 584, 86 S.E. 507; *Singleton v. Cherry,* 168 N.C. 402, 84 S.E. 698.

It is further contended by the appellant that since the defendant complied with the agreement from June 1952 until February 1955, he should be estopped from attacking it, citing *Howland v. Stitzer,* 236 N.C. 230, 72 S.E. 2d 583. The contract involved in the *Stitzer case* was not void; therefore, the ruling there is not controlling on the facts in this case. A void contract will not work as an estoppel. *Daughtry v. Daughtry, supra; Fisher v. Fisher, supra* (218 N.C. 42); *Wallin v. Rice, supra.* Furthermore, if the doctrine of estoppel were available to the plaintiff, she has not pleaded it. *Upton v. Ferebee,* 178 N.C. 194, 100 S.E. 310; 19 Am. Jur., Estoppel, section 179, page 832, *et seq.;* Annotation, 120 A.L.R. 28.

The ruling of the court below is

Affirmed.

STOKELY EVANS v. ASHEVILLE CITIZENS TIMES COMPANY AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

(Filed 9 October, 1957.)

1. Master and Servant § 53b (1)—

The amount of compensation to be awarded an employee for permanent partial disability from a back injury is 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter, G.S. 97-30, G.S. 97-31, regardless of the amount actually earned, the intent of the statute being to provide compensation only for loss of earning capacity.

2. Master and Servant § 45—

While the Industrial Commission may make rules for carrying out the provisions of the Workmen's Compensation Act, it has no power to promulgate a rule which is inconsistent therewith.

APPEAL by defendants from *Nettles, J.,* at February 1957 "A" Term of BUNCOMBE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimant.

In this Court it is conceded by defendants that this is a compensable case under the provisions of the North Carolina Workmen's Compensation Act for injury by accident on 18 March, 1955.

Defendants challenge the rule applied by the Industrial Commission for the admeasurement of compensation to be allowed,—the parties having stipulated that on and prior to the date of injury plaintiff was regularly employed by defendant employer at an average weekly wage of $55.00.

In April 1956 the hearing commissioner found as a fact that on 18 March, 1955, plaintiff sustained injury by accident by reason of which he was temporarily totally disabled from 13 June, 1955 to 9 January, 1956, and is entitled to compensation during said period at the rate of $30.00 per week; that plaintiff reached the end of the healing period on 9 January, 1956, and has a 25 per cent permanent partial disability or incapacity for work resulting from his injury; that "defendant employer has not tendered plaintiff any work suitable to his condition since January 9, 1956, and plaintiff has been unable to secure same," and that he "is entitled to compensation at the rate of $30.00 per week from and after January 9, 1956, until work suitable to his capacity is tendered to plaintiff or until he obtains gainful employment or until there has been a change in his condition, for permanent partial disability, but not exceeding the limits prescribed by law." Accordant therewith the hearing commissioner made conclusions of law, and so awarded compensation.

Defendants excepted to these findings of fact, and conclusions of law, and the award made, and applied to the Full Commission for review. On such review the Full Commission adopted "as its own the findings of fact and conclusions of law" of the hearing commissioner, "together with the award based thereon," and affirmed his decision in all respects. Defendants excepted thereto, and appealed to Superior Court—assigning, among others, exceptions to the findings of fact, and conclusions of law and award as to compensation to be allowed plaintiff from and after 9 January, 1956 for permanent partial disability, as hereinabove set forth.

Upon the hearing, the presiding judge of Superior Court overruled these exceptions, and affirmed the findings of fact, conclusions of law and the award so adopted by the Full Commission.

Defendants except thereto, and assign error and appeal to Supreme Court.

Uzzell & DuMont and Edward L. Loftin for Plaintiff Appellee.
Meekins, Packer & Roberts for Defendants Appellants.

WINBORNE, C. J. What is the correct measurement of compensation, under the North Carolina Workmen's Compensation Act, for permanent partial disability? Appellants, the defendants, contend, and we hold properly so, that the question is answered by the provisions of G.S. 97-30. On the other hand, appellee, the plaintiff, contends that the provisions of Rule XVI adopted by the North Carolina Industrial Commission are properly applicable.

G.S. 97-30 provides that "Except as otherwise provided in G.S. 97-31 where the incapacity for work resulting from injury is partial, the

employer shall pay or cause to be paid . . . to the injured employee during such disability, a weekly compensation equal to sixty per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter . . ."

(At time of the injury to back of plaintiff here involved such injury was not included in G.S. 97-31. But see Chap. 1026, Sec. 7, of 1955 Session Laws, which extended provision of G.S. 97-31, effective July 1, 1955.)

The Workmen's Compensation Act, G.S. 97-2i, provides that when used in this article, unless the context otherwise requires . . . the term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

And in the light of the provisions of these statutes, this Court declared in *Hill v. DuBose,* 234 N.C. 446, 67 S.E. 2d 371, in opinion by *Devin, C. J.*, a case treating the subject of permanent partial disability, that "compensation must be based upon loss of wage earning power rather than the amount actually received" by the employee. And it is there stated that "it was intended by the statute to provide compensation only for loss of earning capacity." Therefore, in accordance with G.S. 97-30 plaintiff is entitled to receive after 9 January, 1956, the end of the healing period, a weekly compensation equal to sixty per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, as set forth in *Hill v. DuBose, supra.*

The record shows findings of fact: (1) that his average weekly wages at time of injury were $55.00; (2) that plaintiff reached end of healing period on 9 January, 1956; and (3) that he has 25 per cent permanent partial disability or incapacity for work resulting from the injury.

These cases cited and relied upon by appellee: *Dail v. Kellex Corp.,* 233 N.C. 446, 64 S.E. 2d 438; *Murray v. Nebel Knitting Co.,* 214 N.C. 437, 199 S.E. 609, and *Smith v. Swift & Co.,* 212 N.C. 608, 194 S.E. 106, are distinguishable in factual situation from case in hand.

As to contention of appellee, it is true that G.S. 97-80 provides that the Commission may make rules for carrying out the provisions of the Workmen's Compensation Act, but it is expressly provided that the power may not be exercised when the rule is inconsistent therewith. Here it is seen that Rule XVI is inconsistent with G.S. 97-30.

For reasons stated above the proceeding will be remanded to the North Carolina Industrial Commission to the end that award of compensation to plaintiff may be made in accordance with this opinion.

Error and remanded.

LEE SIDES AND LEE SIDES, ADMINISTRATRIX OF THE ESTATE OF JAMES D. SIDES, DECEASED, v. THE CITIZENS NATIONAL BANK AND GODFREY SIDES.

(Filed 9 October, 1957.)

1. Banks and Banking § 8—

Admission by a bank that a named depositor was the owner of monies deposited with it establishes the relation of debtor and creditor between the bank and the depositor, placing the burden upon the bank, in an action by the depositor's administratrix, to show that it had discharged its debt, or to show matter constituting a legal excuse for failure to do so.

2. Banks and Banking § 4: Estates § 16—

In an action by the administratrix of a depositor against the bank of deposit and the depositor's son to recover the amount deposited by intestate, the fact that plaintiff introduces the bank's ledger sheet captioned in the name of intestate and intestate's son, who claimed the funds, does not justify nonsuit in view of the bank's admission that intestate was the owner of the monies deposited, since if plaintiff is to be defeated defendants have the burden of showing how the debt was discharged.

APPEAL by plaintiff from *Rudisill, J.*, March 1957 Term of GASTON.

Plaintiff, as an individual and as administratrix, seeks to recover monies deposited with the defendant bank. James D. Sides died 4 July 1956, and plaintiff, his widow, qualified as administratrix of his estate. Defendant Godfrey Sides, son of the intestate by a former marriage, asserts ownership of the deposit. The parties waived a jury trial. When plaintiff rested, defendants moved for nonsuit. The motion was allowed and judgment entered accordingly. Plaintiff administratrix appealed.

Henry L. Kiser and Hugh W. Johnston for plaintiff appellant.

Whitener & Mitchem for appellee Godfrey Sides.

RODMAN, J. The judgment of nonsuit is an adjudication that the evidence, viewed in the light most favorable to plaintiff, is insufficient to support a favorable finding for the plaintiff on the issues raised by the pleadings. *Goldsboro v. R. R., ante,* 101.

Section 4 of the complaint in substance alleges: On 3 January 1952 plaintiff and her husband opened a joint savings account with defendant bank in the amount of $1,871.75. Subsequently $200 was deposited. No withdrawals were made except for a part of the interest which had accrued. The amount on deposit at the death of James D. Sides was $2,130.47.

Section 5 of the complaint alleges that plaintiff had made demand on the bank for the deposit but payment had been refused, "that the

reason for such refusal is that one of the employees of the Bank erased from the Account Record the signature and name of Mrs. James D. Sides and permitted the defendant, Godfrey Sides, to enter his name and signature on the account record."

Section 10 of the complaint alleges: "That the money deposited in said account was actually money which belonged to the said James D. Sides."

Defendant bank responded to these allegations of the complaint thus:

"4. Answering the allegations of the fourth paragraph, this defendant says and alleges that on or about January 3, 1952 James D. Sides opened up a savings account with this defendant, and since said date had made several deposits to said account, and that said account now approximates $2,130.47, and that at the request of James D. Sides a pass book was issued to James D. Sides and Mrs. James D. Sides."

"5. It is admitted that plaintiff has requested this defendant to be permitted to withdraw the entire balance of said account of James D. Sides, and that this request has been denied for the reason that the defendant, Godfrey Sides, contends that he is entitled to the remaining balance."

"10. That as this defendant is advised and believes, the allegations of the tenth paragraph are true."

Godfrey Sides, in his answer, admitted when James D. Sides died there was on deposit with defendant bank the sum of $2,130.47 in the name of "James D. Sides and/or Godfrey Sides." He alleges in his further answer that the funds were deposited by James D. Sides "pursuant to an agreement, based upon a valuable consideration, that the same should be a joint account with right of survivorship to the surviving of them."

Plaintiff offered in evidence sections 4, 5, and 10 of the complaint and the corresponding sections of the answer of the bank. Plaintiff also offered in evidence a duplicate deposit book issued by the bank 3 November 1952, account number 03949, for the account "James D. Sides, Route 1, Bessemer City, N. C." This book shows a balance on 11 July 1956 on deposit of $2,130.47. She also offered the bank's ledger sheet entitled at the top "James D. Sides or Godfrey Sides, Rt. 1, Bessemer City Duplicate book issued Nov. 3, 1952." This ledger sheet shows deposits and withdrawals beginning with a deposit of $200 on 27 December 1951 and terminating 29 March 1957, with a balance on 29 June 1956 of $2,130.47. The additions since June 1952 represent interest accrued. At the bottom of this ledger sheet is the statement: "My signature on this card opposite each withdrawal is an acknowledgment that the withdrawal and the extended balance are correct." Following this are the names "James D. Sides, Godfrey Sides." The only withdrawal supported by a signature is $27.19 on 30 March 1954, signed by

James D. Sides. The amounts and dates of the other debits would indicate they were payments of State intangible tax.

The admission by the bank that James D. Sides was the owner of the monies deposited established the relation of debtor and creditor between it and the depositor. *Bank v. Weaver,* 213 N.C. 767, 197 S.E. 551; *Williams v. Hood, Comr.,* 204 N.C. 140, 167 S.E. 574; *Woody v. Bank,* 194 N.C. 549, 140 S.E. 150. When the defendant bank admitted the deposit, the burden rested on it of showing it had discharged its debt. As said by *Walker, J.,* in *Churchwell v. Trust Co.,* 181 N.C. 21, 105 S.E. 889: "If the bank received the fund, and has not paid it to the depositor or to his representative, on demand, it is liable to plaintiff, unless in some way excused for the default, and the burden of showing this is upon it. If the other defendant claims the fund, he must show it. (citing authorities) 'A deposit should not be transferred from one account to another without ample authority, and what is sufficient authority is a question of fact (and law), which is to be answered whenever it arises.'" *Boney v. Bank,* 190 N.C. 863, 129 S.E. 583; *Bank v. Thompson,* 174 N.C. 349, 93 S.E. 849; *Yarborough v. Trust Co.,* 142 N.C. 377; *McQueen v. Bank,* 111 N.C. 509.

The fact that plaintiff introduced the ledger sheet captioned "James D. Sides or Godfrey Sides," when considered with the admissions in the answer, does not suffice to defeat the right of plaintiff administratrix. *Hall v. Hall,* 235 N.C. 711, 71 S.E. 2d 471; *Redmond v. Farthing,* 217 N.C. 678, 9 S.E. 2d 405; *Nannie v. Pollard,* 205 N.C. 362, 171 S.E. 341.

Plaintiff has shown facts sufficient to justify an affirmative finding that the monies on deposit belong to the estate of James D. Sides. If plaintiff is to be defeated, defendants have the burden of showing how the debt of the bank to James D. Sides was discharged.

Reversed.

WAYNE B. LOVE, EVERETT H. LOVE, AND ROY L. FURR, PARTNERS, TRADING AS LOVE LUMBER COMPANY, v. JOSEPH M. SNELLINGS AND WIFE, LURA J. SNELLINGS; J. HAROLD McKEITHEN, TRUSTEE; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; FRED A. BRUTON; DOGGETT LUMBER COMPANY, INCORPORATED; AND PAUL H. MOORE, TRADING AS MOORE SHEET METAL CO.

(Filed 9 October, 1957.)

1. Principal and Agent § 7a—

Evidence tending to show that the owners of a lot, husband and wife, authorized their contractor to purchase materials for building a house thereon, that the contractor purchased such materials from plaintiffs and that plaintiffs billed the contractor therefor, and that when the material

furnisher demanded payment from the owners, the husband promised to provide the contractor money to pay the materialman or to pay the materialman himself, *is held* sufficient to show liability of the owners to the materialman under the principle of agency.

2. Laborers' and Materialmen's Liens § 8—

In order for a subcontractor to enforce a lien against the owner he must notify the owner of his claim before settlement with the contractor, and the lien may not be enforced unless the owner has on hand funds owing to the contractor when he is notified of the claim.

APPEAL by plaintiffs from *Sharp, S. J.*, 16 April 1957 Special Term of MECKLENBURG.

Upon the conclusion of plaintiffs' evidence, defendants Snellings moved for judgment of nonsuit. The motion was allowed. Plaintiffs thereupon submitted to a voluntary nonsuit as to the defendant Bruton and appealed.

McDougle, Ervin, Horack & Snepp for plaintiff appellants.

J. Edward Stukes for defendant appellees.

RODMAN, J. The complaint alleges that defendants Snellings engaged defendant Bruton to construct a dwelling for them on lands therein described and thereafter the defendants Snellings and Bruton purchased lumber and building materials from plaintiffs for use in the construction of the dwelling. The purchases amounted to $2,551.64. They assert a lien on the property having priority over the lien of a deed of trust to defendant McKeithen securing the defendant Prudential Life Insurance Company. Defendants Lumber Company and Metal Company are alleged to be asserting liens for materials furnished in the construction of the dwelling.

Defendants Snellings admit they made a contract with defendant Bruton for the construction of a dwelling on their property. They aver the contract price was $11,500. They deny liability to plaintiffs in any sum, denying they ever purchased or plaintiffs ever furnished them with any building materials.

Bruton in his answer admits he was engaged by Snellings to construct a dwelling on their property. He admits that plaintiffs furnished the materials for that purpose but denies he is liable therefor, asserting that the materials were secured by defandants Snellings or their duly authorized agent.

Plaintiffs do not contend that the complaint was intended to assert a right of action under the provisions of Art. 2, c. 44, of the General Statutes.

Plaintiffs claim defendants Snellings are liable for goods purchased by their agent who had authority to purchase, or, if not authorized, his purchases made for Snellings' benefit were ratified by them. If the evidence is sufficient to permit the jury to find the facts as plaintiffs contend, the nonsuit was erroneously granted.

The contract between Bruton and Snellings is not in the record. It does not appear whether it was verbal or written.

The evidence for plaintiffs is sufficient for the jury to find: Bruton contracted as a "general contractor to build the Snellings' house." His agreement "with Mr. and Mrs. Snellings was that I was to build their house for cost, whatever their house cost." It cost $15,818.73 to construct the house. It would take $5,118 to settle the outstanding accounts, which sum represents the amount owing to material suppliers including the amount owing to plaintiffs. Defendants Snellings owe a balance of $5,118.73 under their contract for the construction of the house. Defendant Bruton does not assert any claim to the balance owing. This balance is owing to the material suppliers. Snellings discussed the materials that would go into their home with Bruton, consulting with him as to the exact materials wanted from plaintiffs.

Snellings authorized Bruton to exercise his judgment as to the best place to purchase. Pursuant to this authorization, building materials were ordered from plaintiffs. The materials ordered were charged and invoiced to J. M. Snellings. The first invoice is dated 16 December 1954. Snellings was billed for this early in January 1955. Deliveries were made and invoiced to J. M. Snellings as late as 26 February 1955. When called on for payment in January, Snellings told plaintiffs he wanted to check with Bruton to ascertain if the materials were used in the construction of his home. He promised plaintiffs to see that they got their money. Snellings told Bruton that he (Snellings) would provide Bruton with funds to pay the invoices or he (Snellings) would himself pay the invoices. Snellings has not provided Bruton with funds to pay nor has payment been made.

This evidence, if true, and we must accept it as such on a motion to nonsuit, is, we think, sufficient for a jury to find that Bruton was acting as agent for defendants Snellings in making the purchases or, if not so acting, Snellings had ratified the act of purchasing in the name of and for defendants Snellings. The jury may find that defendants Snellings still owe under the contract a sum sufficient to pay all of the unpaid material claims. If these facts are found by jury, plaintiffs are entitled to recover. *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114; *Construction Co. v. Holding Corporation*, 207 N.C. 1, 175 S.E. 843; *Lumber Co. v. Motor Co.*, 192 N.C. 377, 135 S.E. 115; *Starkweather v. Gravely*, 187 N.C. 526, 122 S.E. 297; *Hardware Co. v. Banking Co.*, 169 N.C. 744,

86 S.E. 706; *Metzger Bros. v. Whitehurst,* 147 N.C. 171; *Miller v. Lumber Co.,* 66 N.C. 503.

Where one seeks as a subcontractor to enforce a lien against the owner, he must of course notify the owner of his claim before settlement has been made with the contractor, and if the relationship is that of independent contractor and not that of principal and agent, the owner is not liable for the materials furnished unless he has on hand funds owing to the contractor when he is notified of the claim. *Pumps, Inc., v. Woolworth Co.,* 220 N.C. 499, 17 S.E. 2d 639.

Reversed.

CARL B. WORLEY AND WIFE, RENA WORLEY, v. CHAMPION MOTOR COMPANY, TYRUS H. ANDREWS AND WALTER CLARK, TRUSTEE.

(Filed 9 October, 1957.)

1. Trial § 19—

Whether the evidence is sufficient to be submitted to the jury is a question of law for the court.

2. Trial § 22b—

On motion to nonsuit evidence favorable to defendant is disregarded.

3. Trial § 22c—

On motion to nonsuit, all conflicts in the evidence are resolved in favor of plaintiffs.

4. Cancellation and Rescission of Instruments § 2—

Evidence that plaintiffs were induced to execute the note and deed of trust in question under duress by a threat of prosecution for embezzlement *held* sufficient to be submitted to the jury.

5. Cancellation and Rescission of Instruments § 10½—

In an action to cancel an instrument for duress there must be allegation, supporting evidence and a proper issue to support a charge on the effect of an agreement to compound a felony, and where the allegation and evidence do not embrace any agreement to forego prosecution but merely that plaintiffs were induced to execute the instruments in question by threat of prosecution of the male plaintiff for embezzlement, a charge on the effect of an agreement to compound a felony must be held prejudicial.

6. Trial § 31c—

It is error for the trial court to charge the jury as to matter not presented by allegation, supported by evidence and embraced in the issues.

APPEAL by defendant Champion Motor Company from *Froneberger, J.,* January, 1957 Term, HAYWOOD Superior Court.

Civil action (1) to restrain foreclosure sale under deed of trust executed by the plaintiffs to Walter Clark, Trustee, to secure the payment of a note for $7,488 to Champion Motor Company, and (2) to require the surrender and cancellation of the note and deed of trust upon the alleged ground their execution was procured by duress.

The plaintiffs alleged the Champion Motor Company employed Tyrus H. Andrews to "investigate the financial activities and records" of its employees "for the purpose of obtaining evidence of misappropriation or misapplication of funds by said employees, . . . and in the event such evidence was obtained, the defendant Andrews would thereupon, by means of threats of criminal prosecution, extort . . . money from said employees . . . to be divided between the defendant Andrews and the defendant Champion Motor Company."

"That the defendant Andrews began an investigation of the plaintiff Carl B. Worley's activities and operations, as manager of said parts department, and ascertained that over a period of some weeks, the plaintiff Carl B. Worley had, in the rush of business, inadvertently failed to complete sales invoices on some parts issued or sold by him, in the amount of approximately $29.00"; and that the plaintiff was not otherwise indebted to the corporate defendant.

That under threats of prosecution for embezzlement the plaintiff Carl B. Worley signed a statement admitting having failed to account for the sum of $29.00 received by him on recent sales of parts. After obtaining the signed statement the defendant Andrews and officers of the Champion Motor Company, by coercion and threats, caused the plaintiff Carl B. Worley to sign a statement admitting that during the preceding 12 years he had failed to account to his employer for an average of $12.00 per week received by him in the course of his employment. That he had not knowingly failed to account for any sum and was not indebted to his employer but, under threats of prosecution for embezzlement, he was coerced into execution of the paper admitting the shortage and also into the execution by himself and wife of the note and deed of trust for $7,488.

The defendants admitted the employment of Andrews to make a sales audit of the corporate defendant's business and that conferences were held with the plaintiff Carl B. Worley, as a result of which the note and deed of trust involved in this action were executed by the plaintiffs. All other material allegations were denied.

The plaintiffs introduced evidence tending to support their contentions as disclosed by their pleadings. At the close of the plaintiffs' evidence motions for nonsuit were duly made and overruled as to the corporate defendant and the trustee, but the motion was allowed as to the defendant Andrews. The defendants offered evidence tending to show that when confronted with the audit of his accounts the plaintiff Carl

B. Worley admitted he had failed to account for an estimated $12.00 per week for the past 12 years; that he agreed to make restitution and for that purpose both he and his wife executed the note and deed of trust without any coercion whatsoever.

The court submitted to the jury the following issue:

> "1. Were the deed of trust and note, described in the complaint, procured by the defendant Champion Motor Company by duress, as alleged in the complaint?"

The jury answered the issue in favor of the plaintiffs and from the judgment on the verdict, the Champion Motor Company appealed.

John M. Queen, Frank D. Ferguson, Jr., and Ward & Bennett for plaintiffs, appellees.

Morgan, Ward & Brown for defendants, appellants.

HIGGINS, J. The defendant's assignments of error present two questions: (1) Was the plaintiffs' evidence of duress, taken in the light most favorable to them, sufficient to go to the jury? (2) Did that portion of the court's charge specifically objected to constitute reversible error?

1. Whether evidence is sufficient to go to the jury is a question of law to be resolved by the court. In passing on that question the evidence favorable to the defendant is disregarded. All conflicts are resolved in favor of the plaintiffs. Viewed in this light, the plaintiffs' evidence was sufficient to survive the motion for nonsuit. The first question must be answered in the affirmative.

2. The court charged the jury:

> "Now it is necessary in this case that the court undertake to lay down to you certain principles of law which the court deems necessary for you to apply to the facts as you find them."
>
> *"That if any writing obtained by duress from one party to another, then such writing is void. If any writing or contract is made to prevent or forestall a prosecution of a felony, it would be void and of no effect, as being against public policy."*

Only that part of the charge in italics is the subject of an exceptive assignment. Nevertheless the preceding sentence serves to emphasize the harmful effect of that part of the charge to which the assignment is directed. The complaint does not allege, the evidence does not disclose, and the issue does not embrace any agreement to forego prosecution—to compound a felony. *Corbett v. Clute,* 137 N.C. 546, 50 S.E.

216; *Lindsay v. Smith*, 78 N.C. 328. In order to justify a charge on the effect of an agreement to compound a felony, three things were necessary: (1) Sufficient allegation. *Maddox v. Brown*, 232 N.C. 542, 61 S.E. 2d 613. (2) Evidence to support the allegation. *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558. (3) A proper issue. *Irvin v. R. R.*, 164 N.C. 5, 80 S.E. 78. All were lacking. ". . . a plaintiff cannot recover except on the cause of action set up in his complaint." *Cook v. Hobbs*, 237 N.C. 490, 75 S.E. 2d 322. "The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable." *Fish Co. v. Snowden*, 233 N.C. 269, 63 S.E. 2d 557. "The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, . . ." *S. v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921.

We conclude the trial court went beyond the complaint, the evidence, and the issue in its charge with respect to compounding a felony. For that reason the defendant is entitled to go before another jury.

New trial.

STATE v. JOHN HENRY GRIFFIN, JR.

(Filed 9 October, 1957.)

1. Criminal Law § 148—

A defendant may appeal when judgment is pronounced regardless of whether execution of the judgment is suspended or not, provided he does not consent to the conditions upon which judgment is suspended.

2. Same: Criminal Law § 135—

Where a defendant consents to the conditions upon which judgment is suspended, he waives or abandons his right of appeal and may not thereafter complain that his conviction was not in accord with due process of law, although he may thereafter contest the sufficiency of evidence to show breach of conditions or assert that the conditions of suspension were unreasonable.

3. Criminal Law § 135—

A court has power to suspend execution of a judgment for a period not in excess of five years. G.S. 15-200.

4. Same—

A court may continue prayer for judgment from one term to another with or without defendant's consent if no terms or conditions are imposed.

5. Same: Criminal Law § 148—

Where prayer for judgment is continued there is no judgment, and when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment, either by fine or

imprisonment, the order is in the nature of a final judgment precluding the court from thereafter imposing additional punishment, and defendant is entitled to appeal therefrom.

6. Criminal Law § 152—

The rule of Court requiring the evidence to be set out in the record in narrative form is mandatory, and when the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing on the face of the record proper. Rule of Practice in the Supreme Court No. 19(4).

APPEAL by defendant from *Moore (Dan K.), J.*, 7 January, 1957 "A" Criminal Term, MECKLENBURG Superior Court.

Criminal prosecution upon an indictment charging the defendant, the contractor, with willful failure to furnish D. R. Winchester, the owner, an itemized statement of the sums due for labor and materials used on the building before receiving from the owner any part of the contract price. The indictment was drawn under G.S. 44-12. The defendant entered a plea of not guilty. The evidence adduced at the trial is not contained in the record. At the close of the State's evidence the court denied the defendant's motion for a directed verdict of not guilty. Upon a verdict of guilty, the court pronounced the following: "The judgment of the court is that the prayer for judgment be continued upon the payment of a fine of $50.00 and the costs." The defendant appealed, assigning errors.

George B. Patton, Attorney General
Claude L. Love, Asst. Attorney General, for the State.
Carswell & Justice,
By: James F. Justice for defendant, appellant.

HIGGINS, J. In the Superior Court the defendant moved for a directed verdict of not guilty upon two grounds: (1) The evidence at the trial was insufficient to make out a case; and (2) G.S. 44-12, under which the indictment was drawn, is unconstitutional in that it violates Article I, Section 17, Constitution of North Carolina, and the 14th Amendment to the Constitution of the United States for assigned reasons. From an adverse ruling on both questions the defendant appealed.

In this Court the Attorney General moved (1) to remand the cause to the Superior Court of Mecklenburg County upon the ground that no final judgment had been entered in the Superior Court and that the appeal is premature; and (2) to dismiss the appeal for failure of the defendant to include the evidence in the case in narrative form as required by Rule 19(4), Rules of Practice in the Supreme Court, 221 N.C. 556.

The condition of the record requires, or at least makes it desirable, that we consider first the State's motions, and in the order in which they were made. If either is allowed, the questions raised by the defendant need not be decided.

The defendant's appeal presents the question whether the trial court entered a judgment in its nature final. *S. v. Baker,* 240 N.C. 140, 81 S.E. 2d 199; *S. v. Webb,* 209 N.C. 302, 183 S.E. 367.

After a conviction or plea (guilty or *nolo contendere*) the court has power: (1) To pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3) to continue prayer for judgment. When the judgment is pronounced and placed into execution the defendant has the right of appeal. Likewise, when the judgment is pronounced and its execution is stayed or suspended, "such disposition of the cause does not serve to delay or defeat the defendant's right of appeal." *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9. However, if the defendant consents to the conditions upon which judgment is suspended, he thereby waives or abandons his right of appeal. "He may not be heard thereafter to complain that his conviction was not in accord with due process of law." *S. v. Miller, supra; S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. Henderson,* 206 N.C. 830, 175 S.E. 201. He is not precluded thereafter, however, from contesting the sufficiency of the evidence to show a breach of conditions, *S. v. Johnson,* 169 N.C. 311, 84 S.E. 767; or, that the conditions were unreasonable, *S. v. Shepherd,* 187 N.C. 609, 122 S.E. 467.

The Superior Courts of North Carolina have the inherent power to exercise a certain measure of control over their judgments by designating the manner by which they shall be executed. ". . . the execution of every sentence of a court is under the control of the court . . ." *S. v. Manuel,* 20 N.C. 144. "The inherent power of a court having jurisdiction to suspend judgment or stay execution of sentence on conviction in a criminal case for a determinate period and for a reasonable length of time has been recognized and upheld in this jurisdiction." *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; G.S. 15-197 (citing cases). The time during which the execution of a sentence may be suspended may not exceed five years. G.S. 15-200.

In the event the court, after a conviction or plea, finds it desirable not to pass judgment immediately, it may continue the prayer for judgment from one term to another without the defendant's consent if no terms or conditions are imposed. *S. v. Graham,* 225 N.C. 217, 34 S.E. 2d 146. "It is sometimes found expedient, if not necessary, to continue a prayer for judgment and when no conditions are imposed, the judges of the Superior Court may exercise this power with or without the defendant's consent." *S. v. Graham, supra; S. v. Burgess,* 192 N.C. 668,

135 S.E. 771. There may be an exception in certain cases under the Probation Act, G.S. 15-197. However, in the case of *S. v. Jaynes*, 198 N.C. 728, 153 S.E. 410, this Court said: "Prayer for judgment may not be continued over the defendant's objection." In that case the prayer was continued upon the payment of a fine and costs. When the prayer for judgment is continued there is no judgment—only a motion or prayer by the prosecuting officer for judgment. And when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal. Punishment having been once inflicted, the court has exhausted its power and cannot thereafter impose additional punishment. *"Nemo debet bis puniri pro uno delicto"*—no one may be punished twice for one offense. *S. v. Warren*, 92 N.C. 825.

The Superior Court in the instant case announced it was entering judgment and proceeded to require the defendant to pay a fine and the costs. The court's statement, "the prayer be continued," is inconsistent with what the court said and with what the court did, and may be treated as surplusage. The court's order was in the nature of a final judgment inflicting punishment and from the judgment, the defendant had the right of appeal. The motion to remand is denied.

The motion to dismiss the appeal for failure on the part of the defendant to present a proper record must be allowed. *S. v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819; *S. v. Daniels*, 231 N.C. 17, 56 S.E. 2d 2. Rule 19(4) requires that the evidence in narrative form be set out in the record. Rules of Practice in the Supreme Court, 221 N.C. 556. For failure to comply with this rule the appeal will be dismissed in the absence of error appearing on the face of the record proper. *Laughinghouse v. Ins. Co.*, 239 N.C. 678, 80 S.E. 2d 457; *Rhoades v. Asheville*, 220 N.C. 443, 17 S.E. 2d 500; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126. Compliance with the rule is mandatory and may not be waived by the parties. *S. v. McNeill*, 239 N.C. 679, 80 S.E. 2d 680; *S. v. Powell*, 238 N.C. 550, 78 S.E. 2d 343. "The Court has not only found it necessary to adopt them (the Rules) but equally necessary to enforce them . . . uniformly." *Pruitt v. Wood, supra.* "According to our decisions . . . the appeal (will be) dismissed, as no error appears in the record proper." *S. v. McNeill, supra.*

Appeal dismissed.

HENRY B. HOOD v. QUEEN CITY COACH CO., A CORPORATION, AND ASHEVILLE UNION BUS STATION, INC., A CORP.

(Filed 9 October, 1957.)

Negligence § 16—Allegations held sufficient to state cause of action for concurring negligence of defendants.

Allegations that defendant bus station and defendant coach company jointly used, possessed and controlled a paved strip of land between their respective offices and invited their patrons and customers to use same, that plaintiff customer bought a ticket at the bus station and was proceeding on foot along the passageway when he fell into a hole along the edge of the passageway, and that defendants were negligent in failing to provide guard rails, signs or warnings, and adequate lights to enable patrons and invitees of defendants to use the passageway in safety, and that such negligence was the proximate cause of plaintiff's injuries, *held* sufficient to state a cause of action for actionable negligence on the part of defendants, and the coach company's demurrer thereto was improperly sustained.

APPEAL by plaintiff from *Phillips, J.*, at 22 July Civil Term, 1957, of BUNCOMBE.

Harkins, Van Winkle, Walton & Buck and Herbert L. Hyde for plaintiff, appellant.

Williams & Williams for defendant Asheville Union Bus Station, Inc., appellee.

JOHNSON, J. Civil action to recover damages for personal injuries alleged to have been caused by the joint negligence of the defendants. The defendant Queen City Coach Company filed answer. The defendant Asheville Union Bus Station, Inc., demurred to the amended complaint for failure to state facts sufficient to constitute a cause of action against it. The demurrer was sustained. The single question presented for decision is whether this ruling was correct.

These, in substance, are among the crucial facts alleged by the plaintiff: The defendant Queen City Coach Company was engaged in operating motor bus lines entering the City of Asheville. The defendant Asheville Union Bus Station, Inc., owned and operated a bus terminal in Asheville. The two defendants operated under a written agreement (copy of which is attached to the complaint) by which the Bus Station furnished the usual terminal facilities for the Coach Company.

The Coach Company occupied a building at the intersection of Interurban Place and Ashland Avenue adjacent to the bus terminal, and used it as a garage and office. A public alley lay between this garage building and the bus station. The defendants were in the joint use and possession of a paved strip of land along the western margin of the

public alley. The alley, together with the paved strip along its western margin and also other paved portions adjacent to the northern and eastern margins of the alley, were used by both the defendants as a passageway. The defendants in their joint use and control of the passageway invited their patrons and customers to travel over it for the purpose of conducting business with both defendants. The defendants, in the joint maintenance and control of the passageway, carelessly and without due regard for the safety of prospective patrons using the passageway, caused to be dug and left exposed alongside the western edge of the passageway an oblong hole about three feet deep and approximately ten feet long, "without guard rails and in such a manner as to create a highly dangerous walkway" for "customers and persons" going to and from the rear of the bus station.

On the night of 20 December, 1955, the plaintiff, a business patron of the defendants, having purchased from the Bus Station a ticket for the purpose of riding a Queen City bus from Asheville to Charlotte, was proceeding on foot along the western side of the passageway; that as he reached the upper end of the hole or pit, "he stepped carefully forward in anticipation of stepping upon a walkway, but due to the absence of a hand rail, or guard rail, and due to the exposed and unguarded condition of the said pitfall and trap, and due to the fault, neglect and failure of the defendants to warn the plaintiff of the dangerous condition of said passageway, . . . the plaintiff fell headlong into the said hole," and as a result sustained serious and permanent injuries.

The plaintiff then goes on to allege in separate paragraphs some 13 different phases of negligent conduct on the part of the defendants, as proximate causes of the injury. Among the phases of negligence so alleged are these: (a) failure to provide guard rails of any kind around the excavation; (b) failure to provide signs or warnings of the alleged dangerous condition created and maintained by the defendants; and (c) failure to provide adequate lights in the vicinity of the hole to enable patrons and invitees of the defendants to use the passageway with safety.

The foregoing allegations and others of supporting and amplifying nature, when taken as true and liberally construed in favor of the plaintiff, as is required on demurrer, state ultimate facts sufficient to show breach of common duties owed by both defendants to the plaintiff, proximately causing injury to him. This suffices to allege actionable negligence. 38 Am. Jur., Negligence, Sec. 257. See also *Bost v. Metcalfe*, 219 N.C. 607, mid. p. 610, 14 S.E. 2d 648, 650. The ruling of the court below in sustaining the demurrer must be held for error.

The decisions cited and relied on by the appellee, including *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193, are distinguishable.

The judgment below is
Reversed.

STATE v. DESMO WYNNE, BRYANT MORAN, E. C. BROWN, AND MARY HANSON.

(Filed 9 October, 1957.)

1. **Riot § 2—**

Evidence that a riot took place when a multitude gathered to prevent police officers from arresting one of defendants and that each of defendants were involved in the riot, *held* sufficient.

2. **Same: Criminal Law § 107—**

Where the law requires the participation of more than one person in order to make their acts criminal, the required number must be found among those described in the bill, and therefore where the indictment charges named persons with participation in a riot without enlarging the number by adding the words "and others," an instruction that each defendant would be guilty if the jury found beyond a reasonable doubt that he together with two or more other persons participated in the offense, must be held for error as permitting the jury to go outside the indictment to find the required number.

APPEAL by Desmo Wynne, Bryant Moran, and E. C. Brown from *Bone, J.*, June, 1957 Term, MARTIN Superior Court.

Criminal prosecution upon bill of indictment in which the three appellants and Mary Hanson were charged with having engaged in a riot in the town of Williamston. Mary Hanson entered a plea of guilty. The three appellants entered pleas of not guilty.

The State's evidence tended to show that five officers went to the home of Mary Hanson about eight o'clock at night on 3 May, 1957, to execute a search warrant for whisky. Mary was seen to pour a quart of whisky out of a coffeepot and the officers sought to place her under arrest. She resisted, fought the officers, and called for help. While the officers were subduing her and placing her in the police car, a crowd estimated at 50 to 100 gathered. Someone in the crowd shouted: "Get them, don't let them get away with it." An officer testified: "We left there with bottles hitting the automobile. Mr. Wiggins (one of the officers) got hit on the leg. The car got hit. The windshield was broken." . . . "Bottles were being thrown and a part of a stump and a rock. E. C. Brown was trying to get someone to keep us from taking her (Mary Hanson) away. He asked the crowd were they going to let us bring her away." The officers' car was so damaged as to require repainting.

The evidence for the State did not place either the appellant Wynne or the appellant Moran at Mary's house or in the crowd there. However, fifteen or twenty persons appeared at the courthouse where the officers had Mary in custody. Wynne and Moran were the leaders, doing most of the loud talking. "They were the ones out front. Wynne had a pop bottle and an open knife in his pocket."

Sheriff Rawls testified: "After we broke this up here (at the courthouse) we went back up (Hanson's house) and disbursed a crowd at the place they had gathered. E. C. Brown was at that place. I went through the crowd and talked to people I knew, asked them to break up and go home, and they did." There was testimony that the disturbance delayed the officers for about one-half hour in placing Mary Hanson in custody and that the whole disturbance continued for approximately one hour.

At the close of the State's evidence the defendants' motion for nonsuit was denied and they excepted. They then introduced evidence which, for the purpose of the motion, need not be repeated here. The court again denied the motion to nonsuit, to which the defendants excepted. They were convicted by the jury, and from the judgment imposed, they prosecuted this appeal.

George B. Patton, Attorney General
Harry W. McGalliard, Asst. Attorney General, for the State.
Robert D. Glass for defendants, appellants.

HIGGINS, J. The evidence was sufficient to permit the finding that a riot took place, and that the defendants were involved. *S. v. Hoffman*, 199 N.C. 328, 154 S.E. 314; *S. v. Davenport*, 156 N.C. 596, 72 S.E. 7; *S. v. Hughes*, 72 N.C. 25; S. v. Stalcup, 23 N.C. 30; 77 C.J.S. 426, sec. 5; 46 Am. Jur. 130, sec. 10.

The appellant Desmo Wynne's exception No. 5 challenges the following part of the court's charge: "If you find from the evidence in this case and beyond a reasonable doubt that Desmo Wynne assembled together with two or more other persons of his own authority and they all had an intent mutually to assist each other in taking Mary Hanson from the officers or preventing the officers from completing her arrest and placing her in jail, and after so assembling with the intent aforesaid they put their design into execution in a terrific and violent manner by throwing bottles or by other acts of overt violence, then you should return a verdict of guilty as to the defendant Desmo Wynne."

Moran took exception No. 6 to a similar charge as to him, and Brown took exception No. 7 to a like charge as to him. The three exceptions are brought forward and discussed under assignments of error Nos. 2, 3, 4, and 7. The assignments leave something to be desired in pin-

pointing the error. However, enough appears to present appellants' challenge to the court's instructions to the jury.

The bill of indictment charged that the three appellants and Mary Hanson committed the offense. Therefore, in order to convict any defendant, it was necessary for the State to prove that he participated with at least two of the three others charged. Nevertheless, the court instructed the jury it might convict any defendant if it be found he participated with *two or more other persons.* To have justified this instruction the indictment should have charged the named defendants *and others* committed the acts constituting the offense. When the law requires the participation of more than one person in order to make their acts criminal, the required number must be found among those described in the bill as participants. However, participants may be designated by name and the number enlarged by adding the words, "and others." *S. v. Raper,* 204 N.C. 503, 168 S.E. 831; *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291; *S. v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25. The court's instructions permitted the jury to go outside the indictment to find the required number.

It is impossible to tell whether the jury found each appellant engaged in a riotous assembly with as many as two of the other three named or whether he so engaged with any two or more of the assembled multitude. The charge permitted the jury to do either. For this error, the defendants are entitled to a

New trial.

STATE v. PAUL WILLIAMS, JR.

(Filed 9 October, 1957.)

Assault and Battery § 4—

Mistaken identity of the victim is not a defense to the crime of felonious assault.

APPEAL by defendant from *Pless, J.,* 29 July, 1957, Regular Criminal Term, of MECKLENBURG.

In separate bills, Richard Fisher and Paul Williams, Jr., appellant, were indicted for felonious assault as defined by G.S. 14-32 on J. B. "Red" Pressley; and Arthur Hunter was indicted for conspiring with Fisher and Williams to commit such assault. The three cases were consolidated for trial.

The only evidence was that offered by the State. It tended to show the facts summarized below.

Pressley lived in the house of George Keziah and was in the Keziah house when the incidents narrated below occurred.

Shortly before midnight, Fisher and Williams went to the Keziah house, but Keziah refused to let them in, basing his refusal on a prior shooting incident. Fisher told Keziah: "Let me go home and get my g—— d—— shotgun and I will blow my way in the house." Thereupon, Fisher and Williams left.

When they left the Keziah house, Fisher and Williams went to a nearby poolroom where they met Hunter. Hunter, who had a car, first took Fisher and Williams to "Bill Wick's house," where they tried to borrow a gun. Unable to borrow a gun from Wick, Hunter drove Fisher and Williams to Williams' house. Williams went into his house, got a single-barrel shotgun, and then came back and got in the car. When they passed Keziah's house, on their way back to the poolroom, Williams fired from the moving car into the Keziah house. Shot from this blast entered the house.

Leaving Hunter in the poolroom, Fisher and Williams went to a spot near the Keziah house from which they had a view of the back (screen) door. While Fisher and Williams stood there, between a parked car and a tree, two other persons came to the back door of the Keziah house. Pressley (not Keziah) went to the door and let them into the house; and, while Pressley stood in the house at the open door, Fisher raised the shotgun and shot him, causing Pressley to lose one eye and to suffer other serious injuries. Fisher and Williams then fled from the scene.

As to Fisher, the verdict was "guilty of FELONIOUS ASSAULT"; and the judgment pronounced was "that he be confined in the State Penitentiary at hard labor for not less than five (5) nor more than seven (7) years."

As to Williams, appellant, the verdict was "guilty of FELONIOUS ASSAULT ON THE BASIS OF AIDING AND ABETTING"; and the judgment pronounced was "that he be confined in the State Penitentiary at hard labor for not less than three (3) nor more than five (5) years."

As to Hunter, the verdict was "guilty of ASSAULT WITH A DEADLY WEAPON ON THE BASIS OF AIDING AND ABETTING, AND IN HIS CASE WE RECOMMEND LENIENCY." As to Hunter, the court continued prayer for judgment until the 30 September, 1957, Term of Criminal Court.

Williams excepted and appealed, assigning errors.

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

James B. Ledford and L. Glen Ledford for defendant, appellant.

PER CURIAM. As to Williams, sole appellant, there was ample evidence to support the verdict; and consideration of each of his eleven assignments of error fails to disclose any error of law deemed sufficiently prejudicial to justify the award of a new trial.

The applicable principles of law are well established. No restatement thereof is required, nor would it serve a useful purpose to analyze in greater detail the evidence tending to establish appellant's guilt.

While the evidence tends to show that the enmity of Fisher and Williams was directed primarily towards Keziah whom they knew and not against Pressley whom they did not know, mistaken identity of the victim is not a defense to the crime of felonious assault. *S. v. West,* 152 N.C. 832, 68 S.E. 14; *S. v. Heller,* 231 N.C. 67, 55 S.E. 2d 800.

No error.

STATE v. ROBERT P. ARTHUR.

(Filed 9 October, 1957.)

Criminal Law § 137: Judgments § 20—

Where, on motion to correct the minutes, the court finds upon supporting evidence that the minutes of the court were correct, its ruling denying the motion is not subject to review.

APPEAL by defendant from *Huskins, J.,* February Term 1957 of MECKLENBURG.

This case was here at the Fall Term 1956 (*S. v. Arthur,* 244 N.C. 582, 94 S.E. 2d 646). While the appeal was pending in this Court, the defendant moved in the court below to correct the minutes of the court, contending that the jury had not returned a verdict of guilty as set out in the minutes of the court, that the true facts are as reported by the Court Reporter. See *S. v. Arthur, supra,* where the contentions of the defendant are set out in full. The court below denied the motion on the ground that the case was pending in the Supreme Court. Upon appeal, we affirmed the ruling in an opinion reported in *S. v. Arthur,* 244 N.C. 586, 94 S.E. 2d 648.

A new trial was granted on the original appeal, and in connection therewith this Court said: "In granting a new trial, it is without prejudice to the 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."

Thereafter, the defendant moved to have the judgment originally entered stricken, and to have the minutes corrected to show that no verdict was rendered by the jury as to the guilt or innocence of the defendant but that the verdict actually rendered in the original trial was as follows: "Court: Lady and Gentlemen of the jury, have you agreed upon your verdict? Jury: We have. Court: Guilty? Jury: We'd like to recommend mercy."

The court below heard the testimony of nineteen witnesses bearing on the question involved, including the Court Reporter, several attorneys, the Assistant Solicitor, the Superior Court Judge who presided at the former trial, a Deputy Clerk of the Superior Court of Mecklenburg County, and eight members of the jury who sat in the original trial, the eight being all that could be located at the time of the hearing.

The court found as a fact that the minutes of the court, to the effect that a verdict of guilty with a recommendation of mercy was returned by the jury, were correct, and denied the motion to amend the minutes.

The defendant appeals, assigning error.

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

Llewellyn & Greene for defendant.

PER CURIAM. The record discloses that the findings of the court below are supported by competent evidence; hence, the challenged ruling is not subject to review, *S. v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339, and cited cases.

Affirmed.

GERTRUDE L. CHAMPION, WIDOW AND ADMINISTRATRIX; DARLENE CHAMPION, DAUGHTER; CARL CHAMPION, SON; BETTY JEAN CHAMPION THORNBURG, DAUGHTER; AND ARBRADELLA CHAMPION BELL, DAUGHTER; LYMAN E. CHAMPION, DECEASED, v. HARDIN-DIXON TRACTOR COMPANY (EMPLOYER) AND TEXTILE INSURANCE COMPANY (CARRIER), DEFENDANTS.

(Filed 9 October, 1957.)

Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence even though there be evidence that would support a finding to the contrary.

APPEAL by defendants from *Craven, Special J.,* at May 1957 Term, of CLEVELAND.

Proceeding under the North Carolina Workmen's Compensation Act to determine liability or non-liability of defendants to claimants for injury by accident resulting in death of Lyman E. Champion on 4 August, 1955.

The Deputy Commissioner, hearing the claim, upon stipulation of parties, and evidence offered by plaintiffs, made findings of fact, among others, that deceased employee sustained an injury by accident arising out of and in the course of his employment, which resulted in his death. In accordance with which the Deputy Commissioner made conclusions of law, and awarded compensation in favor of claimants. Defendants excepted thereto, and appealed to and applied for review by the Industrial Commission as a whole.

Upon such appeal and review the Commission adopted as its own the findings of fact and conclusions of law of the Deputy Commissioner, together with the award based thereon,—and affirmed his decision in all respects. Defendants excepted thereto and appealed to Superior Court, assigning error.

And upon hearing on such appeal, the presiding judge of Superior Court, being of opinion, after due deliberation, that in this proceeding (1) the findings of fact are supported by competent evidence before the Industrial Commission and are determinative of all questions at issue in the proceeding, and (2) justify the legal conclusions, decisions, and award of the Industrial Commission, and (3) that there is no merit to any of the fourteen exceptions made by defendant to the decision, opinion and award of the Full Commission, entered judgment overruling each exception so made, and affirming the award in all respects.

Defendants except thereto, and appeal to Supreme Court, and assign error.

Horn & West for Plaintiffs Appellees.

Kennedy, Covington, Lobdell & Hickman for Defendants Appellants.

PER CURIAM. When there is any competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary. *Watson v. Clay Co.*, 242 N.C. 763, 89 S.E. 2d 465, and cases there cited. Therefore in the light of the Commission's findings of fact, supported by competent evidence, the judgment from which this appeal is taken must be, and it is

Affirmed.

E. C. HELMS v. GENE LUTHER WEHUNT AND GOFORTH BROTHERS, INC., A CORPORATION.

(Filed 9 October, 1957.)

APPEAL by defendants from *Sharp, S. J.*, Special Civil Term 4 March 1957 of MECKLENBURG.

Civil action to recover damages for personal injuries and property damage sustained in a collision between an automobile and a truck.

The jury answered the issues of negligence, contributory negligence, and damages in plaintiff's favor.

From judgment on the verdict, defendants appeal.

Robert L. Scott and Charles T. Myers for Plaintiff, Appellee.

Kennedy, Covington, Lobdell & Hickman for Defendants, Appellants.

PER CURIAM. Defendants' only assignments of error are to the denial by the court below of their motions for judgment of nonsuit, except a formal one as to the judgment.

Defendants state in their brief, "it is not contended that there is no evidence of negligence on the part of the defendants to go to the jury." Defendants' contention is that the case should have been nonsuited on the ground that plaintiff was guilty of contributory negligence as a matter of law.

A study of plaintiff's evidence does not establish the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. Plaintiff has not proved himself out of court as a matter of law. *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19. The trial judge properly submitted the issue of contributory negligence to the triers of the facts.

No error.

JASPER STOKES AND WIFE, REBA STOKES; HATTIE C. STOKES; GLADYS STOKES McLAWHORN; LYMAN G. STOKES AND WIFE, MARY STOKES; BERNICE L. STOKES AND WIFE, EDNA EARL STOKES, AND ELEANOR JEAN OSTRANDER AND HUSBAND, ALFRED OSTRANDER,
v. EUGENE SMITH AND WIFE, RUTH W. SMITH; KIRBY SMITH AND WIFE, CLARA SMITH; RALPH SMITH AND WIFE, MARY A. L. SMITH; CORA BOB SMITH TURNAGE; LARRY W. SMITH, JR., AND WIFE, DARLENE SMITH, AND DOROTHY W. SMITH AND ROY TURNAGE, JR.

BLANEY McLAWHORN MOORE, JENNIE NICHOLS, DOROTHY CAYTON, NINA DEAVER, BEN McLAWHORN, ED McLAWHORN, AND EUGENE McLAWHORN, INTERVENORS.

(Filed 16 October, 1957.)

1. Appeal and Error §§ 28, 37—

Where plaintiff appellants have served no case on appeal, filed no assignments of error and no brief or appeal bond, appellee's motion to dismiss the appeal will be allowed.

2. Husband and Wife § 12c—Conveyance by husband and wife to third person and reconveyance to husband do not establish as matter of law attempt to circumvent G.S. 52-12.

The mere fact that husband and wife conveyed her land to a third person, without the examination of the wife, and that such third person, on the following day, conveyed the land to the husband for the same recited consideration, is insufficient to establish conclusively that the conveyances were for the purpose of transferring the wife's title to the husband without complying with G.S. 52-12, but whether the conveyances were executed to accomplish an illegal purpose should be established by verdict of jury or finding of the court, and where the parties stipulate the facts without stipulating that the transaction was not *bona fide* for a proper purpose, the husband acquires title.

3. Same—

Where a deed purports to be from husband and wife to a third party, the burden is upon the party asserting it to prove that the conveyance was made to such third party, who reconveyed to the husband, for the purpose of circumventing G.S. 52-12.

4. Homestead § 4a—

Sales under execution to provide funds to pay a debt, and sales under judicial decree for such purpose, are void unless the debtor's homestead is laid off in accordance with mandatory provision of statute. G.S. 1-371, 372, 375, 376, 379, 386.

5. Same—

Land allotted as the homestead is exempt from levy or sale under execution during existence of the homestead right.

6. Homestead § 7—

To make a valid conveyance of allotted homestead, the wife of the homesteader must join in the conveyance.

7. Same—

Land allotted as the debtor's homestead is not subject to sale under judicial process so long as it is owned, occupied or beneficially enjoyed by the homesteader.

8. Same—

A mortgage of allotted homestead is not such sale as to subject the land to sale under execution.

9. Same—

When the homesteader voluntarily parts with his legal title and the right to use, occupy and enjoy his allotted homestead, he has no right to prohibit the sale of that land under judicial process, though he may convey it subject to any reservations, exceptions or conditions which he deems advisable.

10. Same: Bankruptcy § 2—

Since the judgment debtor has the right to sell the land allotted to him as a homestead subject to his right to use and occupy it as a homestead, it is property which a trustee in bankruptcy may, but does not have to, take into possession and administer.

11. Same—

The term "homestead rights" has different meanings when applied to different factual situations: homestead rights are protected from the force of judicial process; but the homesteader may voluntarily dispose of property allotted as his homestead for the purpose of satisfying his debts, in which case he is presumed to have exercised his full powers of disposal and to have retained only the right of occupancy for the period prescribed by the Constitution.

12. Appeal and Error §§ 49, 55—

Where facts stipulated by the parties are insufficient to determine the law applicable to the case, the cause must be remanded.

APPEAL by plaintiffs and intervenors from *Burgwyn, E. J.,* 27 May, 1957 Term of PITT.

Plaintiffs brought this action to recover possession and to be adjudged the owners of a parcel of land in Pitt County containing five acres allotted to Ed McLawhorn as his homestead.

Defendants other than Darlene Smith answered. They admitted possession of the land, denied plaintiff's ownership, and for a further defense and by way of affirmative relief asserted their ownership under a chain of title set out in the further answer. They pray that they be adjudged the owners of the land.

Thereafter Ben McLawhorn, Blaney McLawhorn Moore, Ed McLawhorn, Jr., and Eugene McLawhorn sought and were granted permission to intervene and assert their right to the land in controversy. They filed pleadings alleging ownership of the land and damages for the alleged wrongful possession.

Thereafter Nina Deaver, Dorothy Cayton, and Jennie Marie Nichols sought and were granted permission to intervene and assert their title to the land in controversy. They filed a pleading alleging ownership and damages for the asserted wrongful detention.

Plaintiffs and defendants answered the pleas of the intervenors. They denied the claims made by the intervenors.

The parties waived a jury trial and stipulated the facts which may be summarized as follows:

(1) Plaintiffs are the widow and heirs of B. F. Stokes or the husbands or wives of said heirs.

(2) Answering defendants are the heirs of R. W. Smith and wife, Cora Smith, or the husbands or wives of said heirs.

(3) Nina Deaver, Dorothy Cayton, and Jennie Marie Nichols are the only children of Ed McLawhorn and his first wife, Mary Jones McLawhorn. Both parents are deceased.

(4) Ben McLawhorn, Ed McLawhorn, Jr., Eugene McLawhorn, and Blaney McLawhorn Moore are the only children of Ed McLawhorn, deceased, and his second wife, Annie McLawhorn.

(5) The land in controversy is part of a large tract inherited by Mary Jones McLawhorn, first wife of Ed McLawhorn, from her father, Ben A. Jones.

"SIXTH: That by instrument of record in Book J-9, page 529, Pitt County Registry, dated 6 April, 1909, Mary McLawhorn, wife of Eddie McLawhorn, executed and delivered to said Eddie McLawhorn a purported deed of conveyance embracing a tract of land which included the five acres in controversy, reserving 'my life estate and that of any of our living issue that may be born to us.'

"Said deed herein referred to was void for lack of acknowledgment and probate as prescribed by law and required by NC GS 52-12.

"SEVENTH: That by instrument of record in Book G-10, page 71, Pitt County Registry, dated 4 October, 1912, recorded 5 October, 1912, at 9:00 A.M., Eddie McLawhorn and wife, Mary A. McLawhorn, (also known as Mary Jones McLawhorn) purportedly conveyed to Exum Dail the same tract of land described and referred to in paragraph 6 above, for a recited consideration of $100. The certifying officer did not certify his findings and conclusion under NC GS 52-12.

"EIGHTH: That by deed of record in Book G-10, page 63, Pitt County Registry, dated 5 October, 1912, recorded at 9:00 A.M. October 11, 1912, Exum Dail and wife, Maud Dail, reconveyed said lands

described in paragraphs 6 and 7 above to Eddie McLawhorn for a recited consideration of $100.00."

(9) In actions entitled "Ed McLawhorn and others *v.* J. H. Byrum" and "Bank of Ayden *v.* Ed McLawhorn," commissioners were appointed by the Superior Court of Pitt County and directed to sell a described tract of land "containing 62½ acres, more or less, and known as part of the B. A. Jones land, save and excepting that certain 12 acres of said land described in a certain mortgage from Ed McLawhorn to J. H. Byrum, and subject to the homestead rights of the said Ed McLawhorn."

(10) The commissioners made the sale in October 1926 as directed by the court "subject only to the homestead rights of the said Ed McLawhorn."

(11) Prior to the sale "the homestead of the said Ed McLawhorn was laid off as provided by law and as appears in Judgment Docket #29 at page 247, said homestead being described as follows:" Then follows a description by metes and bounds of the land in controversy.

(12) The commissioners executed a deed to R. W. Smith. It describes a tract of land, reciting it contains 62½ acres, and concludes: ". . . saving and excepting that certain 12 acres of said land described in a certain mortgage from Ed McLawhorn to J. H. Byrum and subject to the homestead rights of said Ed McLawhorn."

(13) R. W. Smith, the purchaser, took possession of the whole tract "except that part thereof which was set apart as a homestead to the said Ed McLawhorn."

R. W. Smith and wife conveyed the property purchased from the commissioners to B. F. Stokes. The Smith deed contains a description identical with the description in the deed from the commissioners to him, and his deed refers to the commissioners' deed. In 1936 Stokes and wife reconveyed to R. W. Smith and wife. The description, after listing the adjoining landowners, proceeds: ". . . saving and excepting from this conveyance the homestead as set apart and allotted to Ed McLawhorn as will appear by reference to Judgment Docket No. 29, Case No. 898, and being the identical land deeded to B. F. Stokes by R. W. Smith and wife, upon which the said B. F. Stokes now resides." Upon the execution of this deed, Smith and wife went into possession of all the land except the area set apart as the homestead.

Ed McLawhorn died 11 July 1930. His youngest child became 21 on 19 June 1951. After June 1951 plaintiffs took possession of the area allotted as the homestead. They were evicted by defendants.

Upon the stipulated facts the court adjudged that the defendants, heirs of R. W. Smith, were the owners of the five acres which had been allotted as the homestead of Ed McLawhorn. Plaintiffs and intervenors excepted and gave notice of appeal.

R. B. Lee for Intervenors Blaney McLawhorn Moore, Ben McLawhorn, Ed McLawhorn (Jr.), and Eugene McLawhorn, appellants.

L. W. Gaylord, Sr., L. W. Gaylord, Jr., and M. E. Cavendish for Intervenors Nina Deaver, Dorothy Cayton, and Jennie Marie Nichols, appellants.

Albion Dunn for defendant appellees.

RODMAN, J. Plaintiffs have served no case on appeal, have filed no assignments of error, and have filed no brief or appeal bond. Defendants' motion to dismiss plaintiff's appeal is allowed.

The children of Mary Jones McLawhorn contend that the facts stipulated establish as a matter of law that Exum Dail was a mere conduit to pass the title of Mrs. McLawhorn's property to her husband, and since the deed from Mrs. McLawhorn and husband to Dail was not probated as required for a valid conveyance from wife to husband (G.S. 52-12), he acquired no title to the property, but upon her death was a tenant by courtesy consummate. Grant the soundness of the premise, and the conclusion follows. *Pilkington v. West, ante,* p. 575; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624. But the facts stipulated do not support the premise. Whether Dail was a *bona fide* purchaser or a strawman was a question of fact. The burden rests upon those asserting the invalidity of the deed to establish that it is not in fact what it purports to be. *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511. The mere fact that on the following day the property was conveyed to the husband and the consideration recited in each deed was the same is not sufficient to conclusively establish that Dail was a mere means to accomplish an illegal purpose. Intervenors had a right to insist on findings of fact by a jury or by the court, but here they have stipulated the facts. It is not stipulated as a fact that the transaction was not *bona fide* and for a proper purpose. We attach no importance to the use of the word "reconvey" in connection with the conveyance from Dail to McLawhorn. The parties did not, on the oral argument or by brief, suggest it meant more than a transmission of a title from Dail to Ed McLawhorn.

Having concluded that title was vested in Ed McLawhorn, we are called upon to determine, if we can from the stipulated facts, the meaning and effect of the phrase "subject to the homestead rights of the said Ed McLawhorn" used in the decree appointing commissioners and in the deed from the commissioners to Smith for the McLawhorn property.

The facts stipulated do not disclose all of the parties or the character or purpose of the actions in which the commissioners were appointed and the order of sale was made. Was Mrs. McLawhorn a party? Were the commissioners appointed to consummate a voluntary disposi-

tion of the land by Ed McLawhorn? If so, was his wife a party to the conveyance? Were the actions in which the decree was entered merely for the purpose of declaring a debt and a lien on McLawhorn's property against which he could assert his homestead exemption and a postponement of the sale of the land allotted as his homestead until the termination of that right?

Defendants strenuously insist that the question has been definitely settled by *Joyner v. Sugg,* 132 N.C. 580; *Davenport v. Fleming,* 154 N.C. 291, 70 S.E. 472; *Kirkwood v. Peden,* 173 N.C. 460, 92 S.E. 264; and *Hicks v. Wooten,* 175 N.C. 597, 96 S.E. 107. Each of those cases dealt with voluntary conveyances made by the property owner and the scope and effect of language used by the grantor. It is not here stipulated that the decree under which the sale was made was entered to consummate and give effect to a voluntary conveyance made by the property owner; and because the facts stipulated do not establish the controlling effect of those cases, we deem it necessary to point out what we think are now well-established principles relating to the homestead.

Statutory provision was made for the exemption from sale under execution of certain kinds of property of an impoverished debtor as early as 1773. Rev. Stat. 1837, c. 45, s. 7; Rev. Code 1854, c. 45, s. 7, 8, 9, 10. It was not until the adoption of the Constitution in 1868 that we wrote into our organic law the right of a judgment debtor to claim as exempt from sale under execution both real and personal property. These constitutional provisions and the statutes enacted to give effect thereto have in the past been fruitful sources of litigation.

The Legislature in 1869 enacted a statute requiring the allotment of the homestead before a levy under execution. c. 137, P.L. 1869. Portions of that Act now appear as G.S. 1-371, 372, 375, 376, 379, and 386. The statute, by express language, commands the sheriff to lay off a homestead to the judgment debtor before any levy is made. The provisions of the statute are mandatory. Sales made under execution merely for the purpose of providing funds to pay a debt are, when the homestead of the judgment debtor has not been allotted, void. *Poe v. Hardie,* 65 N.C. 447; *Taylor v. Rhyne,* 65 N.C. 530; *Waters v. Stubbs,* 75 N.C. 28; *Mebane v. Layton,* 89 N.C. 396; *McCracken v. Adler,* 98 N.C. 400; *Morrison v. Watson,* 101 N.C. 332; *Mobley v. Griffin,* 104 N.C. 112; *Ferguson v. Wright,* 113 N.C. 537; *Williams v. Johnson,* 230 N.C. 338, 53 S.E. 2d 277.

A sale of decedent's land by judicial decree for the purpose of making assets to pay his debts is not within the letter of the statute but is clearly within the spirit of the law. Hence it has been consistently held that a homestead, where the right exists, must be allotted before lands of the decedent can be sold to pay his debts. *Trust Co. v. McDearman,*

213 N.C. 141, 195 S.E. 531; *Fulp v. Brown,* 153 N.C. 531, 69 S.E. 612; *Shields v. Allen,* 77 N.C. 375; *Hinsdale v. Williams,* 75 N.C. 430.

The constitutional right of a debtor to a homestead and the statutory right to have it allotted before levy and sale were not controversial. But when the allotment was made, what should the sheriff sell? Should he sell the entire tract subject only to the right of the judgment debtor to use and occupy the allotted area for his life and the life of his widow or the minority of his children or should the officer exclude from the sale the entire area allotted as a homestead and sell only the remaining land, if any, of the judgment debtor? The Legislature in 1870 provided the answer. It enacted: "It shall not be lawful to levy or sell under execution for any debt the reversionary interest in any land included in a homestead until after the termination of the homestead interest itself: *Provided,* that the statute of limitations shall not run against any debt owing by the holder of the homestead affected by this section, during the existence of his interest in the homestead." c. 121, s. 1, Laws 1869-70 (Battle's Rev. 1873, c. 55, s. 26).

As early as 1871 the Court said: "Only the interest of a debtor in land in excess of the homestead can be levied upon and sold; and this excess must be ascertained by appraisers properly appointed." *Taylor v. Rhyne, supra.* It explained the reason for the legislation, saying: "That act (c. 121, Laws 1870) was intended to protect the owner of a homestead by the purchaser against any vexatious litigation which might be instituted by the purchaser of a reversionary interest. Such interest, if sold, would yield but little to an execution creditor in satisfaction of his debt, and in nine cases out of ten would be purchased by speculators." *Poe v. Hardie, supra.* In this connection it was said in *Kirkwood v. Peden, supra:* "The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead." As noted in *Mebane v. Layton, supra,* s. 1 of the Act of 1870 was not brought forward in the Code of 1883. The reason for the omission is not clear.

Divergent views are expressed in the older cases with respect to the basis for the exemption from levy and sale, during the existence of the homestead right, of the lands allotted as a homestead. Some of the cases predicate this exemption on the statute; others predicate the right on the Constitution itself. No matter what the basis for the exemption, the cases are in agreement that the land allotted as the homestead is exempt from levy and sale under execution during the existence of the homestead right. *Lambert v. Kinnery,* 74 N.C. 348; *Hinsdale v. Williams, supra; Gheen v. Summey,* 80 N.C. 187; *Mebane v. Layton, supra; Markham v. Hicks,* 90 N.C. 204; *Vanstory v. Thornton,* 112 N.C. 196.

Fulp v. Brown, supra; Crouch v. Crouch, 160 N.C. 447, 76 S.E. 482; *Brown v. Harding,* 171 N.C. 686, 89 S.E. 222; *Cheek v. Walden,* 195 N.C. 752, 143 S.E. 465; *Miller v. Little,* 212 N.C. 612, 194 S.E. 92; *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567; *Sample v. Jackson,* 225 N.C. 380, 35 S.E. 2d 236.

Though there was agreement on this aspect of the law relating to homestead, from the time of the adoption of the Constitution until after the turn of the century, sharp disagreement often existed among members of the Court in respect to an interpretation of s. 8 of Art. X of the Constitution, providing: ". . . no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife." Did that section require the signature of the wife, when no homestead had been allotted, in order that the husband could validly convey it? During the same period, members of the Court often expressed equally divergent views on the question of the right of a debtor to assert exemption from levy and sale pursuant thereto of a tract of land which he had voluntarily conveyed. Did the right which a judgment debtor grantor had to claim homestead in a particular tract of land follow the land and inure to the benefit of the grantee during the life of the debtor grantor and the minority of the children? If so, was the debtor grantor entitled also to claim his homestead in other lands which he had not sold?

Adrian v. Shaw, 82 N.C. 474, decided at the Spring Term 1880, held that a judgment debtor was, by the Constitution, entitled to a homestead; and when a sale of his property was made without allotting his homestead the sale was void and the purchaser acquired no title to the land even though the judgment debtor had subsequently sold the land. *Ashe, J.,* speaking for a unanimous Court, said: "It may be that the owner of a homestead who leaves the State and changes his domicile should be considered as having abandoned his homestead. But the law, when it authorizes one to sell his homestead, would be untrue to itself and the obligations of justice if it were to allow the owner to sell it, receive a full and fair price, and then leave it subject, in the hands of his vendee, to the satisfaction of his debts. We cannot believe that to be the law."

The reasoning and conclusion reached in *Adrian v. Shaw, supra,* was adopted in a number of subsequent cases. Illustrative: *Simpson v. Houston,* 97 N.C. 344; *Vanstory v. Thornton, supra* (*Clark, J.,* later *C. J.,* dissented); *Gardner v. Batts,* 114 N.C. 496 (again *Clark, J.,* dissented); *Stern v. Lee,* 115 N.C. 426 (*Clark* and *McRae* dissented); *Brown v. Harding, supra.* (This case, though decided in 1916, applied the law as the Court interpreted it, to transactions occurring prior to 1905.)

In *Fleming v. Graham,* 110 N.C. 374, the Court held that where a judgment debtor made a valid conveyance of his land, it was a waiver of his right to have his homestead assigned in that land. There was no dissent in that case.

The divergent views of the members of the Court were brought sharply into focus in *Thomas v. Fulford,* 117 N.C. 667, where each of the five members of the Court filed an opinion. The problem created by the divergent views expressed in *Thomas v. Fulford, supra,* was emphasized when *Joyner v. Sugg,* 131 N.C. 324, was decided at the Fall Term 1902. Again five separate opinions were filed. No common ground could be found on which a majority could stand. The case revolved around the right of a property owner in debt to convey his land without the joinder of his wife and the estate and property acquired at a foreclosure sale when the conveyance was made "subject to the reserved homestead right" of the mortgagor. A majority of the Court reached the conclusion that a conveyance by one in debt without the joinder of his wife and without the allotment of the homestead was void as to such portion of the land as represented the value of the homestead, to wit, $1,000.

The membership of the Court changed with the election in 1902. A petition to rehear was filed, granted, and opinion rendered by three judges reversing the conclusion reached on the former hearing. *Douglas, J.,* filed a dissenting opinion. *Connor, J.,* having been of counsel, did not sit. This opinion was filed in May after the Legislature had adjourned. *Walker, J.,* speaking for the Court, said: "If it was intended by the framers of the Constitution that all of the interest of the owner in the homestead land should be exempted from sale, it was not necessary to pass the act of 1869-'70, as the Constitution sufficiently protected it.

"It was only upon the supposition that there was an interest in the exempted land which was left exposed to sale that made it necessary to pass the said act. That statute was remedial in its nature. The old law was the Constitution, which declared that a certain part of the land should be set apart and to it be attached a right or privilege of exemption only, thereby rendering it liable to sale, subject to that exemption. The mischief was that sales under execution had been and were then being made, which were recognized as valid by the courts and which were considered as injurious to the homesteader; and to remedy this evil, the statute was enacted."

The Legislature met in January 1905 with this confused and apparently unstable state of law relating to homesteads confronting it. Manifestly, legislation was necessary. On 16 January 1905, S.B. 116 was introduced to amend s. 505 of the Code of 1883 which now appears as G.S. 1-375. That bill, with an amendment inserted in the House to

the effect that it should not have retroactive effect, became the law on 6 February 1905. It now appears as G.S. 1-370. If one is to read the amendment intelligently, he should read first G.S. 1-371, then 375, and then 370; and when so read and compared with the Act of 1870, it is manifest that the Legislature intended to provide: (1) It is mandatory that the homestead be allotted before proceeding with a sale of the judgment debtor's lands to satisfy his debts by judicial process. This is demonstrated by *Williams v. Johnson, supra; Trust Co. v. McDearman, supra,* and other cases cited. (2) To make a valid conveyance of the allotted homestead, the wife of the homesteader must join in the conveyance. *Dalrymple v. Cole,* 170 N.C. 102, 86 S.E. 988, and cases cited; *Hall v. Dixon,* 174 N.C. 319, 93 S.E. 837; *Cheek v. Walden, supra.* (3) The land so allotted is not subject to sale under judicial process so long as owned, occupied, or beneficially enjoyed by the homesteader. *Assurance Society v. Russos,* 210 N.C. 121, 185 S.E. 632; *Watters v. Hedgpeth,* 172 N.C. 310, 90 S.E. 314; *Williams v. Johnson, supra.* (4) A mortgage of the allotted homestead is not such sale as subjects it to sale under execution. *Cleve v. Adams, supra.* (5) When the owner voluntarily parts with his legal title and the right to use, occupy, and enjoy a particular tract of land which has been allotted as his homestead, he has no right to prohibit the sale of that land under the judicial process, *Sash Co. v. Parker,* 153 N.C. 130, 69 S.E. 1; *Rose v. Bryan,* 157 N.C. 173, 72 S.E. 960; *Duplin County v. Harrell,* 195 N.C. 445, 142 S.E. 481; *Land Bank v. Bland,* 231 N.C. 26, 56 S.E. 2d 30, thus overruling *Adrian v. Shaw, supra,* and that line of cases. He may convey subject to any reservations, exceptions, or conditions which he deems advisable, and when so made in his deed, the provisions therein contained will be interpreted as they would in any other deed. (6) Since the judgment debtor has a right to sell the land allotted to him as a homestead, subject to his right to use and occupy it as a homestead, it is property which the trustee in bankruptcy may, but does not have to, take into possession and administer. 11 U.S.C.A. 110; *Murray v. Hazell,* 99 N.C. 168; *Williams v. Scott,* 122 N.C. 545; *Watters v. Hedgpeth, supra; Patrick v. Beatty,* 202 N.C. 454, 163 S.E. 572; *Sample v. Jackson, supra.*

"The same words or those nearly similar, used under different circumstances and contexts, may express different intentions." *Coffield v. Peele, ante,* p. 661.

We think the term "homestead rights" has different meanings when applied to different factual situations. One situation requires the ascertainment of the rights which can be claimed against judicial process; the other, the ascertainment of what a party retains when he voluntarily conveys his property.

When a judgment creditor uses the force of judicial process to collect the obligation owing to him, his debtor has a right to have a portion of his land allotted for his use and occupancy. Coupled with and as an incident to this right to use and occupy is the right provided by the statute to postpone the sale of the area so allotted until the right of occupancy has terminated. These are the homestead rights protected against the force of judicial process. A judicial sale subject to these rights passes no title to the allotted land. *Barrett v. Richardson,* 76 N.C. 429. Sound reason exists for the exclusion. *Poe v. Hardie, supra.*

On the other hand, when a property owner voluntarily disposes of his property for the purpose of satisfying his debts and subject to his homestead right, he is presumed to have exercised his full power of disposal and to have retained only the right of occupancy for the period prescribed by the Constitution. No question is presented of any violation of his legal rights. *Joyner v. Sugg, supra; Davenport v. Fleming, supra; Kirkwood v. Peden, supra; Hicks v. Wooten, supra;* involve the construction of voluntary conveyances.

The facts stipulated are insufficient to determine the law applicable to the case. Hence a remand is necessary for proper development of the facts. *Guilford College v. Guilford County,* 219 N.C. 347, 13 S.E. 2d 622.

The appeal of plaintiffs is

Dismissed.

As to the intervenors, the cause is

Remanded.

ALICE C. DEAN v. HOME BENEFICIAL LIFE INSURANCE COMPANY.

(Filed 16 October, 1957.)

1. Insurance § 30f—

The beneficiary's introduction in evidence of insured's application for reinstatement, containing a signed statement that he was in good health, etc., together with testimony of insurer's agents, one that he saw insured sign the application and recommended him as a first class risk and the other that he wrote "O.K." on the application, is sufficient to make out a *prima facie* showing of good health and does not establish as a matter of law, so as to justify nonsuit, insurer's affirmative defense of misrepresentation of health.

2. Trial § 22a—

On motion to nonsuit, the evidence must be interpreted in the light most favorable to plaintiff, giving her the benefit of every legitimate inference that may be drawn therefrom.

3. Trial § 22c—

On motion to nonsuit, conflicts in the evidence must be resolved in plaintiff's favor.

4. Insurance § 30f—

Plaintiff beneficiary's evidence tended to show that applications for reinstatement were acted on by insurer within a ten day period and that if an application were rejected a rejection slip was sent to the field agent within that time, that insured died ten days after signing application for reinstatement, which application was received by insurer in due course, and that proof of death forms were given the beneficiary by the field agent some eighteen days after the application was made, together with other evidence in the case, *is held* sufficient to justify the inference that the application for reinstatement had been approved at the home office of insurer prior to the death of insured.

APPEAL by plaintiff from *Rudisill, J.*, at February Term, 1957, of GASTON.

Ernest R. Warren and Hugh W. Johnston for plaintiff, appellant.
Porter B. Byrum for defendant, appellee.

JOHNSON, J. Civil action on policy of life insurance. The court below allowed the defendant's motion for nonsuit at the close of the plaintiff's evidence. The appeal tests the correctness of this ruling.

It is admitted that the policy sued on was duly issued by the defendant, insuring the life of Gordon C. Dean in the amount of $500, and that his wife, the plaintiff herein, was the beneficiary. It is further admitted that the policy lapsed for nonpayment of premiums at the end of the thirty-day grace period on or about 23 May, 1956.

On 14 June, 1956, the insured signed application for reinstatement of the policy. The application was made on a written form furnished by the insurance company and filled out by its agent, S. L. Ferrell. The insured paid agent Ferrell all past due premiums and also future premiums for two weeks, up to 2 July, 1956. The premium receipt issued by agent Ferrell recites that the premiums were received without obligation on the part of the insurance company until the reinstatement application "is received and approved by the Company at its Home Office," and further that if the "application is rejected, this deposit will be returned . . ."

The insured died 24 June, 1956, before receiving notice whether the company at its home office had approved or rejected the application.

The widow, beneficiary, brings this action, alleging that the application had been approved and that the policy was in force at the time of the death of her husband. The defendant denies that the application was approved and contends that it was rejected.

Decision turns on whether the plaintiff's evidence was sufficient to carry the case to the jury on the question of reinstatement.

The crucial phases of the evidence may be summarized as follows: The application for reinstatement was made on a form card. The card contains numerous blank spaces printed on each side. The blank spaces contain in small print requests for factual information respecting the lapsed policy, *e.g.*, number, date, and type of the policy; name, age, and address of the insured; questions concerning the health of the insured; date of lapse, etc. The application card also contains this statement, printed in bold type on its face:

> "The above described policy having lapsed, application is hereby made for revival of same. To induce the company to revive the policy the undersigned does hereby represent and declare that the person heretofore insured by the above described policy has not been sick or injured, nor has said person consulted or been prescribed for by a physician since said policy was lapsed, except as stated above. The undersigned understands and agrees that all arrears deposited with the company at this time on account of the above policy are held subject to the application for revival being officially approved at the home office of the company, and that if this application is declined by the company, said arrears are to be refunded. The undersigned also expressly agrees that no liability shall exist on the part of the company until this application for revival has been so approved and accepted and in accordance with the terms of the policy."

The application for reinstatement signed by the insured, Gordon C. Dean, contained statements representing that he "had not been sick or injured since the policy lapsed" and that the condition of his health was "good." Agent Ferrell signed the application card on the back certifying that he saw the insured at the time the "application was written," that he questioned him concerning his health, and that he recommended the insured "as a first class risk." J. M. Smith, the company's Staff Superintendent at the Gastonia field office, testified as an adverse witness for the plaintiff. He said he wrote his "O.K." on the application card in red ink and initialed it "J.M.S." Superintendent Smith further testified that "normally when an agent represents somebody as a first class risk" the application for reinstatement "goes through with no complications."

The foregoing statements of the insured, representing that he was in good health, together with the supporting statements of agents Ferrell and Smith, constitute *prima facie* evidence of sound health and insurability of the insured within the requirements laid down by the com-

pany for reinstatement. This being so, in dealing, as we are here, solely with a question of nonsuit, we need not consider the defendant's plea by way of affirmative defense that the insured was sick and under the care of a physician when the application for reinstatement was made, nor need we consider or discuss the testimony in support of the affirmative defense elicited from the plaintiff on cross-examination. It suffices to note that in view of the *prima facie* showing of good health disclosed in the insured's application, the plaintiff by her own testimony has not established as a matter of law the defendant's affirmative defense. See *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86.

Adverting further to the contents of the reinstatement card, it is noted that on the right side of the face of the card there is a blocked-off space with heavy print indicating "Home Office Use Only." Under this heading and in the left section of the blank is printed in small type the word "weeks" and in the right section of the space is printed the word "arrears." The figure "9" appears in the left section of this space. This figure "9," which the plaintiff contends was written in the blank after the application reached the home office, is referred to and commented on in the testimony of J. M. Smith hereinafter set out. The following memoranda appearing on the margin of the application card (placed there, as the plaintiff contends, in the home office) are also referred to in the testimony of J. M. Smith: "July—2—1956" on the left margin of the card; and the letter "a" written near the right-hand bottom margin.

J. M. Smith, Staff Superintendent of the defendant, testifying as to the procedure followed in processing a reinstatement application, said: "The agent turns it in at the Gastonia office. We mail it to Richmond. . . . This blank here (pointing to one of the blanks on the application for reinstatement) says 'For Home Office Use Only.' We don't fill any of that out. This section here where it says 'arrears,' I imagine that means how many weeks in arrears the policy is. . . . I don't know anything about that particular, because we don't never fill it out. That spot you pointed to says, 'For Home Office Use Only.' I'm not in the Home Office, I'm in the field office. . . . When we sent (send) the application off they do not send it back to us. . . . if it's rejected, they send us a small slip; if they don't, they put it on a regular form when they send it down and issue it into a life register. . . . I recognize those initials on the application card. That's my writing. That red mark there, 'O.K., J.M.S.' I check it to see if the thing is completely filled out so there won't be no more delay in sending it back. That other writing is not mine. That 'July 2, 1956' is not mine. I did not put that small 'a' on the card. . . . That section says 'Home Office Use.' It's got 'weeks—9' in there. . . . I imagine that would be the number of weeks in arrears that Mr. Dean's policy would have been calling for

and two in advance. . . . Yes, she paid eleven weeks. That takes you through July 2, 1956. They paid it on June 14th, and that was for the week June 18th. . . . And it was nine weeks in arrears. And he called for two weeks in advance, so if it came back in his account, it would not be in arrears on his book. That's the usual procedure when reviving an insurance policy—to collect two weeks in advance, so when it comes down it will not be in arrears. The contract says it should be a week in advance. . . . To the best of my knowledge Mr. Dean died on Sunday. I was down at his house sometime the following week. . . . I went down there with them papers and told her to go ahead and fill them out and if it was approved the Home Office would definitely pay the claim; but it had never been approved by the Home Office. . . . When I say it had never been approved by the Home Office I don't know that. . . . It was rejected. It never came in Mr. Ferrell's account. It didn't have time to go through the channels to get back on the agent's book."

The plaintiff, Alice C. Dean, testified in part: "The insurance got behind. . . . Mr. Ferrell didn't say much. . . . He just told me that whenever four weeks were up, my policy would lapse. . . . After I got some money, Mr. Ferrell dropped by again. . . . He asked me about the approval (revival) and I gave him the money and my husband signed the approval (application for reinstatement) card. . . . The next time I saw Mr. Ferrell was after my husband died, . . . that would be two weeks later. . . . I was away (from home) the first week and the next week was two weeks later and my husband had passed away and I told him that I'd lost my husband. This was the week my husband died. And Mr. Ferrell looked at me in amazement. He said 'I never heard of it.' I said 'Yes, he died the 24th.' And he said, well, . . . he'd go back and see about making arrangements to pay off. The next day there were some more insurance men came down there. . . . I don't believe Mr. Ferrell was with them. . . . there were two of them. . . . I see one of the men . . . who came down after my husband died. That black-headed fellow right yonder is one of them, and I believe that that other fellow is the other one. . . . And they asked concerning about it and they said they would pay off, so they went back. . . . They said they would go back and fix up the application papers and everything. They brought me a paper to have filled out and all. . . . And then on Friday Mr. Ferrell came down and said they wouldn't. . . . he said he'd bring the $12.98 check the next day. . . . I never did take the check."

In deciding whether the evidence is sufficient to withstand the defendant's motion for nonsuit we are required to accept and interpret the evidence in the light most favorable to the plaintiff and to give to her the benefit of every legitimate inference that may be drawn therefrom.

Cozart v. Hudson, 239 N.C. 279, 78 S.E. 2d 881. "If there is conflict in the evidence, or if it is susceptible of more than one interpretation, these must be resolved in the plaintiff's favor." *Poindexter v. First National Bank of Winston-Salem,* 244 N.C. 191, 92 S.E. 2d 773.

In applying this formula to the case at hand, these crucial phases of the evidence come into focus: (1) The testimony of Staff Superintendent Smith, explaining the memoranda and writings appearing on the margins of the application for reinstatement and in the space marked for "Home Office Use Only," justifies the inferences that the application was received in due course and was acted upon in the home office. (2) Superintendent Smith said the procedure followed at the home office after acting on an application for reinstatement was, in case of rejection, that a slip to that effect would be sent down from the home office to the field office; whereas, if the application was approved, the record of the policy would go "into a life register," and come down from the home office in the account of the field agent. (3) While Superintendent Smith, testifying as an adverse witness, said it usually takes from ten to fourteen days for an application to be approved, and for that reason it was customary for the canvassing agent in taking a reinstatement application to collect advance premiums for two weeks, so that the policy would not be in arrears again when approval came down from the home office, nevertheless witness Smith said *the insurance policy provides for collection of an advance premium of only one week.* This policy provision indicates that the insurance company contemplated that it should take only one week in which to process an application for reinstatement. This being so, the policy provision supports the plaintiff's contention that her husband's application was acted upon and approved in the home office during the 10-day period intervening between the date the application was made and his death. The contention finds further support in the circumstance that no notice of rejection appears to have come down to the field office or to agent Ferrell before he called at the Dean home after Dean's death. Ferrell learned then for the first time of the death of the insured and told Mrs. Dean he would go back and make arrangements about paying off. It was after this, according to Superintendent Smith's testimony, that he, Smith, took the proof of death papers out to the home for the widow to execute. According to her testimony, this was the second week after the death of the insured; according to Smith's testimony, it was the first week thereafter. Viewed in the light most favorable to the plaintiff, the claim papers were given to her some eighteen days after the application for reinstatement was made. From this line of testimony it is inferable that no rejection notice had come down from the home office, else Superintendent Smith would have so advised the widow rather than assist her in filing claim for the policy benefits. Further-

more, agent Ferrell's call at the home after Dean's death, when considered in the light of Ferrell's statement to Mrs. Dean that he did not know of her husband's death, is corroborative of other evidence tending to show that the policy had been reinstated at the home office and was back in Ferrell's debit account, and that Ferrell was calling at the Dean home to make a regular premium collection. This is also borne out inferentially by the testimony of Superintendent Smith.

The foregoing facts and circumstances, when considered with other evidence favorable to the plaintiff, is sufficient to justify the inference that the application for reinstatement had been approved at the home office of the insurance company before the death of the insured.

In this view of the case it is not necessary to discuss whether the allegations of the complaint are broad enough to put to test the principle that where death of the insured occurs after the lapse of a reasonable period of time for consideration of a reinstatement application, but before formal approval or rejection thereof, the unreasonable delay operates as an estoppel or waiver entitling the beneficiary to recover. See *Apostle v. Acacia Mutual Life Ins. Co.*, 208 N.C. 95, 179 S.E. 444; *Trust Co. v. Ins. Co.*, 199 N.C. 465, 154 S.E. 743; 29 Am. Jur., Insurance, Sections 271 and 272; Annotations: 105 A.L.R. 486; 164 A.L.R. 1057.

The judgment below is

Reversed.

BEULAH T. MATHESON v. AMERICAN TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES PLEASANT MATHESON, DECEASED; NELL COFFEY LINNEY, ADMINISTRATRIX C.T.A. OF THE ESTATE OF BAXTER M. LINNEY, DECEASED; NELL COFFEY LINNEY, MARGARET LINNEY COFFEY, MARY FRANCES LINNEY BREWER, KENNETH BOGLE LINNEY; MAMIE LEE MATHESON,, ADMINISTRATRIX OF THE ESTATE OF ROBERT ATWELL MATHESON, DECEASED; MAMIE LEE MATHESON; GLENN HOLLAND, EXECUTOR OF THE ESTATE OF LILLIAN MATHESON HOLLAND, DECEASED; GLENN HOLLAND, ROBERT GLENN HOLLAND, LUCILE MATHESON ABERNETHY, MARY AYRES PAYNE CAMPBELL, WILLIAM MATHESON PAYNE, AND THOSE UNKNOWN AND UNBORN PERSONS WHO MAY HEREAFTER, *by* EITHER BIRTH OR ADOPTION FALL WITHIN THE CLASS DESIGNATED BY JAMES PLEASANT MATHESON, DECEASED, IN HIS WILL AS "MY NIECES AND NEPHEWS" PRIOR TO THE DEATH OF THE PLAINTIFF, BEULAH T. MATHESON.

(Filed 16 October, 1957.)

Wills § 34b—

Testator's will provided for the payment of income from designated property to his brother "and his wife" in equal parts and to the survivor of them for the lifetime of the survivor, with provision for the distribution of the *corpus* upon the death of the survivor. After testator's death,

the wife died and the brother remarried. Thereafter the brother died. *Held:* The gift was to the wife of the brother living at the time of the execution of the will and testator's death, and the second wife of the brother took no interest under the will.

APPEAL by the plaintiff, Beulah T. Matheson, and by the Guardian *ad Litem* from *Sharp, S. J.*, March, 1957 Special Term, MECKLENBURG Superior Court.

The plaintiff brought this action for the purpose of having the court determine her rights under the will of James Pleasant Matheson. The testator, a physician residing in Charlotte, North Carolina, executed his will on 15 March, 1934. He was killed in an automobile accident on 5 August, 1937. He was never married. At the time of the execution of the will the testator had one living brother, two living sisters, and a number of nieces and nephews. The brother, W. L. Matheson, and wife, Fairy Porter Hurd Matheson, were married in 1900 and from that date until after the testator's death they lived in Mooresville, North Carolina, approximately 30 miles from Charlotte. No children were born of the marriage. Fairy Porter Hurd Matheson died on 29 July, 1948. W. L. Matheson married the plaintiff, Beulah T. Matheson on 3 April, 1951. They lived together until his death on 18 January, 1956.

At the time of the testator's death, nine nephews and nieces by birth and one by adoption were living. No additional ones have come into being since that date.

After making certain specific bequests the testator, in Item XIII of his will, devised and bequeathed to his named trustees all the residue of his real and personal property to be disposed of by dividing the income into 72 equal parts. "They shall pay 12/72nds to my brother W. L. Matheson and his wife, of the Town of Mooresville, North Carolina, in equal parts for their lifetime. Should either of them die before the termination of this trust, said trustees shall pay the whole of said income to the survivor of them during the lifetime of such survivor. In event both of them shall die before the termination of this trust, . . . the said trustees shall pay said income in equal parts to my nieces and nephews, until the termination of the trust created in this Item XIII, exclusive of Jean Booth Matheson . . . for whom I have made provision hereinafter."

In Item XVI the will provided that the trustees shall continue to hold 12/72nds of the *corpus* of the fund "for the benefit of my said brother W. L. Matheson and his wife, paying the net income therefrom to my said brother and his wife in equal parts or to the survivor of them for the lifetime of such survivor. Upon the death of the survivor of them, said trustees shall distribute said 12/72nds interest so held by

them equally among my nieces and nephews, exclusive of Jean Booth Matheson, for whom I have hereinbefore made provision."

The trustees paid 12/72nds of the income in equal parts to W. L. Matheson and his wife, Fairy Porter Hurd Matheson, until the latter's death on 29 July, 1948, and thereafter paid all the income to W. L. Matheson, the survivor, until his death on 18 January, 1956. The trustee now has for distribution under Item XVI of the will, approximately $123,000.00.

The court found facts, of which the above is a summary, and concluded as a matter of law" . . . the interests in remainder in the 12/72nds of the trust estate, of which W. L. Matheson and his wife were the beneficiaries for their lifetime and the lifetime of the survivor, vested in the nieces and nephews of the testator as of the date of his death, 5 August 1937; that no nieces or nephews of the testator came into being subsequent to the date of the will and that the class designated as 'nieces and nephews' closed upon the death of W. L. Matheson, 18 January 1956."

The Guardian *ad Litem* appointed to represent all unborn nieces and nephews contends the roll cannot be called and the nieces and nephews who take be known until the death of the plaintiff, Beulah T. Matheson, second wife of W. L. Matheson.

The court, by judgment, ordered the trustee to distribute the *corpus* of the 12/72nds of the trust estate held for the benefit of W. L. Matheson and his wife, together with all income accrued after 18 January 1956, to the nieces and nephews designated in the judgment dated 4 March, 1957, each to receive a one-ninth part thereof. To the court's findings and judgment, the plaintiff and the Guardian *ad Litem* appealed, assigning errors.

Kennedy, Covington, Lobdell and Hickman,
By: W. T. Covington, Jr., for plaintiff, appellant.
Harry C. Hewson, for Guardian ad Litem, appellant.
Taliaferro, Grier, Parker & Poe,
By: Joseph W. Grier, Jr.,
Sydnor Thompson, for defendant Nell Coffey Linney, appellee.
Charles W. Campbell, for defendants Mary Ayres Payne Campbell and William M. Payne, appellees.
Scott, Collier & Nash,
By: Robert A. Collier, for defendant Lucile M. Abernethy, appellee.
Deal, Hutchins & Minor,
By: Roy L. Deal, for defendants Margaret Linney Coffey, Mary Frances Linney Brewer, and Kenneth Bogle Linney, appellees.

Raymer & Raymer,
By: A. B. Raymer, for defendants Glenn Holland and Robert Glenn Holland, appellees.
Harry R. Stanley, for defendant Mamie Lee Matheson, appellee.

HIGGINS, J. Stripped of its nonessentials, the question presented is this: Does the plaintiff, Beulah T. Matheson, acquire any right to the income under Items XIII and XVI of the will of James Pleasant Matheson? At the time the will was executed in 1934, and likewise at the time of the testator's death in 1937, W. L. Matheson and his wife, Fairy Porter Hurd Matheson, lived in Mooresville, North Carolina. They had lived together since their marriage in 1900. Fairy Porter Hurd Matheson was well known to the testator. After the testator's death the brother, W. L. Matheson, and his wife, Fairy Porter Hurd Matheson, received the income from the fund in equal parts until her death in 1948. Thereafter W. L. Matheson, the survivor, received the entire income until his death in 1956. Nothing appears in the will or in the attendant circumstances surrounding the testator, at the time he made it, to indicate he had in mind as a beneficiary any wife of his brother W. L. Matheson, except the one to whom he was then married and with whom he then lived in Mooresville, N. C.

Item XIII disposes of the income during the life of the trust. Item XVI disposes of the *corpus* at the end of the trust period, except as to the 12/72nds thereof which the trustees "shall continue to hold" and pay the income to W. L. Matheson and wife exactly as directed in Item XIII. The two items must be construed together.

The plaintiff's contention the gift to the wife of W. L. Matheson is a class gift is without support. A gift to children or to nieces and nephews may be, and often is, a gift to a class. Ordinarily, however, wives do not come as a class—they come one at a time.

A gift to a man and his wife is a gift to the wife living at the date of the will "or at the date from which the will is deemed to speak." *Williams v. Alt,* 226 N.Y. 283, 123 N.E. 499; *Gurley v. Wiggs,* 192 N.C. 726, 135 S.E. 858; *Hill v. Aldrich,* 326 Mass. 630, 96 N.E. 2d 147; *In re Fitzgerald's Estate,* 32 N.Y.S. 2d 1004, 178 Misc. 15; *Beers v. Narramore,* 61 Conn. 13, 22 A. 1061; *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771; *Doherty v. Russell,* 116 Me. 269, 101 A. 305; *Rogers v. Rogers,* 22 N.Y.S. 2d 659, 174 Misc. 841; *Meeker v. Draffen,* 201 N.Y. 205, 94 N.E. 626.

This Court, speaking through *Barnhill, J.* (later *C. J.*), in the case of *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45, said:

"Thus a conveyance, *Ballard v. Farley,* 226 S.W. 544, or a devise, *Motley v. Whitemore,* 19 N.C. 537, to a named man 'and wife' or a

deed to a designated person 'and children' conveys an estate to the 'wife' or 'children' living at the time of the execution and delivery of the deed, or, in the case of a will, at the death of the testator. *Darden v. Timberlake,* 139 N.C. 181; *Buckner v. Maynard,* 198 N.C. 802, 153 S.E. 458; *Cullens v. Cullens,* 161 N.C. 344, 77 S.E. 228; *King v. Stokes,* 125 N.C. 514; *Helms v. Austin,* 116 N.C. 751; *Gay v. Baker,* 58 N.C. 344. It is just as effectual as if the name of the wife or child or children had been given in full, 6 Thompson, Real Property, 322, 325, and extrinsic evidence is admissible for the purpose of fitting the description to the person or persons intended. 16 A.J. 482; 6 Thompson, Real Property, 322, 325; *Gold Mining Co. v. Lumber Co.,* 170 N.C. 273, 87 S.E. 40."

Under the factual situation presented here, the bequest to W. L. Matheson and wife of Mooresville, North Carolina, is a bequest to W. L. Matheson and wife, Fairy Porter Hurd Matheson, as effectively as if her name were inserted in the will. The trustees have carried out the trust by paying the net income to W. L. Matheson and wife, Fairy Porter Hurd Matheson, in equal shares until her death, and in paying all income thereafter to W. L. Matheson, the survivor, until his death. By the express provisions of the will the bequest of the income then terminated. It is now the duty of the trustees to distribute the *corpus* of the fund and all income therefrom since 18 January, 1956, to the nine nieces and nephews designated by Judge Sharp in the judgment of 4 March, 1957, or to those who legally represent them.

The evidence and the amendment to the complaint offered in the court below were immaterial. The motion to amend here is denied for that reason. The judgment is

Affirmed.

ENGLISH MICA COMPANY; WESTERN ASSURANCE COMPANY v. AVERY COUNTY BOARD OF EDUCATION.

(Filed 16 October, 1957.)

1. State § 3c—

The findings of fact of the Industrial Commission in a proceeding under the Tort Claims Act are conclusive on appeal if supported by any competent evidence, even though there is evidence that would support a finding to the contrary.

2. State § 3b—

In this proceeding under the Tort Claims Act the evidence *is held* sufficient to support a finding that the accident in question resulted from the

negligence of the driver of a school bus in hitting a vehicle traveling in the opposite direction while a portion of the school bus was on its left of the center line of the highway, and the Industrial Commission's findings of negligence and proximate cause are conclusive. G.S. 143-300.1.

APPEAL by plaintiffs from *Nettles, J.*, April Term 1957 of AVERY.

This proceeding involves a claim arising under the Tort Claims Act, G.S. 143-291, *et seq.*, which was duly filed with the North Carolina Industrial Commission.

The matter was heard before a Deputy Hearing Commissioner (hereinafter called Deputy Commissioner) of the Commission. The evidence is to the effect that on 7 September 1955 at approximately 2:45 p.m., a tractor-trailer owned by the plaintiff English Mica Company was being driven in a northerly direction on Highway No. 19-E in Plumtree, North Carolina, toward a bridge; that the tractor-trailer was being driven by Homer Pitman, an employee of the plaintiff English Mica Company. The trailer was loaded with mica and it was being driven upon the right side of the highway at a speed of 33 to 35 miles per hour, the speed limit at such place being 35 miles per hour. The paved highway was approximately 18 feet wide and had a center line dividing the lanes of traffic. The bridge was more than 18 feet wide.

When the plaintiffs' driver got to the bridge, he saw a school bus coming. It was approximately 30 or 40 feet from the bridge. The bridge was approximately 50 feet long. There is a curve to the left of the bridge, the school bus driver was making this curve, which was to his right, at a speed of approximately 25 miles per hour. The school bus was empty except for the driver. When the school bus driver saw the tractor-trailer, he applied his brakes in such a manner as to lock the back wheels of the bus and it skidded and bounced diagonally across the road in front of the tractor-trailer. The driver of the tractor-trailer, according to his testimony, thought the school bus was loaded with children and he pulled over a little too far to the right of the road and "about that time the back end of the bus hit my front wheel and knocked the steering wheel out of my hand and I couldn't pull it back. The tractor and trailer turned over on the side. . . . The end of the bus that hit the tractor-trailer was over on my side of the road. The portion of the bus that hit me was at least 4 feet in my line (*sic*) of traffic."

According to other evidence, the school bus was driven by Isaac Goldman Hughes, an employee of the defendant, who was at the time acting within the scope of his employment and who admitted immediately after the accident that it was his fault. The school bus was between 7 feet 8 inches and 8 feet in width; the tractor-trailer was approximately 8 feet in width. The two vehicles could have passed on the bridge if "both had been on the proper side of the road."

There is no controversy as to the amount of plaintiffs' damages.

The Deputy Commissioner found the facts and concluded as a matter of law: (1) That there was negligence on the part of the above-named employee of the defendant while acting within the scope of his employment and that such negligence was the proximate cause of the damages sustained by the plaintiffs. (2) There was no contributory negligence on the part of the plaintiffs or upon the part of the driver of the plaintiffs' motor vehicle. (3) That as a result of the negligence of the employee of defendant, the plaintiffs were damaged in the total sum of $2,000.73.

An award in favor of the plaintiffs was entered accordingly and from the decision and award the defendant, in apt time, appealed to the Full Commission. The hearing was held and the Full Commission adopted as its own the findings of fact and conclusions of law and order of the Deputy Commissioner and affirmed the result reached by him.

The defendant appealed to the Superior Court, filing exceptions and assignments of error to the findings of fact and conclusions of law adopted by the Full Commission. In the Superior Court each exception of the defendant to the findings of fact and conclusions of law adopted by the Full Commission was sustained, "the court being of the opinion that there is not sufficient evidence in the record to establish negligence or damages by the defendant."

Judgment was entered sustaining the exceptions and remanding the cause to the Industrial Commission for further proceedings in accord therewith.

Plaintiffs appeal, assigning error.

Warren H. Pritchard for appellants.
Charles Hughes for appellee.

DENNY, J. It is provided, among other things, in G.S. 143-300.1, 1955 Cumulative Supplement, as follows: "The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged negligent act or omission of the driver of a public school bus who is an employee of the county or city administrative unit of which such board is the governing board, and which driver was at the time of such alleged negligent act or omission operating a public school bus in the course of his employment by such administrative unit or such board."

If there is any competent evidence to support findings of fact by the Industrial Commission, such findings are conclusive, and on appeal are not subject to review by the Superior Court or this Court. *Moore v. Superior Stone Co.*, 242 N.C. 647, 89 S.E. 2d 253; *McCraw v. Calvine*

Mills, Inc., 233 N.C. 524, 64 S.E. 2d 658; *Gabriel v. Town of Newton*, 227 N.C. 314, 42 S.E. 2d 96; *Creighton v. Snipes*, 227 N.C. 90, 40 S.E. 2d 612; *Fox v. Cramerton Mills*, 225 N.C. 580, 35 S.E. 2d 869; *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918; *Kearns v. Furniture Co.*, 222 N.C. 438, 23 S.E. 2d 310; *Knight v. Body Co.*, 214 N.C. 7, 197 S.E. 563; *Swink v. Asbestos Co.*, 210 N.C. 303, 186 S.E. 258.

This is true even though there is evidence that would support a finding to the contrary. *Blalock v. City of Durham*, 244 N.C. 208, 92 S.E. 2d 758; *Hawes v. Mutual Ben. Health & Acci. Assn.*, 243 N.C. 62, 89 S.E. 2d 739; *Watson v. Harris Clay Co.*, 242 N.C. 763, 89 S.E. 2d 465; *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109; *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Rewis v. N. Y. Life Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97.

The foregoing decisions are equally applicable to findings of fact by the Industrial Commission in a proceeding under the Tort Claims Act. The Act provides for appeals from the Commission to the Superior Court of the county in which the claim arose. However, "such 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 . . ." G.S. 143-293.

The facts found by the Industrial Commission, which are essential to a recovery by the plaintiffs under the Tort Claims Act, are supported by competent evidence. *Moore v. Superior Stone Co., supra.* Hence, the judgment entered in the court below must be

Reversed.

STATE v. JOE GREEN.

(Filed 16 October, 1957.)

1. Rape § 4—

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of the crime of rape, defendant's contradictory evidence of the consent of prosecutrix being disregarded on motion to nonsuit.

2. Criminal Law § 98—

Conflicts in the testimony, the weight of the evidence, and the credibility of witnesses are all matters for the jury.

3. Rape § 24: Criminal Law § 3—

There is no such offense as an attempt to commit rape, but the offense is an assault with intent to commit rape, and therefore the solicitor's statement that he would ask for a verdict of guilty of rape with recommendation

of life imprisonment or of guilty of an attempt to commit rape cannot have the effect of limiting the court's duty to submit to the jury the question of defendant's guilt of less degrees of the crime of rape supported by the evidence.

4. Criminal Law § 109: Rape § 27—

Where the State's evidence, in a prosecution under an indictment charging the felony of rape, is sufficient to support the charge, but defendant testifies that prosecutrix consented and there is conflict in the evidence in other respects, it is incumbent on the court to submit also the question of defendant's guilt of assault with intent to commit rape, or guilt of assault upon a female, or of not guilty, it being the mandatory duty of the court to submit to the jury the less degrees of the offense which are supported by the evidence. G.S. 1-180.

5. Rape § 25—

The charge of the court on the question of defendant's guilt of assault with intent to commit rape *held* without error.

6. Assault and Battery § 16: Criminal Law § 109—

Where there is no evidence of a simple assault, the court properly refuses to submit the question of defendant's guilt of such less offense.

7. Criminal Law § 116—

The court may properly instruct the jury as to their duty to make a diligent effort to arrive at a verdict when the court's language in no way tends to coerce the jury or to intimate in the slightest any opinion of the court as to what the verdict should be.

8. Same: Criminal Law § 98—

It is not error for the court, upon inquiry by a juror, to tell the jury the punishment for the offense in question.

APPEAL by defendant from *Pless, J.*, February-March Term 1957 of CALDWELL.

Criminal prosecution upon a bill of indictment charging the felony and crime of rape upon a 16-year-old female child by a male person over 18 years of age. G.S. 14-21.

At the outset of the trial the Record shows this announcement by the solicitor for the state:

> "The State will not ask for a verdict of guilty of the capital crime carrying the death penalty, but will ask for a verdict of guilty of rape, with the recommendation of life imprisonment or guilty of attempt to commit rape, as the facts and law may justify."

The judge instructed the jury that they might return one of four verdicts: Guilty of rape with a recommendation of life imprisonment, G.S. 14-21; guilty of an assault with intent to commit rape, G.S. 14-22; guilty of an assault upon a female, G.S. 14-33; not guilty.

Verdict: Guilty of an assault with intent to commit rape.
From a judgment of imprisonment the defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.
W. H. Strickland for Defendant, Appellant.

PARKER, J. The defendant assigns as error the denial of his motion for judgment of nonsuit renewed at the close of all the evidence. It would benefit no one to stain the pages of our Reports with a recital of the sordid details of the evidence. Suffice it to say that there is competent, substantial evidence, which taken in the light most favorable to the State, tends to show that the defendant, a married man living with his wife and child, assaulted a female child 16 years of age, and ravished and carnally knew her by force and against her will. The court properly submitted the case to the jury. *S. v. Reeves,* 235 N.C. 427, 70 S.E. 2d 9. The defendant's evidence tends to show intercourse by consent. Conflicts in the testimony, the weight of the evidence, the credibility of witnesses are all matters for the jury, not the court. *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564.

The defendant assigns as error that the court in its charge submitted to the jury the question of the defendant's guilt of the crime of an assault with intent to commit rape, and his guilt of the crime of assault upon a female, because such a question "was not before the court," because of the solicitor's statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, and further because there is a distinction between the attempt to commit rape and an assault with intent to commit rape, and further because the evidence shows the defendant is guilty of rape or not guilty. This Court said in *S. v. Hewett,* 158 N.C. 627, 74 S.E. 356, a statement quoted with approval in *S. v. Adams,* 214 N.C. 501, 199 S.E. 716: "There is no such criminal offense as an 'attempt to commit rape.' It is embraced and covered by the offense of 'an assault with intent to commit rape,' and punished as such." See 75 C.J.S., Rape, p. 488.

The indictment properly charges the felony and crime of rape, and also an assault upon a female by a male person over 18 years of age. An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape. G.S. 15-170; *S. v. Roy* and *S. v. Slate,* 233 N.C. 558, 64 S.E. 2d 840. G.S. 15-169 provides that "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault

against the person indicted." In *S. v. Roy* and *S. v. Slate, supra,* the indictment charged rape. The jury found the defendant Roy guilty of an assault with intent to commit rape, and the defendant Slate guilty of an assault on a female. This Court found no error in the trial.

The instant case is not one where the uncontradicted evidence shows that the crime of rape has been committed like *S. v. Brown,* 227 N.C. 383, 42 S.E. 2d 402, where the defense was insanity, and *S. v. Smith,* 201 N.C. 494, 160 S.E. 577, where the defense was an alibi, in which cases it was held that it was not requisite to charge upon any lesser offenses. The State's evidence in this case, if believed to its fullest extent, established the crime of rape. The defendant testified the intercourse was with her consent. The evidence was conflicting in other respects. It would have been error for the court not to have charged the jury on the lesser offenses, as it did. *S. v. Williams,* 185 N.C. 685, 116 S.E. 736. The solicitor's statement at the beginning of the trial did not relieve the court of its mandatory duty under G.S. 1-180 to declare and explain to the jury the law arising on the evidence given in the case.

Under this same assignment of error the defendant contends that the charge on an assault with intent to commit rape was error. The contention is without merit. The charge in that respect is in accord with what is said in *S. v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191, and the cases there cited.

There was no evidence of a simple assault to submit to the jury. *S. v. Robbins, ante,* 332, 98 S.E. 2d 309.

After the jury had been out for some time, the judge sent for them, and instructed them as to their duty to make a diligent effort to arrive at a verdict. His language in no way tended to coerce or force the jury to arrive at a verdict, nor did it intimate in the slightest any opinion of the judge as to what the verdict should be. What the judge said did not transgress beyond the bounds of our decisions. *S. v. Pugh,* 183 N.C. 800, 111 S.E. 849; *S. v. Brodie,* 190 N.C. 554, 130 S.E. 205; *S. v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552; *S. v. Barnes,* 243 N.C. 174, 90 S.E. 2d 321. The assignment of error thereto is overruled.

When the judge recalled the jury, a juror asked what was the punishment for an assault with intent to commit rape. The judge replied that the maximum punishment was 15 years. The juror then said, "it would be in the discretion of the court?" The judge replied, "Yes." The defendant assigns as error the judge telling the juror what the punishment for this offense was. This assignment of error is overruled upon the authority of *S. v. Garner,* 129 N.C. 536, 40 S.E. 6. The judgment of the court was confinement for not less than 20 nor more than 24 months.

The defendant has 22 assignments of error, which are brought forward and stated in his brief. Nearly all of these assignments of error

set forth in his brief are supported by no citation of authority. All have been examined, and all are overruled. No assignment of error points out prejudicial error in the trial which would justify a new trial. The evidence was in sharp conflict. The triers of the facts heard the evidence, and have spoken. The defendant must abide by his punishment for his offense against the 16-year-old girl in this case.

No error.

APPENDIX.

Amendment to Rules of Practice in the Supreme Court.

Upon motion duly made and seconded it was unanimously Resolved that the Rules of Practice in the Supreme Court as amended and published in 242 N.C. 766, be amended in the following particular:

At the end of paragraph three of Rule 5, add the following:

"All criminal cases from the foregoing districts which are tried between the first day of January and the first Monday in February, and between the first day of August and the fourth Monday in August must be docketed within forty-five days from the last day of the term at which the respective cases were tried."

(s) CARLISLE W. HIGGINS,
For the Court.

8 March 1956.

WORD AND PHRASE INDEX

Abatement and Revival — Pendency of prior action, *In re Department of Archives*, 392; *Buchanan v. Smawley*, 592; *Cox v. Cox*, 532; *Beeson v. Beeson*, 330.

"Accident" — Within purview of Compensation Act, *Hensley v. Cooperative*, 274.

Accomplices — Failure of court to charge jury to scrutinize testimony of accomplice, *S. v. Andrews*, 561.

Account — Competency of ledger sheets in evidence, *Builders Supply v. Dixon*, 136.

Actions—Particular actions see particular titles of actions; criminal actions see Criminal Law and particular titles of crimes; actions under Declaratory Judgment Act see Declaratory Judgment Act: Actions to construe will, see Wills; abatement of action for prior action pending, see Abatement and Revival; venue, see Venue; wrongful or illegal act constituting element of cause of action, *Supervision Co. v. Thomas*, 281; distinction between forms of action, *Smith v. Pate*, 63; commencement of action, *Thrush v. Thrush*, 114.

Active Trusts — *Finch v. Honeycutt*, 91; *Pilkington v. West*, 575.

Additional Evidence — Discretionary power of court to reopen case for, *Builders Supply v. Dixon*, 136.

Administrators — See Executors and Administrators.

Adverse Possession — Possession within definite lines, *Scott v. Lewis*, 298; tacking possession, *Scott v. Lewis*, 298; color of title, *Bumgardner v. Corpening*, 40.

Advertising Signs — Liability to pedestrian injured when advertising sign on parking lot was knocked over by automobile, *Johnson v. Meyer's Co.*, 310.

Affidavit — Amendment of, for service of summons by publication, *Thrush v. Thrush*, 114.

Agriculture — Agricultural tenancies, *Keith v. Lee*, 188; marketing quotas, *Burleson v. Francis*, 619.

Aiders and Abettors — *S. v. Redfern*, 293; jury must find which of defendants was actor before conviction of other defendant as aider and abettor, *S. v. Dutch*, 438.

Alcoholic Beverage Control Act — See Intoxicating Liquor.

Alimony — See Divorce and Alimony.

Amendatory Act — Is nullity when act sought to be amended has been repealed, *S. v. Blackwell*, 642.

Amendment — Of affidavit for service of summons by publication, *Thrush v. Thrush*, 114; warrant may not be amended so as to charge different offense, *S. v. Cooke*, 518.

Animals — Liability for permitting cow to run at large, *Bullard v. Phillips*, 87.

Anticipation of Injury — Foreseeability is element of proximate cause, *Philyaw v. Kinston*, 534.

Anticipation of Negligence — Party is not required to foresee negligence of others, *Lea v. Light Co.*, 287; *Johnson v. Meyer's Co.*, 310.

Appeal and Error — In criminal cases see Criminal Law; review of award of Industrial Commission in Superior Court, see Master and Servant; nature and grounds of appellate jurisdiction, *NASCAR v. Midkiff*, 409; *Penland v. Coal Co.*, 26; *Anders v. Anderson*, 53; *S. v. Blackwell*, 642; *Todd v. White*, 59; *Temple v. Temple*, 334; judgments appeallable, *Cox v. Cox*, 528; "party aggrieved", *Gregg v. Williamson*, 356, *In re Estate of Cogdill*, 602; moot questions, *Walker v. Moss*, 196; *Construction Co. v. Electrical Workers Union*, 481; *Archer v. Cline*, 545; necessity of motion in lower court, *Cotton Mills v. Duplan Corp.*, 88; jurisdiction of lower court after appeal *Cox v. Cox*, 528; certiorari, *Lowry v. Dillingham*, 618; objections, exceptions and assignments of error, *Weddle v. Weddle*, 336; *Freight Lines v. Burlington Mills*, 143; *S. v. Worley*, 202;

Gurganus v. Trust Co., 655; *Price v. Gray*, 162; *Goldsboro v. R. R.*, 101; *Cox v. Cox*, 528; *Barbour v. Scheidt*, 169; *Ramsey v. Comrs. of Cleveland*, 647; *Construction Co. v. Electrical Workers Union*, 481; *In re Estate of Cogdill*, 602; *Bridgers v. Graham*, 371; case on appeal, *Stokes v. Smith*, 694; *Johnson v. Scheidt*, 452; record, *Johnson v. Scheidt*, 452; *Penland v. Coal Co.*, 26; *Huie v. Templeton*, 86; the brief, *NASCAR v. Midkiff*, 409; *Construction Co. v. Electrical Workers Union*, 409 *Stokes v. Smith*, 694; harmless and prejudicial error, *Price v. Gray*, 162; *Keener v. Beal*, 247; *Coach Co., v. Fultz*, 523; *Kirkman v. Baucom*, 510; *In re Will of Crawford*, 322; *Highway Com. v. Privett*, 501; *Jones v. Bailey*, 599; *Morgan v. Bell Bakeries*, 429; *Bank v. Bloomfield*, 492; review of findings or judgment on findings, *Goldsboro v. R. R.*, 101; *Realty Co. v. Speigle*, 458; *Sudan Temple v. Umphlet*, 555; *review of injunctive proceedings, Edwards v. Hunter*, 46; review of judgments on motion to nonsuit, *Shearin v. Lloyd*, 363; *Morgan v. Bell Bakeries*, 429; *Kirkman v. Baucom*, 510; petitions to rehear, *Cotton Mills v. Duplan Corp.*, 88; remand, *Edmundson v. Henderson*, 634; *Stokes v. Smith*, 694; stare decisis, *Pilkington v. West*, 575.

Arrest — Warrant of arrest, *S. v. Blackwell*, 642.

Arrest of Judgment — *S. v. Morgan*, 596; *S. v. Cooke*, 518.

"Arising Out Of" — As used in Compensation Act, *Hardy v. Small*, 581.

Armed Robbery — Instruction held for error as failing to define elements of armed robbery, *S. v. Rogers*, 611.

Assault — On female, *S. v. Robbins*, 332; mistaken identity of victim no defense, *S. v. Williams*, 688; duty to submit question of less degrees, *S. v. Robbins*, 332; *S. v. Green*, 717; with intent to commit rape, *S. v. Green*, 717.

Assignments of Error — May not present by amplification question not embraced in exception, *Freight Lines v. Burlington Mills*, 143; must be supported by exceptions, *S. v. Worley*, 202; *Weddle v. Weddle*, 336; exceptions relating to single question of law are properly grouped under one assignment, *Gurganus v. Trust Co.*, 655; appeal is itself exception to judgment, *Weddle v. Weddle*, 336; requirements of exceptions and assignments of error to admission of evidence, *Bridges v. Graham*, 371; sufficiency of exceptions and assignments of error to findings of fact, *Weddle v. Weddle*, 336; exceptions not brought forward in the brief are deemed abandoned, *S. v. Worley*, 202; *Construction Co. v. Electrical Workers Union*, 481.

Associations — Liability of labor union to suit, *Construction Co. v. Electrical Workers Union*, 481.

Attachment — *Thrush v. Thrush*, 114.

Attempts — No such offense as attempt to commit rape, *S. v. Green*, 717.

Attorney and Client — Stipulation entered into at trial is conclusive, *Church Conference v. Locklear*, 349.

Automobiles — Liability to pedestrian injured when advertising sign on parking lot was knocked over by automoble, *Johnson v. Meyer's Co.*, 310; accidents at grade crossings, see Railroads; pick-up truck is not passenger car within purview of accident policy, *Marshall v. Insurance Co.*, 447; search of car for whiskey without warrant, *S. v. Miller*, 608; revocation of license, *Snyder v. Scheidt*, 81; *Barbour v. Scheidt*, 169; *Johnson v. Scheidt*, 452; negligence in operation, *Keener v. Beal*, 247; *Crotts v. Transportation Co.*, 420; *Coach Co. v. Fultz*, 423; *Bullard v. Phillips*, 87; *Freight Lines v. Burlington Mills*, 143; pleadings, *Lewis v. Lee*, 68; presumptions, *Robbins v. Crawford*, 622; competency of evidence, *Morgan v. Bell Bakeries*, 429; *Kirkman v. Baucom*, 510; *Coach Co. v. Fultz*, 523; *Jones v. Bailey*, 599; sufficiency of evidence and nonsuit, *Robbins v. Crawford*, 622; *Kirkman*

v. Fuller, 510; *Ransom v. Locklear*, 456; *Keener v. Beal*, 247; *Price v. Gray*, 162; *Morgan v. Bell Bakeries*, 429; *Lane v. Bryan*, 108; *Bridgers v. Graham*, 371; *Crotts v. Transportation Co.*, 420; *Barbee v. Perry*, 538; instructions, *Price v. Gray*, 163; concurring and intervening negligence, *Norris v. Johnson*, 179; *Grantham v. Myers*, 204, *Riddle v. Artis*, 629; instructions, *Freight Lines v. Burlington Mills*, 143; *Kirkman v. Baucom*, 510; *Price v. Gray*, 162; *Coach Co. v. Fultz*, 523; estoppel, *Thompson v. Lassiter*, 34; guests and passengers, *Bell v. Maxwell*, 257; family purpose doctrine, *Thompson v. Lassiter*, 34; drunken driving, *S. v. St. Clair*, 183; *S. v. White*, 587; failing to stop after accident, *S. v. Dutch*, 438.

Baggage — Carrier's liability for, *Neece v. Greyhound Lines*, 547.

Bailment — *Ashley v. Jones*, 442; liability of carrier as bailee, *Neece v. Greyhound Lines*, 547.

Bankruptcy — *Stokes v. Smith*, 694.

Banks and Banking — Joint Accounts, *Sides v. Bank*, 672.

Bastards — *S. v. Smith*, 118.

Beer — Retail beer permit, *Boyd v. Allen*, 150.

Bonds — Enjoining issuance of municipal bonds, *Garner v. Newport*, 449.

Boundaries — *Bungardner v. Corpening*, 40.

Brief — Exceptions not brought forward in the brief are deemed abandoned, *S. v. Worley*, 202; *Construction Co. v. Electrical Workers Union*, 481.

Brokers — *Harris v. Bingham* 77.

Burden of Proof — In action for wrongful death, *Lane v. Bryan*, 108; *Philyaw v. Kinston*, 534; in ejectment actions, *Scott v. Lewis*, 298; in action to cancel deed, *Garris v. Scott*, 568; burden of proving that loss should have been minimized, *Bank v. Bloomfield*, 492; burden of proving affirmative defense, *Builders Supply v. Dixon*, 136.

Burden of Showing Error — *Keener v. Beal* 247; *Sudan Temple v. Umphlett*, 555.

Burglary — *S. v. Andrews*, 561.

Bus Companies — As carrier, see Carriers; injury to patron falling in hole along edge of passageway, *Hood v. Coach Co.*, 684.

Cancellation and Rescission of Instruments — *Garris v. Scott*, 568; *Worley v. Motor Co.*, 677.

Carpenter — Fall of carpenter from eave of roof because of want of scaffold, *Burr v. Evenhart*, 327; electrocution of carpenter by power line over building, *Philyaw v. Kinston*, 534.

Carriers — Regulation, *Neece v. Greyhound Lines*, 547; liability for baggage, *Neece v. Greyhound Lines*, 527; injury to patron falling in hole along edge of passageway, *Hood v. Coach Co.*, 684.

Case on Appeal — In absence of case on appeal, appeal will be dismissed in absence of error on record proper, *Stokes v. Smith*, 694.

Caveat — See Wills.

Certificate of Public Convenience — For condemnation of land, *In re Department of Archieves and History*, 392.

Certiorari — To review judgment over ruling demurrer, *Lowry v. Dillingham*, 618.

Charge — See Instructions.

Chattel Mortgages and Conditional Sales — *Supervision Co. v. Thomas*, 281.

Children — Devise to children of testator and their children held to children alone, question of representation not being involved, *Coffield v. Peele*, 661.

Churches — Control and management of property, *Church Conference v. Locklear*, 349.

Circumstantial Evidence — Sufficiency of to overrule nonsuit, *S. v. Davis*, 73; *Lane v. Bryan*, 108; circumstantial evidence held sufficient to sustain conviction of violation of liquor control statutes, *S. v. Tessnear*, 615;

negligence may be established by, *Lane v. Bryan*, 108; physical facts at scene of collision as constituting circumstantial evidence of negligence, *Robbins v. Crawford*, 622; *Kirkman v. Baucom*, 510; identity of driver of car may be established by, *Bridges v. Graham*, 371; identity of vehicle may be established by, *Morgan v. Bell Bakeries, Inc.*, 429; guilt of defendant as aider and abettor may be established by, *S. v. Redfern*, 293.

Cities and Towns — See Municipal Corporations.

Civil Conspiracy — *Burns v. Oil Corporation*, 266.

Clerks of Court—Proceedings to establish neighborhood public road or its discontinuance, *Edwards v. Hunter*, 46; clerk has power to refuse to issue letters to nominee of heirs *In re Estate of Cogdill*, 602,

Colleges — Theft of examination papers, *S. v. Andrews*, 561.

Color of Title — *Bumgarner v. Corpening*, 40.

Commerce — Federal statutes control movement of interstate commerce, *Neece v. Greyhound Lines*, 547.

Common Carriers — See carriers.

Common Knowledge — That vaue of farm is dependent on size of tobacco allotment is matter of common knowledge, *Garris v. Scott*, 568.

Compensation Act — See Master and Servant.

Complaint — See Pleadings.

Compounding Felony — Allegations and evidence held not to raise question of compounding felony, *Worley v. Motor Co.*, 677.

Concurring Negligence — *Norris v. Johnson*, 179; *Hood v. Coach Co.*, 684.

Condemnation — Of property for public purpose, see Eminent Domain.

Confessions — *S. v. Redfern*, 293.

Confidential Informer — Right of defendant to divulgence of name of, *S. v. Boles*, 83.

Conflict of Laws — Our courts have jurisdiction to award custody of a child here notwithstanding domicile of child is in another state, *Holmes v. Sanders*, 200.

Confrontation of Accusers — *S. v. Boles*, 83; *Raper v. Berrier*, 193.

Consideration — Inadequacy of consideration as evidence of fraud, *Garris v. Scott*, 568

Conspiracy — Civil conspiracy, *Burns v. Oil Corp.*, 266.

Constitutional Law—Special act authorizing police officer to issue warrant does not relate to establishment of inferior court within purview of constitutional prohibition, *S. v. St. Clair*, 183; prosecution of Negroes for trespass in refusing to leave public golf course, *S. v. Cooke*, 518; federal statutes control movement of interstate commerce, *Neece v. Greyhound Lines*, 547; constitutional question will not be determined unless properly presented, *S. v. Blackwell*, 642; power of General Assembly to grant power of eminent domain for restoration of Tryon's Palace, *In re Department of Archives and History*, 392; courts must declare law as written, *Hensley v. Cooperative*, 274; searches and seizures, *S v. Mills*, 237; due process, *Raper v. Berrier*, 193; full faith and credit to foreign judgments, *Johnson v. Catlett*, 341; right to confront accusers, *S. v. Boles*, 83; self-incrimination, *S. v. Floyd*, 434.

Continuing Offense — Wilful failure to support illegitimate child is, *S. v. Smith*, 118.

Contracts — Statute may prescribe limitation for enforcement of contractual rights provided reasonable time is allowed for enforcement of such right prior to bar, *Gregg v. Williamson*, 356; insurance contracts, see Insurance; lease agreement, see Landlord and Tenant; limiting liability for negligence, *Neece v. Greyhound Lines*, 547.

Contribution — Joinder of joint tort feasor for, see Torts.

Contributory Negligence—Nonsuit for,

Keener v. Beal, 247; *Bell v. Maxwell*, 257; *Irby v. R.R.* 384; *Crotts v. Transportation Co.*, 420.

Controversy without Action—*NASCAR v. Midkiff*, 409.

Corporations — Corporation held mere bookkeeping transaction, *Bank v. Bloomfield*, 492; purchase of stock by corporation, *Collins v. Covert*, 303.

Correction of Minutes — Where court finds upon supporting evidence that minutes of court were correct, denial of motion to correct minutes is without error, *S. v. Arthur*, 690.

Counterclaim — *Burns v. Oil Corporation*, 266.

Counties — Legislative control *Ramsey v. Comrs. of Cleveland*, 647; county may construct water and sewer systems, *Ibid.*

County Courts — Original jurisdiction of misdemeanors, *S. v. White*, 587, *S. v. Morgan*, 596.

Courts — Superior Court has no original jurisdiction of proceedings to establish discontinuance of neighborhood public road, *Edwards v. Hunter*, 46; special act authorizing police officer to issue warrant does not relate to establishment of inferior court within purview of constitutonal prohibition, *State v. St. Clair*, 183; original jurisdiction of misdemeanors, *S. v. White* 587; *S. v. Morgan*, 596; jurisdiction of Superior Court on appeal from county court, *S. v. Mills*, 237; courts must declare law as written, *Shearin v. Lloyd*, 363; court has discretionary power to order mistrial, *Keener v. Beal*, 247; our courts have jurisdiction to award custody of child here, notwithstanding domicile of child is in another state, *Holmes v. Sanders*, 200.

Covenants — To repair, *Manufacturing Co., v. Gable*, 1; restrictive covenant, *Reed v. Elmore*, 221.

Cows — Damage to car colliding with cow on highway, *Cotton Mills Co. v. Duplan Corp.*, 88.

Crime Against Nature — *S. v. Gillyard*, 217.

Criminal Law — Particular crimes see particular titles of crimes; attempts, *S. v. Green*, 717; entrapment, *S. v. Boles*, 83; *S. v. Kilgore*, 455; *S. v. Wallace* 445; aiders and abettors, *S. v. Redfern*, 293; *S. v. Dutch*, 437; jurisdiction, *S. v. White*, 587; *S. v. Morgan*, 596; appeals to Superior Court, *S. v. Mills*, 237; *S. v. Cooke*, 518; *S. v. Morgan*, 596; transfer to Superior Court, *S. v. White*, 587; former jeopardy, *S. v. Strickland*, 120; *S. v. Cooke*, 518; rebuttal of matters brought out by adverse party, *S. v. Davis*, 73; attempt to divert suspicion, *S. v. Redfern*, 293; acts and declarations of conspirators, *S. v. Kirby*, 157; evidence obtain by search, *S. v. Mills*, 237; *S. v. Miller*, 608; expression of opinion by court on evidence, *S. v. Lynn* 80; argument to jury, *S. v. Kirby*, 157; function of court and jury, *S. v. Green*, 717; nonsuit, *S. v Kirby*, 157; *S. v. Davis*, 73; *S. v. Tessnear*, 615; *S. v. Gillyard*, 217; instructions, *S. v. Meshaw* 205; *S. v. Davis*, 73; *S. v. Andrews*, 561; *S. v. Wynne*, 686; *S. v. Green*, 717; *S. v. Hunt*, 454; verdict, *S. v. Meshaw*, 205; polling jury, *S. v. Dow*, 644; arrest of judgment, *S. v. Cooke*, 518; *S. v. Morgan*, 596; sentence *S. v. Floyd*, 434; *S. v. White*, 587; suspended sentences, *S. v. St. Clair*, 183; *S. v. Miller*, 608; *S. v. Griffin*, 680; modification and correction of judgment by trial court, *S. v. Arthur*, 690; costs, *Barbour v. Scheidt*, 169; nature and ground of appellate jurisdiction, *S. v. Morgan*, 596; *S. v. Blackwell* 642; judgments appealable, *Barbour v. Scheidt* 169; right of defendant to appeal, *S. v. Griffin*, 680; *S. v. Canady*, 613; harmless and prejudicial error, *S. v. Robbins*, 332; *S. v. Floyd*, 434; *S. v. Meshaw*, 205; determination and disposition of cause, *S. v. Andrews*, 561; *S. v. White*, 587.

Crops — Contract for share of crops does not create agricultural partner-

ship, *Keith v. Lee*, 188.

Crossings — Accidents at grade crossings, see Railroads.

Crosswalks — Injury to pedestrian crossing street at place where there was no marked crosswalk, *Barbee v. Perry*, 438.

Damages — *Bank v. Bloomfield*, 492.

Death — Actions for wrongful death, *Lane v. Bryan*, 108; *Philyaw v. Kinston*, 534.

Decedent—Transactions or communications with, *Collins v. Covert*, 303; testimony of declarations of decedent held incompetent to prove truth of matters declared *Gurganus v. Trust Co.*, 655.

Deception — Duty of party signing instrument to read it, *Harris v. Bingham*, 77; intent to deceive is essential element of fraud, *Calloway v. Wyatt*, 129.

Declarations — Held not part of res gestae and incompetent, *Jones v. Bailey*, 599; testimony of declarations of decedent held incompetent to prove truth of matters declared, *Gurganus v. Trust Co.*, 655.

Declaratory Judgment Act — *Edmundson v. Henderson*, 634.

Dedication — *Jackson v. Gastonia*, 404; *Todd v. White*, 59.

Deeds — Ascertainment of boundaries, see Boundaries; deeds of trust, see Mortgages; cancellation and rescission of deed for fraud, see Cancellation and Rescission of Instruments; conveyance by married woman to husband, *Bolin v. Bolin*, 666; *Stokes v. Smith*, 694; general rules of construction, *Reed v. Elmore*, 221; *Powell v. Roberson*, 606; Rule in Shelley's Case, *Powell v. Roberson*, 606; reservations and exceptions, *Todd v. White*, 59; restrictive covenants, *Reed v. Elmore*, 221.

Deeds of Separation — *Bolin v. Bolin*, 666.

Demurrer — See Pleadings.

Department of Archives and History — *In re Department of Archieves and History*, 392.

Devise — See Wills.

Directed Verdict — Peremptory instructions, *Church Conference v. Locklear*, 349.

Disabilities — Withn coverage of Compensation Act, see Master and Servant.

Discretion of Court — Discretionary order setting aside verdict not reviewable, *Walston v. Greene*, 617.

Divorce and Alimony — Alimony without divorce, *Beeson v. Beeson*, 330; custody and support of children, *Cox v. Cox*, 528.

Doctrine of Last Clear Chance — *Freight Lines v. Burlington Mills*, 143; *Irby v. R.R.*, 384.

Dower — *Waggoner v. Waggoner*, 210.

Driver's License — *Snyder v. Scheidt*, 81; *Barbour v. Scheidt*, 169; *Johnson v. Scheidt*, 452.

Drunken Driving — *S. v. St. Clair*, 183.

Duress — Execution of note under threat of prosecution for embezzlement, *Worley v. Motor Co.*, 677.

Easements — Appurtenant within the purview of lease, *Manufacturing Co. v. Gable*, 1; refusal of purchaser to comply with contract upon learning of easement for highway, *Harris v. Bingham*, 77; grantees held charged with notice of restrictive covenant in collateral deed of common grantor, *Reed v. Elmore*, 221; by implication, *Huie v. Thompson*, 86.

Eave — Fall of carpenter from eave of roof because of want of scaffold, *Burr v. Everhart*, 327.

Ejectment — *Scott v. Lewis*, 298; *McCormick v. Smith*, 425; *Kelly v. Kelly*, 174.

Ejusdem Generis — *Porter v. Yoder and Gordon Co.*, 398.

Election of Remedies — *NASCAR v. Midkiff*, 409.

Elections — Where election sought to be restrained has been held, the question becomes moot, *Archer v.*

Cline, 545; contested elections, *Garner v. Newport*, 449.

Electrical Turn Signals — Motorist must take cognizance of signal device on car regardless of whether it had been approved by Motor Vehicle Dept., *Coach Co., v. Fultz*, 523

Electricity — *Lea v. Light Co.*, 287; *Philyaw v. Kinston*, 534.

Embezzlement — Execution of note under threat of prosecution for embezzlement, *Worley v. Motor Co.*, 677.

Eminent Domain — *Goldsboro v. R. R.*, 101; In re Department of Archives, 392; *Highway Com. v. Privett*, 502; *Buchanan v. Smawley*, 592.

Entrapment — *S. v. Boles*, 83; *S. v. Wallace*, 445; *S. V. Kilgore*, 455.

Equal Application of Law — Applies to imposition of taxes but not to expenditure of tax funds, *Ramsey v. Comrs. of Cleveland*, 647.

Equity — Unjust enrichment, *Collins v. Covert*, 303; laches, *Jordan v. Chappel*, 620.

Estates — Survivorship in personalty, *Sides v. Bank*, 672.

Estoppel — By judgment, see Judgments; equitable estoppel, *Bolin v. Bolin*, 666; estoppel to assert dower, *Waggoner v. Waggoner*, 210

Evidence — Competency and relevancy of evidence in particular actions, see particular titles of actions; in criminal cases, see Criminal Law and particular titles of crime; judicial notice, *Walker v. Moss*, 196; *Johnson v. Catlett*, 341; *Garris v. Scott*, 568; burden of proof, *Builders Supply v. Dixon*, 136; evidence competent to corroborate witness, *Bridgers v. Graham*, 371; facts in issue and relevant to issues, *Johnson v. Meyer's Co.*, 310; *Gurganus v. Trust Co.*, 655; transactions with decedent, *Collins v. Covert*, 303; accounts and ledgers, *Builders Supply v. Dixon*, 136; hearsay evidence, *Gurganus v. Trust Co.*, 655; admissions, *Morgan v. Bell Bakeries*, 429; declarations, *Gurganus v. Trust Co.*, 655; *Johnson v. Meyer's Co.*, 310; *Jones v. Bailey*, 599; evidence as to health, *Penland v. Coal Co.*, 26; opinion evidence, *Jones v. Bailey*, 599; *Price v. Gray*, 162; discretionary power of court to reopen case for additional evidence, *Builders Supply v. Dixon*, 136; expression of opinion by court on evidence in interrogating witness, *S. v. Lynn*, 80, court may not hear evidence in custody proceedings in absence of parties, *Raper v. Berrier*, 193; beneficiary under holographic will not disqualified to testify as to handwriting, In re Will of Crawford, 322; objection to admission of evidence not waived by cross-examination and introduction of conflicting testimony, *Jones v. Bailey*, 599; requirements of exceptions and assignments of error to admission of evidence, *Bridges v. Graham*, 371; must be set out in narrative form in record, *Huie v. Templeton*, 86; harmless and prejudicial error in the admission or exclusion of evidence, *Price v. Gray*, 162; *Highway Commission v. Privett*, 501; *Kirkman v. Baucom*, 410.

Examinations — Theft of examination papers, *S. v. Andrews*, 561;

Exceptions — Appeal is itself exception to judgment, *Weddle v. Weddle*, 336; to signing of judgment, *Goldsboro v. R. R.* 101; *Cox v. Cox*, 528; assignment of error may not present by amplification question not embraced in exception, *Freight Lines v. Burlington Mills*, 143; assignments of error must be supported by exceptions, *S. v. Worley*, 202; *Weddle v. Weddle*, 336; exceptions relating to single question of law are properly grouped under one assignment, *Gurganus v. Trust Co.*, 655; requirements of exceptions and assignments of error to admission of evidence, *Bridges v. Graham*, 371; sufficiency

of exceptions to findings of fact, *Goldsboro v. R. R.*, 101; *Weddle v. Weddle*, 336; exceptions not brought forward in the brief are deemed abandoned, *S. v. Worley*, 202; *Construction Co. v. Electrical Workers Union*, 481.

Executions — Suspended, *S. v. Miller*, 608; *S. v. Canady*, 613; *S. v. Griffin*, 680; *S. v. St. Clair*, 183.

Executors and Administrators — Persons entitled to appointment, *In re Estate of Cogdill*, 602; action to surcharge and falsify account, *Davis v. Davis*, 307.

Expert Testimony — Physician may give opinion based on statements made to him in course of professional treatment, *Penland v. Coal Co.*, 26.

Explosion — of heating plant, *Manufacturing Co. v. Gable*, 1; caused by leaking tank truck, *Ashley v. Jones*, 442.

Expression of Opinion — By court on evidence in interrogating witness, *S. v. Lynn*, 80.

Facts — Agreed, see Controversy Without Action.

Family Car Doctrine — Liability of father for negligent driving of child, *Thompson v. Lassiter*, 34.

Farming Contracts — Contract for share of crops does not create agricultural partnership, *Keith v. Lee*, 188.

Federal Labor Management Act — Record held not to show that continuance of temporary order enjoined the exercise of any rights under Labor Management Act. *Construction Co. v. Electrical Workers Union*, 481.

Federal Statutes — Control movement of interstate commerce, *Neece v. Greyhound Lines*, 547.

Fellow Servant — Compensation Act precludes suit by employee against fellow servant, *Johnson v. Catlett*, 341.

Felonies — Intent to steal property of value less than $100 is misdemeanor, *S. v. Andrews*, 561.

Felonious Breaking or Entering, *S. v. Andrews*, 561.

Female — Assault on, *S. v. Robbins*, 332.

Filling Stations — Oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318.

Final Judgment — Where prayer for judgment is continued, there is no final judgment from which an appeal will lie, *Barbour v. Scheidt*, 169.

Finding of Fact — Are reviewable in injunction proceedings, *Edwards v. Hunter*, 46; conclusive when supported by evidence, *Goldsboro v. R.R.*, 101; *Burleson v. Francis*, 619; conclusions of law are reviewable even though denominated findings of fact, *Realty Co. v. Spiegel, Inc.*, 458; of Industrial Commission conclusive when supported by evidence, *Champion v. Tractor Co.*, 691; *Mica Co. v. Board of Education*, 714; of Industrial Commission not supported by competent evidence not conclusive, *Penland v. Coal Co.*, 26; sufficiency of exceptions to findings of fact, *Goldsboro v. R. R.*, 101; *Weddle v. Weddle*, 336; sole exception to judgment presents only whether judgment is supported by findings, *Cox v. Cox*, 528; *In re Estate of Cogdill*, 602; where evidence is not in record it will be presumed findings are supported, *Sudan Temple v. Umphlett*, 555; where findings are insufficient to determine applicable law, cause must be remanded, *Stokes v. Smith*, 694.

Fixtures — *Stephens v. Carter*, 318.

Foreign Judgments — Full faith and credit to, *Johnson v. Catlett*, 341.

Foreseeability — Is element of proximate cause, *Phillyaw v. Kinston*, 534; person is not required to foresee negligence of others, *Lea v. Light Co.*, 287; *Johnson v. Meyer's Co.*, 310.

Former Jeopardy — Prosecution under void indictment cannot support plea of, *S. v. Strickland*, 120.

Franchise — In granting franchise to gas company municipality acts in governmental capacity, *Denning v. Gas Co.*, 541.

Fraternal Order — Insurance benefits, *Sudan Temple v. Umphlett*, 555.

Fraud — Cancellation and rescission of deed for fraud, see Cancellation and Rescission of Instruments; knowledge and intent to deceive, *Calloway v. Wyatt*, 129; deception and reliance on misrepresentation, *Harris v. Bingham*, 77; *Calloway v. Wyatt*, 129.

Frauds, Statute of — Oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318; written lease may not be modified by parol, *Manufacturing Co. v. Gable*, 1.

Full Faith and Credit — To foreign judgments, *Johnson v. Catlett*, 341.

Furnace — Covenant by tenant to repair, *Manufacturing Co. v. Gable*, 1;

Gas — Negligence in delivering leaking tank truck to bailee, *Ashley v. Jones*, 442; in granting franchise to gas company municipality acts in governmental capacity, *Denning v. Gas Co.*, 541.

General Assembly — Counties are subject to almost unlimited legislative control, *Ramsey v. Comrs. of Cleveland*, 647; power of General Assembly to grant power of eminent domain for restoration of Tryon's Palace, *In re Department of Archives and History*, 392.

Golf Course — Prosecution of Negroes for trespass in refusing to leave public golf course, *S. v. Cooke*, 518.

Governmental Immunity — For torts, see Municipal Corporations.

Grade Crossings — Accidents at, see Railroads.

Grandchildren — Devise to children of testator and their children held to children alone, question of representation not being involved, *Coffield v. Peele*, 661.

Grandparents — Proceeding for custody of child as between father and grandparent, *Holmes v. Sanders*, 200.

Harmless and Prejudicial Error — Mere technical error alone insufficient for new trial, *Coach Co. v. Fultz*, 523; in instructions, *Keener v. Beal*, 247; in the admission or exclusion of evidence, *Price v. Gray*, 162; *Highway Commission v. Privett*, 501; *Kirkman v. Baucom*, 510; objection to admission of evidence not waived by cross-examination and introduction of conflicting testimony, *Jones v. Bailey*, 599; error cured by verdict, *Bank v. Bloomfield*, 492; error held not cured by verdict, *S. v. Meshaw*, 205; *S. v. Robbins*, 332; where correct result of dismissal is reached, judgment will not be disturbed, *Temple v. Temple*, 334.

Hearsay Evidence — *Gurganus v. Trust Co.*, 655.

Heating Plant — Covenant by tenant to repair, *Manufacturing Co. v. Gable*, 1.

Hernia — Whether the result of accident within coverage of Compensation Act, *Hensley v. Cooperative*, 274.

Highways — Law of the road, see Automobiles; neighborhood public roads, *Edwards v. Hunter*, 46; refusal of purchaser to comply with contract upon learning of easement for highway, *Harris v. Bingham*, 77; under facts of this case injury to employee while crossing highway was risk incident to employment, *Hardy v. Small*, 581.

History — *Department of Archieves History, In re*, 392.

Holographic Wills — *In re Will of Crawford*, 322.

Homestead — *Stokes v. Smith*, 694.

Homicide — *S. v. Davis*, 73; *S. v. Redfern*, 293.

Husband and wife — Evidence held sufficient as to wife as aider in murder of husband by son, *S. v. Redfern*, 293; determination of right to custody of children after institution of divorce action, see Divorce and

Alimony; conveyances by wife to husband, *Pilkington v. West*, 575; *Stokes v. Smith*, 694; separation agreements, *Bolin v. Bolin*, 666.

Illegal Act — Wrongful act may not be basis of civil action, *Supervision Co. v. Thomas*, 281.

Illegitimate Children — Wilful failure to support, *S. v. Smith*, 118.

Implication — Devise by, *Finch v. Honeycutt*, 91; easement by, *Huie v. Thompson*, 86.

Implied Dedication — Sale of lots by reference to map showing streets is not implied dedication when deeds reserve to grantors title and control of streets, *Todd v. White*, 59.

"In Course of" — As used in Compensation Act, *Hardy v. Small*, 581.

Inadequacy of Consideration — As evidence of fraud, *Garris v. Scott*, 568.

Independent Contractor — General farm laborer is not, *Hardy v. Small*, 581.

Indictment and Warrant — May not be amended so as to charge diferent offense, *S. v. Cooke*, 518; where cause is transferred to Superior Court upon defendant's demand for jury trial or upon defendant's appeal from conviction, defendant cannot be convicted except as charged in the warrant, *S. v. White*, 587; *S. v. Morgan*, 596; issuance of warrant, *S. v. Blackwell*, 642; joinder of counts, *S. v. Meshaw*, 205; charge of crime, *S. v. Andrews*, 561; identification of person accused, *S. v. St. Clair*, 183; motions to quash, *S. v. St. Clair*, 183; *S. v. Andrews*, 561; amendment, *S. v. Cooke*, 518; where indictment for riot charges only defendants with committing offense without adding "and others," instruction permitting jury to go outside indictment to find required number is error, *S. v. Wynne*, 686; charge on less degrees of crime, *S. v. Green*, 717.

Industrial Commission — See Master and Servant.

Infants — Contracts, *NASCAR v. Midkiff*, 409; determination of custody, *Holmes v. Sanders*, 200; *Raper v. Berrier*, 193; determination of custody in divorce actions see Divorce.

Informer — Right of defendant to divulgence of name of confidential informer *S. v. Boles*, 83.

Injunctions — Enjoining issuance of municipal bonds, *Garner v. Newport*, 449; continuance and modification and temporary orders, *Construction Co. v. Eelectrical Workers Union*, 481; *Edwards v. Hunter*, 46; where election sought to be restrained has been held, the question becomes moot, *Archer v. Cline*, 545.

Instructions — Statement of evidence and application of law thereto, *S. v. Davis*, 73; *Freight Lines v. Burlington Mills*, 143; *Keith v. Lee*, 188; *In re Will of Crawford*, 322; *Morgan v. Bell Bakeries, Inc.*, 429; *S. v. Floyd*, 434; *Glenn v. Raleigh*, 468; it is error for court to charge law on matter not presented by allegation and supported by evidence, *Worley v. Motor Co.*, 677; where indictment for riot charges only defendants with committing offense without adding "and others," instruction permitting jury to go outside to find required number is error, *S. v. Wynne*, 686; trial court properly refrains from commenting on probative value of negative testimony, *Kirkman v. Baucom*, 510; instruction that jury should convict all defendants if any one of them was guilty is error, *S. v. Meshaw*, 205; court may charge jury on duty to reach verdict, *S. v. Green*, 717; instruction as to defense of entrapment held erroneous, *S. v. Wallace*, 445; instruction held for error as failing to define elements of armed robbery, *S. v. Rogers*, 611; Instruction on weight to be given testimony of undercover agent held without error, *S. v. Hunt*, 454; instruction as to whether negligence

and contributory negligence should be "a" or "the" proximate cause, *Price v. Gray*, 162; charge on less degrees of crime, *S. v. Green*, 717; directed verdict and peremptory instructions, *Church Conference v. Locklear*, 349; harmless and prejudicial error in instructions, *Keener v. Beal*, 247; ordinarily misstatements of contentions must be brought to trial court's attention in apt time, *Highway Commission v. Privett*, 501.

Insurance — Construction of policies in general, *Gaulden v. Ins. Co.*, 378; *Marshall v. Ins. Co.*, 447; waiver of condition, *Sudan Temple v. Umphlett*, 555; life insurance, *Dean v. Ins. Co.*, 704; *Sudan Temple v. Umphlet*, 555; *Gaulden v. Ins. Co.*, 378; auto insurance, *Marshall v. Ins. Co.*, 447; *Smith v. Pate*, 63.

Intent — To steal property of value less than $100 is misdemeanor, *S. v. Andrews*, 561.

Intent to Deceive — Is essential element of fraud, *Calloway v. Wyatt*, 129.

Interlocutory Injunction — See Injunctions.

Interlocutory Judgments — Not ordinarily appealable, *Cox v. Cox*, 528.

Intersections — *Price v. Gray*, 162; *Norris v. Johnson*, 179.

Interstate Commerce — Federal statutes control movement of, *Neece v. Greyhound Lines*, 547.

Intoxicating Liquor — Driving while under influence of, *S. v. St. Clair*, 183; search of car for whiskey without warrant, *S. v. Miller*, 608; control statutes, *Boyd v. Allen*, 150; *S. v. Morgan*, 596; beer and wine license, *Boyd v. Allen*, 150; prosecutions, *S. v. Mills*, 237; *S. v. Miller*, 608; *S. v. Williams*, 614; *S. v. Tessnear*, 615; *S. v. Floyd*, 434.

Issues — Form and sufficiency of, *Bank v. Bloomfield*, 492; error cured by verdict, *Bank v. Bloomfield*, 492.

Joinder of Causes — See Pleadings.

Joint Tort Feasors — Joinder of for contribution, see Torts.

Judgments — Motion for judgment on pleadings, *S. v. Meshaw*, 205; *Tyer v. Leggett*, 638; motion for judgment on pleadings, where pleading has been amended, motion relates to amended and not original pleadings, *Duncan v. Renfrow*, 197; modification and correction in trial court, *S. v. Arthur*, 690; *res judicata*, *Thompson v. Lassiter*, 34; where court finds upon supporting evidence that minutes of court were correct, denial of motion to correct minutes is without error, *S. v. Arthur*, 690; suspension of judgment, *S. v. Griffin*, 680; *S. v. St. Clair*, 183; judgment appealable, *Cox v. Cox*, 528; *Barbour v. Scheidt*, 169; exceptions to signing of judgment, *Goldsboro v. R. R.*, 101; *Cox v. Cox*, 528; *In re Estate of Cogdill*, 602; appeal is itself exception to judgment, *Weddle v. Weddle*, 336; full faith and credit to foreign judgments, *Johnson v. Catlett*, 341.

Judicial Notice — Courts must take judicial notice of laws of this State, *Walker v. Moss*, 196; courts must take judicial notice of laws of sister state, *Johnson v. Catlett*, 341; that value of farm is dependent on size of tobacco allotment is matter of common knowledge, *Garris v. Scott*, 568.

Jurisdiction — Our courts have jurisdiction to award custody of a child here, notwithstanding domicile of child is in another state, *Holmes v. Sanders*, 200; Supreme Court will take notice of want of jurisdiction ex mero motu, *Temple v. Temple*, 334; original jurisdiction of misdemeanors, *S. v. White*, 587; *S. v. Morgan*, 596; of Superior Court on appeal from county court, *S. v. Mills*, 237.

Jury — Motion for mistrial on ground that officer talked to jurors during trial, *Keener v. Beal*, 247; polling the jury, *Highway Commission v. Privett*, 501; *S. v. Dow*, 644; opinion testimony held to invade province of jury, *Jones v. Bailey*, 599.

Label — Statute does not require containers of commercial paint ingredient to be labeled "poison." *Porter v. Yoder & Gordon Co.*, 398.

Labor Management Act — Record held not to show that continuance of temporary order enjoined the exercise of any rights under Act, *Construction Co. v. Electrical Workers Union*, 481.

Labor Union — Service of process on, *Construction Co. v. Electrical Workers Union*, 481; action to enjoin alleged unlawful picketing, *Construction Co. v. Electrical Workers Union*, 481.

Laborers' and Materialmen's Liens — *Love v. Snellings*, 675; *Linthicum v. Construction Co.*, 203.

Laches — *Jordan v. Chappel*, 620.

Landlord and Tenant — Construction of leases, *Mfg. Co. v. Gable*, 1; possession and use: *Ibid;* duty to repair, *Ibid;* subleasing, *Realty Co. v. Speigle*, 458; *Bank v. Bloomfield*, 492; cancellation, *Realty Co. v. Spiegle*, 458.

Lapsed Devises — *Carter v. Davis*, 191.

Larceny — *S. v. Andrews*, 561; *S. v. Meshaw*, 205.

Last Clear Chance — *Freight Lines v. Burlington Mills*, 143; *Irby v. R. R.*, 384.

Lawn Mower — Injury to park invitee caused by rock thrown by, *Glenn v. Raleigh*, 468.

Lead Poisoning — Statute does not require containers of commercial paint ingredient to be labeled "poison." *Porter v. Yoder & Gordon Co.*, 398.

Leases — See Landlord and Tenant.

Ledger Sheets — Competency in evidence, *Builders Supply v. Dixon*, 136.

Legislature — Counties are subject to almost unlimited legislative control, *Ramsey v. Comrs. of Cleveland*, 647; power of General Assembly to grant power of eminent domain for restoration of Tryon's Palace, *In re Department of Archives and History*, 392.

Less Degrees of Crime — Charge on, *S. v. Green*, 717.

Libel and Slander — *Tyer v. Leggett*, 638.

License — To drive, *Snyder v. Scheidt*, 81; *Barbour v. Scheidt*, 169; *Johnson v. Scheidt*, 452; retail beer license, *Boyd v. Allen*, 150.

Liens — Suit by subcontractor to enforce lien for materials, *Linthicum & Sons v. Construction Co.*, 203.

Life Insurance — See Insurance.

Lights — Evidence held sufficient for jury on issue of negligence in permitting car to stand on highway without light, *Keener v. Beal*, 247.

Limitation of Actions — To recover land from mortgagee in possession, *Jordan v. Chappell*, 620; construction of statutes in general, *Shearin v. Lloyd*, 363; statutory changes in period of limitation, *Gregg v. Williamson*, 356; accrual of cause of action, *Shearin v. Lloyd*, 363.

Malpractice — See Physicians and Surgeons.

Maps — Sale of lots by reference to map showing streets is not implied dedication when deeds reserve to grantors title and control of streets, *Todd v. White*, 59; competency of maps in evidence, *McCormick v. Smith*, 425.

Married Women — See Husband and Wife; dower, see Dower; fact that trust is for benefit of married woman does not render it active, *Pilkington v. West*, 575.

Master and Servant — Collective bargaining, *Construction Co. v. Electrical Workers Union*, 481; common law liability of employer to employee, *Burr v. Everhart*, 327; Workmen's Compensation Act, *Hardy v. Small*, 581; *Hensley v. Cooperative*, 274; *Alford v. Chevrolet Co.*, 214; *Penland v. Coal Co.*, 26; *Brinkley v. Minerals Co.*, 17; *Johnson v. Catlett*, 341; *Evans v. Times Co.*, 669; *Champion v. Tractor Co.*, 691.

Materialmen's Liens — Suit by subcontractor to enforce lien for mater-

ials, *Linthicum & Sons, v. Construction Co.*, 203; owner of lot held liable for contractor's purchase of material upon doctrine of principal and agent, *Love v. Snellings*, 674.

Mechanics' Liens — Suit by sucontractor to enforce lien for materials, *Linthicum & Sons v. Construction Co.*, 203.

Merger — Of legal and equitable titles, *Finch v. Honeycutt*, 91.

Minimizing Loss — Burden of proving that loss should have been minimized, *Bank v. Bloomfield*, 492.

Minutes — Where court finds upon supporting evidence that minutes of court were correct, denial of motion to correct minutes is without error, *S. v. Arthur*, 690.

Misdemeanors — Intent to steal property of value less than $100 is misdemeanor, *S. v. Andrews*, 561; original jurisdiction of misdemeanors, *S. v. White*, 587; *S. v. Morgan*, 596.

Misjoinder — Demurrer for misjoinder of parties and causes, *Davis v. Davis*, 307.

Mistrial—Court has discretionary power to order mistrial, *Keener v. Beal*, 247.

Money Received — *Collins v. Covert*, 303.

Monoxide Poison — Statute does not require containers of commercial paint ingredient to be labeled "poison," *Porter v. Yoder & Gordon Co.*, 398.

Moot Questions — Appeal will be dismissed when question has become moot, *Walker v. Moss*, 196; *Archer v. Cline*, 545; whether question sought to be determined had become moot held better determined in trial court, and therefore appeal is not dismissed, *Construction Co. v. Electrical Workers Union*, 481.

Mortgages — Estates of parties, *Gregg v. Williamson*, 356; foreclosure, *Ibid;* redemption, *Jordan v. Chappel*, 620.

Motions — to nonsuit, see Nonsuit; to quash, see Indictment and Warrant; motion for judgment on pleadings, *S. v. Meshaw*, 205; *Tyer v. Leggett*, 638; *Duncan v. Renfrow*, 197; for change of venue, *Brendle v. Stafford*, 218.

Municipal Corporations — Electrocution of carpenter by power line over building, *Philyaw v. Kinston*, 534; liability for torts, *Glenn v. Raleigh*, 469; *Denning v. Gas Co.*, 541; appropriation of private water system, *Jackson v. Gastonia*, 404.

Municipal Parks — Prosecution of Negroes for trespass in refusing to leave public golf course, *S. v. Cooke*, 518.

Negative Easements — Grantees held charged with notice of restrictive covenant in collateral deed of common grantor, *Reed v. Elmore*, 221.

Negative Testimony — Trial court properly refrains from commenting on probative value of negative testimony, *Kirkman v. Baucom*, 510.

Negligence — In operation of automobile, see Automobiles; accidents at grade crossings, see Railroads; of power company, see Electricity; governmental immunity for torts, see Municipal Corporations; contracts limiting liability for negligence, *Neece v. Greyhound Lines*, 547; dangerous substances, *Porter v. Gordon Co.*, 398; res ipsa loquitur, *Lane v. Bryan*, 108; *Lea v. Light Co.*, 287; *Johnson v. Meyer's Co.*, 310; condition and use of lands and buildings, *Johnson v. Meyer's Co.*, 310; proximate cause, *Lane v. Bryan*, 108; *Price v. Gray*, 162; *Johnson v. Meyer's Co.*, 310; *Philyaw v. Kinston*, 534; last clear chance, *Freight Lines v. Burlington Mills*, 143; *Irby v. R.R.*, 384; contributory negligence, *Harris v. Bingham*, 77; *Bell v. Maxwell*, 257; pleadings, *Hood v. Coach Co.*, 684; presumptions, *Burr v. Everhart*, 327; *Robbins v. Crawford*, 622; sufficiency of evidence and nonsuit, *Burr v.*

Everhart, 327; *Lane v. Bryan*, 108; nonsuit for contributory negligence, *Keener v. Beal*, 247; *Bell v. Maxwell*, 257; *Crotts v. Transportation Co.* 420; instructions, *Freight Lines v. Burlington Mills*, 143; *Price v. Gray*, 162; *Glenn v. Raleigh*, 469.

Negroes — Prosecution of for trespass in refusing to leave public golf course, *S. v. Cooke*, 518.

Neighborhood Public Road — *Edwards v. Hunter*, 46.

Nolo Contendere — Plea of nolo contendere by one defendant may not be argued as ground for conviction of another defendant, *S. v. Kerley*, 157.

Nonresident — Service on while attending court in this State is not void, *Thrush v. Thrush*, 114; our courts have jurisdiction to award custody of child here, notwithstanding domicile of child is in another state, *Holmes v. Sanders*, 200.

Nonsuit — Evidence must be taken in light most favorable to plaintiff, *Manufacturing Co. v. Gable*, 1; *Shearin v. Lloyd*, 363; *Bridges v. Graham*, 371; *Morgan v. Bell Bakeries, Inc.*, 429; *Glenn v. Raleigh*, 468; *Kirkman v. Baucom*, 510; *Dean v. Insurance Co.*, 704; nonsuit may not be entered on conflicting evidence, *Ashley v. Jones*, 442; conflicts in testimony are for jury, *S. v. Green*, 717; defendant's evidence considered only insofar as is favorable to plaintiff, *Keener v. Beal*, 247; *Bell v. Maxwell*, 257; *Bridges v. Graham*, 371; *Kirkman v. Baucom*, 510; *Robbins v. Crawford*, 622; sufficiency of evidence to overrule, *Lane v. Bryan*, 108; *S. v. Kerley*, 157; sufficiency of circumstantial evidence to overule nonsuit, *S. v. Davis*, 73; *Lane v. Bryan*, 108; for variance, *Calloway v. Wyatt*, 129; discrepancies and contradictions in plaintiff's evidence do not justify, *Bridges v. Graham*, 371; nonsuit may not be allowed after verdict, *Temple v. Temple*, 334; sufficiency of evidence to overrule nonsuit in action in ejectment, *Kelly v. Kelly*, 174; sufficiency of evidence of guilt of homicide, see Homicide; nonsuit for contributory negligence, *Keener v. Beal*, 247; *Bell v. Maxwell*, 257; *Irby v. R.R.*, 384; *Crotts v. Transportation Co.*, 420; plaintiff may not take voluntary nonsuit when defendant demands affirmative relief, *Cox v. Cox*, 528; preservation of right to review on exception to refusal to nonsuit in trial by court, *Goldsboro v. R.R.*, 101.

N. C. Industrial Commission — See Master and Servant.

Notice — Grantees held charged with notice of restrictive covenant in collateral deed of common grantor, *Reed v. Elmore*, 221.

Obiter Dicta — Does not come within rule of stare decisis, *Pilkington v. West*, 575.

Obligations of Contract — Statute may prescribe limitation for enforcement of contractual rights provided reasonable time is allowed for enforcement of such rights prior to bar, *Gregg v. Williamson*, 356.

Occupational Disease — Within coverage of Compensation Act, see Master and Servant.

Oil Tanks — Oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318.

Operator's License—*Snyder v. Scheidt*, 81; *Barbour v. Scheidt*, 169; *Johnson v. Scheidt*, 452.

Opinion Testimony — Held to invade province of jury, *Jones v. Bailey*, 599; physician may give opinion based on statements made to him in course of professional treatment, *Penland v. Coal Co.*, 26.

Order of Proof — *Bridges v. Graham*, 371.

Parent and Child — Liability of father for negligent driving of child, *Thompson v. Lassiter*, 34; wilful failure to support illegitimate child, *S. v.*

Smith, 118; determination of right to custody of children after institution of divorce action, see Divorce and Alimony; proceeding for custody of child as between father and grandparent, *Holmes v. Sanders*, 200.

Parking Lot — Liability to pedestrian injured when advertising sign on parking lot was knocked over by automobile, *Johnson v. Meyer's Co.*, 310.

Parks — Injury to park invitee caused by rock thrown by power mower, *Glenn v. Raleigh*, 468; prosecution of Negroes for trespass in refusing to leave public golf course, *S. v. Cooke*, 518.

Parol Evidence — Written lease may not be modified by parol, *Manufacturing Co. v. Gable*, 1.

Partial Intestacy — Presumption against, *Finch v. Honeycutt*, 91, *Carter v. Davis*, 191.

Parties — Joinder of joint tort feasors for contribution, see Torts; demurrer for misjoinder of parties and causes, *Davis v. Davis*, 307; in action to compel executors to account and make settement, *Davis v. Davis*, 307; parties plaintiff, *Smith v. Pate*, 63; parties defendant, *Edmondson v. Henderson*, 634; defect of parties and amendment, *Linthicum v. Construction Co.*, 203.

Party Aggrieved — Trustee may not appeal from judgment declaring that right to possession and right to foreclose were barred, *Gregg, v. Williamson*, 356.

Partnership — *Keith v. Lee*, 188.

Passenger Cars — Pick-up truck is not passenger car within purview of accident policy, *Marshall v. Insurance Co.*, 447.

Passive Trusts — *Finch v. Honeycutt*, 91; *Pilkington v. West*, 575.

Payment — *Builders Supply v. Dixon*, 136.

Pedestrians — *Lane v. Bryan*, 108; *Barbee v. Perry*, 538.

Pendency of Prior Action — Abatement for, see Abatement and Revival.

Peremptory Instructions — Directed verdict, *Church Conference v. Locklear*, 349.

Permanent Partial Disability — Compensation for disability from back injury, *Evans v. Times Co.*, 669.

Personalty — Survivorship in bank deposits, *Sides v. Bank* 672.

Petition to Rehear — *Cotton Mills Co. v. Duplan Corp.*, 88.

Pharmacy — Statute does not require containers of commercial paint ingredient to be labeled "poison," *Porter v. Yoder and Gordon Co.*, 398.

Physical Facts — At scene of collision, *Kirkman v. Baucom*, 510; *Robbins v. Crawford*, 622.

Physicians and Surgeons — May give opinion based on statements made to him in course of professional treatment, *Penland v. Coal Co.*, 26; malpractice, *Shearin v. Lloyd*, 363.

Picketing — Action to enjoin alleged unlawful picketing, *Construction Co. v. Electrical Workers Union*, 481.

Pick-up Truck — Is not passenger car within purview of accident policy, *Marshall v. Insurance Co.*, 447.

Pipe — Electric shock from touching water pipe, *Lea v. Light Co.*, 287.

Plea in Abatement — For pendency of prior action, see Abatement and Revival.

Plea of Nolo Contendere — By one defendant may not be argued as ground for conviction of another defendant, *S. v. Kerley*, 157.

Pleadings — Review of judgment overruling demurrer, *Lowry v. Dillingham*, 618; pleadings in particular actions see particular titles of actions counterclaims, *Burns v. Oil Corp.*, 266; demurrer, *Buchanan v. Smawley*, 592; *Lewis v. Lee*, 68; *Harris v. Bingham*, 77; *Riddle v. Artis*, 629;

Construction Co. v. Electrical Workers Union, 481; *Davis v. Davis*, 307; *McBryde v. Lumber Co.*, 415; *Calloway v. Wyatt*, 129; judgment on pleadings, *Duncan v. Renfrow*, 197; *Waggoner v. Waggoner*, 210; *Tyer v. Leggett*, 638; *motions to strike*, *Smith v. Pate*, 63.

Poisons — Statute does not require containers of commercial paint ingredient to be labeled "poison," *Porter v. Yoder and Gordon Co.*, 398.

Police Sergeant — Held not authorized to issue warrant of arrest, *S. v. Blackwell*, 642.

Polling the Jury — *Highway Commission v. Privett*, 501; *S. v. Dow*, 644.

Power Companies — Negligence of, see Electricity.

Power Mower — Injury to park invitee caused by rock thrown by, *Glenn v. Raleigh*, 468.

Prayer for Judgment Continued — *Barbour v. Scheidt*, 169; *S. v. Griffin*, 680.

Precatory Words — *Anders v. Anderson*, 53.

Presumptions — Against partial intestacy, *Finch v. Honeycutt*, 91; *Carter v. Davis*, 191; that public official has discharged his duties in good faith, *Construction Co. v. Electrical Worker Union*, 481; from possession of intoxicating liquor, *S. v. Miller*, 608; no presumption of negligence arises from fact of injury, *Burr v. Everhart*, 327; *Robbins v. Crawford*, 622.

Principal and Agent — *Love v. Snellings*, 674.

Prior Actions — Plea in abatement for pendency of prior action, see Abatement and Revival.

Process — Service of process by publication in tax foreclosure suit, *Kelly v. Kelly*, 174; service by publication and attachment, *Thrush v. Thrush*, 114; *Temple v. Temple*, 334; service on unincorporated associations, *Construction Co. v. Electrical Workers Union*, 481.

Processioning Proceedings — See Boundaries.

Propane Gas — Negligence in delivering leaking tank truck to bailee, *Ashley v. Jones*, 442.

Proximate Cause — See Negligence; instruction as to whether negligence and contributory negligence should be "a" or "the" proximate cause, *Price v. Gray*, 162.

Public Convenience and Necessity — Certificate of for condemnation of land, *In re Department of Archives & History*, 392.

Public Laws — Courts must take judicial notice of laws of this State, *Walker v. Moss*, 196.

Public Officers — presumption of proper performance of duties, *Construction Co. v. Electrical Workers Union*, 481.

Public Purpose — Bonds for county water and sewer systems are for public purpose, *Ramsey v. Comrs. of Cleveland*, 647.

Public Utilities — In granting franchise to gas company municipality acts in governmental capacity, *Denning v. Gas Co.*, 541.

Publication — Service of process by publication in tax foreclosure suit, *Kelly v. Kelly*, 174; is essential element of action for libel, *Tyer v. Leggett*, 638.

Punishment — Court may inform jury as to punishment for offense, *S. v. Green*, 717.

Quantum Meruit—*Jackson v. Gastonia*, 404.

Quashal — See Indictment and Warrant.

Quieting Title — *Bumgarner v. Corpening*, 40.

Racial Discrimination — Prosecution of Negroes for trespass in refusing to leave public golf course, *S. v. Cooke*, 518.

Railroads — Right of municipality to condemn Railroad land for street, *Goldsboro v. R.R.*, 101; accidents at

crossings, *Irby v. R.R.*, 384.

Rape — *S. v. Green*, 717.
717.

Real Party in Interest—Insurer paying for loss is, *Smith v. Pate*, 63.

Receiving Stolen Goods—*S. v. Meshaw*. 205.

Record — Appeal is limited by, *Penland v. Coal Co.*, 27; evidence must be set out in narrative form in record, *Huie v. Templeton*, 86.

Reference — Report of reference. *McCormick v. Smith*, 525.

Registration — Grantees held charged with notice of restrictive covenant in collateral deed of common grantor, *Reed v. Elmore*, 221; registration of chattel mortgages and priorities thereby created, see Chattel Mortgages

Rehearing—*Cotton Mills Co. v. Duplan Corp.*, 88.

Reinstatement — Application for reinstatement of life insurance policy, *Dean v. Insurance Co.*, 704.

Religious Societies — Property and Government, *Church Conference v. Locklear*, 349.

Remand — For necessary parties, *Edmonson v. Henderson*, 634; where findings are insufficient to determine applicable law, cause must be remanded, *Stokes v. Smith*, 694.

Reopening Case — Discretionary power of court to reopen case for additional evidence, *Builders Supply v. Dixon*, 136.

Repair — *Manufacturing Co. v. Gable*, 1.

Repeated Offenses — Punishment for, *S. v. White*, 587.

Res Gestae — Declaration held not part of res gestae, *Jones v. Bailey*, 599.

Res Ipsa Loquitur — *Lane v. Bryan*, 108; *Lea v. Light Co.*, 287; *Johnson v. Meyer's Co.*, 310.

Res Judicata — Parties estopped, *Thompson v. Lassiter*, 34; judgment of another state as constituting res judicata, *Johnson v. Catlett*, 341.

Residuary Clause — *Carter v. Davis*, 191.

Respondeat Superior — Liability of father for negligent driving of child, *Thompson v. Lassiter*, 34.

Restraining Order — See Injunctions.

Restrictive Covenants — *Reed v. Elmore*, 221.

Revocation of Driver's License, *Snyder v. Scheidt*, 81; *Barbour v. Scheidt*, 169; *Johnson v. Scheidt*, 452.

Right of Appeal — Defendant may appeal from judgment imposing fine, notwithstanding statement of court that prayer for judgment was continued, *S. v. Griffin*, 680.

Right of Confrontation — *S. v. Boles*, 83; *Raper v. Berrier*, 193.

Right of Way — At intersections, *Price v. Gray*, 162; *Norris v. Johnson*, 179; declaration of officer as to which party had right of way held incompetent, *Jones v. Bailey*, 599; liability of power company for injury from wire broken by felled tree, *Lea v. Light Co.*, 287.

Right to Work Statute — Action to enjoin alleged unlawful picketing, *Construction Co. v. Electrical Workers Union*, 481.

Riot — *S. v. Wynne*, 686.

Robbery — *S. v. Rogers*, 611.

Roof — Fall of carpenter from eave of roof because of want of scaffold, *Burr v. Everhart*, 327.

Rule in Shelley's Case — *Powell v. Roberson*, 606.

Rupture — Whether the result of accident within coverage of Compensation Act, *Hensley v. Cooperative*, 274.
of roof because of want of scaffold, *Burr v. Everhart*, 327.

School Bus — Evidence held sufficient to support finding that accident resulted from negligence of driver of

school bus, *Mica Co. v. Board of Education*, 714.

Schools — Theft of examination papers, *S. v. Andrews*, 561.
Searches and Seizures — *S. v. Mills*, 238; *S. v. Miller*, 609; *S. v. Williams*, 614.

Self-Incrimination — Privilege against does not apply to physical marks on body of defendant, *S. v. Floyd*, 434.

Sentences — Suspended, *S. v. Miller*, 608; *S. v. Canady*, 613.

Separation Agreements — *Bolin v. Bolin*, 666.

Service — By publication and attachment, *Thrush v. Thrush*, 114; on nonresident while attending court in this State is not void, *Thrush v. Thrush*, 114; by publication in tax foreclosure suit, *Kelly v. Kelly*, 174.

Service Station — Oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318.

Setting Aside Verdict — Discretionary order setting aside verdict not reviewable, *Walston v. Greene*, 617.

Sewer System — County bonds for sewer system are for public purpose, *Ramsey v. Comrs. of Cleveland*, 647.

Shelley's Case — *Powell v. Roberson*, 606.

Signal Device — Motorists must take cognizance of signal device on car regardless of whether it had been approved by Dept. of Motor Vehicles, *Coach Co. v. Fultz*, 523.

Signs — Liability to pedestrian injured when advertising sign on parking lot was knocked over by automobile, *Johnson v. Meyer's Co.*, 310.

Silicosis — Within coverge of Compensation Act, see Master and Servant.

Sister State — Court must take judicial notice of laws of, *Johnson v. Catlett*, 341.

Sketches — Competency of in evidence, *McCormick v. Smith*, 425.

Skidding — Duty of motorist to exercise caution when he sees skidding car approaching, *Freight Lines v. Burlington Mills*, 143.

Special Act — Authorizing police officer to issue warrant does not relate to establishment of inferior court within purview of constitutional prohibition, *S. v. St. Clair*, 183.

Stare Decisis — Obiter dicta does not come within rule of stare decisis, *Pilkington v. West*, 575.

State — Tort Claims Act, *Mica Co. v. Board of Education*, 714; counties are subject to almost unlimited legislative control, *Ramsey v. Comrs. of Cleveland*, 647.

State Police Power — State has power to regulate sale of beer, *Boyd v. Allen*, 150.

States — Our courts have jurisdiction to award custody of a child here notwithstanding domicile of child is in another state, *Holmes v. Sanders*, 200.

Statute of Uses — *Finch v. Honeycutt*, 91.

Statutes — Statute may prescribe limitation for enforcement of contractual rights provided reasonable time is allowed for enforcement of such right prior to bar, *Gregg v. Williamson*, 356; constitutional proscription against passage of special acts, *S. v. St. Clair*, 183; construction, Porter v. *Gordon Co.*, 398; amendment to repealed statute, *S. v. Blackwell*, 642.

Stipulations — Stipulation entered into by counsel at trial is conclusive, *Church Conference v. Locklear*, 349.

Stock — Purchase agreement, *Collins v. Covert*, 303.

Storage Tanks—Conversion of, *Burns v. Oil Corporation*, 266; oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318.

Store — Liability to pedestrian injured when advertising sign on parking lot was knocked over by automobile, *Johnson v. Meyer's Co.*, 310.

Streets — Sale of lots by reference to

map showing streets is not implied dedication when deeds reserve to grantors title and control of streets, *Todd v. White*, 59; right of municipality to condemn railroad land for street, *Goldsboro v. R.R.*, 101.

Strikes — Action to enjoin alleged unlawful picketing, *Construction Co. v. Electrical Workers Union*, 481.

Subcontractor — Suit by subcontractor to enforce lien for materials, *Linthicum & Sons v. Construction Co.*, 203; owner of lot held liable for contractor's purchase of material upon doctrine of principal and agent, *Love v. Snellings*, 674.

Subdivision — Owner of water and sewer lines must be compensated therefor upon taking by municipality, *Jackson v. Gastonia*, 404.

Subleases — Lessor held to have waived right to declare forfeiture by accepting rents after sublease of premises, *Realty Co. v. Spiegel, Inc.*, 458; sublease does not relieve lessee of obligation to pay rent, *Bank v. Bloomfield*, 492.

Submission of Controversy — See Controversy Without Action.

Subrogation — Insurer paying loss is real party in interest, *Smith v. Pate*, 63.

Sudden Emergency — Doctrine of held sufficiently submitted to jury, *Kirkman v. Baucom*, 510.

Summons — See Process.

Superior Courts — Have no original jurisdiction of proceeding to establish discontinuance of neighborhood public road, *Edwards v. Hunter*, 46; jurisdiction of Superior Court on appeal from county court, *S. v. Mills*, 237.

Supreme Court — See Appeal and Error.

Surgeons — See Physicians and Surgeons.

Survivorship — In bank deposits, *Sides v. Bank*, 672.

Suspended Sentences and Executions, *S. v. Miller*, 608; *S. v. Canady*, 613; *S. v. Griffin*, 680; *S. v. St. Clair*, 183.

Tacking Possession — *Scott v. Lewis*, 298.

Tank Truck — Negligence in delivering leaking tank truck to bailee, *Ashley v. Jones*, 442.

Tanks — Oral sale of storage tanks buried in ground held ineffective as against grantee of realty, *Stephens v. Carter*, 318.

Taxation — Uniform rule, *Ramsey v. Comrs. of Cleveland*, 647; public purpose, *Ibid;* enjoining issuance of bonds, *Garner v. Newport*, 449; tax foreclosure, *Kelly v. Kelly*, 174.

Temporary Restraining Order — See Injunctions.

Tenants in Common — *Davis v. Davis*, 307.

Terminal Leave — Held not cessation of employment within provision of group policy, *Gaulden v. Insurance Co.*, 378.

Three-Car Collision — Evidence held insufficient to show that driver of third car involved in collision was liable as joint tort feasor, *Riddle v. Artist*, 629.

Timber Deed — Both grantor and grantee in timber deed may be guilty of trespass in cutting trees beyond boundary, *McBryde v. Lumber Co.* 415.

Time — Where time is not of essence, indictment will not be squashed for failure to allege specific date *S. v. Andrews*, 561.

Tobacco Allotments — That value of farm is dependent on size of tobacco allotment is matter of common knowledge, *Garris v Scott*, 568; determination of review committee conclusive when supported by evidence, *Burleson v. Francis*, 619.

Tort Claims Act — *Mica Co. v. Board of Education*, 714.

Torts — Governmental immunity for, see Municipal Corporations; joinder of joint tort feasors, *Riddle v. Artis*, 629; *Norris v. Johnson*, 179; *Johnson v. Catlett*, 341; *McBryde v. Lumber Co.*, 415.

Transactions or Communications —

With decedent. *Collins v. Covert*, 303.

Trees — Liability of power company for injury from wire broken by felled tree, *Lea v. Light Co.*, 287.

Trespass — *Smith v. Pate*, 63; *McBryde v. Lumber Co.*, 415; criminal trespass, *S. v. Cooke*, 518.

Trial — By court, sufficiency of exceptions to finding of fact, *Goldsboro v. R.R.*, 101; court may not hear evidence in custody proceedings in absence of parties, *Raper v. Berrier*, 193; stipulations and pre-trial agreements, *Church Conference v. Locklear*, 349; reopening case for additional evidence, *Builders Supply v. Dixon*, 136; nonsuit, *Riddle v. Artis*, 629; *Mfg. Co. v. Gable*, 1; *Kirkman v. Baucom*, 510; *Bridgers v. Graham*, 37; *Morgan v. Bell Bakeries*, 429; *Dean v. Ins. Co.*, 704; *Ashley v. Jones*, 442; *Worley v. Motor Co.*, 677; *Bell v. Maxwell*, 257; *Keener v. Beal*, 247; *Glenn v. Raleigh*, 469; *Robbins v. Crawford*, 622; *Lane v. Bryan*, 108; *Calloway v. Wyatt*, 129; voluntary nonsuit, *Ashley v. Jones*, 442; *Cox v. Cox*, 528; peremptory instructions, *Church Conference v. Locklear*, 349; instructions, *Freight Lines v. Burlington Mills*, 143; *Keith v. Lee*, 188; *In re Will of Crawford*, 322; *Glenn v. Raleigh*, 469; *Worley v. Motor Co.*, 677; *Kirkman v. Baucom*, 510; *Builders Supply v. Dixon*, 136; issues, *Bank v. Bloomfield*, 492; polling jury, *Highway Com. v. Privett*, 501; new trial for misconduct affecting jury, *Keener v. Beal*, 247; setting aside verdict, *Temple v. Temple*, 334; *Keener v. Beal*, 247; *Walston v. Greene*, 617; trial by court, *Goldsboro v. R.R.*, 101.

Tryon's Palace — Restoration of, *In re Department of Archives & History*, 392

Trucks — Pick-up truck is not passenger car within purview of accident policy, *Marshall v. Insurance Co.*, 447.

Trusts — Devise to wife "to provide for" herself and child creates trust, *Morris v. Morris*, 314; trustees of chuch property, *Church Conference v. Locklear*, 349; written trusts, *Finch v. Honeycutt*, 91; *Pilkington v. West*, 575; active and passive trust, *Finch v. Honeycutt*, 91; *Pilkington v. West*, 575; termination of trust under terms of instrument, *Trust Co. v. Taliaferro*, 121.

Turlington Act — See Intoxicating Liquor.

Turn Signals — Motorists must take cognizance of signal device on car regardless of whether it had been approved by Dept. of Motor Vehicles, *Coach Co. v. Fultz*, 523.

Undercover Agent — Instruction on weight to be given testimony of undercover agent held without error, *S. v. Hunt*, 454.

Uniform Rule — Applies to imposition of taxes but not to expenditure of tax funds, *Ramsey v. Comrs. of Cleveland*, 647.

Union — Service of process on unincorporated labor union, *Construction Co. v. Electrical Workers Union*, 481; action to enjoin alleged unlawful picketing, *Ibid*

Universities — Theft of examination papers, *S. v. Andrews*, 561.

Unjust Enrichment — *Collins v. Covert*, 303.

Utilities — In granting franchise to gas company municipality acts in governmental capacity, *Denning v. Gas Co.*, 541.

Utilities Commission — *In re Department of Archives*, 392.

Variance — See Pleadings; nonsuit for, *Calloway v. Wyatt*, 129; failure of State to prove commission of crime on very date alleged held not fatal, *S. v. Gillyard*, 217.

Vendor and Purchaser — Refusal of purchaser to comply with contract upon learning of easement for highway, *Harris v. Bingham*, 77; fraud in misrepresenting capacity of well on lot sold, *Calloway v. Wyatt*, 129.

Venue — Residence of parties, *Brendle v. Stafford*, 218; change for convenience, *Ibid.*

Verbal Act Doctrine — *Gurganus v. Trust Co.*, 655.

Verdict — Of guilty as charged refers to all counts in indictment, *S. v. Meshaw*, 205; polling the jury, *Highway Commission v. Privett*, 501; *S. v. Dow*, 644; directed verdict and peremptory instructions, *Church Conference v. Locklear*, 349; discretionary order setting aside verdict not reviewable, *Walston v. Greene*, 617; nonsuit may not be allowed after verdict, *Temple v. Temple*, 334; error cured by verdict, *Bank v. Bloomfield*, 492; error held not cured by verdict, *S. v. Meshaw*, 205; *S. v. Robbins*, 332.

Waiver — Of constitutional right, *S. v. St. Clair*, 183; accepting benefits, *Realty Co. v. Spiegel*, 458.

"Want"—Held imperative rather than precatory, *Anders v. Anderson*, 53.

Warrant — See Indictment and Warrant.

Water Pipe — Electric shock from touching water pipe, *Lea v. Light Co.*, 287.

Water Systems — County bonds for water system are for public purpose, *Ramsey v. Comrs. of Cleveland*, 647.

Wells — Fraud in misrepresenting capacity of well on lot sold, *Calloway v. Wyatt*, 129.

"Widow" — Meaning of word in stock purchase agreement executed by principal stockholders, *Collins v. Covert*, 303.

Wife — Devise to brother "and his wife" held to devise estate to his brother and his then wife, *Matheson v. Trust Co.*, 710.

Wills — Holographic wills, *In re Will of Crawford*, 322; revocation, *Ibid;* caveat, *Ibid;* construction of wills, *Anders v. Anderson*, 53; *Trust Co. v. Taliaferro*, 121; *Morris v. Morris*, 314; *Coffield v. Peele*, 661; *Finch v. Honeycutt*, 91; *Carter v. Davis*, 191; *Matheson v. Trust Co.*, 710; residuary clauses, *Carter v. Davis*, 191; actions to construe, *Finch v. Honeycutt*, 91; *Edmundson v. Henderson*, 634; lapsed legacies, *Carter v. Davis*, 191.

Witnesses — Expression of opinion by court on evidence in interrogating witness, *S. v. Lynn*, 80; beneficiary under holographic will not be disqualified to testify as to handwriting, *In re Will of Crawford*, 322; privilege against self-incrimination does not apply to physical marks on body of defendant, *S. v. Floyd*, 434; instruction on weight to be given testimony of undercover agent held without error, *S. v. Hunter*, 454.

Workmen's Compensation Act — See Master and Servant.

Wrongful Act — May not be basis of civil action, *Supervision Co. v. Thomas*, 281.

Wrongful Death — See Death; institution of action for wrongful death by minor's administrator cannot constitute disaffirmance of insurance agreement as to beneficiary named therein, *NASCAR, Inc. v. Midkiff*, 409.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action in General.

The priniciple of abatement of a second action on the ground of a prior action pending between the parties is a rule of convenience to prevent multiplicity of suits, and there the principle can have no application where the power of eminent domain is given one agency of the State, which institutes condemnation proceedings thereunder, and later this power is withdrawn from such agency and given to another, which institutes identical proceedings, since the prior proceeding, as constituted, cannot be prosecuted further, and the second petition may be treated as a motion in the cause to substitute the name of the successor State agency for that of the first. *In re Department of Archives*, 392.

§ 4. Procedure to Raise Question of Pendency of Prior Action.

A demurrer on the ground of the pendency of a prior action must be overruled when it appears upon the face of the complaint that even though the prior action involves the same subject matter it is not between the same parties. G.S. 1-127(3). If the identity of the actions does not appear upon the face of the complaint, objection may be raised only by answer. *Buchanan v. Smawley*, 592.

§ 5. Effect of Plea of Pendency of Former Action.

A plea in abatement for pendency of a prior action between the parties is a plea in bar, and the court must dispose of such plea before considering other matters in issue. *Cox v. Cox*, 532.

§ 8. Pendency of Prior Action—Identity of Actions.

The pendency of the husband's action for absolute divorce under G.S. 50-6 is not ground for abatement of the wife's subsequent action for alimony without divorce under G.S. 50-16. *Beeson v. Beeson*, 330.

ACTIONS

§ 5. Where Wrongful or Illegal Act Constituted Element of Cause of Action.

Where plaintiff's cause of action is based on facts occurring prior to an illegal agreement, exists independent of such agreement, and the maintenance of the action does not involve an affirmance of an illegal act, such illegal agreement does not impair plaintiff's right to maintain the action. *Supervision Co. v. Thomas*, 281.

§ 6. Distinction between Forms of Action in General.

The distinction between forms of actions has been abolished, and the right to recover will be determined in accordance with the facts alleged and not by the technical name given the action. *Smith v. Pate*, 63.

§ 10. Method of Commencement and Time from which Action is Pending.

A civil action is commenced by the issuance of summons or by the filing of affidavit that personal service is not intended to be made in this State. *Thrush v. Thrush*, 114.

ADVERSE POSSESSION

§ 1. Actual, Hostile and Continuous Possession in General.

Adverse possession, without color of title, of lands within the bounds of another's deed is limited to the area actually possessed, and evidence of acts of ownership without identity of the lines and boundaries claimed is unavailing. *Scott v. Lewis*, 298.

§ 6. Tacking Possession.

Successive adverse possessions may be tacked for the purpose of showing a continuous adverse possession where there is a privity of estate or connection of title between the several successive occupants. *Scott v. Lewis*, 298.

Where parties bring action for the recovery of land as heirs at law of their ancestor and judgment is rendered in the action adverse to them, such judgment adjudicates want of title in their ancestor and is binding upon them, and they may not in a subsequent action, in which they assert title by adverse possession, tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under the known and definite boundaries. *Ibid.*

§ 15. Instruments Constituting Color of Title.

Where the parties claim under deeds from a common source calling for a road as the dividing line between the tracts, but subsequent deeds in the chain of title of respondents describe the land by specific description without reference to the road, respondents are entitled to claim the land encompassed in the description in the intermediate deeds as under color of title, and when they offer evidence of adverse possession under their deeds, an instruction limiting their claim to the road as it existed at the time of the execution of the deeds from the common source, is error. *Bumgardner v. Corpening*, 40.

§ 16. Presumptive Possession to Outermost Boundaries of Deed.

Where the description in the deed from the common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. *Bumgarner v. Corpening*, 40.

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Conflicting evidence as to the character or extent of the possession under color of title raises the issue for the determination of the jury. *Bumgarner v. Corpening*, 40.

AGRICULTURE

§ 6. Agricultural Tenancies.

Farming contract for share of crop does not create agricultural partnership. *Keith v. Lee*, 188.

§ 11. Marketing Quotas and Cards.

The finding of fact of the Superior Court that there was substantial evidence supporting the determination by the review committee of the tobacco allotment of the petitioner's farm is binding on the Supreme Court if there be evidence to support it. *Burleson v. Francis*, 619.

ANIMALS

§ 3. Liability of Owner for Permitting Domestic Animals to Run at Large.

Evidence *held* sufficient on question of negligence in permitting cow to run in highway causing collision with car. *Bullard v. Phillips*, 87.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Upon appeal from judgment entered on facts stipulated, the review relates to whether the judgment is correct upon the stipulated facts and not the reasoning upon which the lower court reached the conclusion embodied in the judgment. *NASCAR v. Midkiff*, 409.

As a general rule, the Supreme Court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory of trial in the lower court ordinarily precludes consideration on appeal of grounds of defense or opposition not asserted or relied on in the lower court. *Penland v. Coal Co.*, 26.

Ordinarily, the Supreme Court will not consider questions not passed upon in the court below. *Anders v. Anderson*, 53.

The constitutionality of a statute will not be determined when the disposition of the appeal may be made to turn upon another ground. *S. v. Blackwell*, 642.

It is not necessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached. *Todd v. White*, 59.

The jurisdiction of the Supreme Court is derivative, and where it appears that the court below had no jurisdiction, the Supreme Court can acquire none by appeal. *Temple v. Temple*, 334.

Where the court below erroneously dismisses an action after verdict for insufficiency of the evidence, but it appears on the face of the record that the court had no jurisdiction of the parties, the correct result is reached and the judgment will not be disturbed. *Ibid.*

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Where it appears on the face of the record that the court below had no jurisdiction, the Supreme Court will so declare *ex mero motu*. *Temple v. Temple*, 334.

§ 3. Judgments Appealable.

As a general rule, interlocutory judgments and orders are not immediately appealable, and refusal of a motion to dismiss is not a final determination of a cause from which an appeal will lie. *Cox v. Cox*, 528.

Where the clerk permits voluntary nonsuit in an action in which defendant has asserted his right to affirmative relief, order of the Superior Court reversing the clerk's judgment of nonsuit has the same effect as if plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before the judge, and attempted appeal from the order reversing the nonsuit is a nullity, notwithstanding that the judge signs the appeal entries. *Ibid.*

§ 4. Parties who May Appeal—Parties Aggrieved.

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under G.S. 45-37(5) the right to possession and the right to foreclose were barred. *Gregg v. Williamson*, 356.

The appointee of some of the heirs has no interest in the estate sufficient to entitle him to challenge the issuance of letters of administration by the clerk to another in the absence of a showing by the appointee that he is legally entitled to have the letters of administration issued to himself. *In re Estate of Cogdill*, 602.

§ 6. Moot Questions and Advisory Opinions.

An action to determine plaintiff's right to have his vote counted in the tally for the votes for the office of a member of a county board of education becomes moot and must be dismissed when, pending the appeal, the General Assembly, pursuant to a public law, has appointed the members of the county board of education. *Walker v. Moss*, 196.

On defendants' appeal from order continuing a temporary order restraining alleged unlawful picketing, plaintiff moved to dismiss the appeal on the ground that the projects in question had been completed, and that therefore the questions had become moot. Defendants filed a written reply asserting that questions as to invasion of the jurisdiction under the National Labor Management Relations Act and other issues had been raised in the action, and that the questions were not moot. The motion to dismiss is denied, since whether the questions had become moot may be more properly determined when the case comes on for trial on the merits. *Construction Co. v. Electrical Workers Union*, 481.

Where it is made to appear on appeal that the election sought to be restrained had been held pending plaintiffs' appeal from order denying injunctive relief, the appeal must be dismissed as presenting only a moot question. *Archer v. Cline*, 545.

§ 9. Necessity for Demurrer or Motions in the Superior Court to Present Question for Review.

The Supreme Court may take cognizance ex moro motu of the fact that the complaint states a defective cause of action and therefore demurrer or motion to dismiss in the Superior Court is not essential. *Cotton Mills v. Duplan Corp.*, 88.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

An attempted appeal from a non-appealable interlocutory order is a nullity and does not divest the Superior Court of jurisdiction to proceed in the action. *Cox v. Cox*, 528.

§ 16. Certiorari as Method of Review.

In order to preserve the right to review a judgment overruling a demurrer other than a demurrer for misjoinder of parties and causes or demurrer to the jurisdiction, appellant must move for *certiorari* within thirty days from the entry of such judgment. *Lowry v. Dillingham*, 618.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error must be supported by an exception duly taken and may not be supported by an exception found only in the appeal entries. *Weddle v. Weddle*, 336.

An assignment of error must be based on an exception duly noted and may not present by amplification a question not embraced in the exception. *Freight Lines v. Burlington Mills*, 143.

Exceptions must be bought forward and assigned as error. Rule of Practice in the Supreme Court No. 19(3). *S. v. Worley*, 202.

Assignments of error not supported by exceptions therein noted cannot be considered. *Ibid.*

Exceptions to the testimony of several witnesses as to declarations made by a particular person are properly grouped under one assignment of error when all the exceptions relate to the single question of law as to whether the testimony was incompetent as hearsay. *Gurganus v. Trust Co.*, 655.

§ 20. Parties Entitled to Object and Take Exception.

A party may not except to an instruction favorable to him. *Price v. Gray*, 162.

§ 21. Exception to Judgment or to Signing of Judgment.

An exception to the signing of the judgment presents whether the facts found support the judgment and whether error of law appears upon the face of the record. *Goldsboro v. R. R.*, 101; *Weddle v. Weddle*, 336; *Cox. v. Cox*, 528.

An appeal in itself presents the question whether the findings of fact are sufficient to support the judgment and whether error of law appears on the face of the record. *Barbour v. Scheidt*, 169.

Upon a sole exception to the signing of the judgment it will be presumed that the facts found by the lower court are supported by competent evidence, and the findings are binding on appeal. *Ramsey v. Commrs. of Cleveland*, 647.

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R. R.*, 101.

Motion to nonsuit made in the course of a trial by the court under G.S. 1-184 does not present the question as to whether the findings of fact are supported by competent evidence when no exceptions have been taken to the admission of the evidence, the findings of fact, or the conclusions of law. *Ibid.*

Exceptions and assignments of error to the refusal of the court to sign judgment tendered and to the findings of fact contained in the judgment entered, are broadside in form and present nothing for review. *Weddle v. Weddle*, 336.

Where the court, in overruling motion to dismiss for invalid service, finds no facts, and there is no request for findings, it will be presumed that the

court, upon proper evidence, found facts to support its judgment. *Construction Co. v. Electrical Workers Union*, 481.

Upon exception to a judgment or order, without exception to any finding of fact, the findings set forth by the trial court will be accepted as established. *In re Estate of Cogdill*, 602.

§ 28. Objections, Exceptions and Assignments of Error to Evidence.

Assignments of error to the admission of evidence should state with particularity the alleged incompetent evidence and definitely present the question for review without the necessity of a search through the record to find the challenged evidence. *Bridges v. Graham*, 371.

§ 28. Necessity for Case on Appeal.

Where plaintiff appellants have served no case on appeal, filed no assignments of error and no brief or appeal bond, appellee's motion to dismiss the appeal will be allowed. *Stokes v. Smith*, 694.

§ 29. Making Out and Serving Case on Appeal.

Where a person is made a party to the proceeding by consent order he must be served with statement of case on appeal. *Johnson v. Scheidt*, 452.

§ 33. Necessary Parts of Record.

Appeal in this case dismissed for insufficiency of the record and for failure to serve statement of case on appeal upon a party made a party to the proceeding by consent order. *Johnson v. Scheidt*, 452.

§ 34. Form and Requisites of Transcript.

On appeal from a judgment of the Superior Court affirming or reversing an award of the Industrial Commission, review is limited to the record that was before the Superior Court, and matters which were not in the record before the Superior Court, but which are sent up with the transcript, are no more a part of the record in the Supreme Court than they were in the Superior Court, and may not be made so by certificate of the court below. *Penland v. Coal Co.*, 26.

The failure of appellant on appeal from judgment of nonsuit to set out the evidence in narrative form in the case on appeal served by him, and becoming the case on appeal, in accordance with Rule of Practice in the Supreme Court No. 19(4), requires dismissal by the Court, even *ex mero motu*, the rule being mandatory. *Huie v. Templeton*, 86.

§ 38. The Brief.

An assignment of error not discussed in the brief is deemed abandoned. *NASCAR v. Midkiff*, 409.

Where no reason or argument is stated or authority cited in the brief in support of an assignment of error, such assignment is taken as abandoned. *Construction Co. v. Electrical Workers Union*, 481.

Where appellants file no brief the appeal will be dismissed in the absence of error appearing on the face of the record. *Stokes v. Smith*, 694.

§ 39. Presumptions and Burden of Showing Error.

Appellants must not only show error, but that the error amounted to a denial of a substantial right. *Price v. Gray*, 162.

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error, but the burden is upon appellant to show error which is prejudicial in amounting to the denial of some substantial right. *Keener v. Beal*, 247; *Coach Co. v. Fultz*, 523.

§ 41. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence.

An exception to the admission of testimony is waived when other evidence of the same import is admitted without objection. *Price v. Gray*, 162; *Kirkman v. Baucom*, 510.

While it is error to admit in a caveat proceeding propounder's evidence of the probate of the instrument in common form, where the caveators incorporate by reference and attachment to their pleading the record of probate and the will itself, they cannot be heard to complain. *In re Will of Crawford*, 322.

Where the record fails to show what the witness would have testified had he been permitted to answer, exclusion of the testimony cannot be held prejudicial. *Highway Com. v. Privett*, 501.

While ordinarily an exception to the admission of evidence is waived when the same evidence is theretofore or thereafter admitted without objection, this rule does not preclude a party from attempting to explain such evidence or destroy its probative value or even contradict it with other evidence, and an objection to testimony of an incompetent declaration is not waived by the party's cross-examining the declarant and by testifying that she had no recollection of the conversation in which the declaration was made. *Jones v. Bailey*, 599.

§ 42. Harmless and Prejudicial Error in Instructions.

A charge which in one instance alone inadvertently placed the burden upon defendant to show that plaintiff's contributory negligence was "the," rather than "a," proximate cause of the injury, but which in other portions repeatedly stated the correct rule that plaintiff's contributory negligence would bar recovery if a proximate cause of the injury, or one of them, and also charged that if the negligence of both contributed to the injury, neither could recover, so that the charge construed contextually could not have misled the jury, will not be held for prejudicial error for the one technical deviation from the correct rule. *Price v. Gray*, 162.

Where the charge, read as a composite whole, is free from prejudicial error, an exception to the charge cannot be sustained. *Keener v. Beal*, 247; *S. v. Floyd*, 434; *Highway Com. v. Privett*, 502.

Ordinarily, the court's recital of the evidence and the statement of the contentions of the parties will not be held for error when asserted misstatements therein are not called to the court's attention before the case is submitted to the jury and no request for correction is made. *Morgan v. Bell Bakeries*, 429; *Highway Com. v. Privett*, 501.

The charge of the court upon the burden of proof on the numerous issues involved *held* without error when construed as a whole. *Kirkman v. Baucom*, 510.

§ 45. Error Cured by Verdict.

Where the answer of the jury to one of the issues submitted determines the rights of the parties, error in the submission of or relating to subsequent

issues cannot be prejudicial. *Bank v. Bloomfield*, 492.

Error, if any, in relation to an issue answered in favor of appellant cannot be prejudicial. *Coach Co. v. Fultz*, 523.

§ 49. Review of Findings or of Judgements on Findings.

Where the findings of fact by the court are supported by competent evidence, they are as conclusive as a verdict of a jury. *Goldsboro v. R. R.*, 101.

The findings of fact of the trial court are conclusive on appeal when supported by any competent evidence, but its conclusions of law, even though denominated findings of fact, are reviewable. *Realty Co. v. Spiegel*, 458.

Asserted error relating to a finding of fact which is immaterial to the decision of the case cannot be prejudicial. *Sudan Temple v. Umphlett*, 555.

Where documentary evidence before the court is not included in the record, it cannot be determined that a finding of the court, based on such documents, was not supported thereby, and therefore appellant has failed to carry the burden of establishing error. *Ibid.*

§ 50. Review of Injunctive Proceedings.

While the findings of fact, as well as the conclusions of law, are reviewable in injunction proceedings, it will be presumed that the findings of fact made by the hearing judge are correct, and the burden is on the appellant to assign and show error. *Edwards v. Hunter*, 46.

§ 51. Review of Judgments on Motions to Nonsuit.

On exception to judgment of involuntary nonsuit in a trial by the court under agreement of the parties, G.S. 1-184, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. *Shearin v. Lloyd*, 363.

In passing on motion to nonsuit and in passing on assignment of error to the refusal of the motion, the evidence must be taken in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences which may be drawn from the evidence, and all conflicts resolved in her favor. *Morgan v. Bell Bakeries*, 429.

Where motions to nonsuit are made at the close of plaintiffs' evidence and renewed at the close of all the evidence, only the motions made at the close of all the evidence are to be considered on appeal. *Kirkman v. Baucom*, 510.

§ 53. Determination of Petitions to Rehear.

Where the complaint states a defective cause of action, the Supreme Court has the power to dismiss *ex mero motu*. Therefore, petition to rehear on the ground that motion to dismiss was not passed on by the Superior Court and was not the subject of an exceptive assignment of error on appeal, will be dismissed. *Cotton Mills v. Duplan Corp.*, 88.

§ 55. Remand.

Where it appears on the face of the record that a person who is a necessary party to a final determination of the action has not been made a party, the Supreme Court will remand the action for appropriate procedure *ex mero motu*. *Edmondson v. Henderson*, 634.

Where facts stipulated by the parties are insufficient to determine the law applicable to the case, the cause must be remanded. *Stokes v. Smith*, 694.

§ 61. Stare Decises.

A decision determining the rights of the parties as they had vested prior to an amendment of the Constitution is *obiter dicta* in its discussion of such rights under the constitutional amendment, and as to such *dicta* is entitled only to such consideration as its reason may impel. *Pilkington v. West*, 575.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General.

Mistaken identity of the victim is not a defense to the crime of felonious assault. *S. v. Williams*, 688.

§ 15. Instructions.

The court's definitions of assault and assault upon a female *held* correct and sufficiently full in this case in the absence of request for further elaboration. *S. v. Robbins*, 332.

§ 16. Necessity of Submitting Question of Guilt of Less Degrees of Crime.

In a prosecution for assault on a female with intent to commit rape, the court is not required to submit to the jury the question of defendant's guilt of simple assault when there is no evidence of this lesser degree of the crime. *S. v. Robbins*, 332; *S. v. Green*, 717.

ASSOCIATIONS

§ 5. Right to Sue and Be Sued.

An unincorporated labor union which is doing business in North Carolina by performing acts for which it was formed is suable as a separate legal entity, G.S. 1-69.1, G.S. 1-97(6), and may be served with process in the manner prescribed by statute. *Construction Co. v. Electrical Workers Union*, 481.

ATTACHMENT

§ 1. Nature and Grounds of Remedy in General.

A warrant of attachment provides a source from which any judgment obtained by plaintiff may be satisfied, and though warrant of attachment and levy pursuant thereto are not sufficient to institute action, when supplemented by the service of process in a manner prescribed by law, it also brings the defendant into court. *Thrush v. Thrush*, 114.

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. *Ibid.*

AUTOMOBILES

§ 2. Grounds and Procedure for Revocation or Suspension of License.

The statute directs the revocation of a driver's license for one year upon his conviction of two charges of reckless driving committed within a period of twelve months, and if both offenses were committed within a twelve-month period, it is immaterial that the conviction of the second offense was

entered more than twelve months after the first. G.S. 20-17(6). *Snyder v. Scheidt*, 81.

In upholding the revocation of a driver's license for a period of one year for two convictions of reckless driving committed within a period of twelve months, the failure of the court to specifically find that the convictions were final, will not be held fatal when the driver makes no contention that there was any appeal from the convictions or that the convictions were not final, and it appears that the convictions as certified by the clerk were considered by the court below and all parties as final convictions. *Ibid.*

The provisions of G.S. 20-17(6) and G.S. 20-19(f) are mandatory. *Ibid.*

Where, in prosecutions for speeding, prayer for judgment is continued upon payment of the costs, there are no final convictions within the purview of G.S. 20-24(c), and defendant's license to drive may not be revoked therefor pursuant to G.S. 20-16. *Barbour v. Scheidt*, 169.

Where, upon petition for review of order of the Commissioner of Motor Vehicles suspending petitioners' operator's licenses under G.S. 20-279.2, the owner of the other car involved in the collision is made a party by consent order and files answer, such owner must be served with statement of case on appeal to the Supreme Court. *Johnson v. Scheidt*, 452.

§ 7. Attention to Road, Look-out and Due Care in General.

The operator of an automobile cannot be held liable in trespass for damages caused when his car struck plaintiff's building if the damages resulted from an unavoidable accident. *Smith v. Pate*, 63.

It is the duty of a motorist not merely to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen. *Keener v. Beal*, 247.

A motorist is not bound to anticipate negligent acts or omissions on the part of others, but, in the absence of anything which gives notice to the contrary, is entitled to assume and act upon the assumption that every other motorist will perform his duty and obey the law and will not expose him to danger which can come to him only by the violation of duty or law by such other motorist. *Ibid.*

A motorist is required to act as a reasonably prudent man and 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 any person or property, G.S. 20-140, G.S. 20-141, and his failure to do so is negligence. *Crotts v. Transportation Co.*, 420.

Apart from safety statutes, a person operating a motor vehicle must exercise proper care in the way and manner of its operation, proper care being that degree of care which an ordinarily prudent person would exercise under like circumstances and when charged with like duty. *Coach Co. v. Fultz*, 523.

§ 8. Turning and Turn Signals.

If the defendant turns left across the highway to enter a driveway without giving the statutory signal, G.S. 20-154, such violation of the statute is negligence *per se*, and if it proximately causes the injury, entitles plaintiff to an affirmative answer to the issue of negligence. *Coach Co. v. Fultz*, 523.

§ 10. Negligence and Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.

A motorist has the right to assume and act upon the assumption that no

other motorist will have his automobile standing upon the paved portion of a highway in the nighttime without lights in violation of statute. *Keener v. Beal*, 247.

§ 10½. Negligence in Regard to Animals on Highway.

Evidence that defendant was driving some seven or eight cattle along a much traveled highway in the nighttime without lights, warning, or any notice to the traveling public, that one of the cows jumped in front of plaintiff's car, and that plaintiff's car was damaged in the resulting collision, *held* sufficient to overrule defendant's motion for nonsuit. *Bullard v. Phillips*, 87.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

A motorist is prohibited from following another vehicle more closely than is reasonable and prudent under the circumstances with regard to the traffic and condition of the highway, G.S. 20-152, and the violation of this statute is negligence. *Crotts v. Transportation Co.*, 420.

The condition and effectiveness of his brakes must be taken into consideration by a motorist in determining what is a safe distance and a safe speed at which he may follow another vehicle. *Ibid.*

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Charge held to have correctly charged law that motorist seeing vehicle approaching from opposite direction skidding out of control was under duty to stop or turn right onto shoulders of road. *Freight Lines v. Burlington Mills*, 143.

§ 18. Passing at Intersections.

A motorist is required by statute to remain on the right side of the highway at a crossing or intersection, G.S. 20-147, and the violation of this statute is negligence. *Crotts v. Transportation Co.*, 420.

G.S. 20-150(c) prohibits a motorist from overtaking and passing at highway intersections, and the violation of this statute is negligence. *Ibid.*

§ 35. Actions for Negligent Operation—Pleadings.

Facts alleged *held* insufficient to show negligence of driver in turning to left to avoid head-on collision with car approaching from opposite direction on its left of highway. *Lewis v. Lee*, 68.

§ 36. Presumptions and Burden of Proof.

Negligence is not to be presumed from the mere fact of injury. *Robbins v. Crawford*, 622.

§ 37. Actions for Negligent Operation — Competency of Evidence in General.

The identity of the vehicle as the one which was negligently operated by the driver thereof may be established by circumstantial evidence. Therefore, when the evidence tends to show that the vehicle negligently operated was a bakery truck which entered the highway from a store, evidence tending to show that bakery products of that company had just been delivered to the store, that other bakeries selling products to the store made no deliveries

near the time in question, and testimony describing the trucks used in making deliveries of bakery products to the store, including the color of defendant's truck, are competent. *Morgan v. Bell Bakeries*, 429.

What occurred immediately prior to and at the time of collision may be established by circumstantial evidence, either alone or in combination with direct evidence. *Kirkman v. Baucom*, 510.

Evidence that defendant driver gave signal of intention to turn left by an electrical signal device operated by a lever on the steering column, is competent to be considered by the jury on the issue of the contributory negligence of such operator, notwithstanding the absence of evidence that such signal device had been approved by the Department of Motor Vehicles, since, apart from G.S. 20-154, it is for the jury to decide whether the signal was in fact given, whether it indicated a left turn by the operator of the car, and whether the driver of the other car was negligent in failing to observe and heed such signal. *Coach Co. v. Fultz*, 523.

Testimony of a witness as to a declaration made by an officer in a conversation with defendant at the hospital sometime after the accident to the effect that the officer said defendant did not have the right of way at the intersection is incompetent and its admission constitutes prejudicial error, the declaration not being a part of the *res gestae* and not coming within any exception to the hearsay rule. *Jones v. Bailey*, 599.

§ 38. Opinion Evidence as to speed and Other Facts at Scene.

Where the question of the right of way at an intersection is the crucial question in dispute, testimony of a declaration by an officer to the effect that the defendant did not have the right of way is incompetent, since such conclusion clearly invades the province of the jury. *Jones v. Bailey*, 599.

§ 39. Physical Facts at Scene.

The testimony of a witness as to the marks observed by him on the highway at the scene of the accident involves no expression of opinion, but relates to facts disclosed from actual observation. *Kirkman v. Baucom*, 510.

When plaintiff relies on the physical facts at the scene to establish negligence, the facts and circumstances relied on must be established by direct evidence and warrant the inference of negligence. *Robbins v. Crawford*, 622.

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Where plaintiff relies upon the physical facts at the scene of the accident to establish negligence on the part of defendant driver, the facts and circumstances relied on must be established by direct evidence and warrant the inference of negligence as a reasonable and logical conclusion, considering the evidence in the light most favorable to plaintiff, and such evidence which raises a mere conjecture or surmise of the determinative issue is insufficient. *Robbins v. Crawford*, 622.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway.

Testimony of witnesses to the effect that at the time of impact they saw fire on the east side of the highway, together with testimony as to the physical facts at the scene immediately thereafter, including the position of the vehicles, and the indications thereon of the point of impact, marks

and tire tracks, etc., *is held* sufficient to be submitted to the jury on the theory that the collision between the north-bound and south-bound vehicles occurred on the east side of the highway while the vehicle traveling north was on its right side thereof. *Kirkman v. Baucom*, 510.

Where plaintiff's evidence and defendant's evidence in explanation and clarification thereof disclose that as defendant's tractor-trailer, traveling north, rounded a curve below an overpass, the car driven by intestate came out from the east shoulder of the road on the tractor driver's right and cut immediately in front of the tractor, such evidence fails to show that the accident resulted from negligence on the part of defendant, and nonsuit is proper. *Robbins v. Crawford*, 622.

§ 41f. Sufficiency of Evidence of Negligence in Hitting Vehicle Moving Slowly or Stopped on Highway.

Evidence tending to show that as plaintiff, driving within the corporate limits of a town, slowed and gave a hand signal for a left turn into the driveway of a residence on her left, her car was struck from the rear by an automobile driven by defendant at a speed of some 70 miles per hour, *is held* sufficient to overrule nonsuit. *Ransom v. Locklear*, 456.

§ 41e. Sufficiency of Evidence of Negligence in Stopping without signal or Parking without Lights.

Evidence held sufficient for jury on issue of negligence in permitting car to stand on highway without lights. *Keener v. Beal*, 247.

§ 41g. Sufficiency of Evidence of Negligence Causing Intersection Collision.

The collision in suit occurred in an intersection having no traffic control signs or signal devices. The evidence tended to show that defendant driver entered the intersection at excessive speed, from plaintiff's left, and struck plaintiff's vehicle midway on its left side. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant driver's negligence in failing to yield the right of way to plaintiff. *Price v. Gray*, 162.

41i. Sufficiency of Evidence of Negligence in Entering Highway.

Evidence of negligence in entering highway in path of traffic, causing collision between two other vehicles, held for jury. *Morgan v. Bell Bakeries*, 429.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrians.

The doctrine of *res ipsa loquitur* does not apply to establish the negligence of the driver of a car along a highway as a proximate cause of the death of a person whose body is thereafter found on the highway with fractured skull, crushed chest and fractured legs. *Lane v. Bryan*, 108.

Evidence held insufficient to establish negligence of defendant as proximate cause of pedestrian's death. *Ibid.*

§ 41p. Sufficiency of Evidence of Identity of Vehicle or of Driver of Vehicle.

The question of fact as to which occupant of an automobile was the driver at the time of the fatal accident may be proved by circumstantial evidence, either alone or in combination with direct evidence. *Bridges v. Graham*, 371.

Evidence to the effect that defendant's intestate kept the car in question at his house, had driven it and claimed ownership for two or three months, was seen driving it about an hour prior to the fatal wreck, with plaintiff's intestate a passenger, riding in the back with his shoes off, and that both intestates were killed in the accident resulting from the driving of the car at excessive speed and in a reckless manner in violation of statutes, with further evidence that the body of plaintiff's intestate was found without shoes after the wreck, *is held* sufficient to be submitted to the jury upon the ultimate fact of whether defendant's intestate was driving the automobile at the time of the accident. *Ibid.*

Circumstantial evidence of identity of vehicle involved in collision as belonging to defendant *held* sufficient. *Morgan v. Bell Bakeries*, 429.

§ 42a. Nonsuit for Contributory Negligence in General.

A motorist is under duty to exercise ordinary care for his own safety, and his negligence in failing to do so bars recovery by him if it contributes to his injury as a proximate cause or one of them. *Keener v. Beal*, 247.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence held not to show contributory negligence as a matter of law in hitting unlighted vehicle standing on highway. *Keener v. Beal*, 247.

§ 42e. Contributory Negligence in Following or Passing Vehicles Traveling in Same Direction.

The evidence tended to show that plaintiff was following a tractor-trailer on the highway, that as they approached an intersection the tractor-trailer twice decreased speed, that plaintiff, upon apprehending this, also decreased speed, but that he permitted the distance between the vehicles to lessen, and that as the tractor-trailer entered the intersection it slowed down suddenly and started turning left, and that plaintiff, traveling some 30 to 35 miles per hour, also pulled to the left, applied his brakes and then attempted to clear the tractor-trailer to the right, but struck the right rear of the tractor-trailer with the left front of his car. *Held:* The evidence discloses that plaintiff was either following the tractor-trailer too closely or was not keeping a proper lookout, and that his negligence in regard thereto was a proximate cause of the collision, so that judgment of nonsuit on the ground of contributory negligence was proper. *Crotts v. Transportation co.*, 420.

§ 42k. Contributory Negligence of Pedestrians.

Evidence tending to show that plaintiff attempted to cross the street between intersections where there was no marked crosswalk, that he saw a car approaching from his right traveling at a lawful speed in its proper lane, that plaintiff, notwithstanding, continued on his way and speeded up a little bit because he wanted to cross in front of the oncoming car, and was struck by the car just before he reached the far curb, *is held* to disclose contributory negligence on his part barring recovery as a matter of law. *Barbee v. Perry*, 538.

§ 42g. Contributory Negligence in Intersection Collisions.

Evidence tending to show that plaintiff's vehicle approached an intersection having no traffic control signs or signal devices, at a speed of 20 miles per hour, that plaintiff looked without seeing any impeding traffic,

and entered the intersection, where his car was struck on its left side by the car operated by defendant driver, which approached the intersection from plaintiff's left, traveling some 50 miles per hour, *is held* not to show contributory negligence as a matter of law on the part of plaintiff. *Price v. Gray*, 162.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Driver of each car colliding at an intersection controlled by traffic lights may be guilty of concurring negligence, since, notwithstanding the negligence of the one in entering the intersection against the red light, the other may be guilty of concurring negligence in failing to maintain a proper lookout and seeing the other's disobedience to the traffic light in time to have avoided the collision, and therefore, in an action by a passenger in one of the cars against the driver of the other, in which the driver of the first car is joined for contribution by the original defendant, motion to nonsuit the cross action on the ground that there was no evidence tending to establish that the drivers were joint tortfeasors, should be denied. *Norris v. Johnson*, 179.

Two trucks, traveling in opposite directions, sideswiped each other, resulting in injury to plaintiff's car, which was following one of the trucks. The evidence tended to show that one of the trucks was driven on its right side of the highway at a lawful speed and at no time prior to the accident crossed the center line to its left. *Held:* The motion to nonsuit by the owner of such truck should have been allowed in the action by the owner of the car against both truck owners. *Grantham v. Myers*, 204.

Plaintiff's evidence tended to show that he was knocked unconscious in a collision between a car driven by himself and a car driven by the first defendant in the opposite direction, that immediately thereafter his car was struck from the rear by a car driven by the second defendant, and that the condition of the vehicles after the collisions and the evidence as to their speed shortly before the accidents indicated that the impact of the first collision was much the more violent. Plantiff's evidence further disclosed that the second defendent was uninjured and was present at the scene of the collisions when the patrolman arrived, and plaintiff testified to the effect that as far as he knew all of his injuries were received as a consequence of the first collision. *Held:* Whether the second collision caused or contributed to the personal injuries received by plaintiff is left in the realm of conjecture and surmise by plaintiff's evidence, and therefore judgment of nonsuit was properly entered as to the second defendant. *Riddle v. Artis*, 629.

§ 46. Instructions in Auto Accident Cases.

Charge held to have sufficiently presented contention of denfendant's negligence in failing to take steps to avoid collision after seeing plaintiff's vehicle skidding out of control. *Freight Lines v. Burlington Mills*, 143.

Instruction that issue of negligence should be answered in affirmative if defendant's negligence was "a" proximate cause of injury *held* correct, and charge in one instance that contributory negligence would bar recovery if "the" proximate cause *held* not prejudicial, construing charge contextually. *Price v. Gray*, 162.

Objection to the charge on the ground that it instructed the jury as to

the law in overtaking and passing another vehicle on the highway, G.S. 20-150, but failed to explain the law applicable to evidence that the driver of a north-bound vehicle pulled to his left preparatory to passing a preceding vehicle and struck a south-bound vehicle while the north-bound vehicle was over the center line to the west, *held* untenable in the absence of special request when the court correctly charged that if the north-bound vehicle was driven to its left of the center of the highway, such action would constitute negligence *per se*. *Kirkman v. Baucom*, 510.

Appellants' contention that their driver was confronted with a sudden emergency when the driver of the vehicle traveling in the opposite direction pulled to his left preparatory to passing a preceding vehicle, and that appellants' driver pulled to his left in an attempt to avoid a head-on collision, *held* submitted to the jury in a manner favorable to appellants, and their exception to the charge in this respect is untenable. *Ibid.*

While an instruction that an electrical turn signal device on an automobile should be given the same attention and regard irrespective of whether it had or had not been approved by the Department of Motor Vehicles, may constitute technical error, when the charge read contextually is to the effect that it was for the jury to decide whether the signal was in fact given, and if so, whether it was sufficient to indicate an intended left turn by the operator of the automobile, and if so, whether the operator of the other car negligently failed to heed such signal, the charge will not be held prejudicial. *Coach Co. v. Fultz*, 523.

§ 48. Suit against Drivers as Joint Tort-Feasors; Parties and Estoppel.

Father contingently liable under family car doctrine who defends as guardian ad litem suit against minor son held estopped by judgment therein. *Thompson v. Lassiter*, 34.

§ 49. Contributory Negligence of Guest or Passenger.

Whether a passenger in a car is guilty of contributory negligence as a matter of law in continuing to ride in a car driven at excessive speed and in a reckless manner must be determined upon the facts and circumstances of each case. *Bell v. Maxwell*, 257.

A passenger in a car is required to exercise for his own safety that care which a reasonably prudent person would employ under the same or similar circumstances. *Ibid.*

Evidence held not to show as matter of law contributory negligence of passenger in resuming trip after assurance that driver would not continue to drive recklessly. *Ibid.*

§ 55. Family Purpose Doctrine.

Liability of the father for the negligence of the son in operating a family purpose car is predicated upon the doctrine of *respondeat superior*. *Thompson v. Lassiter*, 34.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to support a verdict of defendant's guilt of operating a motor vehicle upon a public highway while under the influence of intoxicants. G.S. 20-138. *S. v. St. Clair*, 183.

§ 75. Punishment for Drunken Driving.

Where warrant charges second offense and transfer of cause to Superior Court upon demand for trial by jury, the indictment charges a third offense, the Superior Court acquires jurisdiction of the substantive offense, but cannot impose punishment in excess of that for a second offense. *S. v. White*, 587.

§ 76. Failing to Stop after Accident.

If the owner and driver of an automobile fails to stop and give his name, address and license number, after an accident resulting in injury to a person in violation of G.S. 20-166 (a) and G.S. 20-166(c), an occupant of the car, merely because he is a guest passenger in the car driven by the owner, is not guilty as an aider and abettor. *S. v. Dutch*, 438.

Where two occupants of car each testify the other was driving, jury must determine which was driving to convict the other as abettor. *Ibid.*

BAILMENT

§ 6. Liabilities of Bailor to Bailee.

Evidence tending to show that a tank-truck containing propane gas held in liquid form by pressure, was delivered by plaintiffs to defendant for repair to differential housing without disclosing to defendant the fact, well known to the plaintiffs, that the pipe from the tank was leaking gas, that the defendant, awaiting parts, stored the truck in its closed garage, and that when the door was opened, giving the gas access to fire, there was a terrific explosion, setting fire to and destroying the garage, *is held* sufficient to overrule nonsuit on defendant's cross action for damage to his garage, set up in plaintiffs' action for destruction of the truck by fire. *Ashley v. Jones*, 442.

BANKRUPTCY

§ 2. Title and Rights of Trustee.

The trustee may, but is not required, to take possession of the debtor's interest in lands allotted as his homestead. *Stokes v. Smith*, 694.

BANKS AND BANKING

§ 3. Deposits in General.

Admission by a bank that a named depositor was the owner of monies deposited with it establishes the relation of debtor and creditor between the bank and the depositor, placing the burden upon the bank, in an action by the depositor's administratrix, to show that it had discharged its debt, or to show matter constituting a legal excuse for failure to do so. *Sides v. Banks*, 672.

§ 4. Joint Accounts.

Proof that account was carried in joint name of depositor and his son does not alone establish son's right to funds by survivorship. *Sides v. Bank*, 672.

BASTARDS

§ 1. Elements and Nature of the Offense of Wilful Failure to Support.

The wilful failure or refusal to support an illegitimate child is a continuing offense. *S. v. Smith*, 118.

§ 2. Warrant in Indictment.

A warrant in a criminal prosecution under G.S. 49-2 which fails to charge that defendant's failure to support his illegitimate child was wilful, is fatally defective. *S. v. Smith*, 118.

BOUNDARIES

§ 2. Calls to Natural Objects.

Where the owner of a tract of land divides it by deeds, each calling for a road as the boundary between the tracts, the road is the true dividing line, and conflicting evidence of the respective parties as to the location of the road at that time is properly submitted to the jury. *Bumgarner v. Corpening*, 40.

§ 7. Nature and Grounds of Special Proceeding to Establish Boundaries.

Title or ownership is not directly in issue in a processioning proceeding, and the proper issue to be submitted to the jury is as to the true location of the dividing line between the lands of the respective parties. *Bumgarner v. Corpening*, 40

Where, in a proceeding to establish the boundary between adjoining landowners, respondents file answer denying location of the boundary as contended by petitioner and also allege ownership of the disputed area by specific description in the answer, the proceeding in effect becomes an action to quiet title, G.S. 41-10, and on appeal to the Superior Court issue involving ownership is properly submitted to the jury. *Ibid.*

BROKERS

§ 5. Duties and Liabilities of Broker to Principal.

Where owner signs contract to sell realty he may not hold broker liable for failure of contract to disclose that land was subject to highway easement. *Harris v. Bingham*, 77.

BURGLARY

§ 1. Burglary in General.

Where the State relies upon intent to steal specific property to sustain the charge of felonious breaking or entering, the State must prove and the jury find beyond a reasonable doubt that defendant intended to steal property of sufficient value to make the taking thereof a felony. *S. v. Andrews*, 561.

§ 2½. Indictment.

Indictment for felonious burglary is not subject to quashal on ground that evidence tended to show nonfelonious breaking or entering. *S. v. Andrews*, 561.

§ 5. Instructions.

In a prosecution under an indictment charging a felonious breaking and entering, an instruction that if the jury should find that defendant broke or entered the room in question with intent to commit the crime of larceny

of "any examination papers," defendant would be guilty of feloniously breaking or entering, must be held for error as assuming as an established fact that the papers possessed such value as to make the intent to steal any of them an intent to commit the crime of felonious larceny. *S. v. Andrews*, 561.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence that the land conveyed was a 125-acre farm having tobacco allotment of five and one-half acres, and that the consideration for the deed attacked was not greatly in excess of the value of the tobacco allotment alone, is evidence of inadequacy of consideration. *Garris v. Scott*, 568.

While plaintiffs, in an action to cancel a deed for fraud, have the burden of proving the fraud relied on, it is not required that it be proved by direct and positive evidence but may be proved by circumstances surrounding the transaction establishing fraud as a reasonable inference. *Ibid.*

Inadequacy of consideration is a circumstance tending to show fraud in procuring the execution of a deed, and while standing alone it is ordinarily insufficient to justify setting aside the deed, if the inadequacy of consideration is so gross as to show that practically nothing was paid, it is sufficient to be submitted to the jury without other evidence. *Ibid.*

Evidence that plaintiffs were induced to execute the note and deed of trust in question under duress by a threat of prosecution for embezzlement *held* sufficient to be submitted to the jury. *Worley v. Motor Co.*, 677.

§ 10½. Instructions.

Where, in an action to cancel a deed for fraud, defendants admit that plaintiffs had title at the time of the execution of the deed in controversy, an instruction to the effect that at the time of executing the deed attacked plaintiffs had only an option to repurchase because of their prior execution of a fee simple deed to third parties with option to repurchase from such third parties, is highly prejudicial, since if plaintiffs had only an option to repurchase no question of inadequacy of consideration could arise. *Garris v. Scott*, 568.

In an action to cancel an instrument for duress there must be allegation, supporting evidence and a proper issue to support a charge on the effect of an agreement to compound a felony, and where the allegation and evidence do not embrace any agreement to forego prosecution but merely that plaintiffs were induced to execute the instruments in question by threat of prosecution of the male plaintiff for embezzlement, a charge on the effect of an agreement to compound a felony must be held prejudicial. *Worley v. Motor Co.*, 677.

CARRIERS

§ 1. State and Federal Regulation and Control.

Loss sustained as a result of a movement of goods in interstate commerce is controlled by the application of appropriate Federal statutes. *Neece v. Greyhound Lines*, 547.

Before a motor carrier can limit its liability for negligent loss or damage to property entrusted to it, it must show that it received the property as a common carrier, that it issued a written receipt which contained the asserted

limitation, and that the Interstate Commerce Commission had expressly authorized the limitation based on a rate differential, and if any one of these conditions is not shown to exist the asserted limitation has no effect. *Ibid.*

§ 15. Carriers Liability for Baggage.

A bus passenger has the right to carry on the bus with her and under her control her baggage, in which event it is in the custody of the passenger and the carrier has no responsibility with respect thereto, or she may check her baggage and impose on the carrier a liability up to $25 in the event of its loss, or she may declare a greater value than $25, and by the payment of extra compensation, impose on the carrier a liability up to $225 in the event of its loss. *Neece v. Greyhound Lines*, 547.

A bus carrier is under no duty to accept for transportation as baggage packages exceeding the dimensions given in the tariff, and when it receives from a passenger a package of dimensions in excess of those limited in the tariff, the carrier is a gratuitous bailee of the package and is liable for its full value for loss occasioned by its gross negligence, the limitation of liability specified in the tariff for baggage not being applicable when the package does not come within the specifications of baggage contained in the tariff. *Ibid.*

The Interstate Commerce Act does not provide for limitation of liability of a passenger bus carrier for baggage of passengers, 49 USCA 20 (11), but does grant to regulatory bodies the power to prescribe such limitation, 49 USCA 302, and certification by the Interstate Commerce Commission of a tariff providing for such limitation is sufficient to show that the Commission had expressly authorized such limitation. *Ibid.*

Proof that a passenger delivered to a bus carrier a package not coming within the tariff definition of personal baggage, and failed to return the package on demand, is sufficient to be submitted to the jury on the issue of the gross negligence of the carrier, or, if jury trial is waived, to require an affirmative finding on the issue by the court. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 12. Priorities.

Where the holder of a chattel mortgage introduces in evidence the registered mortgage, a defendant asserting that he had purchased the chattel from the mortgagor prior to the registration of the instrument, has the burden of proving such affirmative defense, and where the evidence is sufficient to support a finding to the effect that his purchase was made subsequent to the registration of the chattel mortgage, nonsuit in claim and delivery for the chattel is erroneously entered. *Supervision Co. v. Thomas*, 231.

CONSPIRACY

§ 1. Elements of Civil Conspiracy.

In order to recover in a civil action for conspiracy it is required that there be some overt act committed by one or more of the alleged conspirators pursuant to the common design. *Burns v. Oil Corp.*, 266.

§ 2. Actions for Civil Conspiracy.

The civil liability of conspirators is joint and several, and an action for

civil conspiracy may be maintained against any one or all of the alleged conspirators. *Burns v. Oil Corp.*, 266.

CONSTITUTIONAL LAW

§ 8a. Legislative Powers in General.

The restoration of the first fixed capital of the Colony of North Carolina is a public purpose for which the General Assembly may grant the power of eminent domain, and provide for the payment of the necessary property out of funds available therefor. *In re Department of Archives*, 392.

§ 10. Judicial Powers.

It is the duty of the courts to declare the law as written and to give to statutes the same interpretation heretofore given in former decisions, the duty to make the law being the exclusive province of the General Assembly. *Hensley v. Cooperative*, 274.

§ 14. Police Power—Morals and Public Welfare.

Under its inherent police power, the State has the power to prohibit, regulate or restrain the use, manufacture or sale of beer within its bounds. *Boyd v. Allen*, 150.

§ 21. Right to Security in Person and Property.

The fundamental law protects a person from the search of his private dwelling without a warrant, which protection extends to all equally, the guilty as well as the innocent. Constitution of North Carolina, Art. I, Sec. 15. Constitution of United States, Fourth Amendment. *S. v. Mills*, 237.

§ 24. What Constitutes Due Process.

In a court proceeding all parties are entitled to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it if they can. Constitution of North Carolina, Article 1, Section 35. *Raper v. Berrier*, 193.

§ 26. Full Faith and Credit to Foreign Judgments.

An award of the Industrial Commission of another State is binding on claimant and is *res judicata* as to liabilities under the Act, and must be given full faith and credit in this jurisdiction. *Johnson v. Catlett*, 341.

§ 31. Right to Confront Accusers.

The refusal of the court to compel a State's witness to disclose the name of a confidential informer who worked with him in purchasing the intoxicating liquor from defendant will not be held for error when at the time the witness's testimony is uncontradicted and nothing appears in evidence concerning the informer except the fact that he was present when the witness made the purchase, the propriety of forcing a disclosure of the identity of the informer being dependent upon the circumstances of the case and at what stage of the proceedings the request is made. *S. v. Boles*, 83.

§ 33. Right of Accused not to Incriminate Self.

The constiutional privilege against self-incrimination applies only to the compulsion of a defendant to testify against himself, and not to testimony

voluntarily given, and further, does not preclude witnesses from testifying as to distinguishing marks on defendant's body. *S. v. Floyd*, 434.

Witnesses for the State had testified as to a small scar near the culprit's left eye, a small mole on his left ear, and gold fillings in his teeth. Upon return of the jury into the courtroom in disagreement as to defendant's identity as the culprit, the court permitted a juror, with defendant's consent, to examine defendant's body for the distinguishing marks. *Held:* Defendant's exception to the proceedings is untenable. *Ibid.*

§ 37. Waiver of Constitutional Guarantees by Defendant.

A defendant may waive a constitutional right relating to a matter of mere practice or procedure. *S. v. St. Cair*, 183.

CONTRACTS

§ 10. Contracts Limiting Liability for Negligence.

Common carriers may, by contract, limit their liability for negligence when expressly authorized to do so by statute or by a regulatory body with power to grant that privilege. *Neece v. Greyhound Lines*, 547.

The law does not look with favor on provisions which relieve a party from liability for his own wrong, and any doubt as to the meaning of such contractual provision of its application will be resolved against the carrier. *Ibid.*

CONTROVERSY WITHOUT ACTION

§ 2. Statement of Facts, Hearings and Judgment.

Where the parties submit the cause upon stipulation of facts, the hearing is on the facts stipulated, and assignment of error for failure of the court to make certain requested findings of fact and conclusions of law is inapposite. *NASCAR v. Midkiff*, 409.

CORPORATIONS

§ 1. Incorporation and Corporate Existence.

Evidence to the effect that the asserted corporation had less than three directors, G.S. 55-48, that no capital stock was issued, that its only assets were the business assets of the incorporator, and that the incorporation was a mere bookkeeping transaction transferring the business of the incorporator to the corporation, is sufficient to support a finding by the jury that the incorporator was sole beneficial owner and in sole control of its affairs. *Bank v. Bloomfield*, 492.

§ 18. Purchase of Own Stock by Corporation.

The stockholders of a close corporation entered into an agreement whereby, in the event of the death of a stockholder, the surviving stockholders obligated themselves to have the corporation purchase the stock of the deceased stockholder. The corporation was to pay for such stock first out of the proceeds of insurance carried on the life of each respectively by the corporation, and the balance from funds of the corporation when the surviving stockholders deem the withdrawal of such funds advisable, with further provision that until the final payment for such stock "the widow" of the deceased stockholder should receive monthly a stipulated sum per share of the stock. *Held:* Under the unambiguous language of the agreement,

the word "widow" referred to the person and not the *status* of the surviving wife of a stockholder, and her subsequent remarriage has no bearing upon her right to receive the stipulated sums monthly until the full purchase price of the stock had been paid. *Collins v. Covert*, 303.

COUNTIES

§ 1. Nature, Functions and Legislative Control.

Counties are agencies of the State and are subject to almost unlimited legislative control within constitutional limitations. *Ramsey v. Comrs. of Cleveland*, 647.

§ 2. Governmental and Private Powers.

Ch. 266, Session Laws of 1957, conferring on counties the power to construct and maintain water and sewer systems, is constitutional and valid, and the fact that the statute requires that bonds for the construction of such systems by a county be approved by its qualified voters, notwithstanding that such purpose is a public one, does not impair the constitutionality of the grant of such power. *Ramsey v. Comrs. of Cleveland*, 647.

CRIMINAL LAW

§ 3. Attempts.

There is no such offense as attempt to commit rape, the offense being assualt with intent to commit rape. *S. v. Green*, 717.

§ 7. Entrapment.

Where the State's evidence shows only that the investigator for an alcohol tax unit gave defendant an opportunity to violate the law and that she freely embraced the opportunity, and defendant's defense is based solely on her contention that she was not present and did not participate in the sale, the question of entrapment does not arise. *S. v. Boles*, 83

The defense of entrapment is not presented upon evidence tending to show merely than an officer of the law, not in uniform and not informing defendant that he was an officer, purchased intoxicating liquor from defendant for the purpose of obtaining evidence. *S. v. Kilgore*, 455.

Entrapment is a defense, and when the court, upon defendant's supporting evidence, instructs the jury that if officers induce an innocent person to commit a crime he would not otherwise have committed, this would constitute entrapment, and "may constitute a defense," must be *held* prejudicial as leaving it optional with the jury whether to apply the law of entrapment. *S. v. Wallace*, 445.

§ 9. Aiders and Abettors.

While mere presence alone at the time of the commission of a crime is insufficient to constitute a person an aider or abettor, a person who is present, either actually or constructively, and who shares the criminal intent of the actual perpetrator and renders assistance or encouragement to him in the perpetration of the crime, is an aider or abettor, and is equally guilty with the actual perpetrator. *S. v. Redfern*, 293.

The guilt of an accused as an aider or abettor may be established by circumstantial evidence. *Ibid.*

An occupant of a car, merely because he is a guest passenger, is not

guilty as an aider or abettor in the driver's offense of failing to stop after an accident. *S. v. Dutch*, 438.

Where two occupants of car each testify the other was driving, jury must determine which was driving to convict the other as abettor. *Ibid.*

§ 16. Jurisdiction—Degree of Crime.

Where the inferior courts of a particular county are given exclusive original jurisdiction of general misdemeanors, any jurisdiction of the Superior Court to try a defendant for a general misdemeanor must be derivative. *S. v. White*, 587.

G.S. 7-64 is not applicable to Craven County, and therefore in such county the Superior Court has no original jurisdiction of prosecutions for general misdemeanors. G.S. 7-222. *S. v. Morgan*, 596.

§ 18. Appeals to Superior Court.

The Superior Court, on appeal from conviction in the county court, has jurisdiction to try defendant only for the specific misdemeanor upon which he had been tried and convicted in the county court. *S. v. Mills*, 237.

On appeal from conviction in an inferior court to the Superior Court, defendants must be tried for the identical crime of which they were convicted in the inferior court, and the Superior Court may try them for a different crime only upon a bill found or waived. *S. v. Cooke*, 518.

Where, in the recorder's court having exclusive original jurisdiction of general misdemeanors, defendant is convicted of possession of nontaxpaid liquor for the purpose of sale, and on appeal to the Superior Court is charged in one count with unlawful possession of intoxicating liquor upon which the requisite taxes had not been paid and in the second count with unlawful possession of the same quantity of nontaxpaid liquor for the purpose of sale, and is found guilty on the first count and not guilty on the second, the judgment must be arrested, since the jurisdiction of the Superior Court is derivative and defendant may not be convicted therein of an offense of which he had not been convicted in the recorder's court. *S. v. Morgan*, 596.

§ 19. Transfer of Cause to Superior Court upon Demand for Jury Trial.

Where the record fails to show jurisdiction in the Superior Court in the trial of a general misdemeanor within the exclusive jurisdiction of an inferior court, appeal to the Supreme Court must ordinarily be dismissed, but where, on motion of the Attorney General for diminution of the record, it is made to appear by certified copies of the original papers that defendant was originally tried on a warrant in the recorder's court and the cause transferred to the Superior Court in accordance with law (Chapter 115, Public Laws of 1929) upon defendant's demand for jury trial, jurisdiction is established. *S. v. White*, 587.

Where a cause is transferred from the recorder's court upon defendant's demand for a jury trial, trial in the Superior Court must be upon a bill of indictment. *Ibid.*

But discrepancy between indictment and warrant as to whether offense was the second or third offense, does not deprive the Superior Court of jurisdiction of the substantive offense, the statutory provisions as to repeated offenses relating solely to the punishment. *Ibid.*

§ 26. Former Jeopardy—Prosecutions under Void Warrants or Indictments.

A prosecution under an indictment void for failure to charge any criminal offense cannot bar prosecution upon a subsequent valid indictment. *S. v. Strickland*, 120.

Where defendants are tried in the Superior Court upon a warrant amended to charge a different crime, without bill found or waived, the State may thereafter proceed upon new warrants. *S. v. Cooke*, 518.

§ 39. Evidence in Rebuttal of Matters Brought out by Adverse Party.

Where the State introduces testimony of statements made by defendant on a particular date, but introduces no evidence in regard to statements made by him on a subsequent date, defendant is not entitled to elicit from the State's witness testimony as to self-serving declarations made by defendant on the later date, the State not having "opened the door" to such testimony. *S. v. Davis*, 73.

§ 49. Attempt to Divert Suspicion and Exculpate Self.

Conflicting statements voluntarily made by the accused at the scene of the homicide as to the manner in which the fatal injury was inflicted, is substantive evidence of guilt as tending to show the mental processes of accused in seeking to divert suspicion and to exculpate himself. *S. v. Redfern*, 293.

§ 74. Evidence—Acts and Declarations of Co-Conspirators, Codefendants.

Where two defendants are jointly indicted for a crime which is several in nature, the fact that one of them tenders a plea of guilty or nolo contendere is not competent as evidence of guilt of the other. *S. v. Kerley*, 157.

§ 79. Evidence Obtained by Unlawful Means.

The admission in evidence of intoxicating liquor discovered as a result of an unlawful search of defendant's premises, is prejudicial error. *S. v. Mills*, 237.

Where defendant consents to search no warrant is necessary and evidence discovered by the search is competent. *S. v. Miller*, 608.

§ 94. Expression of Opinion by Court on Evidence During Progress of the Trial.

Where the court, during the cross-examination of defendant, interposes questions tending to impeach the defendant and depreciate his testimony, a new trial must be awarded. *S. v. Lynn*, 80.

§ 97. Argument and Conduct of Counsel and Solicitor.

Where two defendants are jointly indicted for a crime which is several in nature, the fact that one of them tenders plea of guilty or *nolo contendere* is not competent as evidence of guilt of the other, and it is improper for the solicitor to argue to the jury that defendants jointly committed the crime, and that if one of them pleaded guilty, the other was also guilty, and the failure of the court, upon timely objection of the defendant then on trial, to charge that the plea of the codefendant should not be considered as evidence bearing upon the guilt of the defendant then on trial, and that the latter's guilt must be determined solely on the basis of the evidence against him, must be held for prejudicial error. *S. v. Kerley*, 157.

§ 98. Functions of Court and Jury in General.

Conflicts in the testimony, the weight of the evidence, and the credibility of witnesses are all matters for the jury. *S. v. Green*, 717.

It is not error for the court to tell the jury the punishment for the offense in question. *Ibid.*

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Testimony of State's witnesses that they had not previously known defendants, and that defendants were the persons who assaulted and robbed one of the witnesses with a pistol, is sufficient to overrule motion for judgment of nonsuit, the criminal record of the State's witnesses being relevant only upon the question of their credibility. *S. v. Kerley*, 157.

While circumstantial evidence must point unerringly to the guilt of defendant and exclude every other reasonable hypothesis in order to be sufficient for conviction, whether it does so is for the jury to determine under instructions to that effect, it being the province of the court upon motion to nonsuit or for a directed verdict to determine only whether there is substantial evidence of every essential element of the offense. *S. v. Davis*, 73.

Circumstantial evidence held sufficient to sustain conviction of violation of liquor control statutes. *S. v. Tessnear*, 615.

§ 102. Nonsuit for Variance.

Where the State's evidence is ample to show defendant's commission of the criminal act as charged in the bill of indictment, the failure of the State to establish that the crime was committed on the very date specified in the indictment does not relieve defendant of criminal responsibility or justify nonsuit, time not being of the essence. *S. v. Gillyard*, 217.

§ 106. Instruction on Guilt of Defendants Tried Jointly.

Where several defendants are tried jointly, a charge which, in effect, instructs the jury that it should convict all the defendants if any one of them was guilty, is prejudicial error. *S. v. Meshaw*, 205.

§ 107. Instructions—Statement of Evidence and Explanation of Law Arising Thereon.

Where the court's instructions to the jury contain a clear, concise and complete charge on all essential features of the case, exceptions to the court's failure to charge on minor aspects of the case cannot be sustained, it being incumbent on defendant, if he desired more detailed instructions, to have tendered a request therefor. *S. v. Davis*, 73.

The failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error in the absence of request for such instruction, since the matter is a subordinate and not a substantive feature of the case. *S. v. Andrews*, 561.

Where the indictment charges the defendant and named persons with participating in a riot, it is error for the court to go outside the indictment and charge that defendant would be guilty if he participated in the offense with two or more other persons is error. *S. v. Wynne*, 686.

§ 109. Instructions on less Degrees of Crime and Possible Verdicts.

The court is not required to submit the question of guilt of a less degree of the crime when there is no evidence thereof. *S. v. Robbins*, 332.; *S. v.*

Green, 717. But is required to submit to the jury the question of defendant's guilt of each less offense of the crime charged which is supported by the evidence. *S. v. Green*, 717.

§ 111. Charge on Credibility of Witnesses.

Where the State's sole witness is an undercover agent who testifies that he purchased nontaxpaid whisky from defendant, an instruction that the jury should scrutinize his testimony in the light of his interest and bias, but that if the jury believed beyond a reasonable doubt that the witness was telling the truth, and if the jury were satisfied beyond a reasonable doubt from such testimony that defendant was guilty, to return such verdict, *is held* without error. *S. v. Hunt*, 454.

§ 116. Additional Instructions after Initial Retirement of Jury.

The court may properly instruct the jury as to their duty to make a diligent effort to arrive at a verdict when the court's language in no way tends to coerce the jury or to intimate in the slightest any opinion of the court as to what the verdict should be. *S. v. Green*, 717.

It is not error for the court, upon inquiry by a juror, to tell the jury the punishment for the offense in question. *Ibid.*

§ 118. Form, Sufficiency and Effect of Verdict.

A verdict of guilty as charged is a verdict of guilty as to each and all counts in the bill of indictment. *S. v. Meshaw*, 205.

§ 120. Polling the Jury.

Where the record does not affirmatively establish that each juror assented to the verdict entered upon the poll of the jury upon motion of defendant, a new trial must be awarded. *S. v. Dow*, 644.

§ 121. Arrest of Judgment.

Where it appears upon the face of the record that the warrant was amended in the Superior Court on appeal from conviction in an inferior court so as to charge an entirely different crime, the record discloses a fatal defect of which the Court must take note *ex mero motu*. *S. v. Cooke*, 518.

Where it appears on the face of the record that the Superior Court was without jurisdiction, the judgment entered therein will be arrested by the Supreme Court *ex mero motu*. *S. v. Morgan*, 596.

§ 131. Severity of Sentence.

Convictions of possession of non-taxpaid whisky and possession of such whisky for purpose of sale and selling such whisky will not support sentence to State's Prison, the offenses being misdemeanors. *S. v. Floyd*, 434.

§ 134. Sentence for Repeated Offenses.

Where the warrant in the recorder's court charges defendant with driving while under the influence of intoxicants and further alleges that the offense was a second offense, and upon transfer of the cause to the Superior Court upon defendant's demand for jury trial, the indictment charges the substantive offense, with further averment that it was a third offense, *held:* the Superior Court acquires jurisdiction of the substantive offense, since the statute, G.S. 20-179, with respect to second, third and subsequent offenses, relates only to punishment. However, the Superior Court cannot impose a penalty greater than that provided for a second offense. *S. v. White*, 587.

§ 135. Suspended Judgments and Executions.

Where defendant appeals from a suspended judgment, the judgment will be stricken on appeal for want of defendant's consent, and the cause remanded for proper judgment on the verdict. *S. v. St. Clair*, 183.

Where active sentence is imposed on one count and suspended sentences are imposed on the other two counts in the indictment, and the defendant gives notice of appeal immediately after entry of judgment, in the absence of error in the trial the cause must be remanded for proper sentence on the counts upon which sentences were suspended, since suspended sentences cannot stand in the absence of defendant's consent thereto. *S. v. Miller*, 608.

A court has power to suspend execution of a judgment for a period not in excess of five years. *S. v. Griffin*, 680.

When defendant complies with conditions of suspension he may not thereafter attack the judgment but may contest the validity of the forms of suspension or the sufficiency of the evidence to a breach of condition. *Ibid.*

A court may continue prayer for judgment from one term to another with or without defendant's consent if no terms or conditions are imposed. *Ibid.*

Where court continues prayer for judgment but imposes fine as condition, the judgment is not suspended, but is a final judgment precluding further puishment. *Ibid.*

§ 137. Modification and Correction of Judgment in Trial Court.

Where, on motion to correct the minutes, the court finds upon supporting evidence that the minutes of the court were correct, its ruling denying the motion is not subject to review. *S. v. Arthur*, 690.

§ 138. Costs.

The payment of costs constitutes no part of the punishment in a criminal case. *Barbour v. Scheidt*, 169.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court.

The jurisdiction of the Supreme Court on appeal is derivative, and when the Superior Court is without jurisdiction, the Supreme Court can acquire none by appeal. *S. v. Morgan*, 596.

The constitutionality of a statute will not be considered and determined by the Supreme Court as a hypothetical question, but constitutional questions will be decided only when properly presented, and even then will not be determined if there is also present some other ground upon which the case may be disposed of. *S. v. Blackwell*, 642.

The question for decision on appeal is whether the ruling of the court below is correct and not whether the reason given by the lower court for its judgment is sound or tenable, and therefore where judgment quashing the warrant is correct, the judgment will be affirmed, and wrong or insufficient or superfluous reasons assigned by the lower court for its decision will be treated as surplusage. *Ibid.*

§ 141. Judgments Appealable.

Prayer for judgment continued upon payment of the costs is not a final disposition of a criminal prosecution from which an appeal would lie, but the cause remains in the court for appropriate action upon motion. *Barbour v. Scheidt*, 169.

§ 143. Right of Defendant to Appeal.

A defendant may appeal when judgment is pronounced regardless of whether execution of the judgment is suspended or not, provided he does not consent to the conditions upon which judgment is suspended. *S. v. Griffin*, 680.

Where suspended sentence is entered and defendant does not except or give notice of appeal during the term, but complies with certain of the terms of suspension, he waives his right to appeal and may not thereafter appeal, even though written notice of appeal is served within ten days from the adjournment of the term. *S. v. Canady*, 613; *S. v. Griffin*, 680.

Where prayer for judgment is continued there is no judgment, and when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment, either by fine or imprisonment, the order is in the nature of a final judgment precluding the court from thereafter imposing additional punishment, and defendant is entitled to appeal therefrom. *S. v. Griffin*, 680.

§ 161. Harmless and Prejudicial Error in Instructions.

Any error in the instructions of the court relating to a higher degree of the offense cannot be prejudicial to defendant upon his conviction of a lesser degree of the crime. *S. v. Robbins*, 332.

Where the charge of the court, construed contextually, is not prejudicial, an assignment of error thereto cannot be sustained. *S. v. Floyd*, 434.

§ 164. Harmless and Prejudicial Error—Error Relating to One Count only.

The jury returned a verdict of guilty as charged to an indictment charging both larceny and receiving the stolen goods with knowledge that they had been stolen. A single judgment was entered on the verdict. There was error in the court's instruction to the jury on the count of receiving. *Held:* Since defendant could not be guilty of both larceny and receiving the same goods, and it is impossible to determine to which count the verdict related, it is impossible to determine whether the error is prejudicial or harmless, and therefore a new trial must be awarded. *S. v. Meshaw*, 205.

§ 166. Questions Necessary to Determination of Appeal.

Where a new trial is awarded on one exception, questions raised by other assignments of error which may not recur on retrial need not be considered. *S. v. Andrews*, 561.

§ 169. Determination and Disposition of Cause.

Where it is apparent from the record that error in the trial of the felony counts may have influenced the verdict on the misdemeanor count, a retrial of the whole case will be awarded, notwithstanding that the error does not pertain directly to the misdemeanor count. *S. v. Andrews*, 561.

Where the warrant in the inferior court charges that the substantive offense was the second offense, and on appeal to the Superior Court judgment is entered upon indictment charging the offense to be a third offense, but no incompetent evidence is admitted during the trial in regard to repeated offenses, a new trial will not be awarded, but the cause will be remanded for proper judgment. *S. v. White*, 587.

Where the warrant in the inferior court charges that the substantive offense

was the second offense, and on appeal to the Superior Court judgment is entered upon indictment charging the offense to be a third offense, the judgment may not be allowed to stand even though the sentence imposed is no greater than that permissible for a first or second offense, since the court may have taken into consideration that the conviction was for a third offense in fixing the punishment. *Ibid.*

DAMAGES

§ 6. Aggravation and Mitigation of Damages.

The burden is upon lessee who has wrongfully breached his lease by failure to pay rent to show that lessor in the exercise of good business judgment could have leased to another and minimized his loss. *Bank v. Bloomfield*, 492.

DEATH

§ 8. Actions for Wrongful Death.

In an action for wrongful death, the burden is on plaintiff to establish that defendant was guilty of a negligent act or omission and that such act or omission proximately caused the death of his intestate. *Lane v. Bryan*, 108.

In an action for wrongful death, plaintiff has the burden of establishing that defendant was guilty of a negligent act or omission, and that such act or omission was the proximate cause of the death of decedent. *Philyaw v. Kinston*, 534.

DECLARATORY JUDGMENT ACT

§ 3. Parties.

The court should refuse to deal with the merits of an action brought under the Declaratory Judgment Act when it appears that a judgment finally settling and determining the question in dispute cannot be entered until a person not a party is brought in as a party to the action. *Edmondson v. Henderson*, 634.

DEDICATION

§ 1. Acts Constituting Dedication in General.

The owner of a subdivision does not dedicate water and sewer lines constructed by him to the public at large by permitting the purchasers of lots in the subdivision to tap into the said lines without charge, since a dedication must be made to the use of the public in general and not to any particular part of it. *Jackson v. Gastonia*, 404.

§ 3. Implied Dedication in Sale of Lots with Reference to Map.

Implied dedication by sale of lots by reference to registered map does not obtain when deeds expressly reserve in grantors right to close streets and parks shown on map. *Todd v. White*, 59.

DEEDS

§ 11. General Rules of Construction.

A deed is to be construed to ascertain the intention of grantor and grantee as expressed in the language employed, and when the meaning of the

language is in doubt, resort may be had to the circumstances of the parties and the situation dealt with. *Reed v. Elmore*, 221.

Doubtful language in a deed must be construed most favorably to grantee. *Ibid.*

The heart of a deed is the granting clause, and in the event of repugnancy between the granting clause and the preceding or succeeding recitals, the granting clause will prevail. *Powell v. Roberson*, 606.

An effective deed must contain operative words of conveyance. *Ibid.*

§ 13b. Rule in Shelley's Case.

The Rule in Shelley's Case is recognized in this jurisdiction, and, when applicable, it is not only a rule of law, but also a rule of property without regard to the intent of the grantor or devisor. *Powell v. Roberson*, 606.

The premises of the deed in question stated that the conveyance was to grantee during her natural life and at her death to her children, but the granting clause and the *habendum* recited that the conveyance was to grantee during her natural life and then to her heirs. *Held:* The Rule in Shelley's Case is applicable and the grantee took a fee simple. *Ibid.*

§ 15. Reservations and Exceptions.

The principle that when the owners of a tract of land subdivide it and convey lots therein by deeds referring to a registered map showing streets and parkways, etc., the owners dedicate such streets and parks to the use of the purchasers and those claiming under them, and also, under certain circumstances, to the public, does not apply when the owners, by unambiguous language, reserve to themselves, their heirs and assigns, title and control of streets and parks which are not adjacent or necessary to the full enjoyment of the lots conveyed, with right to change, alter or close same. *Todd v. White*, 59.

§ 16b. Restrictive Covenants.

Restrictive covenants are to be strictly construed. *Reed v. Elmore*, 221.

A reasonable restrictive covenant which does not materially impair the beneficial enjoyment of the land conveyed and which is not contrary to public policy, is valid and enforceable in the same manner as any other contractual obligation. *Ibid.*

The owner of contiguous lots conveyed one lot by deed stipulating that the land therein conveyed should be subject to the restriction that no structure should be erected thereon by grantee within a stipulated distance from the public road, and that the restriction should likewise apply to the adjacent lot retained by grantor. *Held:* The deed imposed mutual restrictive servitudes on both lots in the nature of negative easements running with the land, and not mere personal obligations. *Ibid.*

It is not necessary that the owner of property subject all of it to the same plan of development in order to create restrictive servitudes or easements running with the land in a designated area. *Ibid.*

Registered deed creating negative easement on lands retained by grantor held binding on purchasers of servient tenement. *Ibid.*

DIVORCE AND ALIMONY

§ 14. Actions for Alimony without Divorce.

The 1955 amendment to G.S. 50-16 merely gives a wife the right to set up

a cross-action for alimony without divorce in the husband's suit for divorce, either absolute or from bed and board, without disturbing the right of the wife to bring an independent action under the statute for alimony without divorce, the alternate procedure being permissive but not mandatory. *Beeson v. Beeson*, 330.

§ 17. Custody and Support of Children—Jurisdiction and Procedure.

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. *Cox v. Cox*, 528

In the wife's action for absolute divorce, the petition of the husband demanding custody of the child of the marriage injects demand for affirmative relief of a substantial nature, and it is error for the clerk thereafter to permit the wife to take a voluntary nonsuit, and thus divest the court of jurisdiction, while the issue of custody is *in fieri*. *Ibid.*

DOWER

§ 8f. Payment of Cash Value of Dower.

Where petitioner seeks the cash value of her dower out of the surplus after foreclosure of a mortgage on lands of which her husband died seized, and alleges her age and that the cash value of her dower was a stipulated amount, which asserted value is expressly denied by respondents, judgment is improperly entered on the pleadings, since the burden is upon the widow to establish her life expectancy upon which the cash value of the annuity value of her dower must be ascertained, G.S. 8-47, and her life expectancy is a question of fact for the determination of the jury, the mortuary tables, G.S. 8-46, being merely evidentiary. *Waggoner v. Waggoner*, 210.

§ 9. Waiver and Forfeiture of Dower.

A married woman may, by conduct and false representation, estop herself from claiming dower. *Waggoner v. Waggoner*, 210.

Respondents alleged that their father owned a life estate in lands, that respondents owned the remainder, and that respondents, in reliance upon their step-mother's representation that she would not claim dower, conveyed their remainder to their father in order for him to obtain a loan to pay taxes and assessments and make repairs to the property, and that she benefited therefrom during the life of her husband. *Held:* In her proceeding for allotment of dower consummate, the facts alleged are sufficient to raise the question for the determination of the jury as to whether the step-mother was estopped to assert dower, with burden on respondents to establish the factual basis for their plea of estoppel. *Ibid.*

EASEMENTS

§ 2. Easements by Implication.

In this action to establish an easement by implication from plaintiffs' land across defendants' land to a public highway, nonsuit *held* proper under authority of *Bradley v. Bradley*, 245 N. C. 483. *Huie v. Templeton*, 86.

EJECTMENT

§ 10. Nature and Essentials of Right of Action.

In an action for the recovery of possession of land, plaintiff must rely upon the strength of his own title. *Scott v. Lewis*, 298.

In all actions involving title to realty title is presumed conclusively to be out of the State, unless it be a party to the action, G.S. 1-36, but there is no presumption in favor of either party, and plaintiff remains under the burden of showing title in himself by some approved method, one of which is by showing title by adverse possession. *Ibid.*

§ 15. Pleadings, Burden of Proof and Presumptions.

In an action for the recovery of land and for trespass thereon by defendant, defendant's denial of plaintiff's title and defendant's trespass ordinarily raises issues of fact, with the burden on each upon plaintiff. *Scott v. Lewis*, 298.

§ 16. Competency and Relevancy of Evidence.

In an action to determine ownership of a tract of land, a map prepared by a surveyor employed by plaintiff, defendants being present when the survey was made, is properly admitted in evidence to illustrate the testimony of the surveyor as to what he did, where he went and what he found in making the survey of the land as described in the deeds in plaintiff's chain of title, the map not being admitted as substantive evidence. *McCormick v. Smith*, 425.

A sketch or map made by a surveyor from the report of the commissioners in a partition of the lands among the heirs of the common source of title, is competent for the purpose of illustrating the testimony of the surveyor, as well as the testimony of the court surveyor, that the land in controversy was within the boundaries of the tract allotted to one of the tenants in common. *Ibid.*

Where defendants introduce timber deed and judgment in favor of the grantor therein against other parties conveying the timber, which judgment described the line as contended for by defendants, *held*, a sketch made by the court surveyor showing the land in controversy and the descriptions in the judgment is competent for the purpose of explaining the testimony of the witness as to the location of the land in the judgment, the sketch not being admitted as substantive evidence. *Ibid.*

§ 17. Sufficiency of Evidence and Nonsuit.

Where, in an action in ejectment, plaintiff introduces evidence that he and defendants claim from a common source and that there was a fatal defect in the tax foreclosure forming a link in defendants' chain of title, nonsuit should be denied. *Kelly v. Kelly*, 174.

In an action in ejectment, nonsuit may not be properly entered on defendant's claim of title by adverse possession, but such claim raises an issue or issues to be submitted to the jury upon proper charge of the court. *Ibid.*

ELECTION OF REMEDIES

§ 1. When Election is Required in General.

The doctrine of election of remedies applies when co-existing, but incon-

sistent, remedial rights vest in the same person so that such person must choose between the inconsistent repugnant remedial rights. *NASCAR v. Midkiff*, 409.

ELECTIONS

§ 18b. Contested Elections—Procedure.

In an action to restrain the issuance of bonds on the ground of irregularities in the bond election, a complaint which fails to allege that the officers appointed to hold the election had reported the results thereof to the governing body of the municipality and that the governing body had canvassed the returns and judicially determined the result, is demurrable, since the court will not permit itself to be substituted for the proper election officials in the first instance for the purpose of canvassing the returns and declaring the result. *Garner v. Newport*, 449.

ELECTRICITY

§ 7. Liabilities for Injury—Condition of Wires, Poles and Equipment.

Where the evidence discloses that the electrifying of a water pipe causing injury to plaintiff was due to the fact that a third person felled a tree, which struck and broke a power line, the doctrine of *res ipsa loquitur* does not apply in an action against the power company. *Lea v. Light Co.*, 287.

The law imposes the duty upon a power company to exercise the utmost care and prudence consistent with the practical operation of its business to avoid injury from its high tension lines. *Ibid.*

A right of way agreement empowering a utility to cut away all trees and obstructions that might in any way endanger the proper maintenance and operation of its power line does not impose the duty upon the power company to cut down a sound tree on or near its line which in no way interferes with its operation and maintenance thereof, solely because the tree is of sufficient height to strike the power line if cut down and felled in that direction, and the power company may not be held liable for injuries resulting from such action by a stranger, since it is not required to anticipate negligence on the part of others. *Ibid.*

The maintenance of high tension wires by a corporation engaged in the distribution of electricity is not wrongful and its duty to insulate such wires and place warning signs thereof is limited to places where in the exercise of ordinary prevision, the electric company could foresee that persons might come in contact therewith in the course of their legitimate pursuits of work, business, or pleasure. *Philyaw v. Kinston*, 534.

The evidence tended to show that workman was electrocuted in the course of his employment when he stood up after sawing rafters of the roof of the building under construction, and came in contact with high tension wires some four or five feet above the height of the roof. There was no evidence that the municipality maintaining the wires was given notice of the construction of the building in proximity to the wire by either the owner or contractor or other person, except in the application for building permit which gave the location and dimensions of the building but revealed no data in reference to the location and proximity of the city electric lines. *Held:* The evidence fails to disclose facts sufficient to charge defendant city with notice that some one might erect a building under and up to its trans-

mission line, and therefore, the death of intestate was not within the reasonable foresight of defendant, and nonsuit was proper. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power in General.

Ordinarily, land devoted to the public use cannot be taken for another public use unless specifically authorized by express or implied legislative authority, but this rule does not apply to property owned by a public service corporation but which is not in actual use or is not necessary or vital to the operation of the business of the owner. *Goldsboro v. R. R.*, 101.

A municipal corporation has power, under its charter and the general powers of eminent domain conferred upon it by statute, to condemn for necessary street purposes a strip of land owned by a railroad company when such property is not being used by the railroad company and is not necessary nor essential to the operation of its business. *Ibid.*

§ 6. Delegation of Power to State Boards and Agencies.

Chapter 543, Session Laws of 1955, granted the Department of Archives and History the power to acquire real estate and personal property of state-wide historical significance by gift or purchase, etc., and the power of condemnation for such purpose with the approval of the Governor and Council of State, and also substituted the Department of Archives and History for the Department of Conservation and Development in Chapter 791, Session Laws of 1945, so as to empower the Department of Archives and History under the 1945 Act, after obtaining a certificate of public convenience and necessity, to condemn land for the restoration of Tryon's Palace without the approval of the Governor and Council of State. *In re Department of Archives*, 392.

§ 18c. Competency and Relevancy of Evidence.

Where, upon cross-examination of respondents' witness who had testified as to the value of respondents' land before and after the taking, petitioner brings out the witness' opinion as to the value of each structure on the land condemned before and after the taking and the statement that the witness based his estimates on the replacement cost of the buildings without allowance for depreciation, the cross-examination tends to impair the weight of the witness' testimony in chief but does not warrant the striking thereof. *Highway Com. v. Privett*, 501.

Where each of two witnesses for respondents testifies that he was familiar with the property in question and the material values in the area and that he had an opinion satisfactory to himself relative to the value of respondents' land before and after the taking, exception to the denial by the court of petitioner's motion for a preliminary examination of the witnesses on the ground that they may have taken into consideration improper elements and methods in forming their opinions of value, will not be sustained, counsel having taken full advantage of the opportunity of impairing the weight of their testimony by cross-examination. *Ibid.*

Where petitioner's witnesses testify as to the value of respondents' property before and after the taking, it is proper for respondents to cross-examine them as to whether the witnesses had opinions or knowledge as to the value of other property in the area for the purpose of attacking the credibility of the witnesses and the weight, if any, to be given their testimony. *Ibid.*

The exclusion of photographs of buildings on the property in question, tendered for the purpose of showing that respondents had stripped the buildings of certain parts which they considered of value before petitioner took possession, is not prejudicial when the evidence fails to show that respondents stripped the building. *Ibid.*

§ 19. Judgment and Decree.

Petitioner's exception to the judgment on the ground that, although the court described the lands condemned in accordance with a map which the parties stipulated showed the original boundaries of respondents' property and the part thereof condemned, the court deleted from the judgment drafted by petitioner an additional description, is untenable, since if the descriptions differ, the additional description should have been deleted, and if the two descriptions are in accord, the deletion is immaterial. *Highway Com. v. Privett*, 501.

Where it appears that petitioner had taken land of respondents to widen a highway, and the proceedings are solely for the purpose of ascertaining the amount of compensation to be paid for the land taken, the judgment should describe the land by reference to the right-of-way of the highway as it was on the date prior to the taking, rather than to its "present right-of-way." *Ibid.*

The court properly refuses to incorporate in its judgment awarding damages for the condemnation of land a provision that the judgment should bear interest until paid, since G.S. 24-5 has no application to a judgment against the State Highway and Public Works Commission. *Ibid.*

§ 25. Time of Vesting of Title.

Complaint held not to disclose as matter of law that title to property in question had passed to Highway Commission. *Buchanan v. Smawley*, 592.

EQUITY

§ 2. Laches.

Judgment that plaintiffs were guilty of *laches* in failing to assert their rights, sustained under the facts of this case. *Jordan v. Chappel*, 620.

ESTATES

§ 16. Survivorship in Personalty.

In an action by the administratrix of a depositor against the bank of deposit and the depositor's son to recover the amount deposited by intestate, the fact that plaintiff introduces the bank's ledger sheet captioned in the name of intestate and intestate's son, who claimed the funds, does not justify nonsuit in view of the bank's admission that intestate was the owner of the monies deposited, since if plaintiff is to be defeated defendants have the burden of showing how the debt was discharged. *Sides v. Banks*, 672.

ESTOPPEL

§ 5. Equitable Estoppel in General.

A void contract will not work an estoppel. *Bolin v. Bolin*, 666.

§ 11a.—Pleadings.

An estoppel must be pleaded. *Bolin v. Bolin*, 666.

EVIDENCE

§ 2. Judical Notice of Legislative Acts.

The Supreme Court is required to take judicial notice of a public law of this State. *Walker v. Moss*, 196.

Our courts are required to take notice of the law of the United States or any other State or Territory of the United States, or of the District of Columbia, or of any foreign country, when any question arises as to such law in an action instituted in this State. *Johnson v. Catlett*, 341.

§ 5. Judicial Notice of Matters within Common Knowledge.

It is a matter of common knowledge that the value of farms in the tobacco section of Eastern North Carolina is dependent to a very large degree upon the size of their tobacco allotments. *Garris v. Scott*, 568.

§ 8. Burden of Proof—Defenses.

Where defendant admits the amount due on a claim as asserted by plaintiff, the burden is upon defendant to prove his affirmative defense of payment or his counterclaim alleged as justification for his failure to pay. *Builders Supply v. Dixon*, 136.

§ 18. Evidence Competent to Corroborate Witness.

Signed statments of witnesses are competent upon the trial for the purpose of corroborating their testimony consistent therewith, and the trial court has the discretion to permit the introduction of such statements for this restricted purpose prior to the cross-examination of the witnesses. *Bridges v. Graham*, 371.

§ 25. Facts in issue and Relevant to issues.

Plaintiff, while walking on the sidewalk, was struck by an advertising sign which had been knocked down by an automobile. Testimony by an officer that when he visited the scene some five hours after its occurence the sign was not anchored, was properly excluded. *Johnson v. Meyer's Co.*, 310.

The relevancy of evidence, as distinguished from its competency, is determined in relation to the issues on which the case is tried. *Gurganus v. Trust Co.*, 655.

§ 32. Transactions or Communications with Decedent or Lunatic.

A party or person interested in the event is incompetent to testify in his own behalf or interest as to a personal transaction or communication with a deceased person in an action against personal representative of the deceased or a person deriving title or interest from, through or under the deceased. *Collins v. Covert*, 303.

In an action by a corporation and the surviving principal stockholders against the widow of a deceased principal stockholder, involving the liability of the corporation under its contract for the purchase of the stock of the deceased stockholder, the surviving partners are incompetent to testify as to conversations between the partners modifying the stock purchase agreement in favor of the corporation or the surviving partners. *Ibid.*

§ 36. Accounts, Ledgers and Private Writings.

Accounts and ledger sheets prepared in the usual course of business and properly identified, are competent in evidence, and their introduction renders

harmless any error in the admission of testimony of a witness in regard thereto prior to the introduction of the ledger sheets in evidence. *Builders Supply v. Dixon*, 136.

§ 41. Hearsay Evidence in General.

In an action on notes against the estate of the deceased maker, defended on the ground that intestate did not execute the notes, testimony of defendant's witnesses as to declarations made by decedent in plaintiff's absence to the effect that plaintiff was trying to borrow money from her, is incompetent as hearsay, since the testimony is offered to prove as a fact matter recited in the declarations of a person not a witness, and the admission of such testimony over plaintiff's objections is prejudicial for the reason that it tends to show that intestate was not indebted to plaintiff on promissory notes or otherwise. *Gurganus v. Trust Co.*, 655.

§ 42a. Admissions in General.

Where relevant statements made by the employee to a patrolman who interviewed him in the afternoon of the day during which the accident in suit occurred, are admitted solely against the employee and the jury instructed not to consider them against the employer, exception to the admission of the testimony cannot be sustained. *Morgan v. Bell Bakeries*, 429.

§ 43a. Declarations in General.

The rule that testimony of a declaration accompanying an act may be competent to explain the legal effect of the act does not permit the introduction of testimony of a declaration to prove as a fact matters recited in the declaration in violation of the hearsay rule, nor does the rule apply when the declaration does not accompany the conduct sought to be explained. *Gurganus v. Trust Co.*, 655.

Testimony of declarations of the maker of notes, made in the absence of the payee and susequent to the execution of the notes, to the effect that she was not indebted to the payee, cannot be competent under the verbal act doctrine. *Ibid.*

§ 43b. Declarations—Res Gestae.

Plaintiff was injured when an advertising sign, maintained by a store on its adjacent parking lot, was struck by a car in the parking lot and knocked down, falling against and over plaintiff. Testimony of plaintiff that as she was lying on the sidewalk one of three men who picked the sign up off her, made statements to the effect that he was not responsible, that he had paid his parking fee and that a parking attendant had left his car in reverse, *held* properly excluded, since the statements were a narrative of past occurrence and were not, therefore, a part of the *res gestae*. *Johnson v. Meyer's Co.*, 310.

Testimony of a witness of a declaration of an officer sometime after the accident that defendant did not have the right of way is incompetent. *Jones v. Bailey*, 599.

§ 46c. Testimony as to Health.

Ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made in the course of professional treatment and with a view of effecting a cure, or during an examination made for the

purpose of treatment and cure, the basis of the expert's opinion being pertinent on the question of probative force but not on the question of competency. *Penland v. Coal Co.*, 26.

§ 49. Opinion Evidence—Invasion of Province of Jury.

Where the crucial question is which party had the right of way at an intersection, a declaration of an officer that defendant did not have the right of way is incompetent as invading the province of the jury. *Jones v. Bailey*, 599.

§ 52. Expert Testimony—Hypothetical Questions.

The fact that the form of a hypothetical question is objectionable will not be held prejudicial when the answer of the expert witness discloses that it was based not upon the hypothetical facts, but upon facts within the personal knowledge of the witness gained from examination and diagnosis. *Price v. Gray*, 162.

EXECUTORS AND ADMINISTRATORS

§ 2b. Persons Entitled to Appointment.

The clerk of the Superior Court has the power to refuse to issue letters of administration to the nominee of the heirs, notwithstanding the nominee's personal competency, when the nominee's relation to the interested parties and the estate is such that the clerk in the exercise of a sound discretion does not consider him a proper party to administer the estate. *In re Estate of Cogdill*, 602.

§ 31. Actions to Surcharge and Falsify Account.

An action to compel executors to account and make settlement is a suit in the nature of a creditor's bill, and the executors are jointly liable and each is a necessary party defendant, and all persons interested in the settlement of the estate, creditors as well as beneficiaries, are at least proper parties, and in some instances may be necessary parties. *Davis v. Davis*, 307.

FIXTURES

§ 3. Right of Removal.

Ordinarily, when a chattel is affixed to the realty, it becomes realty and may thereafter be conveyed only by deed, and whether it becomes a part of the freehold or not depends upon the understanding or agreement of the parties, express or implied, at the time the chattel is affixed, with the right of removal ordinarily existing only in favor of a tenant in regard to trade fixtures placed upon the land for the better temporary use of the premises for trade or agriculture. *Stephens v. Carter*, 318.

A filling station, which had two storage tanks buried in the ground, was sold by deed containing no reservations. The purchaser sold certain fixtures by parol and thereafter conveyed the realty to defendant by deed containing no reservations. The purchaser of the fixtures thereafter instituted this action to recover the storage tanks. *Held:* The tanks were a part of the realty and could be conveyed only by a written instrument, and the attempt to transfer them by parol was ineffectual, and therefore nonsuit should have been allowed. *Ibid.*

FRAUD

§ 4. Knowledge and Intent to Deceive.

Intent to deceive is an essential element of an action for fraud, and a complaint which fails to allege intent to deceive, or facts from which the equivalent of an intent to deceive may be legitimately implied, is fatally defective. *Calloway v. Wyatt*, 129.

§ 5. Deception and Reliance on Misrepresentation.

A person signing a written instrument is under duty for his own protection to read same, and is charged with knowledge of its contents in the absence of mistake, fraud or oppression. *Harris v. Bingham*, 77.

The right to rely on representations is inseparably connected with the correlative duty of the representee to use due diligence to ascertain the facts unless prevented from doing so by some artifice, or unless the representation is of such character as to induce action by a person of ordinary prudence. *Calloway v. Wyatt*, 129.

The evidence disclosed that in the negotiations for the purchase of a tract of land, the purchasers particularly asked about the supply of water from the well because of knowledge that wells and springs were going dry all over that locality, that the vendor repeatedly represented there was "plenty of water," and that the purchasers relied upon the representation without making any investigation. *Held:* The purchasers could have ascertained the volume of water by the exercise of the slightest diligence in turning on the spigots before purchasing, and in the absence of allegation that the purchasers were prevented by artifice or any act on the part of the vendor from making an investigation, action for fraud will not lie upon later discovery of the inadequacy of the water supply. *Ibid.*

HIGHWAYS

§ 11. Nature and Establishment of Neighborhood Public Roads.

The procedure for the establishment of a neighborhood public road, as well as the procedure to establish discontinuance thereof, is by special proceeding before the clerk, and although an interlocutory injunction in connection with the proceeding under the statute may be issued only by the judge, the Superior Court does not have original jurisdiction of the proceeding. *Edwards v. Hunter*, 46.

This action was instituted to restrain defendants from blocking an alleged neighborhood road, constituting a segment of an old abandoned highway, situate on defendants' land and sought to be used by plaintiff, owner of adjoining land. The complaint did not allege that the road was a neighborhood public road or any basis for the establishment of a neighborhood public road, but did allege facts upon which the action could be maintained to establish an easement appurtenant. *Held:* Demurrer to the jurisdiction on the ground that the proceeding was in the original jurisdiction of the clerk, was properly overruled. *Ibid.*

HOMESTEAD

§ 4a. Nature of Homestead in General.

Sales under execution to provide funds to pay a debt, and sales under judicial decree for such purpose, are void unless the debtor's homestead is

laid off in accordance with mandatory provision of statute. *Stokes v. Smith*, 694.

Land allotted as the homestead is exempt from levy or sale under execution during existence of the homestead right. *Ibid.*

§ 7. Conveyance of Homestead.

To make a valid conveyance of allotted homestead, the wife of the homesteader must join in the conveyance. *Stokes v. Smith*, 694.

A mortgage of allotted homestead is not such sale as to subject the land to sale under execution. *Ibid.*

When the homesteader voluntarily parts with his legal title and the right to use, occupy and enjoy his allotted homestead, he has no right to prohibit the sale of that land under judicial process, though he may convey it subject to any reservations, exceptions or conditions which he deems advisable. *Ibid.*

Since the judgment debtor has the right to sell the land allotted to him as a homestead subject to his right to use and occupy it as a homestead, it is property which a trustee in bankruptcy may, but does not have to, take into possession and administer. *Ibid.*

The term "homestead rights" has different meanings when applied to different factual situations: homestead rights are protected from the force of judicial process; but the homesteader may voluntarily dispose of property allotted as his homestead for the purpose of satisfying his debts, in which case he is presumed to have exercised his full powers of disposal and to have retained only the right of occupancy for the period prescribed by the Constitution. *Ibid.*

HOMICIDE

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant was found dressed in the kitchen of his home about 8:30 in the morning, that his wife had been mortally beaten sometime during the night and was lying near a pool of blood in the bathroom of the house, that blood was found inside the shoes defendant was wearing, and men's clothing on which there was blood was found in the house, *is held* sufficient to be submitted to the jury and sustain a verdict of defendant's guilt of murder in the second degree. *S. v. Davis*, 73.

Testimony of a confession by defendant that he shot the deceased, together with testimony that deceased died as a result of the bullet wound thus inflicted, raises the presumption of an unlawful killing with malice, placing the burden upon defendant to satisfy the jury of facts mitigating the homicide to manslaughter, or justifying it on the ground of self-defense, and is sufficient to take the case to the jury on a charge of second degree murder and support a verdict of guilty of manslaughter upon defendant's evidence in mitigation. *S. v. Redfern*, 293.

Evidence held sufficient to be submitted to the jury on the question of femme defendant's guilt of murder in second degree as aider and abettor. *Ibid.*

HUSBAND AND WIFE

§ 12c. Conveyances by Wife to Husband.

Conveyance of property by wife to trustee without compliance with G.S.

52-12 renders void any estate or trust attempted to be set up in favor of husband. *Pilkington v. West*, 575.

Conveyance by husband and wife to third person and reconveyance to husband do not establish as matter of law attempt to circumvent G. S. 52-12. *Stokes v. Smith*, 694.

And the burden is on the party asserting the contrary to prove that the deed to the third person was not *bona fide*. *Ibid.*

§ 12d. Separation Agreements.

A separation agreement between husband and wife which provides for the support of the wife is a contract between them required to be executed in conformity with G.S. 52-12, notwithstanding that it does not purport to divest the wife of dower or the husband of curtesy, and where the agreement is executed without the examination of the wife and the finding by the probate officer that it is not unreasonable or injurious to her, the agreement is void *ab initio*. *Bolin v. Bolin*, 666.

Payments made by the husband in accordance with a separation agreement void for failure to comply with G.S. 52-12 cannot estop him from attacking the agreement. *Ibid.*

INDICTMENT AND WARRANT

§ 6½. Issuance of Warrant.

A warrant of arrest of a defendant on a charge of crime may be issued only by an officer authorized by law to do so. *S. v. Blackwell*, 642.

Where a statute authorizing a police officer to issue warrants purports to amend a law which has been repealed the amendatory statute is a nullity. *Ibid.*

§ 8. Joinder of Counts.

A charge of larceny and a charge of receiving stolen goods with knowledge that they had been stolen may be joined in a single bill, each being a felony. *S. v. Meshaw*, 205.

§ 9. Charge of Crime.

Where time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date during the month on which the crime was committed. *S. v. Andrews*, 561.

§ 10. Identification of Person Accused.

Where defendant's name appears in the warrant which refers to the affidavit, forming a part thereof, the omission of defendant's name from the affidavit is not a fatal defect. G.S. 15-153. An affidavit form which fails to name the person charged is disapproved. *S. v. St. Clair*, 183.

§ 12. Time of Making Motions to Quash.

When motion to quash the warrant on the ground that it was issued by a police officer is not made until after plea of not guilty is entered, the motion is addressed to the discretion of the trial court and its exercise of such discretion is not reviewable on appeal. *S. v. St. Clair*, 183.

§ 13. Grounds for Quashal.

A motion to quash will lie only for fatal defect appearing on the face of

the indictment, and upon such motion the court may not consider extraneous evidence or matters *dehors* the record proper. *S. v. Andrews*, 561.

An indictment charging all the essential elements of a felonious breaking or entry within the purview of G. S. 14-54 is not subject to quashal on the ground that defendant should have been charged with a nonfelonious entry under the statute, since the sufficiency of the evidence to support the felony charge cannot be challenged by motion to quash, but must ordinarily be raised by motion to nonsuit or by prayer for special instructions. *Ibid.*

§ 15. Amendment of Warrant or Indictment.

While the Superior Court, on appeal from an inferior court, has power to amend the warrant to make accurate and sufficient the statement of the crime asserted or attempted to be asserted, the court has no power to permit an amendment which results in the charge of an entirely different crime from the one of which defendant was convicted in the lower court. *S. v. Cooke*, 518.

INFANTS

§ 6. Affirmance and Disaffirmance of Contracts.

Institution of action for wrongful death by minor's administrator cannot constitute disaffirmance of insurance agreement as to beneficiary named therein. *NASCAR v. Midkiff*, 409.

§ 21. Jurisdiction to Determine Right to Custody.

Our courts have jurisdiction to award the custody of a child resident here, notwithstanding that the domicile of the child, following that of his father, is in a foreign jurisdiction. *Holmes v. Sanders*, 200

§ 22. Right to Custody of Infants.

In this proceeding for the custody of a minor child, the order of the court disclosed that the judge conferred with the minor in its chambers in the absence of counsel and the parties. *Held:* The judgment must be reversed and the cause sent back for rehearing upon objection duly entered by petitioner, the record failing to show consent or waiver of his constitutional right by petitioner. *Raper v. Berrier*, 193.

Findings and conclusions, supported by evidence, that the best interest of the child requires that he remain in the custody of his maternal grandparents and that there had been no material change in the conditions since the custody of the child had been awarded to them upon like predicate, *held* to support order denying petition of the child's father for modification of the former decree. *Holmes v. Sanders*, 200.

INJUNCTIONS

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

A temporary order issued in the cause should be continued to the hearing upon plaintiff's showing of a *prima facie* right to the primary equity when the relief sought will be irrevocably lost if the *status quo* is not preserved to the hearing. *Edwards v. Hunter*, 46.

Plaintiff sought a permanent injunction to restrain defendants from blocking a private roadway on their lands. The findings established that the use of the road by plaintiff was not necessary for ingress and egress

to his land, but was a matter of mere convenience, based upon the right to an easement appurtenant. *Held:* The continuance of a temporary restraining order to the hearing involved only the relative conveniences and inconveniences to the respective parties, and the dissolution of the temporary order rested largely in the discretion of the hearing judge and will not be disturbed on appeal. *Ibid.*

The findings of the court, upon the hearing of a motion to show cause why a temporary restraining order should not be continued to the hearing, are not determinative or relevant when the issues are determined at the trial. *Ibid.*

Where the verified complaint alleges sufficient facts to support an order continuing the temporary restraining order to the hearing, the court's order to this effect upon its finding the facts to be as set out in the complaint is without error, and defendant's exception that such finding is a broadside finding is without merit. *Construction Co. v. Electrical Workers Union*, 481.

Record held not to show that continuance of temporary order enjoined the exercise of any rights under Federal Labor Management Act. *Ibid.*

§ 9. Hearings on the Merits.

The findings of fact and the other proceedings upon the hearing of a motion for the continuance of an interlocutory injunction are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. *Construction Co. v. Electrical Workers Union*, 481.

INSURANCE

§ 13a. Construction and Operation of Policies in General.

An insurance policy is only a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. *Gaulden v. Ins. Co.*, 378.

Where the language of an insurance policy is plain and unambiguous, extrinsic evidence as to the meaniing of the language is not admissible, and, the facts not being in dispute, the question of its coverage is a question of law for the court. *Marshall v. Ins. Co.*, 447.

§ 13c. Waiver of Conditions of Policy in General.

Insurer has the right to waive provisions inserted in the insurance contract for its benefit. *Sudan Temple v. Umphlett*, 555.

§ 30f. Reinstatement of Life Policies.

The beneficiary's introduction in evidence of insured's application for reinstatement, containing a signed statement that he was in good health, etc., together with testimony of insurer's agents, one that he saw insured sign the application and recommended him as a first class risk and the other that he wrote "O.K." on the application, is sufficient to make out a *prima facie* showing of good health and does not establish as a matter of law, so as to justify nonsuit, insurer's affirmative defense of misrepresentation of health. *Dean v. Ins. Co.*, 704.

Plaintiff beneficiary's evidence tended to show that applications for reinstatement were acted on by insurer within a ten day period and that if an application were rejected a rejection slip was sent to the field agent within that time, that insured died ten days after signing application for rein-

statement, which application was received by insurer in due course, and that proof of death forms were given the beneficiary by the field agent some eighteen days after the application was made, together with other evidence in the case, *is held* sufficient to justify the inference that the application for reinstatement had been approved at the home office of insurer prior to the death of insured. *Ibid.*

§ 36b(2). Life Insurance—Change of Beneficiary.

Where insured has the right to change the beneficiary, the beneficiary has no vested right in the contract during the life of insured, but has a mere expectancy. *Sudan Temple v. Umphlett*, 555.

Original beneficiary having no vested right may not attack validity of change of beneficiary as between insurer and substituted beneficiary. *Ibid.*

§ 36½. Group Policies.

The group policy sued on provided increased amount of insurance over that provided in the group policy which it superseded during continuance of employment as to each employee who made apt application therefor, and who was actively engaged at work on the date the new policy became effective, with further provision to the effect that cessation of active work should constitute termination of employment unless absence from active work was due to leave or temporary lay-off. Deceased filed his application in apt time, and upon the effective date of the policy was on terminal leave at full pay for the period equal to his unused vacation and unused sick leave, which he had earned under the terms of his employment. Deceased died during his terminal leave. *Held:* The terminal leave did not terminate the employment and was a leave of absence of the identical type of "leave of absence or temporary lay-off," which was not to be deemed "cessation of active work," and the beneficiary is entitled to the increased amount under the terms of the new policy. *Gaulden v. Ins. Co.*, 378.

§ 43b. Auto Accident Insurance—Risks Covered.

A policy providing for benefits if insured should be killed in an accident while driving or riding in a private passenger car of the pleasure type, does not cover the risk of insured's death while driving a pick-up truck, notwithstanding this was the only vehicle owned by insured when the policy was issued, and notwithstanding the vehicle was used by insured solely as a passenger vehicle in going to and from work and for pleasure. *Marshall v. Ins. Co.*, 447.

§ 51. Auto Insurance—Payment and Subrogation.

Where insurer has paid the entire loss insured may not maintain the action against the tort-feasor. *Smith v. Pate*, 63.

INTOXICATING LIQUOR

§ 1. Validity of Control Statutes.

Under its inherent police power, the State has the power to prohibit, regulate or restrain the use, manufacture or sale of beer within its bounds. *Boyd v. Allen*, 150.

§ 2. Construction and Operation of Control Statutes.

G.S. 18-50 making the possession of illicit liquor for the purpose of sale

a general misdemeanor, and G. S. 18-48 making it a misdemeanor to possess whisky upon which requisite taxes have not been paid, create separate offenses, and the one is not included in the other. *S. v. Morgan*, 596.

§ 8½. Retail Licenses for Wine and Beer.

A retail beer permit grants the holder a special privilege limited by the statutes under which it is granted, and such permit is not a contract, or property right, or vested right in any legal or constitutional sense. *Boyd v. Allen*, 150.

A proceeding by the State Board of Alcoholic Control to suspend a beer permit for alleged violations by the holder of G.S. 18-78.1, is an administrative proceeding, which does not involve any criminal liability of the holder of such permit. *Ibid.*

The revocation or suspension of a retail beer permit for violation of the statutory regulations is done in the exercise of the police power of the State in the interest of public morals and welfare, and does not violate Article I, Section 17, of the Constitution of North Carolina. *Ibid.*

Findings of fact, supported by evidence, that the employees of the holders of a beer permit sold whiskey on the premises, and sold beer consumed by the purchaser on the premises after closing hours and at a time when the sale of beer was prohibited by law, support judgment suspending the permit, notwithstanding the further finding that the holders had no knowledge of the unlawful conduct of the employees. *Ibid.*

§ 9a. Prosecutions—Indictment and Warrant.

A warrant charging defendant with possession of a quantity of non-tax paid liquor together with other illegal whiskey and beer for the purpose of unlawful sale does not restrict the charge to non-tax paid liquor, since the possession of tax paid liquor for the purpose of sale is within the purview of the phrase "other illegal whiskey." *S. v. Mills*, 237.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's possession of 7 pints of tax paid whiskey of various brands, a pint of gin and 33 cans of different kinds of beer, together with evidence that a hundred empty pint whiskey bottles were found strewn under his dwelling, *is held* sufficient, unaided by any presumption, to be submitted to the jury on a charge of unlawful possession of intoxicating liquor for the purpose of sale. *S. v. Mills*, 237.

Evidence that in excess of one gallon of nontax-paid whiskey was found in defendant's automobile is sufficient to be submitted to the jury in a prosecution for possession of whiskey upon which the requisite taxes had not been paid and possession of whiskey for the purpose of sale, the absence of tax stamps being *prima facie* evidence that the whiskey was nontaxpaid and the possession of more than one gallon being *prima facie* evidence of possession for the purpose of sale. *S. v. Miller*, 608.

Evidence that officers found whiskey in defendant's home in a container not having the requisite tax stamps on it, is sufficient to be submitted to the jury on the charge of unlawful possession of nontax-paid whiskey for the purpose of sale. *S. v. Williams*, 614.

Evidence tending to show that defendant was seated beside the driver of a car, the owner being in the back seat, when the driver attempted to

run over officers walking along a road not a public road, that a roadblock was set up, that all the occupants, when confronted with the roadblock, abondoned the car and ran, and that the officers, armed with a search warrant, found five gallons of nontaxpaid liquor in the car, with further evidence that the officers backtracked the car to a place at or near where they first heard it and before found tracks leading off to an illicit distillery that was still warm from recent use, *is held* sufficient to be submitted to the jury and support conviction of defendant of unlawful possession of intoxicating liquor and unlawful possession of intoxicating liquor for the purpose of sale, and to warrant consolidation of the prosecution with the prosecution of the driver of the vehicle. *S. v. Tessnear*, 615.

§ 9g. Verdict and Judgment.

Possession of nontax-paid whiskey, possession of such whiskey for the purpose of sale, and the selling of such whiskey, are misdemeanors, and sentence of defendant, upon conviction, to be confined in the State's prison is not sanctioned by law, and the cause must be remanded for proper sentence. *S. v. Floyd*, 434.

JUDGMENTS

§ 20. Modification and Correction in Trial Court.

Where, on motion to correct the minutes, the court finds upon supporting evidence that the minutes of the court were correct, its ruling denying the motion is not subject to review. *S. v. Arthur*, 690.

§ 32. Operation of Judgment as Bar to Subsequent Action in General.

While the plea of *res judicata* ordinarily requires an identity of parties, a person not a party to the prior action may be bound by the judgment rendered therein if he had a proprietary or financial interest in the judgment or in the determination of the issues involved therein, and either individually or in cooperation with others controlled the presentation or prosecution of his side of the case. *Thompson v. Lassiter*, 34.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lein of Subcontractors and Materialmen.

In order for a subcontractor to enforce a lien against the owner he must notify the owner of his claim before settlement with the contractor, and the lien may not be enforced unless the owner has on hand funds owing to the contractor when he is notified of the claim. *Love v. Snellings*, 674.

§ 10. Enforcement of Lien.

Contractor is necessary party in action by sub-contractor to enforce lien. *Linthicum v. Construction Co.*, 203.

LANDLORD AND TENANT

§ 7. Construction of Leases in General.

A lease of premises includes all easements and privileges appurtenant to the demised premises which are reasonably necessary to its enjoyment, and parol evidence is competent to show the meaning of the term "appurtenances" as used in the lease contract. *Mgf. Co. v. Gable*, 1.

The owner of a three-story building leased the second and third floors to

plaintiff and the first floor to other tenants, with provision in the leases, respectively, that the lessee of the second and third floors should be responsible for two-thirds of the maintenance and upkeep of the heating plant and for two-thirds the fuel costs, etc., and the tenants of the first floor should be liable for one-third thereof. *Held:* The heating system in the basement is an appurtenance to the leased premises and is included in the property leased. *Ibid.*

§ 8. Possession and Use.

A lessee in possession under the terms of the lease is entitled to hold possession and control against the world, and the landlord has no right to enter upon the leased premises against the consent of the tenant. *Mfg. Co. v. Gable*, 1.

Where a lease for a term of five years is in writing as required by statute, G.S. 22-2, oral statement of the lessor's son-in-law forbidding lessee to have anything to do with the furnace, an appurtenance of the demised premises, cannot have the effect of modifying the written lease, certainly in the absence of evidence that the son-in-law had legal authority as agent of the lessor to agree or assent to a change in the written lease. *Ibid.*

§ 10. Duty to Repair.

Provision in a lease that lessee should be responsible for the maintenance and upkeep of the heating plant in the building demised, is equivalent to a general covenant to repair the heating plant. *Mfg. Co. v. Gable*, 1.

§ 11. Liability of Landlord to Tenant for Dangerous or Unsafe Condition of Premises.

Where the lessee is responsible for the maintenance, upkeep and repair of the heating plant in the building, the lessor may not be held liable for damages caused by an explosion in the heating plant when the evidence shows that the explosion was the result of improper maintenance and not the manner of the installation of the equipment itself. *Mfg. Co. v. Gable*, 1.

§ 15. Rights and Liabilities of Parties upon Subleasing of Premises.

The lease in question provided that lessee might not assign or sublease without the consent of lessor. The lease also provided for termination for default continuing for forty-five days after written notice by lessor to lessee of such default. Lessee assigned the lease and lessor notified lessee that it did not consent to the assignment and it would declare a forfeiture for breach of condition unless the breach was cured within the forty-five day period. Lessor refused rent tendered by the sublessee, but accepted rent from the lessee in accordance with the terms of the lease for more than a year after the expiration of the forty-five day period. *Held:* By accepting the rent after the expiration of the forty-five day period, lessor waived its right to declare forfeiture, and it was immaterial that payment of rent was made by the lessee rather than the sublessee. *Realty Co. v. Spiegel*, 458.

The lessee signing a lease expressly covenanting to pay rent is not relieved of his obligation to do so by assignment of the lease in accordance with its terms, even though lessor agrees to the assignment, unless the lease by express terms absolves lessee of his obligation to pay rent upon assignment or the lessor expressly agrees to accept the assignee in substitution of the original lessee, and mere agreement by lessor to the assignment and ac-

ceptance of rent from the assignee do not amount to such agreement. *Bank v. Bloomfield*, 492.

§ 17. Cancellation under Terms of Lease.

If the landlord receives rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, the acceptance of the rent constitutes a waiver of the forfeiture, which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. *Realty Co. v. Spiegel.*, 458.

LARCENY

§ 2. Degree of Crime.

The common law rule that the stealing of property of any value is a felony has been changed by statute so that the stealing of property of the value of not more than $100 is a misdemeanor. *S. v. Andrews*, 561.

G.S. 14-401.1 applies to examinations given by State licensing boards and has no application to theft of college examination papers. *Ibid.*

§ 4. Indictment.

A charge of larceny and a charge of receiving stolen goods with knowledge that they had been stolen may be joined in a single bill. *S. v. Meshaw*, 205.

§ 9. Verdict.

A defendant may not be found guilty of larceny and of receiving the same goods with knowledge that they had been stolen. *S. v. Meshaw*, 205.

LIBEL AND SLANDER

§ 5. Publication.

In order to recover for slander plaintiff must allege and prove publication, and in an action for separate slanders, proof of a mere possibility that someone might have overheard the conversation between plaintiff and defendant constituting the basis of one of the slanders is insufficient, and the court correctly excludes those particular words in submitting the case to the jury. *Tyer v. Leggett*, 638.

§ 10. Pleadings.

Motion for judgment on the pleadings in an action for slander may not be entered when the answer denies each allegation of that cause of action except as admitted in the further answer and defense, and such further answer and defense, although containing purely evidentiary matter, nevertheless does not admit the crucial allegations of the complaint or merely plead matter in mitigation or justification. *Tyer v. Leggett*, 638.

LIMITATION OF ACTIONS

§ 1. Nature and Contruction of Statutes of Limitation in General.

Statutes of limitation are inflexible and unyielding, and operate without reference to the merits of the cause of action. *Shearin v. Lloyd*, 363.

The courts do not have the power to write into a statute of limitations exceptions not therein appearing to prevent the bar of a meritorious cause of action. *Ibid.*

§ 3. Statutory Changes in Periods of Limitations.

The General Assembly may make a statute of limitations applicable to pre-existing contractual obligations provided a reasonable time is allowed for the enforcement of such rights prior to the bar. *Gregg v. Williamson*, 356.

§ 5a. Accrual of Cause of Action in General.

Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong is committed giving rise to the right to suit, even though the damages at that time be nominal and without regard to the time when consequential injuries are discovered or should have been discovered. *Shearin v. Lloyd*, 363.

§ 16. Burden of Proof.

Where defendant aptly pleads a statute of limitations, the burden is on plaintiff to show that the action was instituted within the prescribed period. *Shearin v. Lloyd*, 363.

MASTER AND SERVANT

§ 2e. Collective Bargaining.

This action was instituted to restrain alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Law. On motion to show cause why the temporary restraining order should not be continued, the court found the verified allegations of the complaint to be facts and found further from defendant's answer and plaintiff's admission that plaintiff was engaged in the construction business, performing services both within and without the State in excess of $500,000 per year, purchased goods from out of State of a large value and had a gross annual income of over $3,000,000 per year. *Held:* The facts are insufficient to show that continuance of the temporary restraining order enjoined the exercise of any rights of defendants protected by the Federal Labor Management Act, and the order will not be disturbed, the question being determinable upon the evidence to be offered upon the hearing upon the merits. *Construction Co. v. Electrical Workers Union*, 481.

§ 15. Tools, Machinery and Appliances, and Safe Place to Work.

Nonsuit held proper in this action by carpenter for fall when rotten condition of eave causing fall was not apparent. *Burr v. Everhart*, 327.

§ 37. Nature and Construction of Compensation Act in General.

The Workmen's Compensation Act should be liberally construed to the end that its benefits should not be denied upon technical, narrow and strict interpretation, but the rule of liberal construction cannot be employed to enlarge the meaning of the Act beyond its plain and unmistakable terms. *Hardy v. Small*, 581.

§ 39b. Compensation Act.—Independent Contractors.

A general farm laborer is an employee and not an independent contractor. *Hardy v. Small*, 581.

§ 40b. Compensation Act—Whether Injury is Result of "Accident."

The mere fact that an employee suffers an injury does not establish the fact of accident, and it is required by the Workmen's Compensation Act that

an injury, in order to be compensable, result from an accident, which is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury. *Hensley v. Cooperative*, 274.

§ 40c. Compensation Act—Whether Accident "Arises Out of Employment."

Findings to the effect that the deceased employee was furnished a car for transportation to and from his work, that he quit work about 7:00 p.m., met a friend for dinner, took repeated drinks throughout the evening, made several trips, on one of which he drove approximately 100 miles per hour, in search of a girl to join the party, and some five hours thereafter started for home in the employer's car, and was killed in a wreck occurring on the direct route from the employer's place of business to the employee's home, *held* to show an abandonment of employment rather than a deviation from it, and therefore the accident did not arise in the course of the employment. *Alford v. Chevrolet Co.*, 214.

An injury does not arise out of and in the course of the employment unless it is fairly traceable to the employment as a contributing proximate cause, and an accident from a hazard to which the public in general is subject does not arise out of the employment. *Hardy v. Small*, 581.

Accidental injury to an employee while on a public street or highway does not arise out of the employment unless the employee at the time of the accident is acting in the course of his employment. *Ibid.*

Under facts of this case injury to employee while crossing highway was a risk incident to the employment. *Ibid.*

§ 40d. Whether Accident Arises in Course of Employment.

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place and circumstances under which an accident occurs. *Hardy v. Small*, 581.

Ordinarily an injury by accident is not compensable if sustained by the employee while on the way to or returning from the place where his employment is performed unless the employer provides the means of transportation. *Ibid.*

§ 40e. Causal Connection between Accident and Disability.

Testimony of claimant and of his expert witness to the effect that the injury received in the course of claimant's employment resulted in partial disability because of pain and increased susceptibility to fatigue when performing manual labor, *held* sufficient to support a finding of partial temporary disability, and the admission of the expert that his opinion was based upon objective statements of claimant during his professional examination of claimant, does not render the expert testimony incompetent. *Penland v. Coal Co.*, 26.

§ 40f. Compensation Act.—Occupational Diseases.

The Compensation Act contemplates that an employee will not be allowed to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated within the meaning of G.S. 97-54, and that if removed from the hazard before such incapacity, he will seek and obtain other remunerative employment. G.S. 97-61. *Brinkley v. Minerals Co.*, 17.

Incapacity from silicosis within the meaning of the statute is incapacity

to perform the normal labor of the last occupation in which remuneratively employed, which may be wholly separate from the one in which the employee was exposed to the hazards of silicosis. G.S. 97-54. *Ibid.*

Where an employee is removed from the hazard of silicosis before becoming actually incapacitated within the meaning of G.S. 97-54, and thereafter obtains other remunerative employment, but becomes actually incapacitated from performing normal labor in such other occupation within two years of the time of his last exposure to the hazard of silicosis, he is entitled to compensation for such incapacity to perform the normal labor of the last occupation in which remuneratively employed. *Ibid.*

Claimant was removed from the hazard of silica dust before becoming incapacitated within the meaning of G.S. 97-54. He was thereafter employed by the same employer for five years at the same wage at employment free from the hazard of silica dust. *Held:* His retirement from such other occupation at the end of five years could not have been caused by incapacity from silicosis resulting within two years of the last exposure to silica dust, and compensation therefor cannot be sustained. *Ibid.*

The evidence in this case *is held* to show that the employment of claimant after he had been removed from the hazards of silica dust was not merely employment at odd jobs of a trifling nature but was a continuous *bona fide* employment of a responsible nature for a period of five years. *Ibid.*

§ 40g. Workmen's Compensation Act.—Hernia.

In order for a hernia to be compensable under the Compensation Act it is required that there be an injury resulting in hernia or rupture, that it appear suddenly, that it be accompanied by pain, and that it immediately follow an accident. *Hensley v. Cooperative*, 274.

The evidence disclosed that claimant in performing his duties in lifting a loaded basket from his left, bending down and placing it in hot water in front of him and then placing it on scales to his right, suddenly suffered a hernia accompanied by pain. The evidence further tended to show that the hernia occurred while the employee was performing his work in the customary and usual manner, and there was no evidence of any unusual condition or any slipping or falling by the employee. *Held:* There was no evidence to justify a finding that the hernia resulted from an accident, and an award of compensation must be reversed. *Ibid.*

§ 41. Compensation Act—Actions against Third Person Tort-Feasor.

Under the Virginia Compensation Act an employee may not maintain a suit against a fellow employee for injuries cognizable under the Act. *Johnson v. Catlett*, 341.

Third person tort-feasor sued by personal representative of deceased employee may not join employer and fellow employee for contribution. *Ibid.*

§ 45. Compensation Act—Nature and Functions of Industrial Commission.

While the Industrial Commission may make rules for carrying out the provisions of the Workmen's Compensation Act. it has no power to promulgate a rule which is inconsistent therewith. *Evans v. Times Co.*, 669.

§ 58b(1). Amount of Compensation for Disability.

The amount of compensation to be awarded an employee for permanent

partial disability from a back injury is 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter, G.S. 97-30, G.S. 97-31, regardless of the amount actually earned, the intent of the statute being to provide compensation only for loss of earning capacity. *Evans v. Times Co.*, 669.

§ 53c. Change of Condition and Review of Award by Commission.

Where the record on appeal to the Superior Court from an award of the Industrial Commission does not disclose a previous award made to claimant, defendants' contention that the award appealed from cannot be sustained in the absence of a finding of change of condition, is untenable, G.S. 97-47 being applicable only when it is made to appear that a previous award had been made. *Penland v. Coal Co.*, 26.

§ 55d. Compensation Act—Review of Award in Superior Court.

The findings of fact of the Industrial Commission, if supported by any competent evidence, are conclusive on appeal even though some incompetent evidence may also have been admitted; but a finding not supported by competent evidence or a finding based on incompetent evidence, is not conclusive. *Penland v. Coal Co.*, 26.

Review on appeal to the Superior Court from an award of the Industrial Commission is limited to the record as certified and questions of law presented by exceptions duly entered. *Ibid.*

Whether an injury by accident arises out of or in the course of the employment is a mixed question of law and of fact. *Hardy v. Small*, 581.

Whether an accident grew out of the employment within the purview of the Workmen's Compensation Act is a mixed question of law and fact, which the court has the right to review on appeal, and when the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission. *Alford v. Chevolet Co.*, 214.

While the findings of fact of the Industrial Commission are conclusive on appeal when supported by any evidence, and claimant is entitled to every reasonable inference which can be drawn from the testimony, when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review. *Hensley v. Cooperative.* 274.

The evidence tended to show that claimant, in the course of his employment, was required to turn to his left, pick up a loaded tray, bend over and place the tray in a drum of hot water in front of him, and then place the tray on scales to his right. The findings were to the effect that claimant's duties required him to "twist" to his left, return to the "normal" position facing straight ahead, bend over and dip the basket, then straighten up to a "normal" standing position and then "twist" to his right . . . *Held:* The findings are in accord with the testimony when the word "twist" is construed as "turn," and the word "normal" is construed as "usual." *Ibid.*

The findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence even though there be evidence that woud support a finding to the contrary. *Champion v. Tractor Co.*, 691.

§ 55i. Compensation Act—Proceedings after Award.

Findings of fact and conclusions of law in respect to claimant's disability

embodied in an award upheld by the full Commission and affirmed in the Superior Court, and from which no appeal is perfected, are determinative of claimant's status with respect to disablement on that date. *Brinkley v. Minerals Co.*, 17.

MONEY RECEIVED

§ 1. Nature and Essentials of Right of Action.

A payment voluntarily made with full knowledge of all the facts cannot be recovered although there was no debt. *Collins v. Covert*, 303.

MORTGAGES

§ 16. Estates of Parties—Mortgagors.

The mortgagor is the owner of the land subject to the debt and the right of foreclosure to satisfy same, and even after default, he is entitled to the rents and profits until the mortgagee takes possession, and may convey the equity of redemption. *Gregg v. Williamson*, 356.

§ 17. Estates of Parties—Mortgagees.

Mortgagees take the legal title to the property only as security for payment of the debt. *Gregg v. Williamson*, 356.

After default, mortgagees are entitled to possession solely for the purpose of assuring payment of the debt or performance of the other conditions of the mortgage, and the estate of the mortgagees is a determinable fee terminating the instant the debt is paid or other condition of the mortgage performed. *Ibid.*

§ 21. Rights of Parties upon Assignment or Transfer of Legal Title.

Where two of the three mortgagees assign the mortgage to the third mortgagee, the assignment transfers the debt only and does not pass any title to the land. *Gregg v. Williamson*, 356.

Where a mortgagee conveys the legal title, the grantee is a mere trustee of the title conveyed, chargeable with a duty to both the owner of the equity and the owner of the debt secured by the instrument, and he has no authority *sua sponte* to sell or demand possession even upon default. *Ibid.*

§ 30b. Parties Who May Foreclose.

Upon the death of the mortgagee the right to exercise the power of sale passes to his personal representative and not his heirs. *Gregg v. Williamson*, 356.

Where there are three mortgagees named in the instrument, the power of sale can be exercised only by all of the surviving mortgagees, and nothing else appearing deed of one of the mortgagees can have no validity as a foreclosure deed even if it purports to be such. *Ibid.*

§ 30i(2). Limitation on Power to Foreclose.

The 1945 amendment to G.S. 45-37(5) providing that the statute should apply to pre-existing mortgages, but allowing one year from the ratification of the Act during which the owners of the debts might proceed to foreclosure or make marginal entry on the instrument that the debt is still outstanding, is constitutional. *Gregg v. Williamson*, 356.

§ 30i(3). Limitation of Actions against Mortgagee in Possession.

This action for the recovery of certain real estate from the mortgagee in possession and for an accounting for rents *held* barred by the lapse of more than ten years. *Jordan v. Chappel*, 620.

MUNICIPAL CORPORATIONS

§ 12. Torts—Exercise of Governmental and Corporate Powers in General.

A municipality is immune to suit for negligence in the performance of a governmental function of the municipality, but is liable for negligence in fulfilling a function of a proprietary character. *Glenn v. Raleigh*, 469.

In the granting of a franchise to a public utility to operate a system for furnishing gas for cooking and heating to residents of the municipality, the municipality exercises a governmental function, and may not be held liable in tort to a person injured by a gas explosion, even if it be conceded that the city were negligent in continuing the franchise after the pipe lines and equipment of the licensee had become defective. *Denning v. Gas Co.*, 541.

§ 14i. Torts—Parks and Playgrounds.

Evidence tending to show that a municipal employee was using an old and powerful rotary-blade mower on rocky ground in cutting grass in a park operated and maintained by the municipality, that the mower had no guards and had been throwing rock for such length of time that the municipality had actual or constructive knowledge of the danger, and that the mower threw a rock which hit an invitee of the park, *is held* sufficient to be submitted to the jury on the issue of negligence. *Glenn v. Raleigh*, 469.

A resident of a municipality is at least impliedly invited to visit a public park and use recreational facilities theirein maintained by the municipality for the benefit of its citizens. *Ibid.*

Plaintiff's evidence tended to show that he was injured while an invitee in a municipal park by the negligence of an employee of the city, and that the municipality received charges and fees for the use of recreational facilities of the park for the year in question, resulting in net revenues which were used by the city for capital maintenance of the park, salaries, expenses, etc. Defendant municipality moved for nonsuit on the ground of governmental immunity. *Held:* Plaintiff's evidence was sufficient to import a corporate benefit or pecuniary profit or advantage to the municipality so as to exclude the application of governmental immunity, and nonsuit was properly denied, defendant's evidence at variance therewith or in contradiction thereof not being considered upon the motion to nonsuit. *Ibid.*

§ 15a. Appropriation of Private Water and Sewer Systems.

Where the owner of a subdivision outside a municipality constructs water and sewer lines and permits purchasers of lots to tap into the lines without charge, the municipality, upon the extension of its limits to include the subdivision, is liable to the owner of the subdivision or his heirs in *quantum meruit* for the value of the water and sewer lines in the absence of charter or contractual provision to the contrary, when the municipality takes over, uses and controls the said lines as its own. *Jackson v. Gastonia*, 404.

The owner of a subdivision does not dedicate water system to the public by permitting owners of lots to tap into the lines without charge. *Ibid.*

NEGLIGENCE

§ 3. Dangerous Substances and Instrumentalities.

In this action to recover for lead poisoning resulting from the use of a commercial paint ingredient containing lead monoxide, based on the alleged negligence of the seller in selling and delivering the compound without labeling the containers "poison" in violation of G.S. 90-77, it *is held* nonsuit should have been entered, since, construing G.S. 90-77 in the light of its caption and the context of the statute, the statute relates to pharmacy and the sale of medicines containing poisonous ingredients, and under the doctrine of *ejusdem generis*, does not apply to the sale of a lead compound used in a commercial paint ingredient. *Porter v. Gordon Co.*, 398.

§ 3½. Res Ipsa Loquitur.

Res ipsa loquitur does not apply to establish the negligence of a driver of a car as the proximate cause of the death of a person whose body is thereafter found on the highway. *Lane v. Bryan*, 108.

Where injury results from a thing under the exclusive management and control of defendant and the accident is one which does not happen in the ordinary course of things if those in control use proper care, the circumstance of injury affords some evidence of negligence and is a sufficient mode of proof, in the absence of explanation by defendant, to carry the case to the jury on the issue of negligence under the doctrine of *res ipsa loquitur*, without affecting the burden of proof upon the issue. *Lea v. Light Co.*, 287.

The doctrine of *res ipsa loquitur* does not apply when the facts causing the accident are known and testified to, where more than one inference may be drawn from the evidence as to the cause of injury, where the existence of negligent default is not the more reasonable probability, where it appears that the accident was due to a cause beyond the control of defendant, where the instrumentality causing the injury is not under the exclusive control of defendant, or where the injury results from an accident as defined by law. *Ibid.*

Plaintiff was injured while walking on the sidewalk when an advertising sign, maintained by a store on its adjacent parking lot, fell against her. There was evidence that the advertising sign fell because it was struck by a car in the parking lot. *Held:* The doctrine of *res ipsa loquitur* does not apply since the facts were known and testified to at the trial. *Johnson v. Meyer's Co,.* 310.

§ 4f. Condition and Use of Lands and Buildings.

Plaintiff's evidence tended to show that she was injured while walking on the sidewalk when an advertising sign, maintained by a store on its adjacent parking lot, was struck and knocked down by a car on the parking lot, and fell against her. There was no evidence that the driver of the car was an agent or employee of the store or in any way connected with it, or that the automobile was under the exclusive control and management of the store. *Held:* Nonsuit in an action against the store was proper, since it could not have reasonably foreseen that a person in no way connected with it and using its parking lot would start or operate his automobile in such a way as to collide violently with its advertising sign. *Johnson v. Meyer's Co.*, 310.

§ 5. Proximate Cause in General.

The only negligence of legal importance is negligence which proximately causes or contributes to the death or injury under judicial investigation. *Lane v. Bryan*, 108.

There may be more than one proximate cause of an injury. *Price v. Gray*, 162.

The issue of negligence is properly answered in the affirmative if defendant's negligence is a proximate cause of plaintiff's injuries, regardless of whether the negligence of some outside agency or responsible third party, or even the contributory negligence of plaintiff, concurs in causing the injury, the question of contributory negligence of the plaintiff as a bar to recovery being for the consideration of the jury upon the subsequent issue relating to that question. *Ibid.*

§ 9. Proximate Cause—Anticipation of Injury.

The only negligence of legal important is negligence which proximately causes or contributes to the injury under judicial investigation, and foreseeability of injury is an essential element of actionable negligence. *Johnson v. Meyer's Co.*, 310

Forseeability of injury is a requisite of proximate cause. *Philyaw v. Kinston*, 534.

§ 10. Last Clear Chance.

The doctrine of last clear chance presupposes negligence and contributory negligence and applies only when plaintiff's contributory negligence would bar recovery in the absence of the doctrine. *Freight Lines v. Burlington Mills*, 143.

The doctrine of last clear chance does not arise until it appears that the injured person has been guilty of contributory negligence, and no issue with respect thereto must be submitted to the jury unless there is evidence to support it. *Irby v. R. R.*, 384.

§ 11. Contributory Negligence of Persons Injured in General.

The right to assume that another will exercise due care is not absolute, but when a person realizes that another has violated a duty which imperils him, he must be vigilant in attempting to avoid injury to himself. *Harris v. Bingham*, 77.

Contributory negligence presupposes negligence on the part of defendant. *Bell v. Maxwell*, 257.

Plaintiff's contributory negligence suffices to bar recovery if it contributes to his injury as a proximate cause or one of them. *Ibid.*

§ 16. Pleadings.

Allegations that defendant bus station and defendant coach company jointly used, possessed and controlled a paved strip of land between their respective offices and invited their patrons and customers to use same, that plaintiff customer bought a ticket at the bus station and was proceeding on foot along the passageway when he fell into a hole along the edge of the passageway, and that defendants were negligent in failing to provide guard rails, signs or warnings, and adequate lights to enable patrons and invitees of defendants to use the passageway in safety, and that such negligence was the proximate cause of plaintiff's injuries, *held* sufficient to state

a cause of action for actionable negligence on the part of defendants, and the coach company's demurrer thereto was improperly sustained. *Hood v. Coach Co.*, 684.

§ 17. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact that there has been an accident and an injury has resulted. *Burr v. Everhart*, 327; *Robbins v. Crawford*, 622.

§ 19b(1). Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

In order to make out a case of actionable negligence, plaintiff must show that defendant failed to exercise proper care in the performance of a duty owed plaintiff, that the negligent breach of such duty was the proximate cause of plaintiff's injury, and that a person of ordinary prudence should have foreseen such result was probable under the conditions as they existed. If the evidence fails to establish any one of these essential elements, nonsuit is proper. *Burr v Everhart*, 327.

§ 19b(4). Sufficiency of Circumstantial Evidence of Negligence.

Actionable negligence may be established by circumstantial evidence, either alone or in combination with direct evidence, but circumstantial evidence must tend to establish the fact in issue as an inference based on facts established by direct proof, since an inference may not be based on an inference. *Lane v. Bryan*, 108.

§ 19c. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence will be granted only when the plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. *Keener v. Beal*, 247; *Bell v. Maxwell*, 257.

If different inferences may be drawn on the issue of contributory negligence from plaintiff's own evidence, some favorable to plaintiff and others to the defendant, the issue is for the jury to determine, since contradictions and discrepancies in the evidence are for the jury to resolve. *Ibid.*

In passing upon the question of nonsuit on the ground of contributory negligence, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of all the inferences to be reasonably drawn therefrom and drawing no inference adverse to him not reasonably necessary from the evidence. *Crotts v. Transportation Co.*, 420.

§ 20. Instructions in Negligence Actions.

It is not error for the court to omit all reference to the doctrine of last clear chance in charging upon the issue of negligence, since that doctrine presupposes negligence and contributory negligence and applies only when plaintiff's contributory negligence would preclude recovery in the absence of the doctrine. *Freight Lines v. Burlington Mills*, 143.

An instruction that the issue of negligence should be answered in the affirmative if the jury should find from the greater weight of the evidence that defendants' negligence was "a" proximate cause of plaintiff's injury, is without error, and the fact that in all other portions of the charge the court instructed the jury to answer that issue in the affirmative if they found by

the greater weight of the evidence that defendants' negligence was "the" proximate cause of the injury, is favorable to defendants and they cannot be heard to complain thereof. *Price v. Gray*, 162.

A charge which in one instance alone inadvertently placed the burden upon defendant to show that plaintiff's contributory negligence was "the," rather than "a," proximate cause of the injury, but which in other portions repeatedly stated the correct rule that plaintiff's contributory negligence would bar recovery if a proximate cause of the injury, or one of them, and also that if the negligence of both contributed to the injury, neither could recover, so that construed contextually it could not have misled the jury, will not be held for prejudicial error for the one technical deviation from the correct rule. *Ibid.*

An instruction of the court defining negligence and proximate cause in general terms in giving the contentions of the parties in detail, but failing to instruct the jury what facts were necessary to be found by them from the evidence to warrant an affirmative finding on the issue of negligence must be held for prejudicial error. *Glenn v. Raleigh*, 469.

PARTIES

§ 1. Parties Plaintiff.

Where insurer has paid the entire loss, insured may not maintain the action. *Smith v. Pate*, 63.

§ 3. Necessary Parties Defendant.

A person is a necessary party to an action when a valid judgment cannot be rendered therein completely and finally determining the controversy without his presence as a party. *Edmondson v. Henderson*, 634.

§ 9. Defect of Parties and Amendment.

Where a subcontractor sues the owners and a named corporation as the contractor to enforce his lien for materials furnished, but it appears that the contractor was an individual trading as a company of the same name as the alleged corporation, and that the individual contractor was not made a party, nonsuit as to the owners is properly entered, since the principal contractor is a necessary party to an action to enforce the lien of a subcontractor. *Linthicum v. Construction Co.*, 203.

PARTNERSHIP

§ 1a. Creation and Existence.

A farming contract under which one person furnishes the land, implements, etc., in consideration of a share of the crops grown on the land by the other, does not create an agricultural partnership. *Keith v. Lee*, 188.

PAYMENT

§ 9. Burden of Proving Payment.

The burden is on the debtor to prove the affirmative defense of payment. *Builders Supply v. Dixon*, 136.

PHYSICIANS AND SURGEONS

§ 17½. Malpractice—Limitations.

An action for malpractice based on negligence must be instituted within

three years from the accrual of the cause of action. *Shearin v. Lloyd*, 363.

A cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrues immediately upon the closing of the incision, and such action may not be maintained more than three years thereafter even though the consequential damage from such negligence is not discovered until sometime after the operation. *Ibid.*

Where there is no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in the patient's body at the conclusion of the operation, but to the contrary that the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit is properly entered in an action for malpractice instituted more than three years after the operation, there being no evidence of fraudulent concealment. *Ibid.*

§ 20. Malpractice—Sufficiency of Evidence.

Evidence to the effect that a surgeon left a foreign substance in the patient's body at the conclusion of an operation, is sufficient to raise an inference of negligence and to sustain a finding to that effect. *Shearin v. Lloyd*, 363.

PLEADINGS

§ 10. Counterclaims and Cross-Actions.

Facts alleged by defendant as the basis for its counterclaims must be taken as true in determining whether the counterclaims are permissible under the statute. *Burns v. Oil Corp.*, 266.

Defendant may set up a counterclaim which is permissible to any one of the causes of action allegel by plaintiff without regard to whether plaintiff separately alleges such cause. *Ibid.*

Counterclaims in tort arising from contractual relationship may be asserted in plaintiff's action in tort arising upon the same contract. *Ibid.*

When a cause of action is brought against several defendants jointly, but the liability of the defendants to plaintiff is both joint and several, any one of the defendants may allege a counterclaim, otherwise permissible, solely in its favor, since if such defendants recovers on any or all of its counterclaims, a several judgment between it and plaintiff may be entered, adjudicating their rights and liabilities *inter se*. *Ibid.*

§ 15. Office and Effect of Demurrer.

A demurrer tests the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom. *Buchanan v. Smawley*, 592.

A demurrer admits the truth of the facts properly alleged, and relevant inferences of fact necessarily deducible therefrom, but it does not admit inferences or conclusions of law. *Lewis v. Lee*, 68; *Harris v. Bingham*, 77.

Upon demurrer, the complaint must be liberally construed with a view to substantial justice, giving the pleader the advantage of every reasonable intendment therefrom, and the pleading must be fatally defective before it will be rejected. *Lewis v. Lee*, 68; *Buchanan v. Smawley*, 592.

§ 17c. Defects Appearing on Face of Pleading and "Speaking Demurrers."

A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. *Construction Co. v. Electrical Workers Union*, 481.

Where, in an action to enjoin alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right to Work Statute, G.S. 95-78 through 95-84, demurrer on the ground that the action was within the exclusive jurisdiction of the National Labor Relations Board and the Federal Courts, is properly overruled when it is not alleged in the complaint, expressly or inferentially, that plaintiff was or is engaged in a business affecting interstate or foreign commerce, and the allegation of additional facts in the demurrer relative to this point is bad as a speaking demurrer. *Ibid.*

§ 19a. Demurrer to Jurisdiction.

On demurrer to the jurisdiction of the court and motion to dismiss for want of valid service on defendant, there is no statute which requires the judge to find the facts. *Construction Co. v. Electrical Workers Union*, 481.

§ 19b. Demurrer for Misjoinder of Parties and Causes of Action.

Plaintiffs, heirs at law, instituted action against defendants for an accounting of rents and profits of lands in which both plaintiffs and defendants were tenants in common; against defendants as executors of the estate of plaintiffs' grandfather for accounting and settlement of that estate; and against one defendant as executor of the estate of plaintiffs' grandmother, without the joinder of the other executor of that estate, for an accounting of the estate of plaintiffs' grandmother. *Held:* Demurrer for misjoinder of parties and causes should have been allowed and the action dismissed. *Davis v. Davis*, 307.

Where additional parties, joined for contribution under G.S. 1-240, file answer, they are precluded from thereafter demurring *ore tenus* for misjoinder of parties and causes, but plaintiffs, seeking no relief against such additional defendants, are not precluded thereby from demurring *ore tenus* on such ground. *McBryde v. Lumber Co.*, 415.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

Where in stating a single cause of action the complaint alleges two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie. *Lewis v. Lee*, 68.

The rule requiring a liberal construction of a pleading cannot warrant the construction into a pleading of an essential allegation which it does not contain. *Calloway v. Wyatt*, 129.

Demurrer for failure of the complaint to state a cause of action should be overruled if any portion of the pleading is good and states a cause of action, since a pleading must be fatally defective before it will be rejected. *Buchanan v. Smawley*, 592.

In action for trespass against individual complaint held not demurrable on ground that it disclosed that title to property had passed to Highway Commission. *Ibid.*

§ 24. Variance.

Where defendant sets up a counterclaim based upon plaintiff's refusal, in violation of contractual obligations, to accept lumber cut by defendant, without specifying lumber cut from any particular tract, but defendant's evidence in support of the counterclaim is explicit that the counterclaim was based upon plaintiff's refusal to accept lumber from a specified tract, defendant may not complain that plaintiff's evidence, under a general denial of the counterclaim in the reply, related to plaintiff's refusal to accept, for failure to meet specifications, lumber cut from other tracts, and defendant's contention that he was taken by surprise by the evidence of unacceptability of lumber cut from other tracts, is untenable, the scope of the inquiry not being so limited either by defendant's counterclaim or plaintiff's reply thereto. *Builders Supply v. Dixon*, 136.

§ 28. Motion for Judgment on the Pleadings.

Where petitioner is allowed to file an amended petition by leave of court, respondent's motion for judgment on the pleadings relates to the amended, and not the original, petition, and when the amended petition is sufficient, exception to the overruling of motion for judgment on the pleadings is without merit. *Duncan v. Renfrow*, 197.

Motion for judgment on the pleadings cannot be allowed if the pleadings raise issues of fact for the determination of the jury and not merely issues of law. *Waggoner v. Waggoner*, 210.

A judgment on the pleadings is proper only if the answer admits each essential element of plaintiff's cause of action. *Tyer v. Leggett*, 638.

§ 31. Motions to Strike.

Plaintiffs brought this action for damages resulting to their building when defendant's automobile collided with it. Defendant set up in the answer the defense that the collision with the building was due to an unavoidable accident and was not due to any fault of defendant, and further that plaintiff's insurer had paid the full amount of the damages. *Held:* The defenses were improperly stricken on plaintiffs' motion. *Smith v. Pate*, 63.

PRINCIPAL AND AGENT

§ 7a. Liability of Principal to Third Persons.

Evidence tending to show that the owners of a lot, husband and wife, authorized their contractor to purchase materials for building a house thereon, that the contractor purchased such materials from plaintiffs and that plaintiffs billed the contractor therefor, and that when the material furnisher demanded payment from the owners, the husband promised to provide the contractor money to pay the materialman or to pay the materialman himself, *is held* sufficient to show liability of the owners to the materialman under the principle of agency. *Love v. Snellings*, 674.

PROCESS

§ 6. Service by Publication and Attachment.

Court may extend the time for service of summons by publication beyond thirty-one days after issuance of order of attachment. *Thrush v. Thrush*, 114.

Affidavit that after due diligence personal service cannot be had on defendant within the State is requisite and jurisdictional to service outside

the State, G.S. 1-98.4(a)(3), and where the record on appeal does not disclose such affidavit, service must be held ineffectual. *Temple v. Temple*, 334.

§ 7½. Service on Unincorporated Associations.

On the hearing of motion of defendant labor union to dismiss the action against it on ground of want of valid service, evidence disclosing that defendant was doing business in this State by performing the acts for which it was formed, that it had appointed no process agent, and that service was had on defendant by service on the Secretary of State, supports adjudication that service was valid, G.S. 1-97(6), the burden being upon defendant, if it contended that the Secretary of State had not forwarded a copy of the process to defendant, to show such failure. *Construction Co. v. Electrical Workers Union*, 481.

Service of process on a defendant labor union by service on its business agent in charge of its affairs, who collected and disbursed money for it, is calculated to give the union full notice. *Ibid.*

PUBLIC OFFICERS

§ 7a. Performance of Public Duties in General.

There is a presumption that a public official discharged his duties in good faith and exercised his powers in accord with the spirit and purpose of the law. *Construction Co. v. Electrical Workers Union.*, 481.

RAILROADS

§ 4. Accidents at Grade Crossings.

In approaching a grade crossing both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident. *Irby v. R. R.*, 384.

While a railroad company is under duty to give timely warning of the approaching of its train to a public crossing, its failure to do so does not relieve a traveler of the duty to exercise due care for his own safety, which includes the duty not only to look and listen before entering upon the track, but also to look and listen at a place where and a time when his precaution will be effective. *Ibid.*

In order to recover on the doctrine of last clear chance, plaintiff has the burden of showing that at the time he was struck by defendant's train he was in an apparently helpless condition on the track, that the engineer saw or by the exercise of ordinary care should have seen him and appreciated his danger and helpless condition in time to have stopped the train before striking plaintiff, and that the engineer failed to exercise such care, which proximately resulted in the injury. *Ibid.*

The doctrine of last clear chance does not apply if at the time plaintiff is in apparent possession of his strength and faculties, and the engineer has no information to the contrary, since under such circumstances the engineer is not required to stop the train or even slacken its speed for the reason that he may assume even up until the very moment of impact that the plaintiff will use his faculties for his own protection and leave the track in time to avoid injury. *Ibid.*

In this action by a motorist to recover for damages to his car and injury

to his person received in a crossing accident, the evidence *is held* to require nonsuit on the ground of contributory negligence and not to warrant the submission of the issue of last clear chance to the jury. *Ibid.*

RAPE

§ 4. Sufficiency of Evidence and Nonsuit in Prosecutions for Rape.

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of the crime of rape, defendant's contradictory evidence of the consent of prosecutrix being disregarded on motion to nonsuit. *S. v. Green*, 717.

§ 24. Assault with Intent to Commit Rape.

There is no such offense as an attempt to commit rape, but the offense is an assault with intent to commit rape, and therefore the solicitor's statement that he would ask for a verdict of guilty of rape with recommendation of life imprisonment or of guilty of an attempt to commit rape cannot have the effect of limiting the court's duty to submit to the jury the question of defendant's guilt of less degrees of the crime of rape supported by the evidence. *S. v. Green*, 717.

§ 25. Assault with Intent to Commit Rape—Prosecution and Punishment.

In a prosecution for assault on a female with intent to commit rape, reference in the court's instruction to the sixteen year old prosecutrix as a "child" could create no more prejudice against defendant than her appearance on the stand and her testimony as to her age. *S. v. Robbins*, 332.

The charge of the court on the question of defendant's guilt of assault with intent to commit rape *held* without error. *S. v. Green*, 717.

§ 27. Submission of Question of Defendant's Guilt of Less Degrees of the Crime.

Where the evidence, in a prosecution under an indictment charging the felony of rape, is sufficient to support the charge, but is conflicting as to prosecutrix' consent and also in other respects, it is incumbent on the court to submit also the question of defendant's guilt of assault with intent to commit rape, or guilt of assault upon a female, or of not guilty, it being the mandatory duty of the court to submit to the jury the less degrees of the offense which are supported by the evidence. *S. v. Green*, 717.

RECEIVING STOLEN GOODS

§ 3. Indictment.

A charge of larceny of goods of the value of $3,000 and a charge of receiving the stolen property with knowledge that it had been stolen, may be joined as separate counts in a single bill, each being a felony. *S. v. Meshaw*, 205.

§ 8. Verdict and Judgment.

In a prosecution upon an indictment charging in one count larceny and in another count receiving the stolen goods, a verdict of guilty as charged is equivalent to a verdict of guilty as to each count, and is not merely inconsistent, but contradictory, since a defendant may be guilty of larceny or of receiving, but not both. *S. v. Meshaw*, 205.

REFERENCE

§ 8. Report of Referee.

The fact that the referee in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporates in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, *held* not prejudicial. *McCormick v. Smith*, 425.

RELIGIOUS SOCIETIES

§ 2. Property and Government.

Where evidence discloses that church was member of conference and bound by its Book of Discipline, instruction as to right to control property based on congregational organization, is error. *Church Conference v. Locklear*, 349.

Where trustees holding title to property for the benefit of a particular church convey the property to the conference of the church, ordinarily the conference must hold such title for the use and benefit of the church and not the conference. *Ibid.*

RIOT

§ 2. Prosecutions.

Evidence that a riot took place when a multitude gathered to prevent police officers from arresting one of defendants and that each of defendants were involved in the riot, *held* sufficient. *S. v. Wynne*, 686.

Where the law requires the participation of more than one person in order to make their acts criminal, the required number must be found among those described in the bill, and therefore where the indictment charges named persons with participation in a riot without enlarging the number by adding the words "and others," an instruction that each defendant would be guilty if the jury found beyond a reasonable doubt that he together with two or more other persons participated in the offense, must be held for error as permitting the jury to go outside the indictment to find the required number. *Ibid.*

ROBBERY

§ 3. Prosecution and Punishment.

Where defendant is charged with armed robbery, an instruction to the effect that defendant would be guilty as charged if the jury should find that he took property from the person of the prosecuting witness by violence or intimidation, must be held for prejudicial error in failing to instruct the jury as to the elements of armed robbery as distinguished from robbery at common law. *S. v. Rogers*, 611.

SEARCHES AND SEIZURES

§ 1. Necessity for Search Warrant and Extent of Authority Thereunder.

Immunity from unreasonable search is a personal right which may be waived, and only the person whose rights are infringed may raise the question of the validity of the search, but even though a person owning a house and

renting a room therein may not object to the search of the rented room, the person renting the room may do so. *S. v. Mills*, 237.

The evidence disclosed that defendant rented a small store building in which was found a bed, towels, sheets, etc., and that he also rented a back room in an adjacent house in which was found a bed with no cover on the mattress. *Held:* Evidence tending to show that others than defendant slept in the rented room, without excluding the possibility that defendant slept there, does not authorize the search of the rented room under a warrant for the search of the store building, since it is not within the curtilage of the store building. *Ibid.*

Where it appears that defendant not only consented to but invited a search of his car without a warrant, he may not complain of the introduction in evidence of nontaxpaid whisky found therein, and his motion to suppress the evidence and motion for nonsuit on the ground that all the evidence was obtained in the course of the illegal search, are properly denied. *S. v. Miller*, 608.

§ 2. Requisites and Validity of Warrant.

Where the affidavit upon which a search warrant is issued describes defendant's premises with sufficient definiteness to identify it, and such description is made a part of the search warrant by proper reference, objection to the search warrant on the ground that it did not describe the premises with sufficient definiteness, is untenable. *S. v. Mills*, 237.

A search warrant is a mandate giving authority for the search of the premises therein described and at the same time limits the scope of the mandate to such premises. Therefore, a warrant for the search of defendant's dwelling at a certain locality, together with barn and outhouses, etc., does not authorize the officer to go into the home of another party, located on the adjoining lot, and search a room there rented by the defendant. *Ibid.*

§ 3. Waiver of Search Warrant.

Where an officer reads the search warrant to the owner of the premises therein designated, the mere fact that the defendant is present and stands by as the owner states to the officer that she had rented the back room to the defendant and that the officer could search all of the house except this room, is not a waiver of the right of defendant against the unlawful search of this room made by the officer of the room rented by defendant. *S. v. Mills*, 237.

§ 4. Service of Warrant.

Evidence tending to show that the officer read the search warrant to the defendant as soon as he could do so in the light of defendant's conduct, and thereafter proceeded to examine the premises, fails to disclose illegal search. *S. v. Williams*, 614.

STATE

§ 3b. Tort Claims Act—Negligence of State Employee.

In this proceeding under the Tort Claims Act the evidence *is held* sufficient to support a finding that the accident in question resulted from the negligence of the driver of a school bus in hitting a vehicle traveling in the opposite direction while a portion of the school bus was on its left of the center line

of the highway, and the Industrial Commission's findings of negligence and proximate cause are conclusive. *Mica Co. v. Board of Education*, 714.

§ 3e. Appeals in Proceedings under Tort Claims Act.

The findings of fact of the Industrial Commission in a proceeding under the Tort Claims Act are conclusive on appeal if supported by any competent evidence, even though there is evidence that would support a finding to the contrary. *Mica Co. v. Board of Education*, 714.

STATUTES

§ 2. Constitutional Proscription Against Passage of Special or Local Acts.

Chapter 82, Sessions Laws of 1945, authorizing certain police officers of a particular municipality to issue warrants, does not relate to the establishment of courts inferior to the Superior Court or to the appointment of justices of the peace, and therefore does not violate the provisions of Article II, Section 29, of the Constitution of North Carolina. *S. v. St. Clair*, 183.

§ 5a. General Rules of Construction.

The intent and spirit of an act controls in its construction, and when the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of its purpose. *Porter v. Gordon Co.*, 398.

§ 16. Amendment of Statute which has been Repealed.

An act purporting to amend a section of an act is a nullity when the section sought to be amended has been expressly repealed by an intervening statute. *S. v. Blackwell*, 642.

TAXATION

§ 1a. Uniform Rule and Discrimination.

The fact that the construction of a water and sewer system by a county may not benefit some sections of the county or all of its inhabitants equally does not render the tax levied to pay the bonds issued for such purpose unconstitutional as a deprivation of property without due process of law or as a denial of the equal application of law, since the requirement of uniformity and equality of burden in taxation relates to the imposition of a tax and not to the distribution of the proceeds. Constitution of North Carolina, Art. I, secs. 5 and 17; Fourteenth Amendment to the Constitution of the United States. *Ramsey v. Comrs. of Cleveland*, 647.

§ 4. Necessary Expense and Necessity for Vote.

No county or municipal corporation may levy a tax except for a necessary expense without the approval of its qualified voters. Constitution of North Carolina, Art. VII, sec. 7. *Ramsey v. Comrs. of Cleveland*, 647.

The construction by a county of water and sewer systems is a necessary expense. *Ibid.*

§ 5. Public Purpose.

A county may levy taxes for public purposes only. Constitution of North Carolina, Art. V, sec. 3. *Ramsey v. Comrs. of Cleveland*, 647.

The construction of water and sewer systems by a county is for a public purpose. *Ibid.*

§ 38a. Remedies of Taxpayer—Enjoining Issuance of Bonds.

A municipal ordinance for the issuance of funding or refunding bonds need not specify that a tax sufficient to pay the principal and interest shall be annually levied and collected, and in an action to enjoin the issuance of bonds, the failure of the complaint to allege that the proposed bonds were not funding or refunding bonds does not disclose invalidity. *Garner v. Newport*, 449.

§ 40. Tax Foreclosure.

In a tax foreclosure suit under C.S. 8037 as rewritten in Section 4, Chapter 221, Public Laws of 1927, the order of publication of notice of summons and the notice pursuant to such order must contain a description of the land which is in fact and in law sufficient to identify the land in itself or by reference to something extrinsic to which the notice refers, and in the absence of such sufficient description, the foreclosure proceeding is fatally defective. *Kelly v. Kelly*, 174.

TENANTS IN COMMON

§ 4. Mutual Rights and Liabilities—Rents and Profits.

Tenants in common may not maintain a joint action against their cotenants for an accounting of rents and profits. *Davis v. Davis*, 307.

TORTS

§ 6. Right to Joinder of Parties as Joint Tort-Feasors.

G.S. 1-240 creates as to parties jointly and severally liable a new right, so that when one joint tortfeasor is sued alone he may join other joint tortfeasors for contribution under the statute without permission from the original plaintiff. *Norris v. Johnson*, 179.

Where one joint tortfeasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff. *Ibid.*

Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant, and such counterclaim is improperly stricken upon motion of the original defendant. *Ibid.*

An additional party joined under G.S. 1-240 on the cross action of the original defendant for contribution is not entitled to nonsuit at the close of plaintiff's evidence, the sufficiency of the evidence on the cross action being determinable only after the original defendant has introduced his evidence in support thereof. *Ibid.*

In order for a defendant in a tort action to have a third party joined for contribution under G.S. 1-240, it is necessary that plaintiff, had he desired to do so, could have joined such additional party. *Johnson v. Catlett*, 341.

The personal representative of a deceased employee sued the third person tort-feasor in an action instituted in this State. Such defendant had the employer and a fellow employee of the deceased employee joined for contribution. The additional defendants filed written motions and answers to the cross-action alleging that the deceased was employed in another State, that the injury came within the purview of the Compensation Act of such State, and

that award had been entered therein adjudicating the liabilities of the additional defendants for the death. *Held:* Since an employee cannot sue a fellow employee for injuries cognizable under the Compensation Act of the Sister State, plaintiff could not have maintained the action against either of the additional defendants at the time the action was instituted, and motions of the additional defendants to strike the cross-action was properly allowed. *Ibid.*

Where the grantee in a timber deed cuts trees within the boundaries pointed out by the grantors, and is thereafter sued for trespass by the owners of the adjacent lands upon allegations that some of the trees so cut stood upon lands owned by them, such grantee is entitled to join his grantors for contribution under the statute, G. S. 1-240, since both grantee and grantors are liable as joint tort-feasors and the owners of the adjacent lands could have joined them as parties defendant in the first instance. *McBryde v. Lumber Co.*, 415.

Drivers of separate cars may be held liable as joint tort-feasors only if their separate acts of negligence concur in producing a single and indivisible injury, and plaintiff's evidence must be sufficient to warrant the inference that the negligence of the second driver caused or contributed to his injuries in order to hold the second driver as a joint tort-feasor. *Riddle v. Artis*, 629.

TRESPASS

§ 1a. Acts Constituting Trespass.

A right of action for trespass is based on wrongful or tortious conduct; therefore, when the invasion of the property of another is the result of an unavoidable automobile accident, there can be no recovery. *Smith v. Pate*, 63.

§ 1½. Parties Liable.

Where the grantors in a timber deed go upon the land, point out the boundary and mark trees as being within their boundary, both the grantors and the grantee who actually cuts the timber within the boundary designated are liable to the owner of the adjacent land for trespass as joint tort-feasors if any of the trees so cut stood on land belonging to the adjacent owner. *McBryde v. Lumber Co.*, 415.

§ 9. Nature and Elements of Criminal Trespass.

While redress for unauthorized entry on lands of another was by civil action at common law, forcible trespass, G.S. 14-126, and trespass after being forbidden to enter, G. S. 14-134, are made crimes by the statutes, but in any criminal prosecution possession is an essential element of the offense, and it is required that the warrant or bill of indictment allege the rightful owner or possessor, and that proof correspond with the charge. *S. v. Cooke*, 518.

§ 10. Prosecutions for Criminal Trespass.

Warrent for trespass after being forbidden to enter may not be amended to change name of person having possession. *S. v. Cooke*, 518.

TRIAL

§ 5½. Stipulations and Pre-Trial Agreements.

A stipulation entered into by counsel for plaintiffs and defendants during the progress of the trial is conclusive and puts to an end any contention to the contrary. *Church Conference v. Locklear*, 349.

§ 17½. Reopening Case for Additional Evidence.

The court has discretionary power to reopen a case and admit additional evidence, and where it is apparent that defendant's request for instructions was based upon testimony as to entries on ledger sheets relating not only to matters during the period in controversy but also, through inadvertence, to matters prior thereto, the action of the court in reopening the evidence and permitting the introduction of the ledger sheets limited to those entries relating to the period in controversy, will not be held for error. *Builders Supply v. Dixon*, 136.

§ 19. Province of Court and Jury in Regard to Evidence.

Whether the evidence is sufficient to be submitted to the jury is a question of law for the court. *Worley v. Motor Co.*, 677.

§ 21. Office and Effect of Motion to Nonsuit.

A demurrer to the complaint and a demurrer to the evidence are different in purpose and effect. *Riddle v. Artis*, 629.

§ 22a. Nonsuit—Consideration of Evidence.

On motion to nonsuit, the evidence must be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Mfg. Co. v. Gable*, 1; *Kirkman v. Baucom*, 510.

Upon motion to nonsuit, plaintiff is entitled to have his evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Bridges v. Graham*, 371; *Morgan v. Bell Bakeries, Inc.*, 429; *Dean v. Ins. Co.*, 704.

In passing upon the sufficiency of the defendant's evidence upon his counterclaim, evidence favorable to plaintiff must be disregarded. *Ashley v. Jones*, 442.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Evidence offered by defendants which contradicts that offered by plaintiffs or which tends to establish a different state of facts, must be ignored. *Kirkman v. Baucom*, 510; *Worley v. Motor Co.*, 677.

On motion to nonsuit, defendant's evidence may be considered only in so far as it is not inconsistent with, but tends to clarify or explain, plaintiff's evidence, and defendant's evidence which tends to establish another and different state of facts or which tends to contradict or impeach plaintiff's evidence is not to be considered. *Keener v. Beal*, 247; *Bell v. Maxwell*, 257; *Bridges v. Graham*, 371.

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him, and defendant's evidence which tends to establish another or different state of facts or which tends to impeach or contradict plaintiff's evidence must be disregarded. *Glenn v. Raleigh*, 469.

On motion to nonsuit, defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and clarify it, may be considered. *Robbins v. Crawford*, 622.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

Discrepancies and contradictions, even in plaintiff's evidence, do not justify

nonsuit. *Bridges v. Graham*, 371; *Kirkman v. Baucom*, 510; *Worley v. Motor Co.*, 677; *Dean v. Ins. Co.*, 704.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

If the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than a basis for speculation and conjecture, it is insufficient to be submitted to the jury. *Lane v. Bryan*, 108.

Where the determinative facts are in dispute and different conclusions may be reasonably reached from the testimony, nonsuit may not be entered. *Ashley v. Jones*, 442.

§ 23e. Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

In order to be sufficient, circumstantial evidence must tend to establish the fact in issue as an inference based on facts established by clear and direct proof, since an inference may not be based on an inference. *Lane v. Bryan*, 108.

§ 23f. Nonsuit for Variance.

The evidence cannot be submitted to the jury on a theory of liability not supported by allegations, since proof without allegation is as ineffective as allegation without proof. *Calloway v. Wyatt*, 129.

§ 25. Voluntary Nonsuit.

If the evidence upon defendant's counterclaim is sufficient to take the issue on the cross action to the jury, plaintiff may not take a voluntary nonsuit to escape the counterclaim. *Ashley v. Jones*, 442.

In the wife's action for absolute divorce, the petition of the husband demanding custody of the child of the marriage injects demand for affirmative relief of a substantial nature, and it is error for the clerk thereafter to permit the wife to take a voluntary nonsuit, and thus divest the court of jurisdiction, while the issue of custody is *in fieri*. *Cox v. Cox*, 528.

§ 29. Peremptory Instructions and Directed Verdict.

If all the evidence upon the trial tends to support plaintiff's right to relief, plaintiffs are entitled to a peremptory instruction in their favor. *Church Conference v. Locklear*, 349.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Where the charge presents all substantive phases of the law arising upon the evidence, a party desiring instructions upon a subordinate feature must aptly tender a request thererfor. *Freight Lines v. Burlington Mills*, 143.

Where the trial court states the contentions of the parties, but inadvertently fails to explain and declare the law arising on the evidence, assignment of error to the charge must be sustained. *Keith v. Lee*, 188.

A charge is sufficient if, when read contextually, the law of the case is presented to the jury in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. *In re Will of Crawford*, 322.

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, G.S. 1-180, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. *Glenn v. Raleigh*, 469.

§ 31c. Instructions—Conformity with Pleadings and Evidence.

It is error for the trial court to charge the jury as to matter not presented by allegation, supported by evidence and embraced in the issues. *Worley v. Motor Co.*, 677.

§ 31e. Expression of Opinion by Court on Evidence in Charge.

The trial court properly refrains from commenting on the probative value, weight or effect of negative testimony. *Kirkman v. Baucom*, 510.

§ 31g. Charge on Credibility of Witnesses.

Appellant's assignment of error to the charge as to the credibility of witnesses overruled on authority of *Styers v. Bottling Co.*, 239 N. C. 504. *Builders Supply v. Dixon*, 136.

§ 32. Request for Instructions.

Where the court gives equal stress to the evidence and contentions of the parties, a party desiring correction, amplification or additional instructions should aptly tender request therefor, and failure to do so waives the right to object. *In re Will of Crawford*, 322.

§ 36. Form and Sufficiency of Issues.

Exception to the issues will not be sustained when the issues submitted are sufficient to present to the jury all determinative facts in dispute and to enable the parties to present every phase of the controversy. *Bank v. Bloomfield*, 492.

§ 41. Polling the Jury.

The sole purpose of polling the jury is to ascertain whether the verdict as rendered is the verdict of each juror, and whether he then assents thereto, and the court properly refuses to permit questioning having for its purpose the impeachment of the jurors or their verdict. *Highway Com. v. Privett*, 501.

§ 48. New Trial for Misconduct of or Affecting Jury.

Defendant moved for a mistrial on the ground that during the trial an officer had talked to two of the jurors in regard to the case. The trial judge interrogated the jurors, and upon their statements that they recalled talking to the officer, but that they had no recollection of anything he had said about the case in such conversation, concluded that neither party had been prejudiced, and denied the motion in his discretion. *Held:* The record does not disclose facts requiring an order of mistrial as a matter of law, or show abuse of discretion by the trial judge in the discretionary denial of the motion. *Keener v. Beal*, 247.

§ 48½. Power of Court to Set Aside Verdict in General.

After verdict the trial judge may not dismiss an action as in case of nonsuit for insufficiency of the evidence. *Temple v. Temple*, 334.

The trial judge may dismiss an action after verdict only on the ground of want of jurisdiction or failure of the complaint to state a cause of action. *Ibid.*

§ 52. Setting Aside Verdict by Court Ex Mero Motu.

The trial court has the discretionary power to discharge a juror and order

a mistrial when necessary to attain the ends of justice. *Keener v. Beal*, 247.

The action of the trial court in setting aside the verdict in its discretion upon its opinion that equity and justice so required is not subject to review on appeal in the absence of abuse of discretion. *Walston v. Greene*, 617.

§ 54. Trial by Court—Hearings, Evidence and Exceptions.

In order to preserve for review on appeal an adverse ruling on a motion for judgment of nonsuit made in the course of a trial by the court under G.S. 1-184, it is necessary that appellant except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. *Goldsboro v. R. R.*, 101.

§ 55. Trial by Court—Findings and Judgment.

In a trial by the court under G.S. 1-184, the court is required to find the facts on all the issues of fact joined on the pleadings, declare the conclusions of law arising on the facts found, and enter judgment accordingly, G.S. 1-185, but where judgment of nonsuit is allowed, such judgment is in effect a holding that all the evidence, taken in the light most favorable to plaintiffs, is insufficient to support a favorable finding for plaintiffs on any issue raised by the pleadings, and is in itself sufficient. *Goldsboro v. R. R.*, 101.

TRUSTS

§ 3a. Written Trusts in General.

In order to create a valid trust, the instrument must employ sufficient words to raise it and specify a definite subject and ascertained object. *Finch v. Honeycutt*, 91.

The conveyance by a married woman of her property to a trustee without any findings of fact or conclusions of law by the notary taking her acknowledgment that the instrument was not unreasonable or injurious to her as required by G.S. 52-12, renders void any estate or trust attempted to be set up in favor of the husband. *Pilkington v. West*, 575.

§ 3b. Active and Passive Trusts and Merger.

The Statute of Uses merges the legal and equitable title in the beneficiary of a passive trust, but this rule does not apply to active trusts, and under an active trust legal title vests and remains in the trustee for the purpose of the trust. *Finch v. Honeycutt*, 91.

Where there is any control to be exercised by the trustee or any duty to be performed by him in relation to the trust property or in regard to the beneficiaries, the trust is an active trust, and the legal and equitable titles do not merge in the beneficiaries. *Ibid.*

A trust is active only when there is some duty or responsibility resting on the trustee. *Pilkington v. West*, 575.

Where a married woman conveys her separate property to a trustee for the benefit of herself during her life with provision that upon her death the trustee should convey the property to her heirs, and in the event of his failure to do so that the property should revert to her heirs, and it is apparent from the instrument that the word "heirs" was used in its technical sense and it is admitted that the possibility of issue of trustor is extinct, the trust is a passive trust executed by the Statute of Uses, since under Art. X, section 6, of the State Constitution the continuance of the trust is not necessary to

preclude the husband of any interest in the property, nor is a continuance of the trust necessary to protect the wife against his importunities. *Ibid.*

§ 8e. Spendthrift Trusts.

While spendthrift trusts may be created when they conform to G.S. 41-9, a person cannot remove his property from liability for his debts or restrict his right of alienation by a conveyance of his own property to a trustee for his sole use and benefit. *Pilkington v. West*, 575.

§ 28. Termination under Terms of the Instrument.

The duration of a trust depends largely on the intention of the trustor as gathered from a proper construction of the instrument and the nature and purposes of the trust. *Trust Co. v. Taliaferro*, 121.

Even after the termination of a trust in accordance with the terms of the instrument, the fiduciary relationship continues between the trustee and the beneficiaries until the beneficiaries have received their share of the *corpus* of the trust. *Ibid.*

Trust for use of married woman held to terminate upon the dissolution of the marriage by divorce, notwithstanding that she later remarried. *Ibid.*

UTILITIES COMMISSION

§ 5. Appeal and Review of Orders.

The determination by the Utilities Commission of an application for a certificate of public convenience and necessity is presumed valid and will not be disturbed unless it is made to appear that it is clearly unreasonable and unjust. *In re Department of Archives*, 392.

VENUE

§ 1a. Residence of Parties.

Where, in an action for personal injuries, the evidence supports the court's finding that at the time the action was instituted and summons issued and served on defendant, defendant was a resident of the county, defendant's motion to remove as a matter of right is properly denied. *Brendle v. Stafford*, 218.

§ 4b. Change of Venue for Convenience of Parties and Witnesses.

A motion to remove for the convenience of parties and witnesses is addressed to the discretion of the court. *Brendle v. Stafford*, 218.

WAIVER

§ 2. Acts Constituting Waiver.

Where a party is faced with the inconsistent choices of declaring a contract terminated by reason of breach or of accepting continuing benefits under the contract, his election, with full knowledge of all the facts, to accept the continuing benefits waives his right to declare the contract terminated for such prior breach. *Realty Co. v. Spiegel*, 458.

WILLS

§ 8. Holographic Wills—Handwriting of Testator.

A beneficiary under a holograph will is not disqualified to testify as to the handwriting of testatrix. *In re Will of Crawford*, 322.

§ 12. Revocation by Testator.

Evidence of the preparation of a later dispositive instrument, without evidence that it was ever executed according to the formalities necessary to make it a valid will and without evidence that it contained any words of revocation or provisions contrary to a prior will, duly executed, is insufficient evidence of revocation of the will to justify the submission of the question of revocation to the jury. *In re Will of Crawford*, 322.

§ 24. Caveat—Sufficiency of Evidence and Nonsuit.

Testimony of two witnesses to the formal execution of a paper writing and that they, in the presence of testatrix and at her request, signed as subscribing witnesses, and testimony of three witnesses that the paper writing was entirely in the handwriting of deceased, with testimony that it was delivered to a named person for safekeeping as the will of testatrix, is sufficient to sustain the instrument both as an attested and as a holograph will. *In re Will of Crawford*, 322.

§ 25. Instructions in Caveat Proceedings.

An instruction in a caveat proceeding that a caveat is a caution entered in the court of probate to stop probate from being granted without the knowledge of the parties in interest, *held* not prejudicial. *In re Will of Crawford*, 322.

§ 31. General Rules of Construction.

If words are used in one part of the will in a certain sense, the same meaning must be given them in another part of the will, unless a contrary intent appears, certainly when an identical word is used repeatedly in a single sentence. *Anders v. Anderson*, 53.

The use of a dispositive phrase does not preclude a testator from limiting it by subsequent language, since the whole of the pertinent provision must be construed from its four corners to ascertain the intent of testator, and when the dispositive phrase is linked with a subsequent provision by the conjunctive "and," the use of the word "and" in itself shows that something is to follow in relation, addition to, or in connection with, the original disposition. *Ibid.*

When it is obvious that testatrix was not attempting to use words in their technical sense, they must be given their natural, ordinary and popular meaning. *Ibid.*

In construing a will, the intent of the testator as gathered from the entire instrument will be biven effect unless contrary to some rule of law or at variance with public policy. *Trust Co. v. Taliaferro*, 121.

In construing a will, greater regard is to be given to the dominant purpose of the testator as ascertained from the language used, construed as a whole, than to the use of any particular words. *Ibid; Morris v. Morris*, 314.

In construing a will every word and phrase should be given effect if possible by any reasonable construction. *Morris v. Morris*, 314.

While recognized rules of construction and canons of interpretation are a guide in the construction of a will, each will must be largely construed by itself and its words interpreted in accordance with the circumstances and contexts of their use. *Coffield v. Peele*, 661.

The primary rule in the construction of a will is to ascertain the intent

of testator as expressed in the whole instrument. *Ibid.*

Apparently conflicting provisions in a will should be reconciled if possible and effect be given to all its words, but where its provisions are inconsistent, the primary intent will control that which is secondary. *Ibid.*

§ 32. Presumption.

The presumption that testator did not intend to die intestate will be employed as an aid in seeking to ascertain testator's intent. *Finch v. Honeycutt*, 91.

The presumption against partial intestacy is to be applied only as an aid in construction and will not prevail where intestacy is effected by the plain and unambiguous language of the will. *Carter v. Davis*, 191.

§ 33a. Estates and Interests Created in General.

The rule that a devise in fee will not be defeated or limited by a subsequent portion of the will expressing a wish or desire for the disposition of the property after the death of the devisee, is applicable only when the devise is in fee, unconditionally, and the subsequent clause uses words which are merely precatory. *Anders v. Anderson*, 53.

Where testatrix uses the word "want" in disposing of realty to her father, brother and sister, and the word "want" in regard to her husband having a home there as long as he wished to live with her people, and the word "want" in stating that after her father's, brother's, and sister's deaths, she wanted the property to go to her nieces and nephews, all in the same sentence, the word "want" must be given the same meaning each time used and is imperative rather than precatory. Therefore, the father, brother and sister take no more than a life estate, terminable upon the death of the last survivor of these three, subject to the exclusive right of the husband to occupy the house, at least during the continuance of the life estates. *Ibid.*

No particular form of expression is necessary to constitute a legal disposition of property by will, but the courts will give effect to the intent of testator as gathered from the language used. *Finch v. Honeycutt*, 91.

The doctrine of devise or bequest by implication obtains in this jurisdiction, but is to be applied only when it cogently appears to be the intention of testator as gathererd from the language of the entire instrument, and the doctrine cannot be applied merely to avoid intestacy. *Ibid.*

Testator's will stated that his estate was a community estate with his wife, and then proceeded to dispose of "my half of my & her (wife) estate" without thereafter again mentioning the other half of the estate or making any provision for his wife. *Held:* The wife took one-half of the estate, both real and personal, as a devise and bequest by implication, this being the inescapable conclusion as to testator's intent as gathered from the language of the instrument as a whole. *Ibid.*

The purpose of G.S. 31-38 is to change the common law rule requiring words of perpetuity for a conveyance in fee so that a devise will be construed to carry the fee unless it appears from the will that the testator intended to convey an estate of less dignity. *Morris v. Morris*, 314.

§ 33d. Estates in Trust.

The will in question devised and bequeathed property to testator's children, but stated the will of testator that the property be held by named trustees for

the benefit of his children, and that the trustees distribute the *corpus* to them on later specified dates, and imposed specified duties on the trustees in the event of the mental or moral irresponsibility of any child, and charged them to look after the children's education, moral and religious, as well as their material, interests. *Held:* The will creates a valid, active trust. *Finch v. Honeycutt*, 91.

Testator died, survived by his wife, son, and daughter. At the time of the execution of his will his daughter and her husband had separated, and she and her two children were living in his home. The will set up a trust to last during the life of his wife and for that period after her death during which his daughter should be married. *Held:* The purpose in continuing the trust during the period the daughter should be married was to protect his daughter during coverture and referred to her then marriage, and therefore upon the termination of that marriage by divorce prior to the death of the widow, the trust terminates in accordance with the dominant purpose of testator upon the death of the widow, notwithstanding the later remarriage of the daughter. *Trust Co. v. Taliaferro*, 121.

No particular words are necessary to create a trust if the purpose is evident. *Morris v. Morris*, 314.

The will in question consisted of one sentence devising all of testator's property to his wife "to provide for" testator's only child "and herself." *Held:* The wife takes an estate in trust for the benefit of the son and herself for the purpose of providing for their joint support. Therefore, there is no merger of the legal and equitable estate in the wife which would defeat the trust even as to herself, and she has no power to sell the realty except as authorized by the court upon a showing that the personal estate and rents are insufficient to support the son and herself. *Ibid.*

§ 33h. Rule Against Perpetuities.

Where a will disposes of property to trustees of an active trust for the benefit of named persons *in esse*, with direction to the trustees to distribute the *corpus* of the estate on specified dates, the trust does not violate the rule against perpetuities, since the gift to the beneficiaries vests in them immediately upon the death of the testator although the full enjoyment is postponed to the dates specified. *Finch v. Honeycutt*, 91.

§ 34b. Designation of Beneficiaries.

The will in question devised and bequeathed to testator's seven children, naming them, all testator's real and personal property, and immediately thereafter used the words, "to be equally divided among the seven children of mine, and their children." *Held:* The dispositive clause of the will is to testator's seven named children alone, and the repugnant provision for distribution equally among testator's children and grandchildren must yield to the primary intent expressed in the instrument that the property should go to the children alone. *Coffield v. Peele*, 661.

In the absence of a manifest intention to the contrary, a will is to be construed in favor of beneficiaries appearing to be the natural or special objects of the testator's bounty. *Ibid.*

Testator's will provided for the payment of income from designated property to his brother "and his wife" in equal parts and to the survivor of

them for the lifetime of the survivor, with provision for the distribution of the *corpus* upon the death of the survivor. After testator's death, the wife died and the brother remarried. Thereafter the brother died. *Held:* The gift was to the wife of the brother living at th time of the execution of the will and testator's death, and the second wife of the brother took no interest under the will. *Matheson v. Trust Co.*, 710.

§ 38. Residuary Clauses.

The will devised real property to a named devisee and later provided that the rest and residue of testatrix' personal property should go to named legatees. The devisee predeceased testatrix. *Held:* The residuary clause cannot control the disposition of the realty upon the lapse of the devise, since the residuary clause is limited to personalty, and the realty must be distributed to testatrix' heirs at law as in case of intestacy. *Carter v. Davis*, 191.

§ 39. Actions to Construe Wills.

Where the judgment of the court in an action to construe a will determines the present vesting of all property disposed of by the instrument, questions as to the disposition of the property upon the happening of certain contingencies, which are merely speculative and not considered by the court below, will not be considered on appeal. *Finch v. Honeycutt*, 91.

Where the determinative matter in dispute is whether the devisees named in the will took a fee or only a life estate, a grantee in a fee simple deed from one of the devisees named is a necessary party to the action. *Edmondson v. Henderson*, 634.

§ 42. Lapsed Legacies.

Where devisee dies, the realty cannot be disposed of under residuary clause referring solely to personalty. *Carter v. Davis*, 191.

GENERAL STATUTES, SECTIONS OF, CONSTRUED

1-15; 1-46; 1-52(5). Action for malpractice must be instituted within three years of accrual of cause of action. *Shearin v. Lloyd*, 363.

1-36. Title is presumed out of State unless it is a party. *Scott v. Lewis*, 298.

1-47(4). Action for recovery of real estate from mortgagee in possession and for accounting held barred. *Jordan v. Chappel*, 620.

1-69.1; 1-97(6). Unincorporated labor union performing acts in North Carolina for which it was organized may be served under the statute. *Construction Co. v. Electrical Workers Union*, 481.

1-82. Residence at time of institution of action determines venue. *Brendle v. Stafford*, 218.

1-88. Civil action is commenced by issuance of summons or by filing of affidavit that personal service is not intended. *Thrush v. Thrush*, 114.

1-98.4(a)(3). Affidavit that personal service could not be had on defendant within the State is jurisdictional to service outside the State.

1-27; 183. Demurrer to complaint and demurrer to evidence are different in purpose and effect. *Riddle v. Artis*, 629.

1-127(3); 1-333. Pendency of prior action may be raised by demurrer only when such fact appears on face of complaint, otherwise only by answer. *Buchanan v. Smawley*, 592.

1-127(6). Complaint in action against individual for trespass held not demurrable on ground that facts alleged disclosed as matter of law that title to property had passed to Highway Commission. *Buchanan v. Smawley*, 592.

1-37; 1-138. Counterclaims in tort arising from contractual relationship may be asserted in plaintiff's action in tort arising upon the same contract. *Burns v. Oil Corporation*, 266.

1-151. Rule requiring liberal construction of pleading does not warrant reading into pleading essential allegation it does not contain. *Calloway v. Wyatt*, 129.

1-151. Upon demurrer the complaint must be liberally construed. *Lewis v. Lee*, 68.

1-180. Failure of court to explain and declare law arising on the evidence is error. *Keith v. Lee*, 188; *Glenn v. Raleigh*, 469.
Court is under duty to submit to jury question of defendant's guilt of less degrees of crime supported by evidence. *S. v. Green*, 717.
Where two occupants each testify that other was driving, failure of the court to charge that jury must determine which was driving in order to convict the other, is failure to explain the applicable law. *S. v. Dutch*, 438.
Court is not required to charge on subordinate features in absence of request, *S. v. Davis*, 73.

1-183. On motion to nonsuit the evidence is to be considered in the light most favorable to plaintiff. *Manufacturing Co. v. Gable*, 1.

1-184. On exception to involuntary nonsuit in trial by court under agreement, the only question is whether evidence taken in the light most

favorable to plaintiff would support findings of fact upon which plaintiff could recover.

1-184; 1-185. In trial by court, court is not required to find facts when he enters nonsuit and in order to preserve review from such ruling, it is necessary that appellant except to the findings of fact in apt time. *Goldsboro v. R. R.*, 101.

1-195. Inclusion in referee's report of summary of evidence and statement of contentions held not prejudicial. *McCormick v. Smith*, 425.

1-222. Any one of several defendants may allege counterclaim otherwise permissible. *Burns v. Oil Corporation*, 266.

1-240. Additional party joined on cross-action of original defendant is not entitled to nonsuit at close of plaintiff's evidence, the sufficiency of the evidence on the cross-action being determinable only after original defendant has introduced his evidence. *Norris v. Johnson*, 179.

Grantee in timber deed sued for trespass is entitled to join his grantors for contribution where grantors have pointed out the boundaries. *McBryde v. Lumber Co.*, 415.

Third person tort feasor sued by personal representative of deceased employee may not join employer and fellow employee for contribution. *Johnson v. Catlett*, 341.

1-277. Refusal of motion to dismiss is not final determination of cause from which appeal will lie. *Cox v. Cox*, 528.

1-371, 372, 375, 376, 379, 386. Sales under execution of judicial decree are void unless debtor's homestead is laid off. *Stokes v. Smith*, 694.

1-440.7. Court may extend time for service by publication beyond thirty-one days after issuance of order of attachment. *Thrush v. Thrush*, 114.

1-440.11(c). Court has discretionary power to permit plaintiff to amend defective affidavit. *Thrush v. Thrush*, 114.

7-222. G. S. 7-64 not being applicable to Craven County, Superior Court has no original jurisdiction of prosecutions for general misdemeanors. *S. v. Morgan*, 596.

8-4. Courts will take judicial notice of laws of United States or any state or territory of United States. *Johnson v. Catlett*, 341.

8-47; 8-46. Life expectancy of widow does not establish cash value of dower. *Waggoner v. Waggoner*, 210.

8-51. In action by corporation and surviving principal stockholders against widow of deceased principal stockholder, surviving stockholders are incompetent to testify as to conversations with deceased partner. *Collins v. Covert*, 303.

8-68. Personal service on nonresident in this State while attending court as party litigant is not void but voidable. *Thrush v. Thrush*, 114.

14-54. Fact that evidence shows nonfelonious breaking or entering is not ground for quashal of indictment charging felonious breaking or entering. *S. v. Andrews*, 561.

14-70; 14-71; 14-72; 15-152. Charge of larceny and of receiving may be joined in single bill. *S. v. Meshaw*, 205.

14-72. Stealing of property of value of not more than $100 is misdemeanor, and it is error for court to assume that larceny of college examination papers would be felonious. *S. v. Andrews*, 561.

14-87. Charge held for error in failing to instruct jury as to elements of armed robbery as distinguished from robbery at common law. *S. v. Rogers*, 611.

14-126; 14-134. Warrant charging trespass on lands of named person may not be amended to charge that trespass was on lands of a different person. *S. v. Cooke*, 518.

14-401.1. Has no application to theft of college examination papers. *S. v. Andrews*, 561.

15-27. Admission in evidence of intoxicating liquor dscovered as result of unlawful search is error. *S. v. Mills*, 237.

15-153. Where defendant's name appears in warrant, the omission of his name from affidavit forming a part thereof is not fatal. *S. v. St. Clair*, 183.

15-200. Court has power to suspend execution of judgment for period not in excess of five years. *S. v. Griffin*, 680.

18-13. Warrant for search of a dwelling house does not authorize search of a room in the dwelling rented by a person not named in the warrant. *S. v. Mills*, 237.

18-32. Possession of more than one gallon of nontaxpaid whiskey is *prima facie* evidence of possession for sale. *S. v. Miller*, 608.

18-50; 18-48. Statutes create separate offenses and one is not included in the other. *S. v. Morgan*, 596.

18-78; 18-78.1. Suspension of beer permit is administrative proceeding. *Boyd v. Allen*, 150.

20-17(6). Time offenses are committed, rather than time of conviction is controlling; statute is mandatory. *Snyder v. Scheidt, Comr. of Motor Vehicles*, 81.

20-24(c); 20-16. Where prayer for judgment is continued upon payment of costs, there is no final conviction upon which driver's license may be revoked. *Barbour v. Scheidt, Comr. of Motor Vehicles*, 169.

20-131(d). Evidence held not to show contributory negligence as matter of law in hitting unlighted vehicle standing on highway. *Keener v. Beal*, 247.

20-134; 20-161. Motorist may assume that no other motorist will have car standing on highway at night without lights. *Keener v. Beal*, 247.

20-138. Evidence of guilt of operating motor vehicle while under influence of intoxicants held sufficient. *S. v. St. Clair*, 183.

20-140; 20-141. Motorist must drive at speed and in manner so as not to endanger person or property. *Crotts v. Transportation Co.*, 420.

20-147. Motorist is required to remain on right side of highway at intersection or crossing. *Crotts v. Transportation Co.*, 420.

20-150; 20-146; 20-148. Charge held to sufficiently explain law applicable in passing vehicle on highway. *Kirkman v. Baucom*, 510.

20-150(c). Motorist may not overtake and pass vehicle at intersection. *Crotts v. Transportation Co.*, 420.

20-152. Following another vehicle more closely than is reasonable and prudent under the circumstances is negligence. *Crotts v. Transportation Co.*, 420.

20-154. Motorist is negligent if he turns left across highway to enter driveway without giving statutory signal. *Coach Co. v. Fultz*, 523.
Evidence that driver gave signal by electrical signal device on steering column is competent to be considered by jury notwithstanding absence of evidence that device had been approved by Department of Motor Vehicles. *Ibid.*

20-155(a). Evidence of negligence in failing to yield right of way at intersection held sufficient. *Price v. Gray*, 162.

20-166(a); 20-166(c). Occupant of car, merely because he is guest passenger therein, is not guilty as aider and abettor in driver's violation of statutes. *S. v. Dutch*, 438.

20-179. The statute relates only to punishment, and therefore discrepancy between warrant and indictment in charging second and third offenses does not deprive Superior Court of jurisdiction. *S. v. White*, 587.

20-279.2. Party joined by consent in proceeding to review order suspending driver's license must be served with case on appeal. *Johnson v. Scheidt, Comr. of Motor Vehicles*. 452.

22-2. Written lease may not be varied by parol. *Manufacturing Co. v. Gable*, 1.

24-5. Has no application to judgment against Highway Commission. *Highway Commission v. Privett*, 501.

28-6(b). Clerk has power to refuse to issue letters to nominee of heirs when he does not consider such nominee a proper party to administer the estate. *In re Estate of Cogdill*, 602.

28-173. Institution of action for wrongful death by minor's administrator cannot constitute disaffirmance of insurance agreement as to beneficiary named therein. *NASCAR, Inc., v. Midkiff*, 409.

31-5.1. Evidence of preparation of later dispositive instrument, without evidence of its execution as valid will is insufficient to show revocation. *In re Will of Crawford*, 322.

31-10(b). Beneficiary under holograph will is competent to testify as to handwriting of testatrix. *In re Will of Crawford*, 322.

31-38. Does not justify construction granting the fee when intent of testator to set up trust is manifest. *Morris v. Morris*, 314.

41-7. Devise and bequest of property to trustees for benefit of testator's children creates active trust and legal and equitable titles do not merge. *Finch v. Honeycutt*, 91.

41-9. Party may not convey his own property to trustee for his own benefit so as to defeat rights of creditors. *Pilkington v. West*, 575.

41-10. Where respondents allege ownership of disputed area, processioning proceeding becomes action to quiet title. *Bumgarner v. Corpening*, 40.

42-1. Contract for farming on shares does not create agricultural partnership. *Keith v. Lee*, 188.

45-4. Upon death of mortgagee right to exercise power of sale passes to his personal representative and not his heirs. *Gregg v. Williamson*, 356.

45-37(5). 1945 amendment providing that bar of statute should be retroactive is constitutional since it allows one year for creditors to protect rights. *Gregg v. Williamson*, 356.

49-2. Warrant which fails to charge a defendant's failure to support defendant's illegitimate child was wilful is fatally defective, *S. v. Smith*, 118.

50-13. Jurisdiction over custody of children of marriage vests exclusively in court in which divorce action was pending. *Cox v. Cox*, 528.

50-16. 1955 amendment merely gives wife right to set up cross-action for alimony without divorce without disturbing her right to bring independent action therefor, and pendency of husband's action for absolute divorce under G.S. 50-6 does not abate wife's subsequent action for alimony without divorce. *Beeson v. Beeson*, 330.

52-12. Transfer of wife of her property to trustee without compliance with statute renders void any estate or trust attempted to be set up in favor of husband. *Pilkington v. West*, 575.

Separation agreement between husband and wife which provides for support of wife is a contract which is required to be executed in conformity with statute, and payments made under agreement cannot estop husband from attacking its validity. *Bolin v. Bolin*, 666.

Conveyance by husband and wife to third person and reconveyance to husband do not establish as matter of law attempt to circumvent statute. *Stokes v. Smith*, 694.

55-48. Evidence held sufficient to show that purported corporation was mere bookkeeping transaction. *Bank v. Bloomfield*, 492.

58-281. Insured members of fraternal order may change beneficiary and original beneficiary, having no vested right, may not attack validity of change of beneficiary as between member and fraternal order. *Sudan Temple v. Umphlett*, 555.

90-77. Statute relates to pharmacy and sale of medicines and does not apply to sale of lead compound used in commercial paint. *Porter v. Yoder & Gordon Co.*, 398.

95-78 through 95-84. Complaint in action to enjoin unlawful picketing pursuant to conspiracy to force plaintiff to violate right to work statute held not demurrable on ground that action was within exclusive jurisdiction of National Labor Relations Board. *Construction Co. v. Electrical Workers Union*, 481.

97-30; 97-31. Compensation for partial disability from back injury is 60 per cent of difference between wages before injury and wages employee is able to earn thereafter. *Evans v. Times Co.*, 669.

97-47. Where record on appeal to Superior Court does not disclose a previous award, contention that award could not be sustained in absence of finding of changed condition is untenable. *Penland v. Coal Co.*, 26.

97-54; 97-61. Where employee is removed from hazard of silicosis before becoming actually incapacitated, but within two years becomes in-

capacitated to perform normal labor in second occupation, he is entitled to compensation; but when he remains in second occupation for five years, his retirement thereafter could not be due to incapacity from silicosis resulting from two years of last exposure. *Brinkley v. Minerals Corp.*, 17.

97-86. Finding of Industrial Commission not supported by competent evidence is not conclusive. *Penland v. Coal Co.*, 26

136-67; 136-68. Superior Court does not have original jurisdiction of proceeding to establish neighborhood public road, but when complaint does not allege that road was neighborhood public road, Superior Court has original jurisdiction of action to restrain blocking neighborhood road. *Edwards v. Hunter*, 46.

143-300.1. Evidence held sufficient to support finding that accident resulted from negligence of school bus driver. *Mica Co. v. Board of Education*, 714.

148-28. Sentence to State's prison upon conviction of possession of nontax-paid whiskey and possession of such whiskey for sale is not sanctioned by law. *S. v. Floyd*, 434.

160-2(6). City acts in governmental capacity in granting franchise to public utility and may not be held liable in tort for granting franchise to utility after its pipe lines had become defective. *Denning v. Gas Co.*, 541.

160-379(2)(c). Municipal ordinance for issuance of refunding bonds need not specify that tax sufficient to pay principal and interest shall be levied annually *Garner v. Newport*, 449.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

Art. I, secs. 5 and 17. Requirement of uniformity and equality in burden of taxation relates to imposition of tax and not to the distribution of the proceeds. *Ramsey v. Comrs. of Cleveland*, 647.

Art. I, sec. 17. Revocation or suspension of retail beer permit for violation of regulation does not violate Constitution. *Boyd v. Allen*, 150.

Art. I, Sec. 35. Court may not hear evidence in absence of party. *Raper v. Berrier*, 193.

Art. II, sec. 29. Statute authorizing certain police officers to issue warrants does not relate to establishment of courts inferior to Superior Court in violation of this section. *S. v. St. Clair*, 183.

Art. V, sec. 3. Bonds for construction of county water and sewer system are for public purpose. *Ramsey v. Comrs. of Cleveland*, 647.

Art. X, sec. 6. The fact that a trust is for the separate use of a married woman does not make it an active trust.

Art. VII, sec. 7. County bonds for water and sewer system are for necessary expense not requiring vote, but provision of statute for vote does not limit power. *Ramsey v. Comrs. of Cleveland*. 647.

Art. XI, sec. 3 Sentence to State's prison upon conviction of possession of nontaxpaid whiskey and possession of such whiskey for sale is not sanctioned by law. *S. v. Floyd*, 434.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED

Art. 4, sec. 1. Award of Industrial Commission of another state must be given full faith and credit. *Johnson v. Catlett*, 341.

14th Amendment. Requirement of uniformity and equality in burden of taxation relates to imposition of tax and not to the distribution of the proceeds. *Ramsey v. Comrs. of Cleveland*, 647.