NORTH CAROLINA REPORTS
VOL. 247

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1957
SPRING TERM, 1958

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1958

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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1957—SPRING TERM, 1958

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JEFF. D. JOHNSON, JR.,
R. HUNT PARKER,
WILLIAM H. BOBBITT,
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WILLIAM B. RODMAN, JR.

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CLAWSON L. WILLIAMS	Eleventh	Sanford.
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RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
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HUBERT E. OLIVE	Twenty-Second	Lexington.
J. A. ROUSSEAU	Twenty-Third	North Wilkesboro.

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HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
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ZEB V. NETTLES	Twenty-Eighth	Asheville.
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DAN K. MOORE	Thirtieth	Sylva.

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H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.
Q. K. NIMOCKS	Fayetteville.

1. Resigned 20 January 1958. Succeeded by Heman R. Clark, Fayetteville, N. C.
2. Died 27 February 1958.
3. Died 23 February 1958.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
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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.

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*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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1957

ADA BROWN, EDITH STALLINGS, LILLIAN LAUGHINGHOUSE, KATE SALLEY AND HUSBAND, F. W. SALLEY, BEATRICE DUPREE, ROSCOE STALLINGS AND WIFE, DARE STALLINGS, F. CLARENCE STALLINGS AND WIFE, BEULAH STALLINGS, GERTIE SIMPSON AND HUSBAND, FRED SIMPSON, ROLAND SIMPSON, IRENE GARDNER AND HUSBAND, ENOCH GARDNER, ONA PEAL STALLINGS, U. D. STALLINGS AND WIFE, MARTHA STALLINGS, JEANNETTE EVANS AND HUSBAND, DORSEY EVANS, J. S. GRIFFIN AND WIFE, ETHEL GRIFFIN, S. C. GRIFFIN, LUDIE ROBERSON, GEORGE C. GRIFFIN, IRA F. GRIFFIN AND WIFE, MINNIE GRIFFIN, LESTER J. GRIFFIN AND WIFE, CHLOE GRIFFIN, CLARENCE W. GRIFFIN AND WIFE, RUTH GRIFFIN, LEONA ROBERSON AND HUSBAND, MACK ROBERSON, EVAN GRIFFIN AND WIFE, BETTY GRIFFIN, LEROY GRIFFIN AND WIFE, ESSIE GRIFFIN, LESLIE GRIFFIN AND WIFE, VERNA GRIFFIN, THURMAN GRIFFIN AND WIFE, ROSE GRIFFIN, MARY CLYDE GRIFFIN, RUBY L. HARDISON AND HUSBAND, ARCHIE HARDISON, VERLIN GRIFFIN AND WIFE, ADDIE LEE GRIFFIN, N. R. PEEL AND WIFE, CADDIE PEEL, SALLY GRIFFIN AND HUSBAND, T. C. GRIFFIN, M. L. PEEL AND WIFE, VERNA PEEL, OSCAR PEEL AND WIFE, OLIVIA PEEL, MYRTLE BAILEY AND HUSBAND, GORDON BAILEY, RAYMOND PEEL AND WIFE, MADELINE PEEL, COLLINS PEEL, JR., AND WIFE, MARTHA PEEL, HARRIETT PEEL, ANN PEEL, HILTON PEEL AND WIFE, NANCY PEEL, DOUGLAS PEEL, A MINOR, APPEARING BY HIS NEXT FRIEND, HUGH M. MARTIN, LABRON LILLEY AND WIFE, BEULAH LILLEY, FANNIE GRAINGER, HOWARD GODARD AND WIFE, LAURA GODARD, v. THURMAN COWPER AND WIFE, SARAH L. COWPER, ROSCOE B. G. COWPER AND WIFE, MARY J. COWPER, GEORGE HOWARD LINDLEY KENT AND WIFE, MARGARET L. KENT, SUSAN ELIZABETH MOORE, JANE MOORE, CLAYTON MOORE, JR., AND WIFE, JULIETTE MOORE, M. S. MOORE AND WIFE, ANNIE KATE MOORE, ANNIE C. GLASGOW, CLAYTON THIGPEN, ELIZABETH T. POOLE AND HUSBAND, HENRY H. POOLE, C. K. THIGPEN AND WIFE, LEOLA D. THIGPEN, E. L.

THIGPEN AND WIFE, RUTH H. THIGPEN, REBECCA THIGPEN, NINA THIGPEN, ELLA PAXTON, MAUDE PHILHOWER AND HUSBAND, LOUIE PHILHOWER, CLAYTON DAVIS AND WIFE, MARION DAVIS, RUSSELL DAVIS AND WIFE, EILEEN DAVIS, DR. W. L. DAVIS AND WIFE, HUMPHREY DAVIS, M. S. MOORE, GUARDIAN OF ALTON STALLINGS, M. S. MOORE, ADMINISTRATOR OF THE ESTATE OF ALTON STALLINGS, DECEASED, AND MAY TYLER.

(Filed 30 October, 1957.)

1. **Descent and Distribution §§ 2, 10—**

A grandchild who is devised lands by his maternal grandparent and whose mother is living at the time of the death of testator takes the land by purchase and not by descent within the meaning of G.S. 29-1, Rule 4, and upon the grandchild's death intestate, the lands descend to the grandchild's cousins and issue of deceased cousins on his father's side as well as those on the side of his mother.

2. **Descent and Distribution § 2½: Conversion § 1—**

As a general rule where real estate of a lunatic is sold under statute, or by order of court, the proceeds remain realty for the purpose of devolution on his death intestate while still a lunatic.

3. **Same: Descent and Distribution § 10d—Property acquired by guardian of insane person in exchange for incompetent's lands retains its character as realty for purpose of devolution.**

A person owned an interest in several tracts of land as heir of his mother. He was later declared incompetent and a guardian appointed. A co-heir executed a deed of trust on his interest, together with other property. The deed of trust was foreclosed and the land purchased at the sale by the *cestui.* The guardian, in a proceeding in strict compliance with G.S. 33-31, acquired for the incompetent the *cestui's* interest in one of the tracts in substitution for the incompetent's interest in the other tracts. The incompetent later died intestate without children while still insane. *Held:* The interest acquired by the incompetent from the *cestui* remained, for the purpose of devolution, lands inherited from his mother, and his cousins and the issue of his deceased cousins of the blood of his mother are entitled to inherit such interest to the exclusion of those of the blood of his father.

4. **Same—Where guardian takes purchase money deed of trust in selling incompetent's land and repurchases the land at foreclosure with the notes, the transaction does not break the line of descent.**

A person owning an interest in lands as heir of his mother was declared incompetent and a guardian appointed. Under court order, the guardian sold the interest in the realty, taking purchase money notes secured by deed of trust for the balance of the purchase price. Upon default and foreclosure the guardian purchased the land at the sale with the unpaid notes, no money passing, and the trustee conveyed the title to the guardian. *Held:* The proceeds of sale retained the character of real estate for the purpose of devolution, G.S. 33-32, and upon the repurchase of the land with the notes, the land would descend in the same manner as it would had it not been sold, and upon the incompetent's death without issue while still insane, such interest descends to the incompetent's cousins and issue of deceased cousins of the blood of the mother to the exclusion of those of the father. G.S. 29-1, Rule 4.

BROWN *v.* COWPER.

APPEAL by respondents from *Bone, J.*, April Regular Term 1957 of MARTIN.

Special proceeding for a partition sale of real property situate in Martin County.

Alton Stallings, a son of William L. Stallings and his wife, Emma V. Moore Stallings, never married, and died intestate on 17 January 1956. He was insane from 1916 until his death. At the time of his death his guardian M. S. Moore held the legal title in fee for him to a three-fifths undivided interest in a tract of land of about 1,200 acres, known as the Ball Gray Farm. Annie C. Glasgow, one of the respondents and a first cousin of Alton Stallings of the blood of his mother, at the time of his death owned the other two-fifths undivided interest in fee in the same farm.

Alton Stallings' father and mother predeceased him. Two children were born of their marriage: Alton and W. Herbert Stallings. W. Herbert Stallings had no issue, and died in 1918 or 1919. Alton Stallings' heirs and next of kin are his first cousins, and the issue of his first cousins. His first cousins and the issue of his first cousins, of the blood of his father, and not of the blood of his mother, are petitioners, except May Tyler, who is a respondent. His first cousins, and the issue of his first cousins, of the blood of his mother are respondents.

The petition alleges that the petitioners and respondents own a three-fifths undivided interest in fee in the Ball Gray Farm, and sets forth with particularity the interest of each.

The answer alleges that the three-fifths undivided interest in the Ball Gray Farm owned by Alton Stallings at his death was transmitted by descent from an ancestor, to-wit, his mother Emma V. Moore Stallings. That the petitioners, and the respondent May Tyler, are first cousins, or the issue of first cousins, of the blood of his father, and not of the blood of his mother, and under G.S. 29-1, Rule 4, inherit no part of Alton Stallings' interest in the Ball Gray Farm. That the respondents, other than May Tyler, are first cousins, or the issue of first cousins, of Alton Stallings of the blood of his mother, and inherit all his interest in the Ball Gray Farm by virtue of G.S. 29-1, Rule 4. The interest of each is set forth with particularity.

The proceeding was transferred to the Civil Issue Docket.

The following facts are shown from the evidence introduced by petitioners and respondents:

Clayton Moore, Sr., who had five children, and was the owner of Ball Gray Farm, died on 26 December 1881. By his Will, which is recorded in Will Book 3, page 222, in the office of the Clerk of the Superior Court of Martin County, he devised Ball Gray Farm in fee to his grandchildren, the grandchildren of

each of his five children taking a one-fifth undivided interest therein *per stirpes.*

All the children of James E. Moore, a son of Clayton Moore, Sr., sold and conveyed their one-fifth undivided interest in fee in Ball Gray Farm to William L. Stallings by deed recorded in Deed Book 000, page 52, in the office of the Register of Deeds of Martin County. William L. Stallings died in 1905, and by his Will, which is recorded in Will Book 4, page 484, in the office of the Clerk of the Superior Court of Martin County, devised his one-fifth undivided interest in fee in Ball Gray Farm to his wife Emma V. Moore Stallings.

Maude Moore Davis, and husband J. E. C. Davis, by deed of record in Deed Book SSS, page 434, in the office of the Register of Deeds of Martin County, sold and conveyed a one-fifth undivided interest in fee in Ball Gray Farm to Emma V. Moore Stallings. Maude Moore Davis was a granddaughter of Clayton Moore, Sr., and was devised a one-tenth interest in fee in this farm by the Will of her grandfather, and she had purchased from a kinswoman a one-tenth undivided interest in fee in the same farm.

Emma V. Moore Stallings died intestate in 1912 seized and possessed in fee of a two-fifths undivided interest in Ball Gray Farm, and of six small tracts of land. W. Herbert Stallings and Alton Stallings were her only children and heirs at law.

Emma V. Moore Stallings was a daughter of Clayton Moore, Sr. Her two sons by the Will of their grandfather Clayton Moore, Sr. were devised a one-fifth undivided interest in fee in the Ball Gray Farm.

On 26 September 1914 W. Herbert Stallings executed and delivered to A. R. Dunning, Trustee, to secure his note for $12,000.00 held by the Bank of Martin County for money borrowed, a deed of trust, which is of record in Book F-1, page 584, in the office of the Register of Deeds of Martin County, and in Book 182, page 584, in the office of the Register of Deeds of Bertie County. In this deed of trust W. Herbert Stallings conveyed to A. R. Dunning, Trustee, his heirs and assigns his three-tenths undivided interest in the Ball Gray Farm, his one-half undivided interest in the six small tracts of land inherited from his mother, a tract of land he had purchased from the Williamston Land and Improvement Company, his right and interest in five tracts of timber he had purchased, a mile of railroad iron, all implements used by him in his milling and logging business, all logs, sawed timber and shingles situate at his mill, a complete ginning outfit, two gasoline boats, all his stock of merchandise in his store at Jamesville, etc.

W. Herbert Stallings having defaulted in the payment of his indebtedness secured by the deed of trust, it was foreclosed, and

at the public sale the Bank of Martin County became the last and highest bidder at the price of $12,550.00 for all the real and personal property described therein. On 19 April 1916 A. R. Dunning, Trustee, conveyed to the Bank of Martin County in fee all the real and personal property described in the deed of trust by deed recorded in Deed Book N-1, page 484, in the office of the Register of Deeds of Martin County.

On 24 April 1916 Alton Stallings was duly adjudicated incompetent from want of understanding to manage his own affairs, and the Clerk of the Superior Court of Martin County appointed J. G. Godard his guardian. On 18 May 1916 J. G. Godard, guardian of Alton Stallings, instituted a special proceeding before the Clerk of the Superior Court of Martin County, by virtue of G.S. 33-31, and in his petition alleged as follows: His ward and the Bank of Martin County own each a one-half undivided interest in six small tracts of land of which Emma V. Moore Stallings died seized and possessed, and a three-tenths undivided interest in the Ball Gray Farm. The Bank of Martin County has offered to sell and convey to his ward its three-tenths undivided interest in the Ball Gray Farm in exchange for his ward's undivided one-half interest in the six small tracts of land. That it would be for the best interest of his ward to accept the offer—the details of which are set forth, and are supported by affidavits of freeholders of Martin County. Wherefore, the guardian prays authority to accept the offer. On 20 May 1916 the Clerk of the Superior Court of Martin County entered an order authorizing and empowering J. G. Godard, guardian, to sell and convey his ward's one-half undivided interest in the six small tracts of land described in the petition to the Bank of Martin County in exchange for its deed conveying to his ward its three-tenths undivided interest in the Ball Gray Farm. On 22 May 1916 the Resident Judge of the District confirmed and approved the Clerk's order. This special proceeding is recorded in Orders and Decrees Book 6, page 250, in the office of the Clerk of the Superior Court of Martin County.

On 30 May 1916 the Bank of Martin County in consideration of $10.00 paid to it, and pursuant to and in accord with the above order, sold and conveyed to Alton Stallings by deed recorded in Deed Book N-1, page 594, in the office of the Register of Deeds of Martin County, its three-tenths undivided interest in the Ball Gray Farm. On the same date, for the same consideration, and pursuant to the same order, J. G. Godard, guardian, sold and conveyed to the Bank of Martin County by deed recorded in Deed Book N-1, page 591, in the same office, his ward's one-half undivided interest in the six small tracts of land.

On 28 October 1926 J. G. Godard, guardian of Alton Stallings, instituted a special proceeding before the Clerk of the Superior

Court of Martin County, pursuant to G.S. 33-31, to sell his ward's three-fifths undivided interest in the Ball Gray Farm. His petition has these allegations: His ward is *non compos mentis*, and for ten years has been in the State Hospital for the Insane at Raleigh. His ward has practically no estate except a three-fifths undivided interest in the Ball Gray Farm. The farm is badly run down, and is yearly decreasing in value because his ward has no funds to keep it up and to repair the buildings. His ward's cousin Annie C. Glasgow owns the other two-fifths interest in the farm, and has given an option to C. C. Fleming and Ransom Roberson to buy her interest for $8,000.00. C. C. Fleming and Ransom Roberson have offered to buy his ward's interest for $12,000.00, to be paid as follows: $3,000.00 in cash, $1,000.00 on 1 January 1928, $1,500.00 on 1 January 1929, $3,250.00 on 1 January 1930, and $3,250.00 on 1 January 1931, all deferred payments to bear interest and to be secured by a deed of trust on the property. Such a sale would be for the best interest of his ward. Wherefore, the guardian prays authority from the court to sell and convey his ward's interest in the Ball Gray Farm to C. C. Fleming and Ransom Roberson according to their offer. On 28 October 1926 the Clerk of the Superior Court of Martin County authorized and empowered the guardian to sell and convey his ward's interest in the Ball Gray Farm to C. C. Fleming and Ransom Roberson for the price of $12,000.00 according to the terms of their offer. On 30 October 1926 the Resident Judge of the District confirmed and approved the Clerk's order. This special proceeding is recorded in Orders and Decrees Book 9, page 164, in the office of the Clerk of the Superior Court of Martin County.

On 5 November 1926 J. G. Godard, guardian of Alton Stallings, in consideration of $3,000.00 cash paid him by C. C. Fleming and Ransom Roberson, and in further consideration of their execution and delivery to him of their four notes in the sum of $9,000.00 secured by a deed of trust upon the land conveyed, sold and conveyed to C. C. Fleming and Ransom Roberson, their heirs and assigns, his ward's three-fifths undivided interest in the Ball Gray Farm by deed recorded in Deed Book W-2, page 434, in the public registry of Martin County. On the same date C. C. Fleming and Ransom Roberson secured their four notes to J. G. Godard, guardian of Alton Stallings, by a deed of trust upon a three-fifths undivided interest in the Ball Gray Farm, which deed of trust is recorded in Book Y-2, page 52, public registry of Martin County. A. R. Dunning was named trustee in the deed of trust.

J. G. Godard resigned as guardian of Alton Stallings, and M. S. Moore on 20 May 1929 was duly appointed to succeed him.

A. R. Dunning, trustee, in the Fleming and Roberson deed of

trust died, and in January 1933 Elbert S. Peel was duly substituted as trustee in his place.

C. C. Fleming and Ransom Roberson having defaulted in the payment of their note secured by the deed of trust, it was foreclosed and at the public sale M. S. Moore, guardian of Alton Stallings, became the last and highest bidder for a three-fifths undivided interest in Ball Gray Farm at the price of $6,000.00, and on 20 November 1942 Elbert S. Peel, substituted trustee, sold and conveyed to M. S. Moore, guardian of Alton Stallings, a three-fifths undivided interest in the Ball Gray Farm, by deed which is recorded in Book C-4, page 599, of the public registry of Martin County.

In the answer M. S. Moore, who was guardian of Alton Stallings, states that he claims no interest in the Ball Gray Farm, except as a first cousin of Alton Stallings of the blood of his mother.

The following issue was submitted to the jury:

"Do the petitioners and respondents own the tract of land described in paragraph one of the petition as tenants in common in the proportions set out in paragraph two of the petition?"

The judge instructed the jury, "if you believe the evidence and find the facts to be as all the evidence tends to show, it would be your duty to answer that issue, "Yes." The jury answered the issue, Yes.

Judgment was entered upon the verdict adjudging that petitioners and respondents own the tract of land described in the petition as tenants in common in the proportions set out in paragraph two of the petition.

Respondents appeal.

Clarence W. Griffin for Plaintiffs, Appellees.
Peel & Peel for Defendants, Appellants.

PARKER, J. At the Fall Term 1956 there was before us the case of *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491, which was a controversy without action to determine the sufficiency of a deed to convey title, submitted to the Court under G.S. 1-250. The plaintiff was a first cousin of Alton Stallings of the blood of his father, and the defendant was a first cousin of Alton Stallings of the blood of his mother. The question sought to be presented for decision in that case is the same question presented for decision in the instant case. We set the judgment aside, and remanded the case for further proceedings, because all the interested persons were not parties. In the instant case where all the interested persons are parties, the facts in some important respects are different from the facts in the former case.

The record shows that the respondents filed an answer, appealed from the judgment, and filed a brief. May Tyler is a respondent, and a first cousin of Alton Stallings of the blood of his father. It would seem that there is a mistake in including her among the appealing respondents.

W. Herbert Stallings and Alton Stallings acquired a one-fifth undivided interest in the Ball Gray Farm as devisees under the Will of their grandfather Clayton Moore, Sr. At the time of the death of the devisor, Clayton Moore, Sr., their mother Emma V. Moore Stallings, who was a daughter of Clayton Moore, Sr., was living, and would have taken a one-fifth undivided interest in the Ball Gray Farm as an heir, had he died intestate. Therefore, W. Herbert Stallings and Alton Stallings at the death of their grandfather were not his heirs or one of his heirs, within the meaning of G.S. 29-1, Rule 4, and necessarily took the one-fifth undivided interest in the Ball Gray Farm as purchasers in its general sense. W. Herbert Stallings and Alton Stallings took this one-fifth undivided interest by devise, and could not have claimed as heirs of their grandfather Clayton Moore, Sr., had the latter died intestate. It follows that the one-tenth undivided interest in the Ball Gray Farm devised to Alton Stallings by his grandfather must be treated as a new acquisition by him, and such a new acquisition in the event of his death intestate would descend to his first cousins, and the issue of his first cousins, on his father's side as well as to those on the side of his mother. G.S. 29-1, Rules 4 and 5; *Peel v. Corey*, 196 N.C. 79, 144 S.E. 559; *Osborne v. Widenhouse*, 56 N.C. 238; *Burgwyn v. Devereux*, 23 N.C. 583.

W. Herbert Stallings took a one-tenth undivided interest in the Ball Gray Farm as a purchaser in its general sense by the will of his grandfather. He took a one-fifth undivided interest in the same farm, and a one-half undivided interest in six small tracts of land, as one of the heirs of his mother, within the meaning of G.S. 29-1, Rule 4. He placed a deed of trust upon his three-tenths undivided interest in this farm, and upon his one-half undivided interest in the six small tracts of land, and upon a large amount of his other property, to secure his note for $12,000.00 for money borrowed from the Bank of Martin County. Having defaulted in the payment of his note, the deed of trust was foreclosed, the Bank of Martin County at the foreclosure sale became the last and highest bidder, and A. R. Dunning, Trustee in the deed of trust, conveyed by deed all the property covered by the deed of trust to the Bank of Martin County, its successors and assigns.

Alton Stallings took a one-fifth undivided interest in the Ball Gray Farm, and a one-half undivided interest in six small tracts of land, as one of the heirs of his mother within the meaning of

G.S. 29-1, Rule 4. He became insane in 1916, and remained insane until his death. On 24 April 1916 he was duly adjudicated incompetent from want of understanding to manage his affairs, and J. G. Godard was duly appointed his guardian by the Clerk of the Superior Court of Martin County. Pursuant to a decree duly entered in a special proceeding for the purpose on 20 May 1916 by the Clerk of the Superior Court of Martin County, and confirmed by the Resident Judge of the district on 22 May 1916, Alton Stallings' guardian sold and conveyed to the Bank of Martin County his ward's one-half undivided interest in the six small tracts of land transmitted to his ward by descent from his mother in exchange for the Bank of Martin County selling and conveying to his ward its three-tenths undivided interest in the Ball Gray Farm. The guardian was authorized by G.S. 33-31 to make such private sale, and the terms of the statute were carefully complied with.

The general rule is that, where the real estate of a lunatic is sold under a statute, or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic. Anno. 90 A.L.R., p. 909 *et seq.*, where the cases are assembled; Anno. Ann. Cas. 1915A, p. 158 *et seq.*; 18 C.J.S., Conversion, p. 75; 19 Am. Jur., Equitable Conversions, Sec. 23; Tiffany on Real Property, 3rd Ed., Sec. 306; Story's Equity Jurisprudence, 14th Ed., Sec. 1101; Pomeroy's Equity Jurisprudence, 5th Ed., Sec. 1167. See *Black v. Justice*, 86 N.C. 504, marginal p. 512; *Bryson v. Turnbull*, 194 Va. 528, 74 S.E. 2d 180; *McCoy v. Ferguson*, 249 Ky. 334, 60 S.W. 2d 931, 90 A.L.R. 891. The equitable doctrine is that upon the involuntary sale by a guardian, under a judicial decree, of the land of an insane person, incapable by reason of his insanity of intelligent assent and of dealing with his real estate, the proceeds of sale should be impressed with the character of the land sold, and should pass as such at his death if the disability of insanity has not been removed. The object of the rule is to prevent, as far as possible, any alteration by the guardian of a lunatic of the respective rights of the heirs of such lunatic in his real property should he die still a lunatic. See 89 Am. St. Rep., note pp. 313-314.

G.S. 33-32, codified under Ch. 33, Guardian and Ward, is captioned "Fund from sale has character of estate sold and subject to same trusts," and its relevant part reads: ". . . in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired . . ., shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper."

This statute does not in explicit words refer to the case where real property is substituted by real property. However, considering the general rule as to the sale of an insane person's real property under a court order, and the purpose and intent of G.S. 33-32, we conclude that the three-tenths undivided interest in the Ball Gray Farm conveyed to Alton Stallings by the Bank of Martin County in exchange for his one-half undivided interest in the six small tracts of land transmitted to him by descent from his mother would, upon his death intestate and continuously insane from prior to the appointment of his guardian until his death, nothing else appearing, descend as by law his one-half undivided interest in the six small tracts of land would descend, if his one-half undivided interest in the six small tracts of land had not been sold, conveyed and exchanged.

The transaction between the Bank of Martin County and the guardian of Alton Stallings was not a partition proceeding, as contended by respondents. It is generally held that a true partition among tenants in common of real property which they hold as an ancestral estate does not affect the ancestral character of the tract taken by each. The rationale of this view is that by such a transaction no new estate is acquired and no change in the title occurs. Each of the parties takes his allotment not by purchase, but is seized of it as much by descent from the common ancestor as he was by the undivided shares before the partition. *Elledge v. Welch*, 238 N.C. 61, 76 S.E. 2d 340; *In re Moran's Estate*, 174 Okla. 507, 51 P. 2d 277, 103 A.L.R. 227; Anno. 103 A.L.R. 231. The transaction between the Bank of Martin County and the guardian of Alton Stallings resulted in Alton Stallings acquiring a legal title to a three-tenths undivided interest in the Ball Gray Farm, which he did not own before.

After the execution of the deed from the Bank of Martin County, Alton Stallings had a three-fifths undivided interest in the Ball Gray Farm: a one-fifth undivided interest transmitted by descent from his mother, a one-tenth undivided interest as a devisee under the will of his grandfather, and a three-tenths undivided interest received from the Bank of Martin County. As set forth above, his one-tenth undivided interest derived by will from his grandfather was an estate of nonancestral character, and the remaining part, a five-tenths undivided interest, was an estate of an ancestral character.

In compliance with an order of court duly entered in a special proceeding instituted for that purpose, J. G. Godard, guardian of Alton Stallings, by deed dated 5 November 1926, conveyed to C. C. Fleming and Ransom Roberson, their heirs and assigns, his ward's three-fifths undivided interest in the Ball Gray Farm for a consideration of $12,000.00—$3,000.00 paid in cash, and

their four notes for $9,000.00 secured by a deed of trust upon the property conveyed. Fleming and Roberson having defaulted in the payment of their notes, the deed of trust was foreclosed, and the guardian of Alton Stallings became at the foreclosure sale the last and highest bidder for a three-fifths undivided interest in the Ball Gray Farm in the amount of $6,000.00. At the time of the sale Fleming and Roberson owed on their notes $10,086.48. No money passed. Elbert S. Peel, substituted trustee in the deed of trust, conveyed a three-fifths undivided interest in the Ball Gray Farm to the guardian of Alton Stallings.

When the three-fifths undivided interest of Alton Stallings, an insane person, in the Ball Gray Farm was sold by his guardian under court order to C. C. Fleming and Ransom Roberson, the proceeds of sale retained the character of real estate for the purpose of devolution on his death intestate while still insane, and would go as his interest in the farm would had it not been sold. G.S. 33-32; *Scull v. Jernigan*, 22 N.C. 144; *Gillespie v. Foy*, 40 N.C. 280; *March v. Berrier*, 41 N.C. 524; *Dudley v. Winfield*, 45 N.C. 91; *Jones v. Edwards*, 53 N.C. 336; *Bateman v. Latham*, 56 N.C. 35; *Wood v. Reeves*, 58 N.C. 271; *State ex rel. Allison v. Robinson*, 78 N.C. 222; *McLean v. Leitch*, 152 N.C. 266, 67 S.E. 490; *Brown v. Wilson*, 174 N.C. 636, 94 S.E. 416. The cases we have cited deal with the proceeds of a sale of an infant's real estate under an order of court, but we think the same principle applies to the proceeds of a sale of an insane person's real estate under an order of court.

But Fleming and Roberson did not, and probably could not, pay their $9,000.00 of purchase money notes, which notes represented the major part of the proceeds of sale of Alton Stallings' three-fifths undivided interest in the Ball Gray Farm. When his guardian used these unpaid purchase money notes to buy back for his ward at the foreclosure sale under the deed of trust securing them the identical three-fifths undivided interest in the Ball Gray Farm, which his insane ward formerly owned, and which he sold to Fleming and Roberson under court order, we conclude that, according to the general rule as to the sale of an insane person's real property under a court order, and the purpose and intent of G.S. 33-32, this three-fifths undivided interest in this farm, which the guardian bought back for his insane ward will descend under the facts here as this interest in the farm of his insane ward would descend if it had not been sold under court order.

The general rule, subject to an exception where the title passed but momentarily and without an intention of breaking the line of descent, is that if one *sui juris* who is in by descent conveys his legal title and interest in real property away, and it be conveyed back to him, the line of descent is broken, and

he holds thereafter by purchase and not by descent. Coke's Commentary upon Littleton, Vol. 1, 12b, 1st American from the 19th London Ed., corrected 1853, with Notes by Butler and Hargrave and including the note to the text; *Doe on the Demise of Harman v. Morgan*, 7 T.R. 103, 101 Eng. Reprint 878; Lord Halsbury's Laws of England, Vol. 8, p. 87 (1909); Broom and Hadley's Commentaries, top page 660; *Nesbitt v. Trindle*, 64 Ind. 183; *Holmes v. Shinn*, 62 N.J. Eq. 1, 49 A. 151; *Dudrow v. King*, 117 Md. 182, 83 A. 34, 39 L.R.A. (N.S.) 955, Ann. Cas. 1913E 1258; 39 L.R.A. (N.S.) 955; Anno. Ann. Cas. 1913E 1262; *Roney v. Dyer*, (Court of Appeals of Tenn., Western Section, *certiorari* denied by Tenn. Supreme Court 17 Feb. 1940), 161 S.W. 2d 640; 26A C.J.S., Descent and Distribution, pp. 547-548; 16 Am. Jur., Descent and Distribution, p. 845; Tiffany, Real Property, 3rd Ed., Vol. 4, p. 389; 12 Columbia Law Review, Breaking Descent by Alienation, p. 625. But in the instant case we have the sale of an insane person's real property under a court order, and we hold that under the facts here, and in view of the general rule as to the sale of an insane person's real property under a court order, and in view of G.S. 33-32, the conveyance to Fleming and Roberson, and the purchase back of the identical real property by the use of the unpaid purchase money notes did not break the line of descent.

G.S. 29-1, Rule 4, reads: "Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." G.S. 29-1, Rule 3, reads as follows: "Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living." G.S. 29-1, Rule 2, provides that females inherit with males, younger with older children, and as to advancements.

G.S. 29-1, Rule 5, reads: "Collateral descent of estate not derived from ancestor. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules."

Alton Stallings was continuously insane from prior to the

appointment of J. G. Godard as his guardian on 24 April 1916 until his death on 17 January 1956. He died intestate. He never married. His mother and father had predeceased him. He had one brother and no sister: his brother predeceased him, and had no issue. Alton Stallings' heirs at law are his first cousins, and the issue of his first cousins, of the blood of his father, and of the blood of his mother.

According to the uncontradicted evidence before us, Alton Stallings at his death had a one-tenth undivided interest in the Ball Gray Farm, which came to him as a devisee under the will of his maternal grandfather, his mother being alive when her father died, and this one-tenth undivided interest was an estate of nonancestral character, and descends, according to G.S. 29-1, Rule 5, to his first cousins, and the issue of his first cousins, of the blood of his father, and of the blood of his mother.

According to the uncontradicted evidence before us, Alton Stallings at his death had a five-tenths undivided interest in this farm, which was, as set forth above, an estate of ancestral character, and this five-tenths undivided interest descends, according to G.S. 29-1, Rule 4, to his first cousins, and the issue of his first cousins, of the blood of his mother.

M. S. Moore, guardian of Alton Stallings, disclaims in the answer filed by him and the other respondents any interest in the real property of his ward, except as an heir of his ward of the blood of his mother.

The assignment of error to the charge is sustained. A new trial is ordered.

New trial.

SAMUEL REID PRUETT v. LUCY LORAINE PRUETT.

(Filed 30 October, 1957.)

1. **Appeal and Error § 22—**
An exceptive assignment of error that the court erred in finding the facts as contained in the judgment is broadside.

2. **Appeal and Error § 49—**
Where appellant makes no contention that the evidence was insufficient to support the findings of fact or any of them, the facts as set forth by the lower court will be accepted as established.

3. **Divorce and Alimony § 5a—**
While the 1951 amendment to G.S. 50-8 eliminated the requirement that jurisdictional affidavit be filed with the complaint, it is required that the complaint, in addition to stating grounds for divorce, allege as constituent elements of the cause of action that complainant has been a resident of the State for at least six months next preceding filing of the pleading and, except where the action is based on two years separation, that the facts set forth as ground for divorce have existed

to complainant's knowledge for at least six months prior to the filing of the pleading, and such facts must be established by verdict of jury. G.S. 50-10.

4. **Divorce and Alimony § 22: Judgments § 27c: Courts § 9—**

Where, in an action for divorce, the complaint is properly verified and the court has jurisdiction of the parties and the subject matter, any error of the court in submitting an issue of abandonment when such ground for divorce is not supported by allegation, is an error of law, which may be corrected only by appeal, and another Superior Court judge may not set aside the judgment for such error at a subsequent term.

5. **Courts § 9: Divorce and Alimony § 22—**

A decree of divorce may be attacked directly by motion in the cause or collaterally when it appears on the face of the record that the court did not have power or jurisdiction to render the decree because the verdict did not establish all the facts prerequisite to a valid decree. If such decree is vacated, the verdict remains undisturbed and the cause remains in the trial court for further hearing as to the essential issuable facts not theretofore determined.

6. **Divorce and Alimony § 5c—Allegations held sufficient averment that ground for divorce had existed to complainant's knowledge for six months prior to filing of pleading.**

While, in an action for divorce *a mensa*, it is advisable that the pleading allege that the facts set forth therein as ground for divorce had existed to complainant's knowledge for at least six months prior to the filing of the pleading in accordance with the language of the statute, where the wife's pleading in her cross-action for divorce *a mensa* alleges gross mistreatment of her by him culminating in his locking her out of her home and ordering her away on a specified date more than six months prior to the filing of the pleading, with verification that the facts alleged therein are true to her own knowledge, her pleading will be held sufficient on this aspect.

7. **Same—**

Where the wife's pleading in her cross-action for divorce *a mensa* alleges gross mistreatment of her by him culminating in his locking her out of her home and ordering her away, the facts alleged are sufficient to constitute a wilful abandonment as a matter of law, and the pleading will be held sufficient on this aspect even though her pleading does not use the word "abandonment" or the word "wilful."

8. **Same—**

It is not required that the wife's pleading in her cross-action for divorce *a mensa* on the ground of abandonment allege that his failure to provide her adequate support had existed to her knowledge for at least six months prior to the filing of her pleading, since failure to provide adequate support is not an essential element of abandonment.

9. **Divorce and Alimony § 1b—**

While the husband's wilful failure to provide adequate support for his wife may be evidence of his abandonment of her, the mere fact that he provides adequate support for her does not negative abandonment as used in G.S. 50-7(1), abandonment under G.S. 50-7(1) not being synonymous with the criminal offense defined in G.S. 14-322.

10. Divorce and Alimony §§ 1b, 5c—

Where the wife's allegations in her cross-action for divorce *a mensa* are sufficient to establish wilful abandonment as a matter of law, G.S. 50-7, G.S. 50-7(1), G.S. 50-7(3), the court properly submits such issue upon supporting evidence, and it is immaterial that her pleading purported to state a cause of action for divorce *a mensa* under G.S. 50-7(3), or that her allegations were insufficient to allege a cause of action for divorce on that ground, since she is required by law to establish only one of the grounds for divorce *a mensa* specified in G.S. 50-7.

11. Divorce and Alimony § 22—

Where the wife's pleading in her cross-action for divorce *a mensa* sufficiently alleges the jurisdictional residence of the parties, facts constituting abandonment, G.S. 50-7(1), and that such facts had existed to her knowledge for more than two years prior to the institution of the action, and the jury finds that the husband had wilfully and without just cause abandoned the wife and failed to provide adequate support for her as alleged in her further answer and defense, *held*, the face of the record discloses that the decree of divorce *a mensa* in her favor was supported by sufficient facts found by the jury, and the decree is not subject to attack on such ground.

12. Divorce and Alimony § 2a—

Where, in the husband's action for divorce on the ground of two years separation, decree is entered in favor of the wife on her cross-action for divorce *a mensa* on the ground of his abandonment of her, such decree is a final judgment determining all issues raised by the pleadings, except possible modifications as to the amount of alimony, and a subsequent decree of absolute divorce in his action, entered without knowledge of the intervening decree of divorce *a mensa*, is void for want of jurisdiction.

13. Same—

A husband is not entitled to a decree of absolute divorce on the ground of two years separation within two years from the entry of a decree of divorce *a mensa* in favor of the wife on the ground of abandonment, since the decree in her favor establishes that the separation was caused by the husband's wilful abandonment, precluding his right to absolute divorce on the ground of such separation. But the decree of divorce *a mensa* legalizes the separation, and after the expiration of two years from the rendition of such decree, the husband may maintain an action for absolute divorce.

14. Courts § 9: Judgments § 17d—

When a judgment has been entered, based on a verdict which determines all issues raised by the pleadings, the cause has been fully determined, and the court at a subsequent term has no jurisdiction to proceed further with reference to the issuable facts therein determined.

APPEAL by plaintiff from *Sharp, Special Judge,* second week of 12 August, 1957, Schedule B Civil Term, of MECKLENBURG.

Plaintiff's appeal is from Judge Sharp's judgment of 23 August, 1957, wherein she sets forth the facts upon which the judgment is predicated, viz.:

"This cause coming on to be heard . . . upon a motion filed by the plaintiff on August 9, 1957, to set aside a divorce *a mensa*

granted to the defendant in this cause on June 11, 1957, by Judge Dan K. Moore, and a jury, and the order of Judge J. Frank Huskins, signed June 3, 1957, said motion being duly and regularly calendared for hearing, and being heard upon the record and statements of counsel made in open Court during the hearing, and the Court finds the following facts:

"1. That at this hearing the plaintiff is represented by Mr. Charles T. Myers; that Mr. L. L. Caudle was his attorney of record and signed the complaint in this case which was filed on May 13, 1957, and is present in Court at this hearing and is still attorney of record; that Mr. Myers has been employed by the plaintiff since August 5, 1957, the date on which his Honor J. Will Pless, Jr. signed an order directing the plaintiff to show cause why he shouldn't be adjudged in contempt of Court for failure to pay the alimony ordered by Judge Moore; that the defendant is represented by Mr. Hugh McAulay, her attorney of record since the institution of this action;

"2. That the case was instituted on May 13, 1957, when the plaintiff filed a complaint in which he prayed for a divorce on the grounds of two years' separation; that on May 21, 1957, the defendant filed an answer in which she denied the plaintiff's right to a divorce and set up a cross action for a divorce *a mensa* and alimony;

"3. That on June 3, 1957, Judge J. Frank Huskins entered an order which appears of record allowing the plaintiff $15.00 a week for her support and subsistence *pendente lite;*

"4. That this case came on for trial on June 11, 1957, before his Honor Dan K. Moore and a jury, at which time the jury answered the issues in favor of the defendant and the judgment which appears of record and is recorded in Minute Book 85, page 392, was signed by Judge Moore granting the defendant a divorce from bed and board from the plaintiff and ordering him to pay the sum of $12.50 a week for the support of his wife;

"5. That at the trial of the case on June 11, 1957, the plaintiff was represented by his attorney of record, L. L. Caudle, and the defendant was represented by her attorney of record, Mr. Hugh McAulay; that she introduced evidence in support of her allegations in the answer; that counsel for plaintiff informed Judge Moore that he did not desire at that time to prosecute his action against the defendant for an absolute divorce, and informed the Court that plaintiff had no evidence to introduce and no objection to the jury answering the issues which were submitted to the jury in favor of the defendant; that the issues which appear of record were duly submitted to the jury and answered in favor of the defendant;

"6. That thereafter on June 25, 1957, counsel for the plaintiff had this case calendared as an uncontested divorce case for

trial on June 25, 1957; that the case came on for trial along with many other uncontested divorce cases; that counsel for the plaintiff stated to the Court that a judgment had heretofore been entered providing for the support of the defendant and that it was understood by the plaintiff that the divorce would be granted subject to the existing order for defendant's support; that plaintiff understood he had to support defendant and consented thereto; that the Court was not informed that a divorce *a mensa* had, on June 11, been granted to the defendant in this same action and that issues had been answered against the plaintiff in this action; that the Court, under a complete misapprehension of the facts, submitted to the jury the usual three issues in an uncontested divorce case based on the grounds of two years' separation and the jury answered them in favor of the plaintiff and a judgment of absolute divorce was signed by the Court based upon the issues submitted; that the defendant was not present or represented at the hearing of the case on June 11, although her counsel Mr. McAulay states to the Court that he knew the case was calendared for trial as an uncontested divorce case but he thought he had no further obligation in the matter or duty to inform the Court that a divorce *a mensa* had been granted the defendant;

"7. That counsel for the plaintiff has stated to the Court that he acted in good faith and was ignorant of the fact that his client was not entitled to secure a divorce on the grounds of two years' separation in the same case in which his wife had secured a divorce *a mensa* on the grounds of his wilful abandonment, and the Court accepts his statement.

"Upon the foregoing findings of fact, the Court holds that the judgment of absolute divorce entered on June 25, 1957, was entered contrary to the practice of the Court; that on the record the plaintiff was not entitled to a divorce on the grounds of two years' separation; that the Court, having granted defendant a divorce *a mensa*, was without jurisdiction to grant plaintiff an absolute divorce in the same action; that said divorce is void and of no effect and should be set aside.

"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the judgment of absolute divorce signed by the undersigned on June 25, 1957, be, and the same is hereby set aside, declared null and void and ordered stricken from the records of this Court.

"The motion of the plaintiff to set aside the judgment of his Honor Judge Dan K. Moore dated June 11, 1957, and the order of his Honor Judge J. Frank Huskins dated June 3, 1957, is in all respects hereby overruled and disallowed."

Plaintiff excepted and appealed.

Charles T. Myers for plaintiff, appellant.
Hugh M. McAulay for defendant, appellee.

BOBBITT, J. Plaintiff's exceptive assignment of error, "That the Court erred . . . in finding the facts . . . as contained in Judgment," is broadside. *In re Sams*, 236 N.C. 228, 72 S.E. 2d 421. Moreover, plaintiff, in his brief, makes no contention that the evidence was insufficient to support the findings of fact or any of them. Hence, we accept as established the facts as set forth in the court's findings. *In re Estate of Cogdill*, 246 N.C. 602, 99 S.E. 2d 785.

The sole question for decision is whether the findings of fact and the facts appearing on the face of the record proper are sufficient in law to support the judgment.

The record of the trial on 11 June, 1957, before Judge Moore, shows that the jury answered issues establishing the marriage and the required residence and in addition thereto answered this crucial issue: "2. Did the plaintiff, wilfully and without just cause, abandon the defendant and fail to provide adequate support for her, *as alleged in the Further Answer and Defense of the defendant?* Answer: Yes." (Italics added.) The judgment, granting to defendant a divorce from bed and board, recites that the cause was heard "upon the cross action of the defendant," to wit, the issues raised by defendant's answer and plaintiff's reply thereto.

The grounds on which plaintiff based his motion to set aside Judge Moore's judgment of 11 June, 1957, are these: (1) That defendant, in her cross action, failed to allege that the facts set forth therein as grounds for a divorce from bed and board had existed to her knowledge for at least six months next preceding the filing of her pleading, and that no issue relating to this essential allegation was submitted to the jury. (2) That defendant, in her cross action, purported only to set up a cause of action for divorce from bed and board under G.S. 50-7(3), to wit, that by cruel and barbarous treatment he had endangered her life, and that her allegations were insufficient to state a cause of action on this ground. (3) That defendant, in her cross action, failed to allege that plantiff abandoned her or that his conduct was wilful; that she failed to allege any specific time when she called on him for support or when he failed to provide adequate support; and that she failed "to specifically set forth the circumstances under which the purported violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband."

The verdict (second issue) established that plaintiff, wilfully and without just cause, abandoned defendant and failed to

provide adequate support for her "as alleged in the Further Answer and Defense of the defendant."

Before examining the allegations of the cross action to determine what facts were alleged therein by defendant and established by the verdict, attention is called to the fact that the General Assembly, by Ch. 590, 1951 Session Laws, rewrote G.S. 50-8. Prior to the 1951 Act, the court acquired no jurisdiction of an action for divorce, absolute or from bed and board, unless the plaintiff filed with the complaint an affidavit containing required statutory averments. Since such affidavit was a prerequisite to jurisdiction, the jurisdiction of the court was subject to challenge either before or after judgment on the ground that the required statutory averments, although set forth sufficiently, were in fact false. Upon such challenge, questions of fact to be resolved by the court were presented. Thus, the distinction was drawn between the material facts constituting the cause of action to be alleged in the complaint, which were for jury determination, and the jurisdictional facts required to be set forth in the affidavit, which were for court determination. *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617, and cases cited.

The 1951 Act eliminated the requirement that such jurisdictional affidavit be filed with the complaint. The only requirement now is that "in all actions for divorce the complaint shall be verified in accordance with the provisions of G.S. 1-145 and G.S. 1-148." But the 1951 Act, now incorporated in G.S. 50-8, to the extent pertinent here, specifically requires that the plaintiff shall set forth in his or her complaint that the plaintiff or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce (except where the alleged cause for divorce is two years separation) have existed to his or her knowledge for at least six months prior to the filing of the complaint. Hence, to allege a cause of action for divorce, a plaintiff, in addition to one or more of the grounds for divorce specified in G.S. 50-5 or G.S. 50-7, must allege the additional material facts now required by G.S. 50-8.

G.S. 50-10, in pertinent part, provides: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, ..." Consequently, upon the basic principle that a plaintiff must prove what he must allege, a plaintiff is entitled to a judgment of divorce only if the issues submitted and answered in favor of the plaintiff establish, *inter alia*, (1) the requisite facts as to residence, and (2) that (ex-

cept where the alleged cause for divorce is two years separation) the facts set forth as grounds for divorce have existed to his or her knowledge for at least six months prior to the filing of the complaint. "The pleadings in the action present the issue which should be submitted to a jury." *Kinney v. Kinney,* 149 N.C. 321, 63 S.E. 97; *Carpenter v. Carpenter, supra.* Thus, the legal effect of the 1951 Act is that the allegations required to be set forth in the complaint are now indispensable constituent elements of plaintiff's cause of action and the facts so alleged must be established by the verdict of a jury.

Here defendant's pleading was verified in accordance with the present statutory requirement. The court had jurisdiction of the parties and of the subject matter.

Plaintiff's counsel, present at the trial on 11 June, 1957, did not object to the issues submitted by Judge Moore, nor did plaintiff appeal from the judgment based upon the verdict. If, as plaintiff now contends, defendant's pleading did not warrant the second issue, the submission thereof and hence the judgment based thereon were erroneous. In such case, upon expiration of the term at which the judgment was rendered, it could be corrected only by this Court; for, as stated by Professor McIntosh, "after the term neither the judge who rendered the judgment nor another judge holding the court can set it aside for such error, and the only remedy is an appeal or a *certiorari* as a substitute for an appeal." McIntosh, N.C.P.&P., p. 736; *Mills v. Richardson,* 240 N.C. 187, 191, 81 S.E. 2d 409. Judge Moore's judgment could not be set aside for such alleged error of law by another Superior Court judge at a subsequent term, nor will it be reviewed by this Court for such alleged error of law in the absence of exception and appeal. *Burrell v. Transfer Co.,* 244 N.C. 662, 665, 94 S.E. 2d 829.

True, a decree of divorce will be declared void if the court was without power or jurisdiction to render it *because of the insufficiency of the facts found by the jury,* when this appears *on the face of the record.* Such decree may be attacked directly by motion in the cause, *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7, or collaterally, *Saunderson v. Saunderson,* 195 N.C. 169, 141 S.E. 572. In such case, as explained by *Stacy, C. J.,* in *Ellis v. Ellis, supra,* "the vacation of the judgment does not mean that the verdict already rendered should be set aside," but only that the court lacked the power to grant the relief contained in the judgment on the basis of the facts established by the verdict. In such case, with the judgment vacated but the verdict undisturbed, the cause is for further hearing as to essential issuable facts not theretofore determined.

To invoke this principle, it must appear, as in the *Ellis* and *Saunderson cases,* that the verdict did not establish all the facts

prerequisite to a judgment of divorce. In this connection, it is noted that no exact formula is prescribed for the settlement of issues. "Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly." *Winborne, J.* (now *C. J.*), in *Cherry v. Andrews*, 231 N.C. 261, 56 S.E. 2d 703; *McGowan v. Beach*, 242 N.C. 73, 86 S.E. 2d 763, and cases cited.

Plaintiff's allegations as to residence were admitted by defendant. In paragraph 3 of the complaint, plaintiff alleged: "3. That the plaintiff and defendant were married to each other on the 9th day of January, 1936, and lived together as man and wife until the second day of May, 1955, when the defendant deserted the plaintiff without cause, and that they have not cohabited since said date of separation." Defendant's answer to said paragraph 3 was as follows: "3. That the allegations contained in paragraph 3 of plaintiff's complaint are untrue and denied, except as hereinafter set forth in defendant's further answer, defense and cross action."

We note presently that defendant's further answer, defense and cross action, while admitting that plaintiff and defendant were lawfully married, alleged that they were married on 9 January, 1930, *not* 9 January, 1936, and that they separated the latter part of May or first of June, 1955, *not* on 2 May, 1955. Defendant's allegations as to the cause of said separation are considered below.

In pleading her cross action for divorce from bed and board, defendant alleged, in substance, that she and plaintiff were lawfully married 9 January, 1930, and that they were residents of North Carolina and had been such residents for more than two years next preceding the commencement of the action. She then alleged that she had worked in a factory for more than twelve years and had turned the wages derived from her labor over to plaintiff, her husband; that she had been at all times during their marriage a kind and dutiful wife; that for many years she had cared for plaintiff's invalid mother; and that prior to their separation her health had broken down and she had become unable to perform all the duties required of her by plaintiff.

Thereupon, defendant alleged the circumstances under which she and plaintiff separated in the following language: "that sometime during the latter part of May or the first of June, 1955, . . . upon this defendant's returning to the home of the plaintiff and defendant, . . . this defendant found that she had been locked out and was ordered away from the home by the plaintiff, and that this defendant walked a distance of several miles and sought refuge with some of the neighbors; that later this defendant went to the home of her father and has not com-

pletely recovered from said illness; that this defendant is at the present time under the care of physicians; that this defendant has called upon plaintiff to buy her medicine, to help her with some clothes, to assist her in some way in paying for medical attention and that this defendant has been informed by plaintiff, recently, that she would not get a damn thing from him."

As to what had occurred prior to the latter part of May or the first of June, 1955, the occasion when plaintiff locked her out of her home and ordered her away and caused her to seek refuge in her father's house, defendant alleged, briefly stated, that defendant had "struck, beat, choked and otherwise mistreated" her; that on numerous occasions he had threatened to kill her; and that, by his cruel and barbarous treatment, he had endangered her life.

True, defendant's pleading contains no allegation "that the facts set forth therein as grounds for divorce (had) existed to . . . her knowledge for at least six months prior to the filing of the (her) complaint." The question presented is whether the allegations of fact in her pleading, quoted above, relating to what occurred the latter part of May or the first of June, 1955, to wit, that plaintiff locked her out of her home and ordered her away, this being the *culmination* of gross mistreatment consisting of beatings, chokings and threats on her life, constitute a sufficient compliance with G.S. 50-8. We answer this question in the affirmative. Ordinarily, it would seem advisable that the required allegation be made in accordance with the language of the statute. Yet, when it appears from the allegations that the facts constituting the abandonment occurred the latter part of May or the first of June, 1955, and that defendant was necessarily present in person and directly involved in what then occurred, the conclusion seems inescapable that she, in substance and in effect, alleged that the facts set forth by her as grounds for divorce had existed to her knowledge for at least six months prior to the filing of her pleading. It is noted that in respect of these allegations, defendant's verification of her pleadings is that "the foregoing Answer" is "true of her own knowledge."

Moreover, while defendant did not use the word "abandonment" or the word "wilful" in her said pleading, we are constrained to hold that the facts alleged by defendant are sufficient to constitute wilful abandonment as a matter of law. It is noted that "abandonment imports wilfulness." *Workman v. Workman*, 242 N.C. 726, 89 S.E. 2d 390.

Even so, plaintiff contends that defendant's allegations as to his alleged failure to provide adequate support for her are too indefinite to support a similar conclusion in that it does not

appear affirmatively from the facts alleged that such failure to provide adequate support for her had existed to her knowledge for at least six months prior to the filing of her pleading. As to this, further analysis of defendant's pleading is unnecessary for the reason that no allegation as to alleged failure to provide adequate support was required.

G.S. 50-7 provides, as a ground for divorce from bed and board: "1. If either party abandons *his* or *her* family." (Italics added.) It is available to the husband as well as to the wife. Abandonment under G.S. 50-7(1) is not synonymous with the criminal offense defined in G.S. 14-322. "In a prosecution under G.S. 14-322, the State must establish (1) a wilful abandonment, and (2) a wilful failure to provide adequate support." *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770.

True, the husband's wilful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as used in G.S. 50-7(1). "A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete." 17 Am. Jur., Divorce and Separation Sec. 98. As pointed out by *Hoke, J.* (later *C. J.*), in *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857: ". . . a suit for divorce because of being maliciously turned out of doors, under subsection 2, section 1562, of Revisal (now G.S. 50-7), is but an instance of a wrongful abandonment provided for in subsection 1 of the statute, and the basic facts in the two suits being the same, . . ."

As to plaintiff's contention that defendant's cross action purports to be under G.S. 50-7(3), to wit, that by cruel and barbarous treatment he endangered her life, we need not determine whether defendant's allegations were sufficient to allege a good cause of action for divorce from bed and board on this ground. No issue was submitted bearing directly on this subject. Suffice to say, we think Judge Moore was correct in interpreting defendant's pleading as sufficient to allege the wilful abandonment of defendant by plaintiff and in submitting the issue so raised. To obtain a divorce from bed and board, the law required that defendant establish one, but only one, of the grounds therefor specified in G.S. 50-7. *Deaton v. Deaton,* 234 N.C. 538, 67 S.E. 2d 626; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909; *Hagedorn v. Hagedorn,* 211 N.C. 175, 189 S.E. 507; *Albritton v. Albritton,* 210 N.C. 111, 185 S.E. 762.

We have not overlooked *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420, and similar cases, wherein it is held, in substance, that a wife, in alleging a cause of action for divorce from bed and board under G.S. 50-7(3) and (4), must set out with particularity the wrongful acts of the husband upon which she relies and also that such acts were without adequate provocation on her part. It may be, a question not now before us, that this rule would apply where a separation alleged to constitute an abandonment under G.S. 50-7(1) is alleged to have been caused by conduct defined in G.S. 50-7(3) and (4). See *Brooks v. Brooks, supra.* Be that as it may, here defendant's allegations to the effect that plaintiff locked her out of her home, ordered her away and caused her to seek refuge in her father's house, considered with her other allegations, are deemed sufficient without further elaboration. The distinction becomes clear when we refer to the factual situation in *Ollis v. Ollis, supra.* There the wife admittedly left her husband. She did not allege that her husband was even at home when she separated herself from him. In short, it was not alleged that the separation was caused by anything that occurred *at the time of the separation.* Her allegations, which related to antecedent matters, were made in part to justify her conduct in so separating herself from him.

Before leaving this phase of the case, mention should be made of the fact that plaintiff in his said motion asserted that he had "a good and meritorious defense to the defendant's action for divorce from bed and board." Indeed, in his reply, he had so alleged prior to the trial on 11 June, 1957. However, the motion was not made under G.S. 1-220, that is, to set aside the judgment on the ground of mistake, inadvertence, surprise or excusable neglect. Hence, Judge Sharp made no findings of fact as to plaintiff's asserted meritorious defense nor does it appear that plaintiff requested her to do so.

Having reached the conclusion that plaintiff's attack on the judgment of 11 June, 1957, cannot be sustained, it follows that the purported second trial before Judge Sharp on 25 June, 1957, conducted by her under a complete misapprehension of the facts, was a nullity; and that Judge Sharp's judgment of 23 August, 1957, wherein she set aside the verdict and judgment of 25 June, 1957, must be affirmed. This is true because the jury on 11 June, 1957, had fully determined all issues raised by the pleadings, and Judge Moore's judgment of that date (except for modifications as to the amount of alimony payments required) was a final judgment. *Cameron v. Cameron,* 235 N.C. 82, 87, 68 S.E. 2d 796.

The verdict of 11 June, 1957, established that the separation occurred the latter part of May or first of June, 1955. Plaintiff instituted this action 13 May, 1957, alleging a separation on 2

May, 1955, an allegation denied by defendant. Hence, the verdict established that plaintiff and defendant had *not* lived separate and apart continuously for two years or more next preceding commencement of plaintiff's action as he had alleged.

Moreover, the verdict of 11 June, 1957, established that the separation was caused by plaintiff's wilful abandonment of defendant under the circumstances alleged by her. This defeated plaintiff's action for absolute divorce on the ground of such separation.

In *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E. 2d 466, where the statutory changes and prior decisions are reviewed, *Stacy, C. J.*, says: "It is true, the statute under review (now G.S. 50-6) provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years,' etc. However, it is not to be supposed the General Assembly intended to authorize one spouse wilfully and wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. (Citations omitted.) Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years, without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by the complainant's own dereliction. (Citation omitted.) Out of unilateral wrongs arise rights in favor of the wronged, but not in favor of the wrongdoer. One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it." In accord: *Pharr v. Pharr*, 223 N.C. 115, 25 S.E. 2d 471; *Taylor v. Taylor*, 225 N.C. 80, 33 S.E. 2d 492; *Pearce v. Pearce*, 226 N.C. 307, 37 S.E. 2d 904; *Johnson v. Johnson*, 237 N.C. 383, 75 S.E. 2d 109. See also, *Young v. Young*, 225 N.C. 340, 343, 34 S.E. 2d 154; *Cameron v. Cameron, supra*.

When a judgment has been entered, based on a verdict which determines all issues raised by the pleadings, the cause has been fully determined; and the court at a subsequent term has no jurisdiction to proceed further with reference to issuable facts theretofore fully and finally determined. It is quite plain that Judge Sharp would not have proceeded with the purported trial on 25 June, 1957, had she been advised of the prior determinations made in the trial before Judge Moore on 11 June, 1957.

While it has been determined that the separation that occured the latter part of May or first of June, 1957, was caused by plaintiff's wilful abandonment of defendant, the effect of the judgment of 11 June, 1957, was to legalize the separation. Hence, it would seem that plaintiff, upon the expiration of two years from 11 June, 1957, would then be at liberty to maintain

an action for absolute divorce under G.S. 50-6. *Lockhart v. Lockhart*, 223 N.C. 123, 25 S.E. 2d 465; and 223 N.C. 559, 27 S.E. 2d 444.

Affirmed.

O. W. DARDEN, ADMINISTRATOR C. T. A. OF THE ESTATE OF J. C. DARDEN, DECEASED, v. L. E. BOYETTE AND M. F. SMITH, ADMINISTRATORS OF THE ESTATE OF RUBY DARDEN, DECEASED.

(Filed 30 October, 1957.)

1. **Trial § 21—**

Where plaintiff has no right, title or interest in the chose in action so as to entitle him to maintain the action for its recovery, nonsuit is proper.

2. **Wills § 33f—**

Where a will bequeaths and devises all of testator's property, real and personal, to testator's wife for life with full power of disposition, with further provision that any of the property not disposed of by the widow during her lifetime should go to testator's heirs at law *per stirpes*, the life estate devised in clear and express words will not be enlarged to a fee, and the limitation over after the life estate is effective.

3. **Executors and Administrators § 8: Descent and Distribution § 2½—**

Upon the death of a person his personal property vests in his executor or administrator, and his real property vests in his devisees, or descends to his heirs.

4. **Executors and Administrators § 20—**

Where the personal representative has paid decedent's debts, the costs of administration and all charges against the estate, the balance remaining in his hands shall be delivered and paid to the person or persons to whom the same may be due by law or the will. G.S. 28-162.

5. **Executors and Administrators § 26—**

When an executrix closes the administration of the estate after paying all debts and charges against the estate, and distributes the balance of the personal property to herself as life tenant in accordance with the will, the delivery of the estate to herself as life tenant inures to the benefit of the remaindermen, and when the will creates no trust and imposes no duty upon anyone in regard to the remainder upon the termination of the life estate, such personal property ceases to be property of the estate or subject to any further administration as a part of the estate, and the personal representative becomes *functus officio* in regard thereto.

6. **Executors and Administrators § 9: Parties § 1—**

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. G.S. 1-57.

7. **Executors and Administrators § 10—**

An administrator *c.t.a.* has no greater rights and powers and is not

subject to greater duties than the executor named in the will. G.S. 28-24.

8. **Executors and Administrators § 9—Where remainder in personalty vests by operation of law upon death of life tenant, testator's personal representative may not maintain action therefor against administrator of life tenant.**

The will bequeathed the personalty in question to testator's wife for life, with power of disposition, and directed that the property not disposed of during her lifetime should go to his heirs. The widow as executrix settled the estate and paid the remaining personalty to herself in accordance with the will. Thereafter she died and her husband's administrator *c.t.a.* brought this action against her administrators to recover the personalty for the remaindermen under the husband's will. The will set up no trust and imposed no duty upon anyone in regard to the remainder. *Held:* The executrix was *functus officio* in regard to such personalty and therefore the administrator *c.t.a.* was also *functus officio* in regard thereto, and therefore G.S. 1-63 does not empower the administrator *c.t.a.* to maintain the action, since he is not a trustee of an express trust nor a person expressly authorized by statute to bring the action.

9. **Same: Bills and Notes § 16—**

While ordinarily only the personal representative of a deceased payee may maintain an action on a note maturing prior to the payee's death, this rule does not apply when the personal representative by valid sale or pledge or by distribution of the note to the legatee in accordance with the will, vests title to the note in the purchaser or legatee.

10. **Executors and Administrators § 9—**

The will bequeathed the notes in question to testator's wife for life with remainder to testator's heirs. The widow as executrix settled the estate and took possession of the personalty under the will. Thereafter, she died and her husband's administrator *c.t.a.* brought this action against her administrators to recover the notes. *Held:* In the absence of a showing by plaintiff that the notes were not endorsed or assigned to the life tenant or that distribution of the estate did not pass title to the notes out of the husband's personal representative, the administrator *c.t.a.* has failed to show that he is the real party in interest to sue on the notes, and nonsuit should have been entered.

APPEAL by the defendants, administrators of the estate of Ruby Darden, deceased, from *Morris, J.*, April Term 1957 of SAMPSON.

From a judgment entered upon a verdict in favor of the plaintiff, the defendants appeal.

Butler & Butler for Plaintiff, Appellee.

J. Faison Thomson & Son and Britt & Warren for Defendants, Appellants.

PARKER, J. J. C. Darden and Annie Ruby Darden were husband and wife. No child was born of their marriage. J. C. Darden died on 3 January 1953. After his death his will was duly probated, and is of record in Will Book 11, p. 503 *et seq.*, in the

Office of the Clerk of the Superior Court of Sampson County. He appointed his wife as sole executrix of his will.

The relevant items of his will are:

"ITEM 1. I give, devise, and bequeath unto my beloved wife, Annie Ruby Darden, for and during her natural life, all my property, real and personal, of every nature and kind, and wheresoever located, which I may have and own at the time of my death, after first paying therefrom my funeral expenses and any just debts that I may then owe, to have and use in any way or manner she may see fit, and with full power to dispose of the same by deed or will in fee simple.

"ITEM 2. At the time of the death of my said wife, if there shall be any of said property, real or personal, left undisposed of by my said wife during her lifetime, the same shall, after payment of her funeral expenses in case her own estate is insufficient to pay the same, be divided among my then heirs at law, *per stirpes* and not *per capita*."

On 14 January 1953 letters testamentary were duly issued by the court to his wife as executrix of his estate. She entered upon the administration of his estate, and administered it according to the will. On 6 January 1954 she filed an inventory with the court setting forth all property received by her as executrix of his estate, which is as follows: $7,005.78 money deposited in two banks, $1,300.00 in U. S. Postal Savings, $28.05 from the Flue Cured Stabilization Corporation, and hogs, mules and farming equipment valued at $1,117.21, a note of Isabella Stevens for $898.17, and a note of Stephen Bass for $634.61, making a total of $10,983.82.

On 25 March 1954 the executrix filed her final account with the court, and requested the court to accept it as such, and to discharge her bond from any future liability. In this final account she showed receipts of $8,646.04, itemized as follows: money received from two banks $7,005.78, U. S. Postal Savings $1,300.00, money received from the sale of hogs $312.21, money received from tobacco $28.05. She showed disbursements in the amount of $1,527.72, consisting of funeral expenses, taxes and cost of administration. Her final account showed cash in the sum of $7,118.32, which she paid to herself under her husband's will. The Record does not show whether the court accepted her final account or not, and discharged her bond. However, the plaintiff in paragraph 4 of his complaint alleges that she administered her husband's estate pursuant to his will, and the answer admits such allegation to be true. The plaintiff further alleges in his complaint that after the payment of funeral expenses, and all debts of the deceased, and the costs of admin-

istration, a net balance of cash belonging to the estate of J. C. Darden in the sum of $7,118.32 was received by Annie Ruby Darden under her husband's will.

Annie Ruby Darden died intestate on 17 July 1954. The defendants were duly appointed by the court administrators of her estate. The plaintiff offered in evidence an Inventory and Report of Sale of the estate of Annie Ruby Darden, made by her administrators to the court, which tend to show that Annie Ruby Darden at the time of her death had in her possession, and undisposed of, the following property she took under her husband's will: the Isabella Stevens note, the Stephen Bass note, farming utensils, which her administrator sold for $1,621.17, and money. This inventory showed the administrators of her estate received personal assets of $42,478.36.

The heirs of J. C. Darden at the death of his wife were his five brothers, his four sisters, and the six children of a deceased brother. The uncontradicted evidence shows that Annie Ruby Darden's own estate was sufficient to pay her funeral expenses.

The plaintiff alleges in his complaint that as administrator of the estate of J. C. Darden, he is the owner, and entitled to the immediate possession, of the sum of $7,118.32, which Annie Ruby Darden received from her husband's estate by his will, of $1,621.17 representing the price received by her administrators at the sale of the farming utensils she received from her husband's estate by his will, and of the Isabella Stevens and the Stephen Bass notes she received from her husband's estate by his will. That Annie Ruby Darden took only a life estate by her husband's will, and that upon her death his property is to be divided among J. C. Darden's then heirs at law *per stirpes*. Wherefore, the plaintiff prays that he be adjudged the owner, and entitled to the immediate possession of this property.

The following issues were submitted to the jury, and answered as appears:

"1. Is the plaintiff the owner and entitled to the possession of the money, notes and tangible personal properties described in the complaint received by defendants' intestate, Annie Ruby Darden, from the Estate of J. C. Darden? Answer: YES.

"2. What was the amount of cash received by the defendants' intestate, Annie Ruby Darden, from the Estate of J. C. Darden? Answer: $7,118.32.

"3. What was the value on 17 July, 1954, of the tangible personal property received by defendants' intestate, Annie

Ruby Darden, from the Estate of J. C. Darden? Answer: $1,621.17."

Judgment was entered that plaintiff as administrator *c. t. a.* of the estate of J. C. Darden, deceased, is the owner of and entitled to the immediate possession of the Isabella Stevens and Stephen Bass notes, and shall recover from the defendants $7,118.32, with interest, and $1,621.17 with interest.

The defendants offered no evidence. They alleged in their answer as a defense that J. C. Darden had received money and property of his wife, which he deposited and invested in his name, and that at his death he was holding this property as trustee for her.

Defendants assign as error the denial of their motion for judgment of nonsuit. The defendants contend that the uncontradicted evidence clearly shows that the plaintiff, administrator c. t. a. of the estate of J. C. Darden, deceased, has no right, title or interest in the action, and therefore should be nonsuited. If such contention is correct, it was error not to nonsuit the plaintiff. *Chapman v. McLawhorn,* 150 N.C. 166, 63 S.E. 721; *Vaughan v. Davenport,* 157 N.C. 156, 72 S.E. 842; *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797; *Hunt v. State,* 201 N.C. 37, 158 S.E. 703; *McCarley v. Council,* 205 N.C. 370, 171 S.E. 323.

Our North Carolina cases hold, and the great majority of the cases from other jurisdictions are in accord, that where an estate for life, with remainder over, is given by will, with a power of disposition in fee of the annexed remainder, the limitation for the life of the first taker will control, and the life estate will not be enlarged to a fee. *Voncannon v. Hudson Belk Co.,* 236 N.C. 709, 73 S.E. 2d 875; *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476; *Alexander v. Alexander,* 210 N.C. 281, 186 S.E. 319; *Helms v. Collins,* 200 N.C. 89, 156 S.E. 152; *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Chewning v. Mason,* 158 N.C. 578, 74 S.E. 357; *Patrick v. Morehead,* 85 N.C. 62; *Troy v. Troy,* 60 N.C. 624; Anno. 36 A.L.R. p. 1180 *et seq.,* where the cases are cited from 24 states, from England and from Canada; 33 Am. Jur., Life Estates, Remainders, etc., sec. 21.

A life estate devised in clear and express words to testator's wife is not enlarged to a fee by power given to the life tenant to use the life estate in any way or manner she may see fit, where a remainder over is given by express words in the will of any of his property left undisposed of by his wife during her life, at her death, to his then heirs at law. *Chestnut v. Chestnut,* 300 Pa. 146, 151 A. 339, 75 A.L.R. 66; *Peckham v. Lego,* 57 Conn.

553, 19 A. 392, 7 L.R.A. 419, 14 Am. St. Rep. 130; Note 7 L.R.A. 419; 33 Am. Jur., Life Estates, Remainders, etc., sec. 27.

In *Jones v. Fullbright,* 197 N.C. 274, 148 S.E. 229, there was a bequest to the wife by the husband in his will of all his personal property during her life to be used and disposed of by her as she saw fit during life, and the proceeds not disposed of by her before death, shall be collected and sold for cash by a commissioner appointed by the Superior Court of Henderson County, who shall pay the balance, after payment of necessary expenses, one-half to the heirs of his wife and one-half to the heirs of his dead sisters. It was held that the wife took a life estate, and had no power to dispose of any of the property by will.

In *Williard v. Weavil,* 222 N.C. 492, 23 S.E. 2d 890, it was held that a life estate with remainder over to designated persons can be created by will in money.

Annie Ruby Darden was given a life estate by her husband's will in all his property. She died intestate. Her own estate was more than sufficient to pay her funeral expenses. Any of her husband's estate left by her undisposed of during her life-time, at her death, vested by the terms of his will in his then heirs at law, to be divided among them *per stirpes. Voncannon v. Hudson-Belk Co., supra,* p. 712, in our Reports and p. 878 in the S.E. Reporter.

When a person dies, his personal property vests upon his death in his executor or administrator, and his real property vests in his devisees, or descends to his heirs. *Moore v. Jones,* 226 N.C. 149, 36 S.E. 2d 920; *Linker v. Linker,* 213 N.C. 351, 196 S.E. 329.

In 21 Am. Jur., Executors and Administrators, sec. 282, it is written: "According to the common law rule as now recognized and followed in most jurisdictions of the United States, the personal property of a decedent vests upon his death in his executor or administrator for the purpose of administration, and for this purpose only."

In *Michigan Trust Co. v. Grand Rapids,* 262 Mich. 547, 247 N.W. 744, 89 A.L.R. 840, the Court said: "The title of an administrator or executor of a decedent to the personal property of deceased is so vested for the purposes of administration, at the conclusion of which the balance remaining will be distributed."

G.S. 28-162 provides that upon the payment of the decedent's debts, of the costs of administration, and charges against the estate, the balance remaining in the hands of an executor or administrator shall be delivered and paid to the persons, or person, to whom the same may be due by law or the will.

The allegations of plaintiff's complaint, together with the admissions in the answer, and the uncontradicted evidence show that Annie Ruby Darden, executrix of the estate of her deceased husband, paid his funeral expenses, all the debts of his estate, ended its administration, and distributed the balance of the personal property of the estate to herself, as she was given a life estate under the will. The will clearly shows that the testator intended to confide the possession of such balance of the personal property of his estate to his widow during her life. Under the uncontradicted facts here, the executrix had a legal right to terminate the administration of the estate on 25 March 1954, without waiting for the expiration of two years from her qualification as executrix. G.S. 28-162; *Turnage v. Turnage,* 42 N.C. 127; *Snow v. Boylston,* 185 N.C. 321, 117 S.E. 14; McIntosh, N.C. Practice and Procedure, 2d Ed., Vol 2, p. 474.

In the present case the will provides only for the payment of funeral expenses and debts before the widow is entitled to receive all the remaining personal property for life. No trust estate was created by the will, and the will imposed no duty upon anyone to be performed as to the remainder upon the termination of the life estate. The will created no express or implied trust in the plaintiff as administrator c.t.a., or anyone, to collect and sell the remainder, as did the will in *Jones v. Fullbright, supra,* or to manage the remainder for testator's three blind children, as did the will in *Smathers v. Moody,* 112 N.C. 791, 17 S.E. 532, or to do anything or to perform any duty in respect to the remainder when the life estate terminated. When the executrix closed the administration of the estate, and distributed the balance of the personal property of the estate to herself as life tenant, it inured to the benefit of the remaindermen, and such personal property ceased to be either property of the estate of her husband, or subject to any further administration as a part of that estate. *In re Sexton's Estate,* 163 Ohio Supreme Court 124, 126 N.E. 2d 129, *certiorari* denied 350 U.S. 838, 100 L. Ed. 747; *Downey v. Kearney,* 81 W.Va. 422, 94 S.E. 509; *Crean v. McMahon,* 106 Md. 507, 68 A. 265, 14 L.R.A. (N.S.) 798; *Weeks v. Jewett,* 45 N.H. 540; *Miller v. Miller,* 232 Ill. Appellate Court Reports 86; *Hunter, Ex'r. v. Green,* 22 Ala. 329; *Bates, Adm'r. v. Woolfolk,* 5 Ga. 329; *McGlawn v. Lowe,* 74 Ga. 34; *Andrews v. Brumfield,* 32 Miss. 107; Woerner's American Law of Administration, 3rd Ed., sec. 456. See also: *Fisk v. Norvel,* 9 Tex. 13, 2 Am. Dec. 58.

In the elaborate note attached to *Crean v. McMahon* in 14 L.R.A. (N.S.) 798, in which many cases are cited, it is written: "The courts passing upon the question are in accord in holding,

as does *Crean v. McMahon*, that the distribution or delivery of property to a legatee or devisee who has a life estate therein inures to the benefit of the remainderman; and upon the termination of the life estate, the title and right of possession vest absolutely in the remainderman without any action on the part of the executor or administrator." The note concludes: "It is, of course, self-evident that if, by the terms of the will, a trust estate is created, or some duty is devolved upon the executor to be performed after the termination of the life estate, the doctrine herein considered would not apply."

In 21 Am. Jur., Executors and Administrators, page 628, it is said: "It is generally held that an assent to the interest of the tenant for life in a chattel will inure to vest the interest of the remainder, since both constitute only one estate." And in *Crean v. McMahon*, it is said: "It would be strange, indeed, if the intervention of an administrator d.b.n. were required to pass a title to a legatee in remainder where the possession had been given up by the executor himself to the legatee for life, when the executor himself, if still living, could not maintain ejectment, because he had given possession to the legatee for life."

In *Downey v. Kearney, supra*, the Court said: "Counsel for plaintiff insists that the administration could not have been completed until the death of the life tenant and possession of the property delivered to the remaindermen. No authority is cited to sustain this proposition, and we have been unable to find any, except in cases where the will expressly or impliedly creates a trust in the executor which continues during the life estate. In the present case the will provides only for the payment of funeral expenses and debts, before the widow is entitled to receive all the remaining property to hold for life. . . . In such case there can be no implied trust in the executors to make distribution among the remaindermen. The office of the executors was ended and the administration of the estate completed, when they paid the debts and turned the remaining property over to the life tenant. . . . That completed the administration and terminated their executorship, for delivery to the life tenant passed all title and control of the assets from them." Cases are cited from New Hampshire, Alabama, Georgia, Mississippi, Pennsylvania, Maryland, Massachusetts and England to support the statement of the Court.

In *McKoy v. Guirkin*, 102 N.C. 21, 8 S.E. 776, the Court said: "It has been settled by repeated adjudications in this Court, supported by strong reasoning, that when an executor assents to a legacy given for life with remainder over, the assent ex-

tends also to such remainder, and his control over it ceases, and having nothing further to do he becomes so far *functus officio*, and the successive legatees must adjust their respective claims among themselves. Numerous cases are cited. If, however, the specific thing bequeathed for life, with a remainder, which in terms requires the restoration of the property to the executor to enable him to execute the trusts attached to the ulterior disposition, the executor may sue and recover, the assent in such case being limited to the vesting of the life estate only."

In *Weeks v. Jewett, supra,* the Court held as correctly stated in the second headnote:

> "Where an executor had delivered over to the tenant for life the personal property given by the will, and such tenant had received and retained it until her death, it was held that the executor could not, as such, maintain a suit against a third person to recover it, as his duty must, in the absence of any provisions in the will to the contrary, be regarded as discharged by the delivery to the legatee."

Miller v. Miller, supra, is a case strikingly similar to the present case. The testator, Samuel S. Miller, devised and bequeathed all his property, real and personal, after the payment of his debts, to his wife, Mary C. Miller, for life, with power of sale over the personalty and to re-invest the proceeds. The will further provided that upon the death of his widow all the property constituting the life estate, together with all additions and increases thereto, is given, devised and bequeathed to his children, share alike. The executors of the will filed in court their final report showing all debts paid, including their commissions, and the balance of the personalty turned over to the widow. There appeared to be no final order discharging the executors. After having administered upon the personal estate and having disposed of the same as the will directed, the will imposed no other duties on the executors. The widow died testate, and her son qualified as executor of her estate. The executors of the estate of Samuel S. Miller filed their petition for citation in the county court against the executor of the estate of Mary C. Miller to procure possession of the personal estate in which Mary C. Miller had a life estate by her husband's will, claiming all such personal property after her death belonged to them as executors of the estate of Samuel S. Miller. The Court held that the distribution of the personal property of the estate of Samuel S. Miller by his executors to his wife under his will, which gave her a life estate, was a distribution to the remainderman, which exhausted the powers of the execu-

tors over such personalty, no further specific or implied powers in the executors of the estate of Samuel S. Miller or the life tenant being contained in the will. The Court further held that the executors of the estate of Samuel S. Miller had no right, title or claim as executors to the property in question, and ordered the petition dismissed and the writ of citation quashed.

G.S. 1-57 provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided. Counsel for plaintiff contends that G.S. 1-63 is an exception to G.S. 1-57, and that by virtue of G.S. 1-63 plaintiff can maintain this action. That statute reads: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another."

Plaintiff is not a trustee of an express trust, and is not a person expressly authorized by statute to bring this action. When the executrix here distributed the balance of the personal property of the estate to herself, pursuant to the terms of the will, (this the complaint alleges and the answer admits, and such allegations in the pleadings would seem to imply that the executrix of the estate properly endorsed the Bass and Stevens notes to herself as life tenant), which gave her a life estate with a remainder over in such property, such property ceased to be a part of the estate, and was not subject to any further administration as part of that estate, because by the terms of the will no trust estate was created, and no duty was imposed upon anyone to be performed after the termination of the life estate. By such distribution the executrix became *functus officio* as to such property, since she had nothing further to do with such property as executrix. G.S. 28-24 provides that an administrator c.t.a. must observe and perform the will, and that he "has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will." Manifestly an administrator c.t.a. has no greater rights and powers, and is not subject to greater duties, than the executor named in the will. Since the executrix named in the will became by the distribution of such personal property, pursuant to the terms of the will, *functus officio* as to such property, necessarily the administrator c.t.a. appointed by the court after the death of the executrix is also *functus officio* as to such property. This being true, we conclude that G.S. 1-63 does not empower the plaintiff as administrator c.t.a. to maintain this action to recover such personal

property, which was no longer a part of the estate, and not subject to further administration.

Counsel for plaintiff further contends that an action for the collection of the Bass and Stevens notes must be brought by plaintiff as administrator c.t.a., and quotes to support his contention this statement from *Cannon v. Cannon*, 228 N.C. 211, 45 S.E. 2d 34: "However, there seems to be no exception to the rule, that where a note was made payable to the decedent and matured before his death, as in the instant case, an action for the collection of such note must be instituted by the representative of the estate in his or her representative capacity."

In *Hayes v. Green*, 187 N.C. 776, 123 S.E. 7, the plaintiff sued the defendant to recover on six negotiable promissory notes, which defendant executed and delivered to H. A. Feimster. The notes were made payable to H. A. Feimster or order. Plaintiff alleged that these notes were delivered and transferred to him by H. A. Feimster, or his agent, for full value and before maturity, but none of the notes bear any endorsement of the payee. H. A. Feimster is dead, and his administrator, J. A. Harper, intervened in the action. The notes, and the mortgages securing them were offered in evidence by the administrator. The Court said: "They (the notes) were made payable to his intestate and were not endorsed or assigned by any one. The legal title, therefore, was in the intervenor, J. A. Harper, administrator." The Court held that the administrator was the owner of the notes and mortgage, and entitled to collect them.

We have held in a long line of decisions that an executor or administrator, having the legal title to the personal property of a decedent's estate for the purpose of administration, may sell or pledge promissory notes of the estate, if the exigencies of the estate make it advisable to do so, and that the parties dealing with the executor or administrator will get a good title, provided the transaction is fair and honest. *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533, where the cases are assembled.

In Woerner's American Law of Administration, 3rd Ed. p. 1913, it is written: "Notes, bonds or other causes of action distributed in kind may be recovered upon by the distributees in their own names, since the order of distribution vests the title in them and out of the representative."

There is no allegation in the complaint, and no evidence in the record, that when the Stevens and Bass promissory notes were distributed by the executrix, they were not endorsed or not assigned to the life tenant, or that such distribution did not

pass title to these notes out of the representative. The record states the Bass notes were payable to the order of Clyde Darden. The record does not state to whom the Stevens notes were payable. Plaintiff's brief alleges these notes were payable to the order of plaintiff's testator. Apparently there were four Bass notes and five Stevens notes, though the executrix's inventory speaks of the Bass note and the Stevens note. Clyde Darden was the same person as J. C. Darden. It is true that we have held in *Jackson v. Love,* 82 N.C. 405, that the possession of an unendorsed negotiable note or bond, not payable to bearer, raises a presumption that the person producing it on the trial is the real and rightful owner. But here the plaintiff is not in possession of these notes, and there is no allegation in the complaint, and no evidence they are unendorsed. What is quoted above from *Cannon v. Cannon* does not apply when the representative of the estate in the settlement of the estate by the distribution of a note to a legatee has vested title in the legatee and out of the representative. The plaintiff as administrator c.t.a. has not shown that he is the real party in interest to sue on these notes, or that he has any right, title or interest in them, and this he must show to maintain his action.

The plaintiff as administrator c.t.a. of the estate of J. C. Darden, deceased, has no right, title or interest in or to the personal property he seeks to recover in this action, no duty devolves upon him by the will of his testator as to such personal property, no trust estate express or implied is created by the will in such property, and the trial court erred in overruling the motion for nonsuit made by the defendants.

Reversed.

EVERETT *v.* YOPP.

ANNIE EVERETT; DAISY E. COSBY AND HUSBAND, JEFFERSON J. COSBY; W. B. EVERETT AND WIFE, MILDRED EVERETT; LYDIA BURROUGHS AND HUSBAND, GEORGE M. BURROUGHS; CLYDE K. EVERETT AND WIFE, RUBY EVERETT; ARTHUR A. EVERETT AND WIFE, ANNIE EVERETT; ANNIE E. GRANT AND HUSBAND, J. PERRY GRANT; LONNIE EVERETT AND WIFE, CLARA MAE EVERETT; NETTIE LOUISE KING AND HUSBAND, BENJAMIN J. KING; ALPHEUS K. EVERETT AND WIFE, ELIZABETH EVERETT, v. THOMAS YOPP, J. H. HANSLEY, ELISHA KING, ET AL.

(Filed 30 October, 1957)

1. Abatement and Revival § 13—

Where, pending an action to recover damages for trespass and for injunctive relief against further trespass, plaintiff dies, the court has authority to permit plaintiff's heirs to become parties on a motion at any time within one year after plaintiff's death, or afterward on a supplemental complaint. G.S. 1-74-1.

2. Trial § 25: Courts s. 6—

Where plaintiffs in apt time take a voluntary nonsuit as to named defendants, and no appeal is taken from the clerk's action in allowing the nonsuit, the action is no longer pending against such defendants, and it is error for the court to set aside the judgments of nonsuit as to such defendants and abate the action as to them, certainly where the record fails to show that such defendants or their representatives were present or contested the right of plaintiffs to take the nonsuit.

3. Pleadings § 10: Trial § 25—

A counterclaim is some matter existing in favor of defendant against plaintiff on which defendant could maintain an independent action, and in an action for trespass and for injunctive relief against further trespass, allegations in the answer of a defendant that he is the owner and in possession of a described tract of land and that insofar as plaintiffs' description covers any of the land described in the answer, the allegations of the complaint are untrue and denied, fail to set up a counterclaim so as to preclude plaintiffs from taking a voluntary nonsuit as to such defendant. G.S. 1-137.

4. Injunctions § 8—

Upon the hearing of an order to show cause why a temporary restraining order entered in an action to recover damages for trespass and to restrain further trespass should not be continued to the hearing, the refusal of the court to find that plaintiffs' description was not sufficiently definite to permit oral testimony to locate the land, and the order continuing the injunction to the final hearing will not be disturbed on appeal, nor will a demurrer *ore tenus* in the Supreme Court be sustained, in the absence of showing of prejudicial error, since the continuance of the temporary order relates to procedural matters and not to the merits of the case.

EVERETT *v.* YOPP.

APPEAL by plaintiff and by defendant Yopp from *Morris, J.*, at March Term 1957, of ONSLOW.

Three civil actions instituted in year 1938 by Annie A. Everett (1) against Cottle and Yopp, (2) against R. D. Johnson and Elisha King, and (3) against W. J. Cottle and Jerry Hansley, to recover damages for trespass upon lands of plaintiff described in the complaints, and for injunctive relief against further cutting.

The record and case on appeal disclose (1) that it is alleged in paragraph two of the complaint in each action: "That the plaintiff is the owner in fee simple and in the rightful possession of the following described tract of land, viz: Being all of the lands formally (formerly) owned by Joseph M. Everett Mill Pond and Mill rest, said land being that part which was covered by water at the time the mill was in operation, and being in Stump Sound Township, Onslow County, about 3 miles west of Sneeds Ferry. Said Deeds being recorded in the Register of Deeds office for Onslow County. Containing approximately 100 acres"; and that on given date the "defendants willfully, wrongfully and unlawfully entered upon the lands of this plaintiff and cut and removed a part of the timber of this plaintiff, and is continuing to remove the timber to her damage" in sum stated.

(2) That in the respective cases in answer to the allegations contained in the second paragraph of the complaint, each defendant, Thomas Yopp, Elisha King and J. H. Hansley, respectively, alleges that he is the owner of and in possession of a certain specifically described tract of land, and that "insofar as the plaintiffs' description describes, covers or includes any of the land described in this paragraph of the answer the allegations in said paragraph of the complaint are untrue and are therefore denied"; and the allegations of trespass are denied.

And plaintiffs' case on appeal shows: That these three actions were consolidated by order of court and a reference was ordered; that the referee heard the cases and made his report, and judgment was later rendered thereon, and on appeal therefrom to Supreme Court the causes were remanded to the court below in accordance with opinion reported as *"Annie A. Everett v. R. D. Johnson, et al,* 219 N.C. 540"; that thereafter, upon motion of defendants, the report of the referee was set aside, the original survey stricken out, and a new reference ordered, appointing the Hon. Cyrus M. Faircloth as referee, and that for failure of counsel to agree upon time for hearing, no trial was ever had before this referee, and he is now dead; that prior to his death two members of counsel for plaintiffs also died; that

later plaintiff also died, and previously the defendants Elisha King and J. H. Hansley had expired (dates not given).

The record shows that by affidavit of Alpheus K. Everett sworn to and subscribed on 13 February, 1957, for new parties and temporary injunction, it was made to appear that Annie Everett was dead; that she had nine children, including Alpheus K. Everett, and that they and their respective spouses are living, of full legal majority and *sui juris;* that the defendant Thomas Yopp has recently entered upon a portion of the above described land through some kind of contract with the Corbett Package Company, of New Hanover County, and in conjunction with the said Package Company has engaged in cutting and removing therefrom valuable pine timber and other trees (which have grown thereon since the water receded from said millpond and have continued to grow during the long pendency of this lawsuit); that said Thomas Yopp has threatened to continue to cut and remove said timber; and that unless they are restrained, the said Thomas Yopp and the Corbett Package Company and their agents and employees will do great and irreparable damage to the property above described.

And it is further stated in paragraph 5 of said affidavit, upon information and belief, that "the said Thomas Yopp and other parties to said consolidated lawsuit have been and still are under the injunctive orders therein issued by the court; but notwithstanding this fact and that this matter has been called to his attention, the said Thomas Yopp has stated that he intends to proceed with the cutting of said timber and trees;" and in paragraph 6 it is set forth "that to the end that they may prosecute the said lawsuit in place of their late mother, Annie Everett, the undersigned and his brothers and sisters, above named, desire to be permitted to come into court and be made parties plaintiff in this lawsuit; and to that end they promise the court a prompt and diligent performance of all the requirements the court may impose upon them."

And in this affidavit this prayer for relief is set forth: "Wherefore, the undersigned and his above named brothers and sisters petition and move the court that it order that they be permitted to become parties plaintiff in this lawsuit, as consolidated by the court; and that the court enjoin and restrain the said Thomas Yopp and his associates, agents and employees from committing further trespass upon the above described premises pending final trial and judgment in this action."

Thereupon the cause coming on and being heard by Morris, J., holding the courts of the Fourth Judicial District, in Chambers, at Kenansville, N. C., on 13 February, 1957, and "it ap-

pearing to the court from the affidavit of Alpheus K. Everett that all of the children and heirs at law of the original plaintiff, Annie Everett, are necessary parties to the conclusion of this suit, the court," entered an order permitting Alpheus K. Everett and his brothers and sisters, and their respective spouses, to become parties to this suit and to that end permitted them to come into court and adopt the several complaints herein filed by their mother or to file a new or amended complaint, as they may be advised.

And "upon further consideration of the said affidavit of Alpheus K. Everett," the defendant Yopp and his agent or contractee, Corbett Package Company, were ordered to appear before the said Judge at certain place and time on 26 February, 1957, and show cause why they should not be restrained as prayed until final hearing, and, in the meantime, restraining them.

The record shows that summons not having been issued for the Corbetts, both the injunction and the action as to them were dismissed on 28 February, 1957.

Thereafter on 5 March, 1957, the newly made parties plaintiff, under order of Judge Morris, dated 13 February, 1957, as aforestated, elected to take nonsuits in the actions (1) against King, and (2) against Hansley, and in accordance therewith the Clerk of Superior Court entered nonsuits on 5 March, 1957.

And the record shows that on 27 March, 1957, Judge Morris entered the following order:

"This Cause, coming on to be heard before His Honor Chester Morris, Judge holding the Courts of the Fourth Judicial District, at Jacksonville, N. C., at 2:30 p.m., on February 28, 1957, upon the return of the temporary injunction, and being heard and it appearing to the Court that Annie Everett is dead and that Daisy E. Cosby and husband, Jefferson J. Cosby; W. B. Everett and wife, Mildred Everett; Lydia Burroughs and husband, George M. Burroughs; Clyde K. Everett and wife, Ruby Everett; Arthur A. Everett and wife, Annie Everett; Annie E. Grant and husband, J. Perry Grant; Lonnie Everett and wife, Clara Mae Everett; Nettie Louise King and husband, Benjamin J. King; and Alpheus K. Everett and wife, Elizabeth Everett, are her heirs at law; and they—appearing in Court having asked that they be made parties plaintiff, the same is allowed; and they having filed an affidavit and motion for injunction on which was used to secure the temporary injunction herein, and same is permitted to be filed in the cause and plaintiffs are allowed 30 days to file an amended complaint and T. O. Yopp given thirty (30) days thereafter to answer; and it appearing

to the court that Elisha King and J. H. Hansley have both been dead for more than ten years and their heirs at law have not been made parties, and that the plaintiff was given leave to amend her complaint and no amended complaint has been filed;

"It is now ordered, considered and adjudged that this action, as to Elisha King and J. H. Hansley and their heirs, devisees and grantees, abates and said action so far as they are concerned is dismissed at the cost of the plaintiff. The Judgments of Voluntary Nonsuit entered by the Clerk as to defendants King and Hansley are set aside and vacated.

"The defendant T. O. Yopp offered the deed referred to in the motion of the plaintiffs from H. L. Grant to Annie Everett, recorded in Book 176, page 391, of the Register of Deeds Office of Onslow County, and the Court Map made herein by B. M. Potter, Court Surveyor, in May, 1943, and asked the Court to find as a fact that there was no well defined shore line around the mill pond in question. The Court declined to so find and the defendant excepted.

"The Court being of opinion that the allegations of the original complaint were sufficient to permit verbal testimony to locate the land in question, continued the injunction to the final hearing as against the defendant T. O. Yopp, forbid him to cut any timber growing on the lands covered by the old Ennett mill pond referred to in the pleadings—upon the plaintiff giving a justified bond in the sum of $1500.00 with surety to be approved by the Clerk.

"By consent of all parties, this judgment may be signed out of term, out of the County and out of the District.

"Done at Jacksonville, N. C., this the 27th day of March, 1957.

/s/ CHESTER MORRIS,

Superior Court Judge."

To the failure of the court to find as a fact that there was no well defined shore line of the old mill pond in question, to the finding that the complaint described and alleged the plaintiff to own lands sufficiently definite to permit oral testimony to locate the land, to the continuing of the injunction to the final hearing, the defendant T. O. Yopp objected and excepted, and appeals to the Supreme Court and assigns error.

(Note: It is noted here that it appearing to the court that the defendant Thomas O. Yopp is dead, his executors, devisees and legatees, naming them, were by order dated 26 July, 1957, substituted as defendants, and permitted to adopt the pleadings

on file by T. O. Yopp and to carry out the appeal which he entered to the Supreme Court.)

And to the abatement and dismissal of the actions against Elisha King and J. H. Hansley and their heirs and devisees and grantees, and to the setting aside and vacating the voluntary nonsuits taken before the Clerk of Superior Court of Onslow County by the plaintiffs, the plaintiffs objected, excepted and appeal to Supreme Court, and assign error.

Nere E. Day, Ellis & Warlick, Marion M. Godwin for plaintiffs appellants and plaintiffs appellees.

E. W. Summersill, Isaac C. Wright for defendants appellants.

On Plaintiffs' Appeal

WINBORNE, C. J. In the main plaintiffs assign as error the action of the trial court in setting aside and vacating the judgments of voluntary nonsuit taken by plaintiffs before the Clerk of Superior Court of Onslow County in the actions against King and Hansley, and in abating these two actions.

In this connection it is provided in G.S. 1-74-1 that "No action abates by death * * * of a party * * * if the cause of action survives, or continues"; and "in case of death * * * the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successors in interest * * *."

In the light of this statute, and bearing in mind that the three actions had been consolidated, and the original plaintiff being dead, the action did not abate, and the court, on motion at any time, within one year thereafter, or afterwards on a supplemental complaint, could allow the action to be continued by her representatives or successors in interest. And upon the facts alleged upon the affidavit of Alpheus K. Everett, set out in the above statement of the case, the court entered an order on 13 February, 1957, permitting the children and heirs at law of plaintiff "to become parties to this suit," and to that end they were "permitted to come into court and adopt the several complaints herein filed by their mother or to file new or amended complaint as they may be advised." This the court had the authority to do. And it was thereafter on 5 March, 1957, that the newly made plaintiffs elected to, and did submit to voluntary nonsuits as to defendants King and Hansley as evidenced by judgments signed by the Clerk on that date, from which the record fails to show any appeals.

It would, therefore, follow that the plaintiffs being parties to the action, having a right to take a nonsuit, and having acted when they had a right to act, and no appeal having been taken from the Clerk's action in allowing the nonsuits, they are final. Hence the actions against King and Hansley were not thereafter pending for abatement.

Furthermore, the record fails to show that a motion was made or that notice of motion was given to plaintiffs to set aside the judgments of nonsuit and to abate the actions. Nor does the record show that at that time King and Hansley, or the representatives of either of them, were present or that they are now contesting the right of plaintiffs to take a nonsuit.

However the question may arise as to whether the answers of defendants King and Hansley amount to a counterclaim such as would prevent plaintiff taking a nonsuit, G.S. 1-137. Decisions of this Court answer in the negative. See *Turner v. Livestock Co.*, 179 N.C. 457, 102 S.E. 849. In this case it is stated that "the defendants filed answer denying the material allegations of the complaint and pleaded as a counterclaim the following: 'That they were at the time of bringing this action, and are now, the owners in fee simple and in possession of the land claimed by the plaintiffs, and they plead said ownership as a counterclaim. Wherefore, defendants demand judgment that they go without day as to plaintiff's claim, and that they be adjudged the owners in fee simple of the lands claimed by plaintiffs, and that they recover cost and have general relief.' The plaintiffs failed to file a reply to the answer, and the defendants moved for judgment upon the alleged counterclaim for want of a reply, which was refused, and the defendants excepted." And in the opinion by Allen, J., the Court has this to say: "The defendants' appeal presents the simple question as to whether the allegations of the defendant in the answer that they are the owners of the land in controversy and in possession thereof constitute a counterclaim, because if it is a counterclaim it was the duty of the plaintiffs to file a reply thereto, and upon failure to do so the defendants would be entitled to judgment for want of reply. 'The criterion for determining whether a defense set up can be maintained as a counterclaim is to see if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim; and it must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and like it, contain a plain and concise statement

of the facts constituting a cause of action.' *Garrett v. Love,* 89 N.C. 207.

"Again in *Askew v. Koonce,* 118 N.C. 531, it is said: 'Unless a defendant has some matter existing in his favor and against the plaintiff, on which he could maintain an independent action, such claim would not be a counterclaim.'

"Tested by this rule, we are of opinion that the defendants have not alleged a counterclaim.

"If they had instituted an independent action alleging simply that they were the owners of the land and in possession it would have been the duty of the court to enter judgment of nonsuit, because if they owned the land and were in possession, nothing else appearing they had no cause of complaint.

"The case would be different if, as in *Roper Lbr. Co. v. Wallace,* 93 N.C. 23, and in *Yellowday v. Perkinson,* 167 N.C. 147, there were allegations entitling the defendants to equitable relief, or if it had been alleged that the plaintiffs were setting up a claim which amounted to a cloud upon their title, but none of these allegations appear in the answer, and as they are relying upon the letter of the law they must abide by it." The cases of *McLean v. McDonald,* 173 N.C. 429, 92, S.E 148, and *Sawyer v. Cowell,* 241 N.C. 681, 86 S.E. 2d, 431, cited by defendants Yopp are distinguishable in factual situation.

Applying this rule of the Court to answers of defendants King and Hansley, it is seen that a counterclaim is not alleged. Indeed, the averments in this respect amount to no more than a denial of plaintiffs' title *pro tanto,* and a disclaimer to all lands described in the complaint outside the boundary of the land defendant avers he owns and has in possession.

Hence this Court is constrained to hold that the assignments of error presented by plaintiffs in these respects are well taken and the judgment setting aside said nonsuits, and abating the actions, the subjects of plaintiffs' appeal, are

Reversed.

On Appeal of Defendants Yopp

There are three assignments of error presented by defendants Yopp on their appeal.

Number One is based upon exception of like number to refusal of the court to find as a fact that there was no well defined shore line of the old mill pond in question.

Number Two is based upon exception of like number to the finding of the court that the complaint described and alleged the plaintiff to own lands sufficiently definite to permit oral testimony to locate the land.

Number Three is based upon exceptions three and four to continuing of the injunction to the final hearing.

As to these assignments, it is noted that the court below was dealing in the main with procedural matters and not with the merits of the case. The trial court was of opinion that the allegations of the original complaint were sufficiently definite to admit of verbal testimony to locate the land in question,—and continued the injunction to final hearing as against defendants Yopp, and forbade them to cut any timber growing on the lands covered by the old Ennett Mill Pond referred to in the pleading. In so ruling, error is not made to appear on this appeal. Indeed reference to the record on former appeal (219 N.C. 540) reveals the fact that on hearing before first referee much evidence was offered by the parties bearing upon the matters at issue in the case.

Moreover, the demurrer *ore tenus* now filed in this Court by defendants Yopp for that the complaint as amended by the affidavit in the record does not state facts sufficient to constitute a cause of action is not well founded. It requires no further elaboration. Hence on defendants' appeal prejudicial error is not made to appear, and the judgment from which the defendants Yopp appeal is affirmed.

Now that the proper parties plaintiff, and proper parties in place of T. O. Yopp, deceased, are properly before the court, the case may and should proceed in an orderly fashion to an early conclusion on its merit as the law directs.

On plaintiffs appeal
Reversed.

On defendants Yopps' appeal
Affirmed.

CLARENCE E. PARKER, ADMINISTRATOR OF THE ESTATE OF BONNIE BEULAH IRENE PATRICK, DECEASED, v. R. K. WILSON, EXECUTOR OF THE ESTATE OF ROBERT DONALD WILSON, DECEASED.

(Filed 30 October, 1957)

1. **Automobiles § 41p—**

G.S. 70-1.1 raises no presumption that the owner of an automobile was the driver thereof at the time of a wreck.

2. **Same: Constitutional Law § 10—**

Where the owner of an automobile is an occupant therein at the time of an accident, whether such owner should be presumed to have been the driver of the car at the crucial time is a matter for the General Assembly and not the courts.

3. **Automobiles § 41p—**

Where plaintiff must rely on the physical facts and other evidence of a circumstantial nature to establish which of the two occupants of a car was the driver thereof at the time of the fatal accident, plaintiff must establish attendant facts and circumstances which reasonably warrant his asserted inference, and such inference cannot rest on conjecture or surmise.

4. **Trial § 23a—**

To carry his case to the jury plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference.

5. **Automobiles § 41p—Physical facts held insufficient to go to jury on question of whether defendant's testate was driving car.**

The evidence tended to show that plaintiff's intestate and defendant's testate were riding in testate's car at the time it crashed violently into a tree, resulting in the death of both. After the accident, testate's body was found on the right with his head partially through the windshield, and the body of the plaintiff's intestate was found on the left, with her head lying on the steering column and switch key, which was just a few inches to the right of the steering column, and with her left arm up over the steering wheel. *Held:* The evidence, together with other evidence in the case in regard to the position of the bodies and damage to the car, is insufficient to go to the jury upon plaintiff's averment that defendant's testate was driving the car at the time of the fatal accident.

HIGGINS, J., dissenting.

APPEAL by plaintiff from *Crissman, J.*, January Term 1957 of FORSYTH.

Civil action to recover damages for an alleged wrongful death brought by the administrator of the estate of Bonnie Beulah Irene Patrick, deceased, against the executor of the estate of Robert Donald Wilson, deceased.

From a judgment of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals.

Spry, White & Hamrick for plaintiff, appellant.
Deal, Hutchins & Minor for defendant, appellee.

PARKER, J. For the sake of brevity plaintiff's intestate will be called Bonnie Patrick, and Robert Donald Wilson will be called Donald Wilson.

Donald Wilson owned a 1952 Oldsmobile automobile. He and Bonnie Patrick had been dating regularly. Between 9:00 and 10:00 p.m. on 23 December 1954 W. C. Campbell saw them leave his home in Donald Wilson's automobile. He did not testify who drove the automobile away.

Just after midnight on the morning of 24 December 1954, about 12:15 a.m., H. W. Holton was at Sheet's Barbecue Place adjacent to U. S. Highway 158. Just beyond this barbecue place there is a curve in the road. He saw an automobile approaching the curve travelling on the highway at a speed of approximately 65 or 70 miles an hour. Just as the automobile rounded the curve it cut across the road into the woods. He heard a crash, and went to the automobile. He found the automobile against a tree, and two people inside it, a man and a woman. The woman was Bonnie Patrick and the man was Donald Wilson. They were in the front seat, and the back seat was thrown up against the windshield on top of them. The biggest portion of the upper part of the woman's face on the right side was torn off, and her head was lying on the switch key and on the steering column, right between them. The switch key on the automobile was just a few inches to the right of the steering column, low on the dash. The man was on the right side with his head partially out of the windshield. He took the back seat off of them, and the man slid down until his head was lying on the dash, and he stayed there until he was moved to an ambulance. After he was moved, Holton saw a dent just above the glove compartment. On cross-examination Holton testified as follows: He was the first one at the scene. "When I saw them, the girl's left arm was up over the steering wheel, hanging onto it, and she was down sort of with her head against the rod of the steering wheel, and her left hand was over the steering wheel." He noticed a pool of blood directly under the switch key where her head was resting. He opened the left door of the

automobile, which is the door next to the steering wheel. There was a woman's shoulder bag hanging on the window latch of the left door, when he opened it. The woman's right foot was under the gas pedal from the right side. On redirect examination Holton testified that he found a liquor bottle in the automobile with the seal unbroken, and that when he arrived, the woman's left foot was to the left of the steering column.

About 12:30 a.m. R. L. Ellis was driving on U. S. Highway 158. When he arrived at Sheet's Barbecue Place, he stopped and went to the wreck. At the wreck, he saw a woman and a man in an Oldsmobile automobile. The woman was about the center of the car, and someone was holding her head up. The man was on the extreme right of the car with his head lying on the dash. As best he could tell, the man was not breathing, the woman was breathing hard, and he thought she was unconscious. "The right of the windshield was busted out, I believe." The steering wheel of the car was on the left side. The woman was bleeding pretty bad. When the ambulance came to get the people, he pulled the seat back from the right-hand side of the car to get the man and woman out of the car. R. L. Ellis was recalled for cross-examination and testified as follows: "In my direct testimony I testified that I was present when the girl and boy were taken out of the car. At that time I testified that they were taken out on the right side of the car."

Tony Barney testified that he arrived at the scene of the wreck between 12:15 and 12:30 a.m. When he arrived, between three and six people were there. A man and a woman were in the car. The man was lying all the way against the right corner of the windshield with his head on the dash. The woman was over near the steering wheel, with her head lying on top of the steering wheel. He testified: "Laying up on top of the steering wheel. The bottom was bent down, and she was laying in the top of it. I don't know where her feet were exactly but they were somewhere in the floorboard. She was sitting on the seat near the steering wheel. She wasn't under the steering wheel." The right-hand side of the windshield was broken out in the bottom.

Plaintiff saw this car about 5:00 a.m. after it had been moved. He saw some brown hair and blood on the dash. Bonnie Patrick had brown hair, and Donald Wilson black. Bonnie Patrick never regained consciousness.

Bonnie Patrick's mother saw the wrecked Oldsmobile automobile. She testified that she saw a terrible dent place in the dashboard, and some of Bonnie Patrick's hair on the right-hand side of the dashboard.

Bonnie Patrick had severe facial lacerations extending from the right cheek across the base of the nose to the left forehead, and also extending down on the right side of the nose to the tip of the nose, with multiple fractures of the underlying bones, and a rupture of the right eye, with an open wound extending into the front part of the brain. Dr. L. C. Smith testified that she did, to his knowledge, have no chest injuries. She died on 26 December 1954. There is no evidence that she ever spoke after the wreck.

During the early morning of 24 December 1954 the coroner of the county, Dr. V. M. Long, examined the dead body of Donald Wilson. His examination showed that Donald Wilson had a broken neck, a crushed chest, a broken right femur and a dislocation of the left hip joint, and in his opinion these injuries caused Donald Wilson's death.

State Highway Patrolman C. N. Jones examined the Oldsmobile automobile about 1:00 a.m. on 24 December 1954. The front end was completely demolished. The tree made a half-moon of the front bumper, and went back in the motor and in between the right front wheel. The motor was pushed back some. The back seat was pulled loose, and brought forward, and the front seat was brought forward almost as far as it could possibly go. The dash on the right side was considerably bent in. The right half of the windshield was gone, and the lower half of the steering wheel was bent downward. In this car the glove compartment was on the extreme right-hand side of the dash. The dent in the dash was from the center to the right side. There was a portion of fine glass and blood and some hair in the dent, but the Patrolman did not know whose hair it was. When the Patrolman reached the wreck no one was in the car.

Plaintiff alleges in his complaint that Donald Wilson was driving his automobile at the time it crashed into the tree, causing the death of Bonnie Patrick and himself. The defendant denies this in his answer, and alleges, upon information and belief, that at such time Bonnie Patrick was driving the automobile.

Plaintiff's counsel states in his brief that he is relying on the rule "that an owner present in his automobile at the time of a collision is presumed to be in control of his automobile by himself or through some other person, and, if there be no direct proof as to the driver of the automobile, the owner will be presumed to have been driving." The brief immediately thereafter states, "lamentably, this Court has not heretofore adopted the foregoing rule, and no case has been found wherein this Court has considered the rule."

Plaintiff relies on this language in *Rodney v. Staman,* 371 Pa. 1, 89 A. 2d 313, 32 A.L.R. 2d 976: "As to the appellant's contention that there is no evidence that the husband was driving the automobile at the time of the accident, there is evidence that he was the owner of the car. That fact affords a rebuttable presumption that he was the driver of the automobile at the time of the accident." Purdon's Penn. Statutes, Anno., Per. Ed., Vehicle Code, Title 75, Sec. 739, provides that "in any proceeding for a violation of the provisions of this act or any local ordinance, rule or regulation, the registration plate displayed on such vehicle shall be *prima facie* evidence that the owner of such vehicle was then operating the same." The Court based the rebuttable presumption on this statute.

Plaintiff in his brief quotes from the dissenting opinion in *Welty's Estate v. Wolfe's Estate,* 345 Mich. 408, 76 N.W. 2d 52, as follows: "The car in which both men died was a Pontiac. It belonged to defendant's decedent Wolfe. That fact gives rise to a rebuttable presumption that he was driving at the time." The sole authority cited to support such statement is the Pennsylvania case of *Rodney v. Staman.*

Plaintiff in his brief quotes from *Drahmann's Adm. v. Brink's Adm.,* (Kentucky Court of Appeals), 290 S.W. 2d 449, as follows: "Other jurisdictions have held that a rebuttable presumption or inference arises that the defendant was driving upon proof of the defendant's ownership of the automobile or upon proof that he was driving shortly prior to the accident." The only authority cited is the Pennsylvania case of *Rodney v. Staman.*

There is an annotation to *Rodney v. Staman* in 32 A.L.R. 2d 988, *et seq.,* entitled "Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident." This annotation states this in effect that the principle of a rebuttable presumption set forth in the Pennsylvania case of *Rodney v. Staman* has been applied or recognized in Iowa, Michigan, Ohio and South Dakota. Then the annotation sets forth cases which hold that one who was shown to be driving an automobile shortly prior to an accident is presumed to have continued as driver, a principle that needs no consideration in the instant case, because there is no evidence that Donald Wilson was driving his car shortly prior to the accident.

"Considerable legal controversy has developed over the extent to which presumptions may follow proof of ownership." Blashfield's Cyc. of Auto. Law and Practice, Vol. 9B, p. 528. See also 5 Am. Jur., Automobiles, Sec. 611.

The General Assembly in 1951 enacted G.S. 20-71.1, which is entitled "Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation." This statute was probably enacted in view of the decision in *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. G.S. 20-71.1 does not provide that proof of ownership of an automobile, or proof of the registration of an automobile in the name of any person, shall be *prima facie* evidence that the owner of the automobile, or the person in whose name it was registered, was the driver of the automobile at the time of a wreck.

We decline the suggestion of plaintiff's counsel to adopt a rule holding that upon the facts of the instant case a rebuttable presumption or inference arises that Donald Wilson was driving his automobile at the time of the fatal crash. Whether or not a rule as contended for by plaintiff should be adopted in this jurisdiction is a matter for the General Assembly.

In order to recover plaintiff must establish that Donald Wilson was negligently driving his automobile at the time of the wreck, and that his negligence was a proximate cause of his intestate's death.

There is no direct evidence that Donald Wilson was driving his automobile shortly prior to the wreck, and no direct evidence that he was driving his automobile at the critical moment. Is there sufficient evidence, considered in the light most favorable to the plaintiff, to carry the case to the jury that Donald Wilson was driving his automobile at the time of the wreck?

The first man at the scene of the wreck was H. W. Holton, who heard the crash. When he arrived, Bonnie Patrick and Donald Wilson were in the front seat with the back seat thrown up on top of them against the windshield. Donald Wilson was on the right side of the front seat with his head partially out of the windshield. Bonnie Patrick was to his left with her head lying on the switch key and the steering column. Her left arm was up over the steering wheel, hanging onto it, and she was sort of down with her head against the rod of the steering wheel, and her left hand was over the steering wheel. A pool of blood was directly under the switch key where her head was resting. Her right foot was under the gas pedal from the right side, and her left foot was to the left of the steering column. A woman's shoulder bag was hanging on the window latch of the left door. The steering wheel of the automobile was on the left side. The switch key was just a few inches to the right of the steering column.

The dashboard on the right side of the automobile was considerably bent in. The right half of the windshield was gone, and the lower half of the steering wheel was bent downward.

Bonnie Patrick was unconscious, and died later without speaking. Donald Wilson was dead or unconscious. Their bodies were taken out on the right side of the automobile. Some of Bonnie Patrick's hair was found on the right-hand side of the dashboard. Did her hair get on the dashboard when the automobile hit the tree at terrific speed, or when her body after the collision was taken out on the right side of the automobile? Any answer would be a pure guess.

Donald Wilson received in the collision a crushed chest. The dent in the dashboard was on the right side, and his body was found on the right side with his head partially out of the broken windshield. Bonnie Patrick, so far as the doctor knew, had no chest injuries.

When in a case like this, the plaintiff must rely on the physical facts, and other evidence, which is circumstantial in nature, to show that Donald Wilson was driving the automobile at the time of the wreck, he must establish attendant facts and circumstances which reasonably warrant such inference. *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879; *Sowers v. Marley*, 235 N.C. 607, 70 S.E. 2d 670. Such inference cannot rest on conjecture or surmise. *Sowers v. Marley, supra.* "The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff." *Whitson v. Frances, supra.* "A cause of action must be something more than a guess." *Lane v. Bryan*, 246 N.C. 108, 97 S.E. 2d 411. A resort to a choice of possibilities is guesswork, not decision. *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392. To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.

When the automobile struck the tree at tremendous speed, and the front seat was brought forward almost as far as it could possibly go, and the back seat was pulled loose and thrown up against the windshield on top of the occupants of the front seat, it would seem that there was no opportunity for the occupants of the front seat to have changed the position in which they were sitting immediately prior to the crash. It would further seem that the crash hurled Donald Wilson's head partially out of the windshield on the right side and with his head in that position his body could not have changed from the posi-

tion it was in immediately prior to the collision with the tree. It would seem that all the evidence tends to show that Bonnie Patrick was driving the automobile at the time of the fatal wreck. But regardless of that, suffice it to say that considering all the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff has not offered sufficient evidence to go to the jury that Donald Wilson was driving the Oldsmobile automobile at the time of the fatal collision. The judgment of nonsuit below is

Affirmed.

HIGGINS, J., dissenting. The evidence is plenary that the driver of the car was negligent and that that negligence proximately caused the death of both occupants. I think the evidence sufficiently indicates that Donald Wilson was the driver to require the submission of appropriate issues to the jury.

Wilson was the owner of the car. He called at her boarding-house for Bonnie Patrick. They left together in his car between nine and ten at night on December 23, 1954. The fatal wreck occurred a few minutes after 12 that night. The evidence with respect to the wreck is fairly stated in the opinion of the Court. The question is: Which of the occupants was the driver?

There is no evidence Miss Patrick had ever driven Wilson's car, or even that she knew how to drive. Wilson had a broken neck, crushed chest, broken right femur, and dislocation of the left hip joint. Miss Patrick had severe facial lacerations extending across the base of her nose to her left forehead, with multiple fractures of the underlying bones, a rupture of the right eye, and an open wound extending into the front of the brain. She had no chest injuries. The lower half of the steeringwheel was bent downward.

It would seem natural and probable that the driver held on to the steeringwheel until the crash and that the body or chest of the driver would be hurled against the steeringwheel and the neck snapped. Wilson's chest was crushed and his neck broken. Miss Patrick had only head—no chest or neck injuries. There was a dent in the instrument board near the center and blood and brown hair imbedded. Miss Patrick had brown hair. Wilson's hair was black.

The tremendous speed of the car and the violence of its impact into the tree certainly could have reversed the positions of the driver and the passenger. I think the problem as to which was the driver and which was the passenger should be settled

by a jury as an issue of fact, and not by the Court as a question of law.

In re BENJAMIN EDGAR RENFROW (STATE v. RENFROW)

(Filed 30 October, 1957)

1. Habeas Corpus § 8—

Except in cases involving the custody of minor children, no appeal lies from a judgment rendered on return to a writ of *habeas corpus*, the remedy, if any, being by petition for a writ of *certiorari* addressed to the sound discretion of the Supreme Court. G.S. 17-40.

2. Appeal and Error § 2—

The Supreme Court may treat a purported appeal from a judgment rendered on return to a writ of *habeas corpus* as a petition for *certiorari* in order to clarify an important question of practice presented by the record. Constitution of North Carolina, Art. IV, § 8.

3. Habeas Corpus § 2—

The sole question for determination upon *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty.

4. Habeas Corpus § 6—

Habeas corpus is a high prerogative writ to be made returnable at a certain time and place specified therein, and the particular judge before whom it is returnable need not be either the resident or the presiding judge of a particular judicial district or the presiding judge at any particular term of court.

5. Criminal Law § 125—

A motion for new trial on the ground of newly discovered evidence made on the day the clerk of the superior court receives the certificate of the Supreme Court affirming the judgment appealed from is made in apt time.

6. Courts § 10: Criminal Law § 125—

Construing G.S. 7-70 and G.S. 7-73 *in pari materia*, it is *held* that no criminal business, including a hearing on any motion which, if allowed, would set aside a verdict and judgment on the criminal docket, such as a motion for new trial on the ground of newly discovered evidence, may be determined at a term of court expressly restricted by statute for the trial of civil cases only.

7. Criminal Law § 169—Clerk properly issues commitment upon receipt of certificate of Supreme Court affirming judgment of conviction.

Upon receipt of certificate of the Supreme Court affirming a final judgment of conviction for an offense less than a capital felony, the clerk of the superior court properly issues commitment to the sheriff and the sheriff properly proceeds to execute the sentence which was appealed from, G.S. 15-186, and the fact that the court allows motion of the solicitor for capias and commitment prior to the issuance of the commitment by the clerk adds nothing to the authority vested in the clerk by the statute, nor does the fact that the solicitor had theretofore advised the defendant to appear in court to be taken into custody on a date subsequent to the solicitor's motion for capias and commitment affect the validity of the commitment when defendant is not taken into custody until the date specified.

8. Same: Criminal Law § 125: Arrest and Bail § 8—

The fact that a defendant has made a motion for a new trial on the ground of newly discovered evidence upon certification of the decision of the Supreme Court affirming final judgment of conviction, does not affect the provisions of G.S. 15-186 or entitle defendant to bond as a matter of right pending hearing upon his motion.

9. Habeas Corpus § 2—

Where, upon return of a writ of *habeas corpus*, it appears that defendant had been taken into custody under G.S. 15-186 upon certification of decision of the Supreme Court affirming final judgment of conviction, and that defendant had aptly made a motion in the trial court for a new trial on the ground of newly discovered evidence, whether defendant should be released under bond conditioned upon his appearance at the next term for the trial of criminal cases for final hearing on his motion rests in the sound discretion of the judge, and the court's order discharging the writ and ordering the petitioner into custody is not reviewable.

10. Same: Criminal Law § 125—Motion for new trial for newly discovered evidence may not be determined at civil term.

Where, upon return of a writ of *habeas corpus*, it appears that petitioner had aptly made motion for a new trial on the ground of newly discovered evidence after affirmance of final judgment of conviction, the hearing judge at a civil term is limited to determining whether, on petitioner's evidence, he will exercise his discretionary power to release petitioner under bond conditioned on his appearance at the next term of court for the trial of criminal cases for final hearing on his motion, and it is error for the court to determine the motion for a new trial on its merits at the civil term.

On *certiorari* to review order of *Morris, J.*, entered April 23, 1957, after hearing during April 22nd Civil Term, 1957, of DUPLIN, on return to writ of *habeas corpus*.

IN RE RENFROW.

At August Term, 1956, of Duplin, petitioner was tried and convicted of manslaughter; and the court pronounced judgment that he be confined in the State's Prison for a term of not less than four and not more than six years. On appeal, this Court found no error in the trial and judgment. *S. v. Renfrow,* 245 N.C. 665, 97 S.E. 2d 218.

On April 2, 1957, the Clerk of the Superior Court of Duplin County received this Court's certificate of its opinion; and on April 5, 1957, said clerk issued a commitment to the Sheriff of Duplin County under which petitioner was taken into custody by said sheriff.

Thereafter, on April 5, 1957, while petitioner was imprisoned in the Duplin County Jail, Judge Frizzelle, upon petitioner's application, issued a writ of *habeas corpus* returnable before Judge McKeithen, Special Judge presiding over the April 8, 1957, Term of Sampson Superior Court, on April 8, 1957, at 2:30 p.m., at the Courthouse in Clinton; and at said time and place the matter was heard by Judge McKeithen.

The facts alleged by petitioner as the basis for his contention that he was then unlawfully imprisoned are as follows: The April 1st Criminal Term, 1957, of Duplin, convened April 1, 1957, and adjourned April 2, 1957. Prior to April 1, 1957, petitioner "contacted" the district solicitor and "was told to make his appearance in open Court at 9:30 a.m., Friday, April 5, 1957." Petitioner made his appearance at said time and place "and was prepared, through his attorneys, to make a motion for a new trial on the grounds of newly discovered evidence," but then discovered that on Tuesday, April 2nd, the district solicitor "had made a motion for commitment and capias to issue," and after petitioner was called in open court, said motion was allowed without notice to petitioner or his attorneys. On Friday, April 5th, petitioner filed with said clerk a motion, affidavit and notice, the motion being for a new trial on the ground of newly discovered evidence, and requested (1) that these be served upon the district solicitor, and (2) that he be allowed to remain at liberty under his appearance bond until the next term for the trial of criminal cases, to wit, the August Term, 1957, but said clerk "denied authority to continue (petitioner's) appearance bond and issued said commitment order to the Sheriff of Duplin County who thereupon took (petitioner) in custody."

By order of Judge McKeithen, the matter was "transferred to the Superior Court of Duplin County to be heard by the Judge presiding at the April 22nd Term of the said Court or at such other term as the Judge may designate," and petitioner was

"permitted to give an appearance bond in the sum of $8,000 for his appearance at said term or at any term designated by said Court." The facts recited in said order are substantially in accord with said allegations in the petition for writ of *habeas corpus*. Judge McKeithen noted that there had been no hearing on petitioner's motion for a new trial on the ground of newly discovered evidence.

On April 23, 1957, pursuant to Judge McKeithen's order, the matter came on for hearing before Judge Morris, then presiding over the April 22nd Civil Term, 1957, of Duplin. Prior to such hearing petitioner, in apt time, moved that his motion for a new trial on the ground of newly discovered evidence be heard at the August Term, 1957, of Duplin, "in that this Court, holding a Civil Term is without jurisdiction to try a criminal action." Petitioner's Exception No. 1 is to the denial of this motion.

Thereupon, petitioner presented evidence pertinent to the motion for a new trial on the ground of newly discovered evidence. Judge Morris made certain findings of fact; and, upon such findings of fact, and in his discretion, Judge Morris denied the motion. Petitioner's Exception No. 2 is to this ruling.

The order entered by Judge Morris (1) denied, in his discretion, the motion for a new trial on the ground of newly discovered evidence; (2) discharged the writ of *habeas corpus* theretofore issued; and (3) ordered that petitioner be committed to serve the sentence imposed by judgment pronounced at August Term, 1956. Petitioner excepted, gave notice of appeal, and brought the matter to this Court in the manner appropriate for perfecting an appeal.

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

William E. Craft and Carl V. Venters for defendant, appellant.

BOBBITT, J. Except in cases involving the custody of minor children, G.S. 17-40, no appeal lies from a judgment rendered on return to a writ of *habeas corpus*. *In re Steele*, 220 N.C. 685, 687, 18 S.E. 2d 132, and cases cited. The remedy, if any, is by petition for a writ of *certiorari*, addressed to the sound discretion of this Court. *In re Lee Croom*, 175 N.C. 455, 95 S.E. 903.

Under the rules stated, petitioner's purported appeal would be dismissed. However, to clarify the important question of practice presented by the record, this Court deems it appropriate to treat petitioner's purported appeal as a petition for writ of *certiorari*. Art. IV, Sec. 8, Constitution of North Carolina; *S. v.*

Burnette, 173 N.C. 734, 739, 91 S.E. 364. So treated, the petition is allowed; and we consider the questions presented as upon return to our writ of *certiorari.*

The sole question for determination upon *habeas corpus* hearing *for alleged unlawful imprisonment* is whether petitioner is then being unlawfully deprived of his liberty. *In re Swink,* 243 N.C. 86, 92, 89 S.E. 2d 792; *In re Young,* 222 N.C. 708, 24 S.E. 2d 539; *In re Samuel Parker,* 144 N.C. 170, 56 S.E. 878; 25 Am. Jur., Habeas Corpus Sec. 2; 39 C.J.S., Habeas Corpus Sec. 4. In this connection, it is noted that the writ of *habeas corpus,* a "high prerogative writ," is to be made returnable at a certain time and place specified therein; and the particular judge before whom it is returnable *need not be* either the resident or the presiding judge of a particular judicial district or the presiding judge at any particular term of court. *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684.

It appears that the April 1, 1957, Criminal Term of Duplin, adjourned April 2, 1957, the very day the clerk received this Court's certificate of its affirmance of the judgment pronounced at August Term, 1956; and that petitioner's said motion was made April 5, 1957, the very day he was to make his appearance at said April 1st Criminal Term, 1957. Unquestionably, his said motion was made in apt time. *S. v. Casey,* 201 N.C. 620, 161 S.E. 81; *S. v. Cox,* 202 N.C. 378, 162 S.E. 907; *S. v. Moore,* 202 N.C. 841, 163 S.E. 700; *S. v. Lea,* 203 N.C. 316, 166 S.E. 292; *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399; *S. v. Dunheen,* 224 N.C. 738, 32 S.E. 2d 322; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *S. v. Smith,* 245 N.C. 230, 95 S.E. 2d 576; *S. v. Mooring,* 245 N.C. 698, 97 S.E. 2d 117.

Petitioner's position, as asserted in his petition for writ of *habeas corpus,* was that he was entitled to be at liberty under bond pending the hearing at August Term, 1957, of his motion for a new trial on the ground of newly discovered evidence.

Petitioner did not request or consent that Judge Morris hear this motion at the April 22nd Civil Term, 1957. On the contrary, prior to the hearing by Judge Morris, petitioner insisted that this motion was for hearing and determination at the August Term, 1957.

The sole question presented at the hearings before Judge McKeithen and Judge Morris on return to writ of *habeas corpus* was whether petitioner was then unlawfully imprisoned. Nothing in the record indicates that petitioner's motion for a new trial on the ground of newly discovered evidence had been set for hearing either before Judge McKeithen or before Judge Morris. It is noted that Judge McKeithen's order, transferring

the matter for hearing by the presiding judge at the April 22nd Civil Term, 1957, of Duplin, simply allowed the petitioner to be at liberty under bond pending further hearing on return to the writ of *habeas corpus*. Petitioner's assignments of error are directed to the order of Judge Morris.

Except as otherwise provided, each term of superior court "shall continue in session one week and be for the trial of criminal and civil cases . . . unless the business thereof shall be sooner disposed of." G.S. 7-70. Thus, except as otherwise provided, each term of court is a combination or mixed term, that is, a term for the trial of both criminal and civil cases. But G.S. 7-70 expressly provides otherwise as to many specific terms of court.

With reference to Duplin County, G.S. 7-70, in pertinent part, provides: (1) That the term referred to herein as the April 1st Criminal Term, 1957, was a term to commence "the fourth Monday after the first Monday in March to continue one week for the trial of criminal cases only." (2) The term referred to herein as the April 22nd Civil Term, 1957, was a term to commence "the seventh Monday after the first Monday in March to continue one week for the trial of civil cases only." (3) The term referred to herein as the August Term, 1957, was a term to commence "the first Monday before the first Monday in September"; and this term, because not otherwise provided, was a term for the trial of both criminal and civil cases.

G.S. 7-73 provides: "No criminal business at civil terms.—No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone."

Provisions now incorporated in G.S. 7-73 may be traced to Secs. 3 and 7 of Ch. 28, Public Laws of 1901; and provisions now incorporated in G.S. 7-70, including the designation of certain terms "for the trial of civil cases only," may be traced to other sections of said 1901 Act. Provisions of Secs. 3 and 7 of said 1901 Act were codified as Sec. 1508, Revisal of 1905, and as Sec. 1445, Consolidated Statutes of 1919, and as G.S. 7-73. It is noteworthy that Sec. 1508, Revisal of 1905, bears the caption, "No grand jury drawn nor criminal process returnable to or solicitors attend, civil terms"; but, when the General Assembly adopted the Consolidated Statutes of 1919, the caption was changed to that now appearing in G.S. 7-73, to wit, "No criminal business at civil terms." It is noted further that said Act of 1901, also an amendatory statute, to wit, Ch. 196, Public Laws of 1913, contained

the provision "that no criminal process shall be returnable to any term designated *in this act* for the trial of civil actions alone." (Italics added.) Moreover, Sec. 1508, Revisal of 1905, contained the provision that "no criminal process shall be returnable to any term designated *in this chapter* for the trial of civil actions alone." (Italics added.) It is obvious that G.S. 7-70 and G.S. 7-73 are parts of one pattern and are to be construed *in pari materia.*

When G.S. 7-70 and G.S. 7-73 are so construed, the legislative intent is clear, and we so hold, that a motion which, if allowed, would set aside a verdict and judgment in a case on the criminal docket, specifically, a motion for a new trial on the ground of newly discovered evidence, may not be determined at a term, such as the April 22nd Civil Term, 1957, of Duplin, expressly restricted by statute as a term "for the trial of civil cases only." Such a motion is for determination at a term of the court (in which the verdict and judgment to which the motion is addressed were rendered) provided for the trial of criminal cases. Consequently, petitioner was entitled to have his motion heard at August Term, 1957; and his assignment of error based on his Exception No. 1 is sustained.

Even so, petitioner was not entitled to be at liberty under bond as a *matter of right* pending the hearing of the motion. Here, the clerk did exactly what G.S. 15-186 explicitly provided that he should do, namely, issue commitment to the sheriff; and the sheriff did exactly what G.S. 15-186 explicitly provided that he should do, namely, "proceed to execute the sentence which was appealed from." It is noted that the sentence appealed from was imposed by a *final* judgment pronounced at August Term, 1956. Compare: *S. v. Bowser,* 232 N.C. 414, 61 S.E. 2d 98. G.S. 17-4 provides that "application to prosecute the writ shall be denied . . . (2) where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." *In re Taylor,* 229 N.C. 297, 303, 49 S.E. 2d 749, and cases cited.

Accepting at face value petitioner's allegations, the assurance by the district solicitor that petitioner need not appear until Friday, April 5th, had no bearing upon the right and duty of the clerk and sheriff to proceed under G.S. 15-186. Moreover, there is nothing to suggest that, when he "contacted" the district solicitor, petitioner intimated that he intended to move at the April Criminal Term, 1957, or thereafter, for a new trial on the ground of newly discovered evidence. Rather, the implication is that the district solicitor did nothing more than assure

petitioner that he need not appear to be taken into custody until Friday, April 5th; and petitioner was not taken into custody until that date.

The calling of petitioner and the allowance of the solicitor's motion for capias and commitment added nothing to the authority vested in the clerk by G.S. 15-186. No question is presented as to the relevancy of this fact in relation to the liability of those obligated on petitioner's appearance bond.

The fact that petitioner made a motion for a new trial on the ground of newly discovered evidence did not suspend or otherwise affect the express provisions of G.S. 15-186 or entitle petitioner to bond as a matter of right pending hearing thereon. At the hearing on return to writ of *habeas corpus*, the precise question, as related to matters pertinent to petitioner's pending motion for a new trial on the ground of newly discovered evidence, was limited to whether petitioner's evidence was of sufficient weight to cause the judge, in his discretion, to release petitioner under bond conditioned on his appearance at the next term for the trial of criminal cases *for final hearing* on his said motion.

It appears that Judge Morris, over petitioner's objection, proceeded to hear the motion for a new trial as upon a final hearing of such motion. In this, we hold that he was in error. However, it is noted that, upon findings of fact to which there is no exception, and in the exercise of his discretion, he denied the motion. Had the motion been properly before him on such hearing, the ruling of Judge Morris would not be subject to review on appeal; for there is no suggestion of abuse of discretion. *S. v. Williams*, 244 N.C. 459, 94 S.E. 2d 374. *A fortiori*, no appeal lies from his discretionary denial of petitioner's asserted right to be released under bond pending final hearing on the motion.

The result is that the portion of Judge Morris' order discharging the writ of *habeas corpus* and ordering the petitioner into custody is affirmed; but, petitioner having made his motion for a new trial on the ground of newly discovered evidence in apt time, the order of Judge Morris should be modified so that petitioner may be heard *de novo* on his said motion at a term of Duplin Superior Court for the trial of criminal cases. It is so ordered.

Modified and affirmed.

ORBY PITMAN, EMPLOYEE v. L. M. CARPENTER & ASSOCIATES, (EMPLOYEE) AND PHOENIX ASSURANCE COMPANY (CARRIER).

(Filed 30 October, 1957)

1. **Master and Servant § 40f—**

In order to support an award of compensation for silicosis it is necessary that the Industrial Commission find, *inter alia*, that the employee had been exposed to the hazards of silicosis for a minimum of thirty working days during the last seven consecutive months of his employment, G.S. 97-57, and that the employee's work in this State had exposed him to the inhalation of silica dust for a minimum of two years, no part of which two-year period was more than ten years prior to his last exposure. G.S. 97-63.

2. **Master and Servant § 55d—**

The findings of the Industrial Commission are conclusive when supported by any competent evidence.

3. **Master and Servant § 40f—**

Conflict in the testimony as to whether plaintiff employee was exposed to the hazards of silica dust in his employment in this State presents an issue of fact for the determination of the Industrial Commission.

4. **Same—**

The evidence in this case *is held* sufficient to sustain the findings of the Industrial Commission that plaintiff employee was exposed to the hazards of silicosis for a minimum of thirty working days during the last seven consecutive months of his employment and that plaintiff's work in this State exposed him to the hazards of silicosis for a minimum of two years, no part of which two year period was more than ten years prior to his last exposure.

5. **Master and Servant § 55b(1)—**

Where plaintiff employee is ordered to abstain from employment in an industry having the hazards of silica dust and directed to report for second and third medical examinations, G.S. 97-61.3, G.S. 97-61.4, it is proper that he be awarded the compensation provided by G.S. 97-61.5(b) without consideration of the fact that his condition was complicated by pulmonary tuberculosis, since the total amount of compensation is to be determined on the hearing after the third medical report, G.S. 97-61.6, at which time consideration should be given the tubercular condition of the employee in accordance with the provisions of G.S. 97-65.

APPEAL by defendants from *Phillips, J.*, July Term, 1957 of MITCHELL.

Defendants appeal from a judgment affirming an order of the Industrial Commission awarding compensation to plaintiff, who is suffering from silicosis.

Warren H. Pritchard for plaintiff appellee.
Fouts & Watson for defendant appellants.

RODMAN, J. To support an award to one suffering from silicosis the Commission must find, *inter alia:* (1) the employee

has been exposed to the hazards of silicosis for a minimum of thirty working days during the last seven consecutive months of his employment, G.S. 97-57, *Bye v. Granite Co.*, 230 N.C. 334, 53 S.E. 2d 274; and (2) plaintiff's work in this State must have exposed him to the inhalation of silica dust for a minimum of two years, no part of which two-year period shall be more than ten years prior to his last exposure, G.S. 97-63; *Hicks v. Granite Corp.*, 245 N.C. 233, 95 S.E. 2d 506; *Midkiff v. Granite Corp.*, 235 N.C. 149, 69 S.E. 2d 166. The Commission found each of these essential facts. The findings were sustained on the appeal to the Superior Court. This appeal again challenges these findings.

Findings of fact by the Industrial Commission are conclusive when supported by any competent evidence. *Mica Co. v. Board of Education*, 246 N.C. 714. Hence the question presented is: Does the record contain any evidence to support the findings made by the Commission?

Our examination of the record convinces us that there is plenary evidence to support each of the challenged findings.

Silicosis is caused by the inhalation of silica dust or silicates. G.S. 97-62. The fact that plaintiff is a victim of silicosis is not challenged. Plaintiff worked for defendant employer from 9 May 1955 to 2 February 1956. His claim was filed 30 April 1956. Dr. C. D. Thomas, a medical expert, testified that mica contains silica, feldspar contains silica. "Silicosis is caused or augmented by the inhalation of free silica of 10 microns or less. It depends on what you call free silica as to whether or not blocks of mica contain free silica."

L. L. McMurray, an expert witness for the defendant, testified: "Silicate is a compound of silica and some other element or elements. Commercial feldspar runs about 65% SiO_2, silica. In the colloquial sense flint is entirely free silica . . . Free silica comes with mica and in this case I would say by accident. It is a contaminent accidentally adhering to the mica. It could stick to the mica. I think trace quantities probably could be found in most cases. It is my opinion that if dust came off the mica, from the material that is surrounding the mica as it was taken out of the ground, that the dust would contain free silica."

Plaintiff testified that he was employed for two or three weeks as a rifter or sheeter. Blocks of mica are split with a knife into small sheets by a rifter or sheeter. During the remainder of his employment he acted as a foreman or supervisor whose duties were to go around among the other employees and see that they were properly splitting and trimming the mica for shipment. He worked in a modern three-story building about

60 by 100 feet. The first floor, where he worked, was twelve feet high. He testified: "The scraps would be brought down in the bags in the elevator and were brought down about every other day. When the scraps would come down on the elevator we had to throw them off on the little trucks and roll them out on the truck and it would just be so thick you could see it all over the house. That was mica dust. . . . You couldn't possibly help breathing that dust from the mica when you were in the building. I was in the building all the time and breathed that mica dust every day. The mica was dirty. There was a dirt dust and the mica would have a drill dust. There was flint dust with it. I was referring to the flint dust as drill dust. . . . That flint dust would be in the air most every day I was in there and I would breathe it."

Lewis Edge, a witness for plaintiff, testified: "If the mica was pretty dry there was lots of dust when they were unloading it. I'd say the dust was composed of dirt, rock and mica. It would circulate in the air up to where I was working and I would breathe it. . . . When he was there where I was working the mica dust did circulate in that area and I would breathe it. . . . Two or three times a week sweeping would be started before we quit work. Both Mr. Pitman and I would be there when this was being done. They were sweeping the dust off the floors which must have come from the mica. . . . I know several times when I got home I spit the dust up which I breathed. The sweeping caused it to circulate in the air over the building. . . . All of these operations would cause mica dust to circulate in the air in that room, which was breathed by people in the room."

Dr. Thomas, an expert witness, in response to a hypothetical question propounded to him, expressed the opinion that under the conditions described by the witnesses for plaintiff, plaintiff was subjected to an injurious exposure to silicosis.

The evidence referred to is merely indicative of the evidence offered by plaintiff with respect to the exposure while in the employment of defendants. True, defendants' witnesses expressed the opinion that there was no injurious exposure. This conflict in the testimony merely imposed on the Commission the duty of determining the disputed fact.

Was plaintiff, prior to his employment by defendant, subject to the hazard of silicosis for a period of two years while employed in North Carolina? For six or eight months immediately prior to his employment by defendant he worked at the Wiseman mine in Mitchell County. Prior to his employment there, he worked at a mica house where the work was of the same character done for defendant employer. Prior to this employ-

ment he worked for ten or eleven months in Yancey County. In 1952 he worked five or six months in Franklin, N. C. He worked about three months in Taylorsville, N. C. He worked about a year during 1950 and 1951 at the Ellis mine in Kona in Mitchell County. In each of these employments he breathed mica, flint, and feldspar dust.

It is apparent that there is evidence from which the Commission could find that for more than two years between 1950 and 9 May 1955 plaintiff was employed at work in North Carolina where he breathed mica dust and feldspar dust. Mica and feldspar each contain silica and silicates. Plaintiff's evidence permitted but did not compel the Commission to find that claimant, prior to his employment by defendant, had within ten years immediately prior to such employment been employed in North Carolina under conditions which for more than two years exposed him to the inhalation of the dust of silica or silicates.

The Commissioner found plaintiff's silicotic condition was complicated by pulmonary tuberculosis. This finding was based on the Advisory Medical Committee's report of the first examination (G.S. 97-61.1) made on 26 May 1956. He likewise found as a fact that plaintiff, when he terminated his employment with defendants, had voluntarily removed himself from any occupation which exposed him to the hazards of silicosis.

On these findings the Commissioner concluded that he was not called upon to determine the full extent of plaintiff's disability; that the provisions of G.S. 97-65 should be considered only on the hearing to be held following the third examination by the Advisory Medical Committee, and the compensation provided by G.S. 97-61.5(b) was payable without regard to the complicating factor of tuberculosis. The full Commission affirmed these findings and conclusions.

The award requires defendant to pay compensation for 104 weeks provided plaintiff complies with the Commission's order to abstain from employment in the hazardous industry. It directs plaintiff to report for a second medical examination (G.S. 97-61.3) on 26 May 1957 and a third medical examination (G.S. 97-61.4) on 26 May 1958. It then provides that the Commission shall, following the third medical report, set the cause for hearing to determine what additional compensation, if any, plaintiff is entitled to recover.

Defendants excepted to the conclusions of law and the award based thereon, insisting that a proper construction of G.S. 97-65 required the Commission to consider plaintiff's tubercular condition in directing payment of compensation as provided in G.S. 97-61.5(b).

The slow development, incurable nature, and usual permanence of the disability resulting from asbestosis and silicosis were pointed to in *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426, as reasons prompting the Legislature to draw distinctions between the tests for compensation to be paid to an injured employee and a diseased employee suffering from silicosis.

The 1955 Legislature rewrote the statutory provisions relating to compensation payable to employees suffering from silicosis. The definition of "disablement" was modified. G.S. 97-54. Express provision was made for two annual examinations following the examination disclosing disablement on account of silicosis. The statute is explicit in directing payment and the amount thereof during this two-year period. G.S. 97-61.5 (b). This is statutory recognition of the difficulty of effecting a cure and the length of time necessary to ascertain the extent of the disability. For that reason the statute fixes a time in the future when the total amount of compensation will be determined. G.S. 97-61.6. It is at that time the Commission's duty to take into consideration the tubercular condition of the employee and determine in its wisdom the extent to which the provisions of G.S. 97-65 should affect the compensation payable to the employee.

The Commission has correctly interpreted the 1955 statute. The judgment of the Superior Court is

Affirmed.

JOE C. SCOTT v. ANDY FOPPE

(Filed 30 October, 1957)

1. **Vendor and Purchaser § 24—**

Where the purchaser refuses or becomes unable to comply with his contract to purchase, he is not entitled to recover the amount theretofore paid by him pursuant to the agreement.

2. **Same: Damages § 6—Doctrine of mitigation of damages does not constitute cause of action.**

Plaintiff was under contract to purchase certain realty but became unable to comply with his agreement, and so advised defendant, whereupon defendant owner sold the property. Plaintiff instituted this action to recover the amount of money expended by him on the property pursuant to the agreement prior to his own breach, alleging that defendant failed to exercise due diligence in selling and could have sold to a prospect obtained by plaintiff at a price which would have avoided any loss. *Held:* Plaintiff's cause is based on the equitable doctrine of mitigation of damages, which applies in proper cases to diminish the amount of recovery by a plaintiff, but does not constitute a cause of action, and therefore nonsuit was proper.

3. Vendor and Purchaser § 24: Contracts §§ 2, 4—Evidence held insufficient to show agreement of vendor to sell at price which would avoid loss to purchaser.

Plaintiff contracted to purchase certain realty upon which a house had been built for him. Prior to the time for performance plaintiff advised defendant he could not finance the purchase and suggested that the parties sell the property themselves, without the intervention of a real estate agent, so that each could get his money back. Plaintiff testified that defendant said, "let's see what we can get out of it," and that "we all agreed not to turn it over to a real estate dealer." Plaintiff's evidence further tended to show that defendant later sold the property through a real estate agent for an amount insufficient for plaintiff to recover the sums theretofore put into the property by him. *Held:* The evidence is insufficient to show a contract to sell at a price at which each of the parties could get back all money put into the property, and further, if such contract had been entered into, there was no evidence of any consideration to support it.

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

This is a civil action to recover from the defendant for certain losses alleged to have resulted from the failure of the defendant to mitigate damages.

On or about 19 August 1955 the plaintiff contracted with the defendant and one H. H. Brecht to buy for him Lot No. 1 in Block H, Sherwood Forest, Section 2, in Sharon Township, Mecklenburg County, known as 5201 Addison Drive, for the sum of $5,000, and to construct a house thereon for the plaintiff according to his plans and specifications. Plaintiff agreed to pay the defendant and Brecht $5,000 for the lot (title to which the defendant took in his name) and to pay the actual cost of the construction of the house, plus ten per cent of the actual construction cost as a profit to the builders. (Mr. Foppe financed the project and Mr. Brecht was the contractor.) Upon completion of the house and payment therefor the property was to be conveyed to the plaintiff.

The plaintiff alleges that, pursuant to said agreement, he paid for certain work and materials that went into the construction of the house, including $1,000 on the lot, the sum of $3,954.54, and for certain appliances placed in the house, the sum of $1,276.16, making a total expenditure of $5,230.70.

About the middle of February, and before the completion of the house the latter part of February or the first part of March 1956, the plaintiff informed the defendant and Mr. Brecht that he would not be able to comply with the terms of his contract. He alleges in his complaint that he notified the defendant and Mr. Brecht of his inability to carry out his contract, whereupon "it was agreed between all three parties that each personally

without the aid of a real estate broker, would try to sell the property and that the highest net offer would be accepted so that each of the parties would get their money back, with the plaintiff taking the first loss should the highest net offer not leave anything for him after the defendant and Mr. Brecht * * * recovered their money, plus Mr. Brecht's 10% commission."

Plaintiff further alleges that he obtained a purchaser who was ready, willing and able to buy the property at a net price of $40,000 and to pay extra for the rugs, drapes, etc., purchased at the Mecklenburg Furniture Shops and for which payment had not been made.

The defendant in his answer alleges that the actual cost of the house and lot was $40,201.37 and that he paid this amount therefor in full. The defendant admits that in order to mitigate his own damages by reason of the breach of the original contract by the plaintiff, H. H. Brecht and the defendant agreed with the plaintiff to undertake to find a purchaser for the property at the best possible price, but denies that they agreed not to employ the services of a real estate agent.

The only evidence offered in support of the allegations in plaintiff's complaint was his own testimony together with certain exhibits. His evidence tends to show that he paid for various items of materials, fixtures, etc., that went into the house. He does not contend that the defendant and Mr. Brecht breached the original contract in any respect. In fact, he testified, "They fulfilled their contract and completed the house. But I was unable to purchase the house and breached my contract." He further testified that approximately a week after he found he could not carry out his contract, he found a purchaser who made a firm offer for his house, as a home for his son, in the sum of $40,000 and further agreed to pay the Mecklenburg Furniture Shops for the rugs, drapes, etc., which had been purchased for the house. This offer, the plaintiff testified, was made orally and submitted to the defendant and Mr. Brecht over the telephone, and the defendant informed the plaintiff "that Brecht said he doesn't want to deliver at that price, that we could get more money." About a week later, the defendant and the plaintiff went to see the plaintiff's prospective purchaser and offered him the property for $40,000 and they were informed by him that he was not interested; that he had made other arrangements for a home for his son. Finally, the property was sold on 16 May 1956 by the defendant and Mr. Brecht for $40,000 and they paid therefrom a commission of $1,250.00 to a real estate agent for making the sale, and $3,116.18 for the drapes, rugs, etc., purchased from the Mecklenburg Furniture Shops.

The plaintiff's testimony, bearing on the alleged contract for the sale of the house, was as follows: "I went to Mr. Brecht and Mr. Foppe and said I could not finance this house on account of the New York firm has failed to complete negotiations on my Company. I said let's try to sell the house and don't turn it over to a real estate agent. All of us can get our money out of it." Plaintiff further testified that the defendant in reply said, "* * * let's see what we can get out of it. We all agreed not to turn it over to a real estate dealer and we would work on it ourselves."

On cross-examination the plaintiff testified, "When I found out that I couldn't go through with the contract and I had to break it, I went to Mr. Foppe and Mr. Brecht and we talked over the situation. It was then agreed that in order to mitigate the loss to Mr. Foppe and Mr. Brecht that we would all try to find another buyer. It was agreed that the house would be sold with the equipment in it. * * * The equipment was all installed when I agreed to sell the house to another buyer for the highest price."

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

J. M. Scarborough, for plaintiff appellant.
Blakeney & Alexander, J. W. Alexander, Jr.
Ernest W. Machen, Jr., for defendant appellee.

DENNY, J. The amount which the plaintiff seeks to recover in this action, to wit, $5,230.70, is the exact amount he claims to have invested in labor and materials that went into the construction of the house, including $1,000 paid on the purchase price of the lot, plus the cost of certain appliances which were installed in the house.

It is settled law that where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms. *Rochlin v. Construction Co.*, 234 N.C. 443, 67 S.E. 2d 464; *Improvement Co. v. Guthrie*, 116 N.C. 381, 21 S.E. 952; 31 A.L.R. 2d 118, Anno.—Vendee's Recovery of Purchase Money; 55 Am. Jur., Vendor and Purchaser, section 535, page 927; 92 C.J.S., Vendor and Purchaser, section 554 (a), page 566.

In view of the facts disclosed on this record, it is clear that the plaintiff is not entitled to recover anything from the defendant as a refund of the amount paid under the contract before

its breach. However, the plaintiff contends in his brief that under these facts and circumstances, when it became known to the defendant that he was unable to carry out his contract to buy the house and lot, the defendant then owed him the duty to minimize or eliminate the damages. This contention is based on the claim that the plaintiff produced a purchaser who was willing and able to buy the property at a price which he contends, if the offer had been accepted, would have been sufficient to reimburse the defendant and the plaintiff for their respective investments in the house and lot.

We think the plaintiff has attempted to base his cause of action on the equitable doctrine of mitigation of damages, growing out of the breach of the original contract, and of an alleged breach by the defendant of a contract allegedly entered into by the parties with respect to the sale of the house and lot after plaintiff had breached the contract for the purchase of the property.

Ordinarily, the equitable doctrine of mitigation of damages is a defense to an action in which the plaintiff seeks to recover for damages allegedly caused by a breach of duty on the part of defendant and does not constitute a cause of action. As stated in Sutherland, Damages, Volume 1, 4th Edition, section 149, page 458, "Mitigation of damages is what the expression imports, a reduction of their amount; not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, *nor of facts which constitute a cause of action in favor of the defendant;* but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him." (Emphasis added.) See *Lane v. R.R.*, 192 N.C. 287, 134 S.E. 855, 51 A.L.R. 1114; *Johnson v. R.R.*, 184 N.C. 101, 113 S.E. 606, 25 A.L.R. 910; *Brewington v. Loughran*, 183 N.C. 558, 112 S.E. 257, 28 A.L.R. 1543.

Finally, as to the alleged contract to sell the property to a third party, after the plaintiff had informed the defendant and Mr. Brecht of his inability to purchase the property, and to accept the highest net offer so that each of the three parties, "would get their money back that had been put in the property," we do not think the evidence offered by the plaintiff is sufficient to show that such a contract was entered into, and we so hold. Moreover, if such a contract had been entered into, there is no evidence of any consideration to support it. *Jordan v. Maynard*, 231 N.C. 101, 56 S.E. 2d 26; *Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E. 2d 676; *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647.

As we have already pointed out, when the plaintiff breached his contract for the purchase of the house and lot, the defendant, under the facts disclosed on this record, was under no legal obligation to refund to him that portion of the consideration theretofore paid pursuant to the terms of the contract. Consequently, when the plaintiff breached the contract, the defendant and Mr. Brecht had the right to dispose of the property as they saw fit. However, if the defendant or Mr. Brecht should institute an action against the plaintiff to recover damages resulting from the plaintiff's breach of the original contract, the plaintiff would have the right to set up in mitigation of the damages claimed, the failure, if any, on the part of Mr. Foppe and Mr. Brecht to exercise due diligence in order to minimize the present plaintiff's loss by reason of his breach of such contract.

The judgment of the court below is
Affirmed.

LAURA FALLINS v. DURHAM LIFE INSURANCE CO.

(Filed 30 October, 1957)

1. Insurance § 41—

In an action on an accidental death policy, the burden is on plaintiff to prove that insured met his death by bodily injury effected directly through external, violent and accidental means, within the coverage of the policy, and, upon such a showing, the burden is upon insurer to prove defenses under the exclusion clauses, such as that insured's death resulted directly or indirectly from insured's participation in, or attempt to commit an assault or a felony, or violence intentionally inflicted by another.

2. Insurance § 38—

Death is "effected by accidental means" if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. The unintended acts of the insured are deemed accidental, as well as the acts of another person, when done without the consent of insured unless they are provoked and should have been expected by insured.

3. Insurance § 41—

Plaintiff's evidence tending to show that insured was engaged in a fight with another boy when the uncle of the other boy shot in their direction for the purpose of frightening them into stopping their fight, and that insured was hit and mortally wounded by the shot, is sufficient to go to the jury and support its finding that the death of insured was effected by external, violent and accidental means.

4. Same—Evidence held not to warrant nonsuit on defense that insured's death resulted from his participation in assault.

The evidence disclosed that insured and another boy were fighting when the uncle of the other boy shot in their direction for the purpose of frightening them into stopping their fight, resulting in the fatal injury of insured. There was no evidence that either party to the fight used or attempted to use any weapon or that any injury was threatened or anticipated by them or that insured was the aggressor under circumstances which rendered serious injury or death likely. *Held:* The evidence does not warrant nonsuit under the exclusion clause of the policy on the ground that insured's death resulted directly or indirectly from his participation in an assault.

5. Same—

The evidence disclosed that insured and another boy were fighting. The uncle of the other boy testified that he shot in their direction for the purpose of frightening them into stopping their fight, but that he did not intend to injure either of them. *Held:* The evidence does not warrant nonsuit under the exclusion clause of the policy on the ground that insured's death resulted from violence intentionally inflicted by another, since under the testimony the uncle, although he intentionally fired the shot, did not intend to inflict any injury.

6. Appeal and Error § 42—

A party may not complain of an asserted error in the charge which is favorable to him.

APPEAL by defendant from *Frizzelle, J.*, June, 1957 Civil Term, CARTERET Superior Court.

Civil action by the beneficiary against the defendant to recover benefits under a policy insuring Albert O. Fallins against death by external, violent, and accidental means. The exclusion clause provided: "Insurance under this policy shall be null and void if the insured's death resulted directly or indirectly from any of the following causes: . . . (d) participating in or attempting to commit an assault or felony, (e) violence intentionally inflicted by another person." Only two witnesses testified in the case: The plaintiff, that she gave notice, and Levi Williams. The latter testified: "On December 31, 1954, I was told my nephew, Abraham, was fighting down behind a telephone pole. I did not know with whom he was fighting. My nephew is about 19 years old and about the same age as Albert Fallins, the deceased. I took my rifle out of the house and shot at the telephone pole which was about 50 feet away from me. . . . Albert and Abraham were about two or three feet behind the pole. I aimed near the bottom of the telephone pole, about four feet from the ground. My intent on firing the rifle was to part Abraham and Albert. However, at the time I didn't know it was Albert. Me wouldn't have done it for nothing. I fired the rifle to make them part. It was about 7:30 at night and it was dark. . . . Alberta

Fair came running in the house and said, 'Her tell they had been down there fighting and didn't say who it was.' "

The defendant moved for a nonsuit at the close of the plaintiff's evidence. The court overruled the motion and the defendant excepted. The defendant did not offer evidence. The court submitted the following issues which the jury answered as indicated:

"1. Was the death of Albert Fallin(*s*) effected directly through external, violent and accidental means?
Answer: Yes.

"2. Did the death of Albert Fallin(*s*) result directly or indirectly from participating in or attempting to commit an assault?
Answer: No.

"3. Did the death of Albert Fallin(*s*) result directly or indirectly from violence intentionally inflicted by another person?
Answer: No."

The fourth issue, as to the amount of recovery, if any, was answered by consent.

The defendant submitted a request for instructions which amounted to a peremptory charge in its favor and which the court refused. From the judgment in accordance with the verdict, the defendant appealed.

George W. Ball, George M. Womble,
By: G. M. Womble, for defendant appellant.
C. R. Wheatly, Jr., for plaintiff, appellee.

HIGGINS, J. The defendant's exception to the instructions and its motion for nonsuit raise the same question—the sufficiency of the evidence to go to the jury.

In cases of this character "the plaintiff, to establish a *prima facie* case, must prove (1) the existence of the contract or policy sued on; (2) the death of the insured or the happening of the event provided for in the policy, and the giving of notice and proof of death (or other event), as required by the policy. On the other hand, the burden is on the company to show a violation of conditions avoiding an otherwise valid policy, or exceptions in the policy which limit the liability of the company." *Collins v. Casualty Co.*, 172 N.C. 543, 90 S.E. 585. The burden is on the plaintiff to show the insured met his death by bodily injury effected directly through external, violent, and accidental means, and upon such a showing the defendant can

relieve itself of liability by showing the insured's death resulted directly or indirectly from (d) participating in, or attempting to commit an assault or a felony, or (e) violence intentionally inflicted by another.

The only witness (except as to proof of loss) was Levi Williams, who testified in substance that upon being told his nephew and some other boy were fighting, fired his rifle at a telephone pole for the purpose of stopping the fight. "Me wouldn't have done it for nothing. Me wanted to stop them from fighting. . . . Me did that so they would hear that so that would make them stop fighting."

There was no evidence the insured was the aggressor in the fight or that he brought it on; no evidence that either was hurt or in danger. Williams, according to his testimony, intentionally fired a rifle at the telephone pole in order to stop the fight, but with no intent to injure either participant. The jurors heard the story. They observed the witness when he told it. They weighed the testimony and found for the plaintiff on all issues. Does the evidence show that death was effected by accidental means?

An injury is "effected by accidental means" if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. The unintended acts of the insured are deemed accidental. Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured. Vance on Insurance, 3rd ed., Sec. 181, p. 947; *Warren v. Ins. Co.*, 215 N.C. 402, 2 S.E. 2d 17; *Powers v. Ins. Co.*, 186 N.C. 336, 119 S.E. 481; *Ziolkowski v. Continental Casualty Co.*, 365 Ill. 594; *Franchebois v. New York Life Ins. Co.*, 171 La. 358, 131 So. 46; *Hutson v. Continental Casualty Co.*, 142 Miss. 388, 107 So. 520; *Eagan v. Prudential Ins. Co.* (Mo.) 107 S.W. 2d 133; *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 p. 1175; *Goldfeder v. Metropolitan Life Ins. Co.*, 280 N.Y.S. 552; *Mutual Life Ins. Co. v. Distretti*, 159 Tenn. 138; *Mutual Ben. Health & Accident Ass'n. v. Ryder*, 166 Va. 446, 185 S.E. 894; *Nalty v. Federal Casualty Co.*, 245 Ill. App. 180.

Under the foregoing authorities, the plaintiff's evidence was sufficient to go to the jury and to support its finding that the death of the insured was effected directly through external, violent, and accidental means. That finding brought the insured within the coverage of the policy.

The defendant contended, however, that the insured's death resulted directly or indirectly from (d) his participating in an

attempt to commit an assault or felony, or (e) from violence intentionally inflicted by another person. The court submitted appropriate issues, both of which were answered for the plaintiff. These issues arose under the exclusion clauses of the policy. As to them, the burden of proof was on the defendant. *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Pearson v. Pearson*, 227 N.C. 31, 40 S.E. 2d 477. Ordinarily, the question whether a party has carried the burden of proof is for the jury.

In this case the insured was not injured by his adversary in the fight but by a stranger to it who shot, or claimed he shot, only to frighten the boys into stopping their fight. There is nothing in the evidence to indicate that either participant in the fight could reasonably expect to be killed by a "crackpot" who thought by shooting into a telephone pole he could stop a boyish fight. There is no suggestion in the evidence that either party to the fight used, or attempted to use any weapon, or that any injury was threatened or anticipated by either of the boys. The evidence in this case is insufficient to call into play the aggressor defense doctrine. Evidence is lacking that the insured was the aggressor in an affray under circumstances which rendered serious injury or death likely. *Clay v. Ins. Co.*, 174 N.C. 642, 94 S.E. 289.

The defendant has contended that notwithstanding the unfavorable verdict on the first and second issues, nevertheless the jury should find the insured's death resulted from *violence intentionally inflicted by another person.* While all the evidence is to the effect that Williams intentionally fired the rifle, it is likewise to the effect he did not intend to injure either participant. The story may or may not be true, but that was for the jury.

In the case of *Epps v. Gate City Life Ins. Co.*, 201 N.C. 695, 161 S.E. 211, cited by the defendant, in denying liability this Court said: "It is immaterial that the officer did not intend to kill the insured; *he did intend to shoot him and this was the act that caused his death.*" (emphasis added). In the Epps case the officer *intentionally* shot the insured. In this case the witness *unintentionally* shot the insured. In order to come within the exclusion clause in the policy, the violence must be *intentionally inflicted.* It was so inflicted in the Epps case; likewise in *Warren v. Ins. Co.*, 219 N.C. 368, 13 S.E. 2d 609. It was not so inflicted in this case. Where a provision of the policy excludes intentional injury it is the intention of the person inflicting the injury that is controlling. 45 C.J.S., sec. 772, p. 800.

The defendant brings forward under proper assignments of error a number of exceptions to the charge. The Assignment No.

7, based on Exception No. 7, relates to the charge on the first issue. After properly charging as to the burden of proof and to the facts necessary to be found in order to answer that issue, "yes," nevertheless, the jury might still answer the issue "no" if it found the killing was intentional. Properly, the latter part of this charge involved the third issue. The defendant cannot complain, therefore, because it had the benefit of the charge on intentional killing on both issues. The court presented the contentions of the parties fairly. It charged in substantial accord with the principles of law herein expressed as applicable to the case. No error of substance appears.

No error.

WILLIAM KENNETH BRANON v. NANCY ANGEL BRANON

(Filed 30 October, 1957)

1. **Divorce and Alimony § 12—**

In the husband's action for absolute divorce on the ground of adultery the wife is entitled to alimony *pendente lite* under the common law unless she answers and defends in bad faith, notwithstanding that she files no cross-action.

2. **Same—**

In the husband's action for absolute divorce on the ground of adultery, the finding of the court, after hearing evidence of the parties, that her answer properly verified and denying the alleged adultery, was made in good faith, is sufficient without any specific finding on the question of adultery.

3. **Same—**

While provision for the wife *pendente lite* in her husband's action for absolute divorce on the ground of adultery, defended by her in good faith, is proper only when she does not have sufficient independent means for her subsistence and for defending the action, the finding in this case, supported by evidence, is sufficient predicate for the court's order that he pay her subsistence and counsel fees *pendente lite.*

APPEAL by plaintiff from *Crissman, J.,* May 20, 1957, Civil Term, of FORSYTH.

This action was instituted March 25, 1957, by plaintiff (husband) for an absolute divorce on the ground of adultery. G.S. 50-5.

Defendant, a minor, is represented herein by guardian *ad litem.* By answer, filed in her behalf and verified by her guardian

ad litem, and also by separate affidavit, defendant denied plaintiff's allegations as to adultery.

The hearing to which the appeal relates was on defendant's motion, made in her behalf by her guardian *ad litem,* that defendant be allowed a reasonable amount for her subsistence *pendente lite* and for counsel fees. After hearing the evidence offered by the respective parties, the court, on May 20, 1957, made findings of fact and entered the order referred to below.

In addition to the facts stated above, the court made these findings of fact:

"1. That the plaintiff and the defendant were married to each (other) on May 5, 1955;

"2. That they lived together as husband and wife until March 19, 1957, at which time the defendant separated herself from the plaintiff;

"3. . . .

"4. . . .

"5. . . .

"6. That the defendant does not have sufficient income from her earnings or separate estate for her support and to defray the necessary expenses of defending herself in this action brought by her husband." Plaintiff's Exception No. 1 is to this finding of fact.

"7. That the answer of the defendant is made in good faith.

"8. That the defendant as a matter of law is entitled to (alimony or subsistence, *pendente lite* and attorney fees.)" Plaintiff's Exception No. 2 is to the portion of this finding of fact in parentheses.

"9. That the plaintiff is gainfully employed as a boarder at the Adams-Millis Hosiery Mills in Kernersville, North Carolina, and in the period January 1, 1957, to May 11, 1957, earned approximately $454 net take-home pay for part-time work.

"10. That Ten ($10) Dollars per week as alimony or subsistence *pendente lite* and One Hundred Fifty ($150) Dollars attorney fees to the defendant for her necessary expenses in defending this action are just and reasonable under the circumstances and conditions subsisting."

Based on these findings of fact, Judge Crissman ordered that plaintiff pay to the clerk, during the pendency of this action, the sum of $10.00 per week, beginning Monday, May 27, 1957, for the use and benefit of defendant, and that he pay to the clerk the additional sum of $150.00, payable at the rate of $10.00 per

week, beginning Monday, May 27, 1957, for the use and benefit of defendant's counsel. Plaintiff excepted to this order (Exception No. 3) and appealed therefrom.

Buford T. Henderson for plaintiff, appellant.
Douglas Dettor and Morris Prince for defendant, appellee.

BOBBITT, J. Plaintiff has charged defendant with adultery and is *prosecuting* this action for an absolute divorce on that ground. Defendant's position is strictly one of defense. She seeks no affirmative relief. All that she asks is that she be provided with such amount for her subsistence pending trial and for counsel fees as is reasonable to enable her to conduct her defense to plaintiff's action.

In *Briggs v. Briggs,* 215 N.C. 78, 1 S.E. 2d 118, the husband's action for absolute divorce was on the ground of two years separation. The wife, *as a defense,* alleged that plaintiff's own wrongful conduct brought about and caused the separation. As succinctly expressed by Barnhill, J. (later C.J.) : "The plaintiff by his suit seeks to deprive the defendant of her legal right to support from him. He must furnish her with the necessary funds with which to defend the action and to support herself pending the litigation." The court's order requiring plaintiff to make certain payments for these purposes was affirmed.

Defendant's right to an allowance for her subsistence pending trial and for counsel fees is not derived from G.S. 50-15 or from G.S. 50-16 but is grounded on the common law. *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Briggs v. Briggs, supra; Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549; *Welch v. Welch,* 226 N.C. 541, 39 S.E. 2d 457; *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913; *Johnson v. Johnson,* 237 N.C. 383, 75 S.E. 2d 109; *Bolin v. Bolin,* 242 N.C. 642, 89 S.E. 2d 303. Cases prior to *Medlin v. Medlin, supra,* which expressly overruled *Reeves v. Reeves,* 82 N.C. 348, are discussed by Hoke, J. (later C.J.), in his opinion in the Medlin case.

True, where the wife is charged with adultery, before she is entitled to such allowance, the court must find as a fact that her denial under oath of the alleged adultery was made in good faith; and before making this determination the court must hear the evidence of the parties. *Holloway v. Holloway, supra.* As to this, Judge Crissman's finding is deemed sufficient; and this finding, as well as the findings to which plaintiff excepted, are sufficiently supported by competent evidence.

The reason underlying the common law rule applicable here is stated by Barnhill, J. (later C.J.), in *Holloway v. Holloway, supra,* as follows:

"Following the decision in *Medlin v. Medlin, supra,* this Court proceeds upon the theory that it would be manifestly unfair to permit a husband to maintain an action which might well stigmatize his wife with foul imputation or deprive her of her marital rights without at the same time requiring him to furnish the necessary funds to enable her to so defend the action as to bring about a fair investigation of the charges and a just determination of the issues. Unless he does so the court will withhold its aid from him. Unless she answers and defends in bad faith she will not be deprived of the support due her from her husband until a jury has determined the issues adversely to her in a trial in which she has had a fair opportunity, and reasonable means with which, to defend herself."

Of course, as stated in *Oliver v. Oliver, supra,* defendant's right to an allowance for her subsistence pending trial and for counsel fees "is predicated upon a finding that the wife is without sufficient means to cope with her husband in presenting their case before the court." In the Oliver case, defendant's motion was denied, the court "finding as a fact that the defendant is not without sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary and proper expenses thereto, but . . . has equal, if not greater, means of support than the plaintiff . . ." Suffice to say, the findings upon which Judge Crissman based his order are entirely different.

Plaintiff cites many cases in support of his contention that defendant has neither alleged nor proved facts sufficient to constitute a cause of action for absolute divorce, for divorce from bed and board or for alimony without divorce. The cited cases are not in point. Defendant makes no contention that she alleged or proved such a cause of action for affirmative relief.

Plaintiff instituted and now prosecutes this action; and defendant, confronted by plaintiff's charges of adultery, which she in good faith denies under oath and intends to contest at trial, is entitled to have such provision made for her *pendente lite* as will enable her to meet plaintiff's challenge on even terms. In the words of Hoke, J. (later C.J.), in *Medlin v. Medlin, supra,* "right, reason and approved precedent are in support of his Honor's ruling."

At the trial, if plaintiff prevails, the judgment will be one of absolute divorce in his favor; and if defendant prevails, the

judgment will do no more than deny to plaintiff an absolute divorce.

The order of Judge Crissman was entered May 20, 1957. Perhaps, if plaintiff had not appealed from said order, a final judgment, after trial to a jury on the issues raised by the pleadings, would have been entered before now.

Affirmed.

MAUD G. WHITTED, BY HER GUARDIAN, MALCOM L. GRADY, PETITIONER, v. MELVIN M. WADE AND WIFE, KATRINE P. WADE; YVONNE WADE, A MINOR; WILLIAM MELVIN WADE, A MINOR; MABEL WHITTED, SALLIE WHITTED, JOE GRAY WHITTED AND WIFE, SHIRLEY WHITTED; FRANCIS ODOM AND HUSBAND, NORWOOD ODOM; ORMAND WHITTED, A MINOR; LESLIE RAY WHITTED, A MINOR; WILLIE W. TURNAGE AND HUSBAND, JOHN TURNAGE; TEMESIA W. BENTON AND HUSBAND, WILLIAM F. BENTON; WINNIE W. DAVIS AND HUSBAND, ROBERT DAVIS; WILLIAM WHITTED AND WIFE, PAULINE M. WHITTED; AND ALL OTHER CHILDREN IN ESSE OR WHO MAY BE HEREAFTER BORN TO THE MARRIAGE BETWEEN THE SAID KATRINE P. WADE AND MELVIN M. WADE; AND ANY AND ALL OTHER PERSONS INTERESTED IN THE PROPERTIES OF WILLIAM G. WHITTED, DECEASED.

(Filed 30 October, 1957)

Wills § 40—Guardian for wife, insane at time of husband's death, may file dissent more than six months after proof of will.

Dower is a common law right, and G.S. 30-1 is not an enabling statute but a statute of limitations prescribing the time within which the widow may protect her dower by dissenting from the will of her husband divesting her of such right, and therefore G.S. 1-17 is applicable in proper cases, so that when a widow is insane at the time of the death of her husband and remains incompetent, a guardian for her, although not appointed until more than six months after the will of the husband was proved, may, upon his appointment, file on her behalf a dissent to the husband's will and institute a special proceeding for the allotment of dower and for an accounting of rents and profits.

APPEAL by defendants from *Moore, J. (Clifton L.)* at February Term 1957, of LENOIR.

Special proceeding for allotment of dower and for an accounting of mesne profits.

The parties stipulated to the following facts: "(1) That Maud G. Whitted and William G. Whitted were lawfully married on December 25, 1917.

"(2) That on May 26th, 1941, Maud G. Whitted was adjudged to be mentally incompetent in a proper proceeding before the Clerk of Superior Court of Lenoir County and was immediately committed to the North Carolina State Hospital for the Insane.

"(3) That since the date of her commitment the said Maud G. Whitted has remained continuously confined in said hospital and is now and has been since said date continuously insane and thereby incompetent.

"(4) That on July 20th, 1952, the said William G. Whitted died a resident of Lenoir County, North Carolina. That a paper writing propounded as the last will and testament of the said William G. Whitted was admitted to probate by the Clerk of Superior Court of Lenoir County on the 22nd day of July, 1952.

"(5) That at the time of the death of the said William G. Whitted he was married to the said Maud G. Whitted who survived him as his widow.

"(6) That William G. Whitted died seized of the properties (lands) described in the complaint.

"(7) That no dissent was filed to said will within six months of the date of the probate.

"(8) That on the 7th day of August, 1956, Malcom L. Grady was appointed Guardian for the said Maud G. Whitted and on the 7th day of August, 1956, filed on her behalf a dissent to the purported will of William G. Whitted, and also on the same date instituted this action. That the said Malcom L. Grady is now and has been since August 7, 1956, the duly appointed and acting Guardian of Maud G. Whitted.

"(9) That the defendants Melvin M. Wade, Katrine P. Wade, Yvonne Wade and William Melvin Wade, having been duly served with process, and said defendants, together with the Guardian *ad litem* for any other children in esse or who may hereafter be born to the marriage between Katrine P. Wade and Melvin M. Wade, have filed an answer in this cause. That the defendants Ormand Whitted and Leslie Ray Whitted have filed answer admitting the allegations of the petition, but the other named defendants in this action have failed to answer within the time provided by law and have not requested nor been given extension of time to so answer or otherwise plead."

The cause came on for hearing before Moore, Clifton L., Judge of Superior Court, presiding, upon the facts so stipulated.

And upon consideration thereof the court makes the following conclusions of law:

"1. An insane person may not be guilty of laches under the facts and circumstances of this case.

"2. That G.S. 30-1 is not an enabling act, but is a Statute of Limitations. Dower is a common law right accruing

to a widow, and when she is about to be divested of that right by the will of her husband, the law accords her a period of time within which to proceed in a court of law to protect and retain the right. G.S. 30-1 does not extinguish the right, but limits the time in which she might resort to the courts to enforce it. *Hinton v. Hinton,* 61 N.C. 410.

"3. That since G.S. 30-1 is a statute of limitations, G.S. 1-17 applies to this case. The plaintiff has been continuously under disability because of insanity since 1941, and was, therefore, under disability at the time this action accrued. (G.S. 1-20.)

"4. That the neglect of kindred or parties having an interest in plaintiff's recovery in this action in failing to have a guardian qualified for her and failing to have the guardian dissent from the will within the six months limited by G.S. 30-1, cannot be imputed to plaintiff or affect her rights herein.

"5. That plaintiff is not barred by G.S. 30-1 or laches from dissenting from the will of her late husband, or from having dower alloted in the lands of which he died seized, or from demanding an accounting for rents and profits because of her vested unalloted dower in said lands."

From these conclusions of law the court "Ordered, Adjudged and Decreed:

"(1) That the Clerk of the Court of Lenoir County proceed with allotment of plaintiff's dower in the lands of her late husband, Wm. G. Whitted, and insofar as this action relates to such allotment, it is remanded to said Clerk for proper proceedings.

"(2) That this cause is retained for an accounting for rents and profits, if any, accruing to plaintiff because of her dower interest in the lands of her said late husband."

Defendants Melvin M. Wade, Katrine P. Wade, Yvonne Wade and William Melvin Wade, Melvin M. Wade, Guardian *ad litem* for Yvonne Wade and William Melvin Wade, minors, and Guardian *ad litem* for the children in esse or who may hereafter be born to the marriage between Melvin M. Wade and Katrine P. Wade, excepted thereto and appeal therefrom to Supreme Court, and assign error.

Wallace & Wallace for plaintiff appellee.
Jones, Reed & Griffin for defendants appellants.

WINBORNE, C. J.: The question involved on this appeal is stated by appellant substantially in this manner: Is the plain-

tiff barred by G.S. 30-1 or by laches from dissenting from the will of her late husband, William G. Whitted, and from demanding an allotment of dower in his lands, and from obtaining an accounting for rents and profits on account of her alleged dower interest therein? It was in this strain that the trial court briefed the law, and we hold properly so, in the light of the stipulated facts.

General Statutes 30-1, enacted in 1869, Laws 1868-9, Chap. 93, Sec. 37, and brought down through the several codifications, The Code 2108, Revisal 3080, and Consolidated Statutes 4096, in substantial accord, expressly provides that every widow may dissent from her husband's will before Clerk of the Superior Court of the county in which the will is proved at any time within six months after the probate; and that the dissent may be in person, or by attorney under given circumstances, but that "if the widow be an infant, or insane, she may dissent by her guardian."

And this Court, in interpreting and applying this statute, G.S. 30-1, in *Hinton v. Hinton,* 61 N.C. 410, as it then appeared, has characterized it as a "Statute of Limitation", and not an enabling statute. It is said in this connection (1) that dower is a common law right accruing to a widow, and when she is about to be divested of her right by the will of her husband, the law accords her a period of time within which to proceed in a court of law to protect and retain the right, and (2) that the six months period for dissent as provided in G.S. 30-1 is not a condition precedent to the right, but merely limits the time in which she may resort to the courts to enforce it.

Since, therefore, G.S. 30-1 is a statute of limitation, G.S. 1-17 applies to this case. This statute, G.S. 1-17, provides that "a person entitled to commence an action * * * who is at the time the cause of action accrued * * * insane * * * may bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter."

In this connection the appellee contends, and properly so, that construing G.S. 30-1, the Hinton case, *supra,* and G.S. 1-17 together, it would appear that an insane widow is not barred by the statute of limitations, but may bring the action through a guardian as provided in G.S. 30-1 within three years after the disability is removed pursuant to G.S. 1-17. Compare *Richardson*

v. Justice, 125 N.C. 409, 34 S.E. 441. There this headnote epitomizes the opinion: "By statute, Code Sec. 2108, the widow is allowed six months in which to dissent from her husband's will, nor will she be precluded from the exercise of this legal right by any agreement, even under seal, which she may be induced by the executor to sign, in ignorance of the condition of the estate."

Here it is true no guardian was appointed within six months after the will of the husband was proved. Nevertheless, a guardian for Maud G. Whitted, the widow, on the day of his appointment, not only filed on her behalf a dissent to the will of her husband, but instituted this special proceeding for allotment of dower, and for an accounting of rents and profits as prayed in the petition. This appears to be orderly procedure—free from error.

Affirmed.

EDMOND BRINSON v. OLD REPUBLIC LIFE INSURANCE COMPANY.

(Filed 30 October, 1957)

Insurance § 38—

In an action on a policy to recover for the permanent loss of the entire sight of one of insured's eyes from bodily injury resulting solely through external, violent and accidental means, insured's evidence that his left eye was injured in a fall from a truck and that as a result of such injury he became permanently blind in the injured eye to the extent that he cannot distinguish objects or colors or tell the difference between day and night, though he can perceive some movement to the side and discover there is a little light when the sun is shining, is sufficient to be submitted to the jury upon the determinative issue.

APPEAL by plaintiff from *Phillips, J.*, March, 1957 Term, DUPLIN Superior Court.

Civil action to recover $2,000.00 benefits under an insurance policy in which the defendant contracted to pay that amount to the plaintiff for the permanent loss of the entire sight of one or both eyes as a result of bodily injury solely through external, violent and accidental means.

The plaintiff testified in substance: On March 28, 1956, while he was unloading stumps from a trailer, he fell headfirst from the top of the load into the stumps already on the ground and received serious head and bodily injuries. "For several weeks I couldn't walk, only just drag around. I found out then (7:30 the night of the accident) that I was blind in my left eye. My

left eye was all right before that day and hadn't given me any trouble. . . . I am blind in my left eye, I cannot see, totally blind." On cross-examination, plaintiff testified it was from about 12 o'clock until seven or eight before he discovered the loss of vision in his left eye. "I can't look at you from here and close this eye good and tell whether you are a man or a woman, black or white. . . . I can tell there is an object there but it will be black. I can see the bulk of your body but it is right black, but I can't tell what it is. I can't see when it is day or night with my left eye. I can discover there is a little light when the sun is shining."

Dr. Dalton, physician and surgeon specializing in diseases of the eye, testified: "I examined Edmond Brinson on April 6. Mr. Brinson had a hemorrhage back of his left eye. . . . He has no useful vision in his left eye. . . . Mr. Brinson can tell day from night and he can see an object when it is waved to the side, but when he directs his eye towards an object he doesn't see it."

Dr. Norris, a medical expert, testified: "I examined the plaintiff on April 7, 1956. In my opinion the injury received from the fall caused blindness in his left eye. . . . I believe the condition in his left eye will be total and permanent."

At the close of plaintiff's evidence the defendant's motion for nonsuit was allowed, and from the judgment dismissing the action, the plaintiff appealed.

Grady Mercer, for plaintiff, appellant.
Vance B. Gavin, for defendant, appellee.

HIGGINS, J. The evidence, in the light most favorable to the plaintiff, permits the inference (1) that his left eye was injured in a fall from a truckload of stumps; (2) because of the injury he is blind in the injured eye to the extent he cannot distinguish objects or colors, or tell the difference between day and night, though he can perceive some movement to the side and discover there is a little light when the sun is shining; (3) that the condition is permanent.

The foregoing seems to be a fair summary of the plaintiff's evidence, both on direct and cross-examination. His statement that he is totally blind in his left eye is explained by his details as to his ability to distinguish a little light when the sun is shining. Does the evidence make out a case for the jury?

"The general rule is that the insured need not be totally blind but that if the insured has lost all practical use of his eyes, he is entitled to recover, although he may still have slight vision such as ability to distinguish between daylight and darkness." Vance on Insurance, 3rd ed., Sec. 193, p. 992. "Provisions in

accident policies for the payment of a specified indemnity for loss of sight are liberally construed in favor of the insured, and within such provisions there is an entire loss of sight, although sight is not completely destroyed, if what sight is left is of no practical use or benefit." 45 C.J.S., sec. 900, p. 988.

In the case of *Tracey v. Standard Acc. Ins. Co.*, 119 Me. 131, 109 A 490, the Supreme Judicial Court of Maine, in a well considered opinion construing a policy similar to the one involved here, announced the following rule:

> "The intent and purpose of the policy as a business proposition was to indemnify the plaintiff for the loss of the complete or 'entire' use of his eye. The 'loss of the entire sight' of an eye, and the loss of the entire use of an eye, by blindness, in practical effect, are precisely the same. Being a business contract, this policy should be construed like any other contract with reference to the object, purpose, conditions, and circumstances.
>
> "The eye has earning capacity as well as the hand. To indemnify the complete loss of the sight of an eye as an earning factor was undoubtedly one of the controlling reasons for taking the policy.
>
> "We feel it would be unfair to the company, as well as the plaintiff, to impute to it the intention, by the artful employment of a word, to base its liability upon the frail and frivolous distinction between ocular ability to discriminate a flood of light from total darkness, and without the power to distinguish one object from another in the strongest light."

In the case of *Continental Casualty Co. v. Linn*, 226 Ky. 328, 10 S.W. 2d 1079, the Court of Appeals of Kentucky, in construing a policy similar to the one involved here, said:

> "The term used must be construed in its plain, orderly, and proper sense, and the loss of the use of the member of the body is equivalent to the loss of that member. Can anyone doubt that one who can barely distinguish daylight from darkness has lost his entire sight? . . . In *Murray v. Aetna Life Ins. Co.*, 243 Fed. 285, where the policy provided for the payment of indemnity for the loss of the entire sight of one eye, . . . it was held that if by accident the insured had irrevocably lost the use and practical sight of the eye, although he could distinguish light from darkness . . . he was entitled to recover under the policy. Other cases to the same effect are *Tracey v. Standard Acc. Ins. Co.*, 119 Me. 131; *Watkins v. U. S. Casualty Co.*, 141 *Tenn.* 583."

To the foregoing authorities may be added the following: *Mulcahey v. Brotherhood of Ry. Trainmen*, 229 Mo. App. 610, 79 S.W. 2d 759; *Mutual Life Ins. Co. v. Meeks*, 157 Miss. 97, 127

So. 699; *International Travelers Assn. v. Rogers,* (Tex.) 163 S.W. 421; *Watkins v. Casualty Co.,* 141 Tenn. 583, 214 S.W. 78; *Bosworth v. Metropolitan,* 114 W.Va. 663, 173 S.E. 780.

"We believe the true rule should be that where, as here, the employee has lost all practical use of an eye, which practical use cannot be restored . . . such amounts in effect to the loss of the eye." *Bilsky v. Mutual Ben. Health & Accident Ass'n.,* 49 N.Y.S. 2d 848, 182 Misc. 122, affirmed 52 N.Y.S. 2d 576, 268 App. Div. 973, appeal denied 53 N.Y.S. 2d 307, 268 App. Div. 1026.

The appellee seeks to sustain the nonsuit upon the authority of *Bolich v. Ins. Co.,* 205 N.C. 43, 169 S.E. 826. In that case the plaintiff testified: "I cannot see to read with my right eye (the injured member) . . . I can see large objects close to me, but I cannot look at any ordinary object through my right eye for any length of time. The object will blur, but by continually batting my eyes, I can see the object. . . . The sight of my right eye is not entirely gone." In ordering a new trial, this Court said: "There was no evidence tending to show that the bodily injury sustained by the plaintiff resulted in the loss of an eye which resulted in the irrevocable loss of the entire sight thereof."

In this case the plaintiff testified he is totally blind in his injured eye, though he later qualified the statement by saying he could perceive a little light in bright sunshine. His doctor testified: "In my opinion the injury received from the fall caused blindness in his left eye. . . . I believe the condition in his left eye will be total and permanent."

The case at bar and the Bolich case are, therefore, readily distinguishable. We think the entire sight of an eye is lost when neither objects, nor forms, nor colors can be distinguished in strong light, although sufficient perception remains to disclose "a little light when the sun is shining." In practical effect, loss of sight is not rendered less complete by reason of ability to perceive no more than a flicker of light in a bright sun. The plaintiff's evidence was sufficient to entitle him to have the jury pass on it.

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 30 October, 1957)

Damages § 5—

While in tort actions for conversion, interest ordinarily is allowable in the discretion of the jury, where the parties in waiving jury trial

stipulate the amount of recovery upon *quantum meruit* in a specified sum, the stipulation is in the nature of a formal judicial admission in respect to the question of damages, precluding the court from allowing interest from the date of the filing of the complaint. However, when the case is erroneously nonsuited and the nonsuit reversed on appeal, plaintiffs are entitled to interest from the first day of the term at which the nonsuit was erroneously entered.

APPEAL by defendant from *Crissman, J.*, at August Civil Term, 1957, of GASTON.

Civil action to recover upon a *quantum meruit* the value of a privately owned water and sewer system installed in a suburban real estate development, which system was subsequently taken over and appropriated by the City upon extension of its corporate limits.

The case was here at the Spring Term, on appeal by the plaintiffs from a judgment of nonsuit at the close of the evidence. The decision, reversing the ruling of the lower court, is reported in 246 N.C. 404, 98 S.E. 2d 444. The basic facts are stated in the former opinion. It there appears that the case was heard upon waiver of jury trial and agreement that the presiding judge should sit as a jury and find the facts and determine the issues. However, most of the crucial facts were stipulated. One of the pertinent stipulations is as follows:

"14. That the recovery of the plaintiffs, if any, is based on
"14. That the recovery of the plaintiffs, if any, is based on *quantum meruit*, and that the agreed reasonable value and the *quantum meruit* of the lines involved in this controversy are as follows, which are based on the appraisal the defendant had made in early 1950: (Then follows the agreed values of the various lines, totaling $9,522.46.)"

The decision on former appeal directed that the cause be remanded for the entry of judgment in accordance with the stipulations of the parties as to reasonable value of the water and sewer lines.

When the case went back to the Superior Court, judgment was entered in favor of the plaintiffs for the total amount of the stipulated values of the various lines taken over by the City, to wit: $9,522.46, with interest thereon at 6% per annum from 22 October, 1952, the date of the filing of the complaint. From the judgment so entered the defendant appeals.

J. Mack Holland, Jr. and James B. Garland for appellant.
L. B. Hollowell and Hugh W. Johnston for appellees.

JOHNSON, J. The only question presented for decision is: Did the court below err in allowing interest from 22 October, 1952, the date of the filing of the complaint? We think so.

In tort actions for conversion, interest ordinarily is allowable in the discretion of the jury. *Stephens v. Koonce,* 103 N.C. 266, 9 S.E. 315; *White v. Riddle,* 198 N.C. 511, 152 S.E. 501; *Ins. Co. v. Railroad,* 198 N.C. 518, 152 S.E. 503. But this principle does not apply here for the reason that the facts were stipulated in respect to the amount of the plaintiffs' recovery. The stipulation provides that "the reasonable value *and the quantum meruit* of the lines involved" is $9,522.46. (Italics added). The term *"quantum meruit"* as so used in the stipulation means what the plaintiffs reasonably deserve. 73 C.J.S., p. 1269. See Black's Law Dictionary, Second Edition, p. 975. It thus appears that the language of the stipulation fixed the amount of the recovery. The judge was without discretion to superadd an allowance for interest as additional damages or compensation. The stipulation, being in the nature of a formal judicial admission of facts made for the purpose of dispensing with proofs in respect to the question of damages or compensation, remained conclusive and binding upon the parties on remand of the case to the Superior Court as directed by the former decision of the Supreme Court. See 50 Am. Jur., Stipulations, Section 13; Annotation: 100 A.L.R. 775, 776; 20 Am. Jur., Evidence, Section 5570.

In this view of the case we have no need to apply the principle that ordinarily a waiver of jury trial is inoperative at a new or subsequent trial. *Benbow v. Robbins,* 72 N.C. 422; *Isler v. Koonce,* 83 N.C. 55; *Hickory v. Railroad,* 138 N.C. 311, 50 S.E. 683.

However, if the case had been decided correctly in favor of the plaintiffs when it was nonsuited at the 10 December, 1956, Term of Superior Court, the judgment would have drawn interest from the first day of the term. G.S. 24-5; *Stephens v. Koonce, supra; In re Chisholm's Will,* 176 N.C. 211, 96 S.E. 1031; *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256. This being so, in so far as the plaintiffs' right to recover interest is concerned, the judgment as entered below after remand will be treated as having been entered at the 10 December, 1956 Term of Court, and the plaintiffs' recovery will bear interest from the first day of that term. *Kneeland v. American Loan & T. Co.,* 138 U.S. 509, 34 L. ed. 1052, 11 S.Ct. 426. Subject to this modification, the judgment below is affirmed.

The decisions relied on by the defendant are factually distinguishable.

Modified and affirmed.

STATE v. VERNON ESTER

(Filed 30 October, 1957)

APPEAL by defendant from *Armstrong, J.*, August Term 1957 of WILKES.

The defendant was tried upon three bills of indictment which were consolidated for the purpose of trial. One bill of indictment, No. 139, charged that Vernon Ester on 15 April 1957 did unlawfully, willfully, and feloniously carnally know and abuse Emma Jean Ester, a female child over twelve years and under sixteen years of age, who had never before had sexual intercourse with any person, he being a male person over eighteen years of age. The other two bills of indictment were numbered 139-A and 139-B.

It was charged in bill No. 139-A that Vernon Ester on the 15th day of April 1957, and in bill No. 139-B that Vernon Ester on the 18th day of April 1957, did unlawfully, willfully, and feloniously have carnal intercourse with Emma Jean Ester, his daughter, knowing at the time that the relationship of father and daughter existed.

The State and the defendant offered evidence. It is disclosed by the State's evidence that Emma Jean Ester was born out of wedlock and that the defendant later married her mother. The evidence also tends to show that the defendant had claimed to be her father.

The jury returned a verdict of guilty as to the crime of carnal knowledge of a female child as charged in bill of indictment No. 139, but not guilty of incest as charged in bills of indictment No. 139-A and No. 139-B.

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

Attorney General Patton, Assistant Attorney General McGalliard, for the State.

Larry S. Moore, for defendant.

PER CURIAM. We have carefully considered the evidence disclosed by the record, and it was amply sufficient to take the case to the jury on the charge contained in the bill of indictment designated No. 139.

We have also carefully examined each exception and assignment of error, and reached the conclusion that they fail to point out prejudicial error. Hence, the verdict and judgment of the court below will not be disturbed.

No error.

IN RE WILL OF H. D. BRAUFF

(Filed 6 November, 1957)

1. **Executors and Administrators § 2d—**

Where a will has been probated in another state, the clerk of the superior court of a county of this State has jurisdiction, upon his finding that decedent was seized of property in the clerk's county, to grant letters testamentary to an ancillary administrator c.t.a. G.S. 28-1.

2. **Executors and Administrators § 3—**

Where a will is probated in another state and the executrix under the will qualifies in such other state, and the clerk of the superior court of a county of this State in which property of the decedent is situate, issues letters testamentary to her upon her application here, without the appointment of a resident process agent as required by G.S. 28-186, the subsequent failure and refusal of the executrix to appoint a process agent in compliance with subsequent order of the clerk is sufficient ground for the revocation of the letters issued here. G.S. 28-32.

APPEAL by movant, Laura E. Brauff, from *Bone, J.*, Resident Judge of the Seventh Judicial District, in Chambers at NASHVILLE, 31 May, 1957. From WILSON.

John Webb and R. H. Morrish for Movant, appellant.

Battle, Winslow & Merrell for Mrs. Gertrude H. Russell and Robert M. Wiley, Ancillary Administrator c.t.a., appellees.

Attorney General Patton and Assistant Attorney General Abbott for Eugene G. Shaw and his successor, as Commissioner of Revenue of North Carolina, appellee.

JOHNSON, J. This is an appeal from an order of Judge Bone affirming an order of the Clerk of the Superior Court of Wilson County in a probate proceeding. On 8 February, 1957, the Clerk entered an order removing Laura E. Brauff as executrix of the estate of Herbert D. Brauff and appointing Robert M. Wiley administrator c.t.a. Thereafter Laura E. Brauff moved the Clerk to vacate the order and revoke the letters testamentary issued to Wiley.

These are the essential background facts: Herbert D. Brauff died on 15 June, 1955, seized of property, tangible and intangible, in Wilson County and elsewhere in North Carolina. He left a will describing himself as a resident of Wilson County, which was probated in Westmoreland County, Pennsylvania. By his will the testator bequeathed to Mrs. Gertrude H. Russell a general legacy of $25,000, and by codicil he bequeathed to her

as a specific legacy his stock in the Atlantic Building & Loan Association of Wilson, with face value of $10,000.

Laura E. Brauff qualified in Pennsylvania as executrix under the will of Herbert D. Brauff, but did not probate the will or qualify in North Carolina. After her appointment as executrix in the State of Pennsylvania, she cashed the $10,000 certificate of stock in the Atlantic Building & Loan Association and removed the proceeds from the State of North Carolina.

Mrs. Gertrude H. Russell employed F. E. Winslow of Rocky Mount, North Carolina, to represent her in collecting her legacies. Her attorney, after learning of the sale of the Building & Loan stock and the removal of the proceeds from the State, received information that the executrix was planning to sell the testator's stock in the Wilson Press, Inc., and in the Washington Daily News, Inc., and remove all the testator's property from the State. Counsel for Mrs. Russell also was advised by Pennsylvania counsel for the executrix that she would contest the validity of the bequest in the codicil of the $10,000 stock in the Building & Loan Association. Thereupon counsel for Mrs. Russell moved before the Clerk of the Superior Court of Wilson County that an authenticated copy of the will be probated in Wilson County and that a personal representative c.t.a. be appointed. (G.S. 31-22; 31-27). Pending the hearing on the motion, the Clerk, in order to preserve the property *pendente lite* (G.S. 28-25), appointed Robert M. Wiley collector of the estate of the testator and fixed his bond at $115,500, the bond premium paid by the collector being $520.

Mrs. Russell's motion came on for hearing, after postponement at the request of Laura E. Brauff, and was heard in the courthouse at Wilson on 27 April, 1956. Mrs. Brauff, executrix, appeared by her attorney. On petition of the Attorney General, Eugene G. Shaw, Commissioner of Revenue of North Carolina, was permitted to intervene on the side of the applicant. Upon the testimony of Mrs. Elizabeth G. Swindell and other evidence offered at the hearing, it was found as a fact by the Clerk that Herbert D. Brauff died "seized of property tangible and intangible in Wilson County, North Carolina, and elsewhere in North Carolina, worth in excess of $167,500; that all of said property has been removed from the State of North Carolina except property worth $38,000, and that no property has come into the hands of the Collector, and that this Court has jurisdiction to order the probate of the will of H. D. Brauff in this County, and appoint a personal representative to administer the assets of the estate in this State." The $38,000 of property remaining in North Carolina consisted of a valid claim against the Wilson

Press, Inc., of Wilson, for $31,000, not due until 1961, and $7,500 insurance money held by Jefferson Standard Life Insurance Company, of Greensboro, N. C.

An order was entered, dated 27 April, 1956, admitting a duly authenticated copy of the will to probate and continuing the appointment of Robert M. Wiley as collector until a personal representative could be appointed. To this order Laura E. Brauff, executrix, noted an objection, but no appeal was taken therefrom. A duly authenticated copy of the will, including codicil and probate proceedings as probated in Westmoreland County, Pennsylvania, was recorded in the office of the Clerk of the Superior Court of Wilson County.

Thereafter, and on or about 6 July, 1956, Mrs. Brauff appeared in the courthouse at Wilson and applied for letters testamentary under the will and filed a bond in the sum of $47,500, with corporate surety, and letters testamentary were issued to her. By inadvertence, the Clerk neglected to require, prior to the issuance of the letters, the appointment of a resident process agent for the executrix in Wilson County, as required by G.S. 28-186.

On or about 18 July, 1956, Robert M. Wiley, collector, filed with the Clerk his final account as required by G.S. 28-28, showing that he gave notice of his appointment to the three corporations in North Carolina in which the estate owned stock, and had attempted to collect $7,500 from the Jefferson Standard Life Insurance Company, which the insurance company thereafter paid to Laura E. Brauff as North Carolina executrix, under her North Carolina bond; that no funds had come into his hands; that he had made cash expenditures of $564.67; that his services were reasonably worth $100 and that the services of his attorney in the probate proceeding were reasonably worth $250; and requesting that his account be approved and paid by the North Carolina executrix as proper costs of administration. The collector's account was examined and found to be correct by the Clerk, and the allowances requested were approved.

Mrs. Laura E. Brauff, after qualifying as executrix in North Carolina, paid to Mrs. Gertrude H. Russell, through her attorney, both legacies bequeathed in the will, totaling $35,000. However, she has failed to file inventory or account or any other document in the Superior Court of Wilson County. She has ignored the court and has failed to pay the costs of the proceeding, including items totaling $914.76 shown in the final account of the collector.

After the lapse of several months, the collector upon inquiry of the Clerk discovered that no resident process agent had been

appointed. Local counsel for Mrs. Brauff was requested to have one appointed. None was appointed. On suggestion of the collector, the Clerk issued an order directing Mrs. Brauff to show cause on 8 February, 1957, why her letters testamentary should not be revoked and a proper personal representative appointed in her place. At that time there was property of the estate of Herbert D. Brauff in North Carolina, to wit, $31,000 debt of the Wilson Press, Inc., not due until 1961. All other property of the testator had been removed from the State by Mrs. Brauff, executrix. The cause came on for hearing on the order to show cause and was heard before the Clerk on 8 February, 1957. Mrs. Brauff, executrix, appeared by her attorneys. The court found facts substantially as recited above, and entered an order: (1) decreeing that the letters testamentary issued to Laura E. Brauff be revoked and that Robert M. Wiley be appointed ancillary administrator c.t.a., and (2) directing that the allowances due Wiley, collector, and the costs of the proceeding be paid by the ancillary administrator out of any assets coming into his hands, and, if none, then that Mrs. Brauff, executrix, and the surety on her bond be required to pay them. To the entry of this order, Laura E. Brauff noted an exception and gave notice of appeal. The appeal was set to be heard before Judge Bone, Resident Judge, on 30 March, 1957. However, Mrs. Brauff abandoned the appeal, and on 28 March, 1957, so notified the Judge and counsel for the other side. On or about 10 April, 1957, Laura E. Brauff, through counsel moved the Clerk to vacate the order of 8 February, 1957, and revoke the appointment of Robert M. Wiley as ancillary administrator c.t.a., on the ground that "There has been no finding of fact in the order of the Clerk, dated February 8, 1957, that would give the Clerk jurisdiction to grant letters of administration of the will of Herbert D. Brauff." The motion was heard on 3 May, 1957. Mrs. Brauff introduced no new evidence, but upon the record presented her motion. It was resisted by counsel for Wiley, administrator, and by counsel for Eugene G. Shaw, Commissioner of Revenue of North Carolina, intervenor under order of 27 April, 1956. These, in substance, are the facts found by the Clerk: that the motion presents the same question which was presented by Mrs. Brauff at the hearing on 27 April, 1956, and at the hearing on 8 February, 1957. She objected to the order of April 27, 1956, that the will of Herbert D. Brauff be probated in Wilson County, North Carolina, and that a personal representative be appointed in this State, but she did not take any appeal from the order. Thereafter, in pursuance of the order, she appeared on 6 July, 1956, and made application for appointment as executrix under the will and in her application represented that the estate then

owned $38,000 worth of property in North Carolina. Letters testamentary were inadvertently issued without requiring her to appoint a process agent in North Carolina, as required by G.S. 28-186, she being a resident of Pennsylvania. "Thereafter, she was called upon to appoint a process agent and refused to do so, and after due notice on February 8, 1957, she was removed as executrix and Robert M. Wiley was appointed administrator c.t.a. in her place. From that order Mrs. Brauff appealed to the Judge of the Superior Court. The hearing was set for 10:30 a.m. on 30 March, 1957, at Nashville, N. C., before the Hon. Walter J. Bone, Resident Judge of the Superior Court in the Seventh Judicial District. On March 28, 1957, Mrs. Brauff abandoned her appeal, and notified the Judge and Robert M. Wiley's counsel to that effect."

Upon the foregoing findings the Clerk ordered:

"1. That the motion of Mrs. Laura E. Brauff presented this day is irregular and improper, and the Court has no jurisdiction to entertain it as a substitute for her appeal to the Judge of the Superior Court, which she abandoned, and the said motion is dismissed as contrary to the course and practice of the Court.

"2. That if this Court has jurisdiction to entertain said motion, the same is denied."

Laura E. Brauff appealed from the foregoing order to the Judge of the Superior Court. The case came on for hearing and was heard before Judge Bone, Resident Judge, on 31 May, 1957. After hearing arguments of counsel for all parties, Judge Bone entered an order adjudging that the order of the Clerk dated 3 May, 1957, from which appeal was taken, is in all respects affirmed. To the judgment as entered, the movant, Laura E. Brauff, objected and excepted, and gave notice of appeal to the Supreme Court. Her only assignment of error is to the ruling of Judge Bone in affirming the order of the Clerk denying her motion.

Conceding without deciding that on procedural grounds the movant, by abandoning her appeal from the Clerk's order of 8 February, 1957, lost her right to challenge the validity of the order, nevertheless we think the order, when considered on its merits, withstands the appellant's challenge, and we prefer to treat and dispose of the appeal on that level.

The appellant contends that the question for decision is one of jurisdiction. She insists that the Clerk of the Superior Court was and is without jurisdictional power to grant letters testamentary upon the estate of Herbert D. Brauff. She concedes

that the question of jurisdiction is controlled by G.S. 28-1, which in pertinent part is as follows: "The clerk of the superior court of each county has jurisdiction, within his county, . . . to grant . . . letters testamentary . . . in the following cases: . . . 3. Where the decedent, not being domiciled in this State, died out of the State, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk."

The appellant insists that the record here fails to disclose the necessary jurisdictional facts to empower the Clerk to proceed under the foregoing statute. Specifically, she asserts: "There has been no finding of fact in the order of the Clerk, dated February 8, 1957, that would give the Clerk jurisdiction to grant letters of administration on the Will of Herbert D. Brauff." In making this assertion the appellant has overlooked the finding made by the Clerk in his order of 27 April, 1956, that "Herbert D. Brauff died on June 15, 1955, seized of property tangible and intangible in Wilson County, North Carolina, and elsewhere in North Carolina, worth in excess of $167,500; . . . and that this Court has jurisdiction to order the probate of the will of H. D. Brauff in this County, and appoint a personal representative to administer the assets of the estate in this State."

Moreover, the Clerk found substantially the same facts in his order of 8 February, 1957. Also, in this latter order the Clerk finds that at the time it was entered there was property of the estate in North Carolina, to wit: a $31,000 debt of the Wilson Press, Inc., Wilson, N. C., not due until 1961. The record discloses that these findings of the Clerk stand unchallenged by the appellant. They are sufficient to sustain the Clerk's exercise of jurisdiction. See G.S. 31-22; 28-16; 31-27; 28-1 (1); 28-1 (3); 31-13; *Cannon v. Cannon,* 228 N.C. 211, 45 S.E. 2d 34; *In re Administration of Franks,* 220 N.C. 176, 16 S.E. 2d 831; *Shields v. Ins. Co.,* 119 N.C. 380, 25 S.E. 951; *Hyman v. Gaskins,* 27 N.C. 267.

In *Cannon v. Cannon, supra,* it is said: ". . . a simple debt due a decedent's estate, which is being administered in a foreign jurisdiction, constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator. (citing authority) The debt is an asset where the debtor resides, even though a note has been given therefor, without regard to the place where the note is held or where it is payable."

It is noted that the court below has made no ruling on the question whether the testator was domiciled in North Carolina or in Pennsylvania. The findings have been limited to facts

sufficient to support ancillary administration, leaving the question of domicile open to be determined in passing upon any claim that may be filed by the State of North Carolina for taxes.

The appellant's failure and refusal to appoint a process agent as required by G.S. 28-186 was sufficient ground under G.S. 28-32 for her removal as executrix. The findings of fact made by the Clerk are adequate to support the order of removal. See *In re Sams' Estate,* 236 N.C. 228, 72 S.E. 2d 421; *In re Pitchi's Estate,* 231 N.C. 485, 57 S.E. 2d 649.

The record supports the order from which the appeal was taken.

Affirmed.

STATE v. ROSS McAFEE (ALIAS J. C. ADAMS)

(Filed 6 November, 1957)

1. **Burglary § 1—**

The opening of a window which is closed, although not fastened, but held in place by its own weight, or pulley weights, is a sufficient "breaking" within the meaning of that term as used with reference to burglary in the first degree.

2. **Burglary § 6—**

Where all the evidence tends to show the offense of burglary in the first degree, and there is no evidence that the dwelling was unoccupied at the time, the court should not submit to the jury the question of defendant's guilt of burglary in the second degree. G.S. 15-171 was repealed by Ch. 100, Session Laws of 1953.

3. **Same—**

The court's charge on the unrestrained discretionary right of the jury to recommend life imprisonment if the jury should convict the defendant of the crime of burglary in the first degree, *held* without error, and the verdict of the jury finding defendant guilty of burglary in the first degree without recommendation of life imprisonment *is upheld,* there being no error of law in the trial.

APPEAL by defendant from *Armstrong, J.,* March Term, 1957, of ALEXANDER.

Criminal prosecution for the capital felony of burglary in the first degree upon the following bill of indictment, viz.:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT: That Ross McAfee, alias J. C. Adams late of the County of Alexander, on the 31st day of January, A.D. 1957, about the hour of

twelve in the night of the same day, with force and arms, at and in the County aforesaid, the dwelling house of one Glenn Waugh and wife, Lovell Waugh, feloniously and burglariously did break and enter said dwelling house with the felonious intent, he, the said Ross McAfee, alias J. C. Adams, to rape, ravish and carnally know Lovell Waugh, a female person occupying said dwelling house at the time, by force and against her will, against the form of the Statute in such case made and provided and against the peace and the dignity of the State."

The only evidence was that offered by the State. It tended to establish the facts summarized below.

Lovell Waugh, then seventeen years of age, lived with Glenn Waugh, her husband, in Taylorsville, N. C. Their dwelling consisted of a bedroom, a kitchen and a bath. A door to the kitchen was the only door for entrance to the dwelling from the outside. There were five windows in the dwelling.

On the night of January 31, 1957, Mrs. Waugh was in her dwelling alone. The door was closed and locked and all windows were closed. Between 8 and 8:30 p.m., after dark, there was a knock at the door. She left her bedroom and went into the kitchen. She did not unlock or open the door but asked who was there. The man outside answered, "J. C.," and asked if she had a cigarette. When she told him, "No," she thought he said, "O.K.," and that he walked off. Then she returned to her bedroom.

Shortly thereafter she heard a rustle of leaves and a crunching of gravel outside her bedroom window. She testified: "The window was tightly closed and the blind (Venetian) was closed also. I heard the window raise up slowly." She went towards the window and raised the blind. Then she observed that the bottom half of the window had been completely raised and she saw the defendant standing outside at the opened window. She ordered him to go away, but instead the defendant leaped through the open window into the bedroom. She made a dash for the kitchen door, trying to get away, but the defendant "grabbed (her) around the neck with his hands." In vulgar terms, he asked if she was going to let him have sexual intercourse with her; and her answer was a defiant, "No." Thereupon, as she struggled with him, he choked her and cut her, principally on her throat and neck; and he succeeded in getting her down on the floor, with her head partially under the stove. Then he got down upon her and attempted, but without success, to have sexual intercourse with her.

Mrs. Waugh, in addition to her physical resistance to the defendant, undertook by her conversation to divert the defend-

ant and thereby gain an opportunity for escape. Unsuccessful in his attempt within the dwelling, defendant had her get up and go out with him to her husband's car. She got in the driver's seat, but she had no key with which to start the car. After some conversation as to where he might obtain the necessary key, the defendant got out of the car; and when he did so she locked the doors of the car and blew the horn continuously. Thereupon, the defendant fled; and a neighbor, attracted by the blowing of the horn, came to Mrs. Waugh's rescue and took her to the hospital.

Upon arrival at the hospital, Mrs. Waugh was treated for nervousness and shock and for her wounds. The doctor testified: "She had a swelling and discoloration of the left eye, and had a great deal of blood on her clothing and about her face and neck, and a number of wounds on her neck, and one wound had cut through into her larnyx. There were two small wounds on her right hand. It is hard to say how many wounds she had in her neck, because they crossed each other and ran into each other, and there were, I would say, at least five or six different wounds. The wounds must have been made with a real sharp instrument, and could easily have been made with a knife. There were a good many stitches taken in her neck and a few in her legs. In all, I would say around forty or fifty stitches were taken."

The State's evidence tended to show that defendant's statements as to what occurred were in substantial accord with the testimony of Mrs. Waugh; and the State, apart from the doctor's testimony, offered substantial evidence as to physical facts tending to corroborate Mrs. Waugh's testimony.

Verdict: "We find him guilty of Burglary in the First Degree, as charged in the bill of indictment." The clerk then inquired: "Without recommendation of life imprisonment instead of death?" The foreman of the jury replied: "Without recommendation."

Judgment: Death by inhalation of lethal gas.

Defendant excepted and appealed.

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

J. H. Burke for defendant, appellant.

BOBBITT, J. Defendant's assignments of error relate to a single question, namely, the sufficiency of the evidence to support a conviction for the crime of burglary in the first degree.

Defendant's contention is that the State's case is defective with reference to burglary in the first degree in that it fails to

show a *breaking* within the meaning of that legal term as used and understood at common law in relation to the crime of burglary; and defendant's contention is brought into focus by his exception to the excerpt from the charge quoted below.

"The Court charges you that there is a sufficient breaking where a person makes an entry possible without additional effort by pushing or pulling open a door which is shut but neither locked nor latched or by raising or lowering a window which is closed, although not fastened, but held in place by its own weight, or pulley weights."

As expressed in defendant's brief: "Counsel for the prisoner makes no point about the time as being after dark, or nighttime, and none as to the place being an occupied dwelling, but insists that the mere raising of an unfastened window where there was no screen, no hook or other device placed there by the owner or occupant, to require loosing or breaking in order to enter, is not a 'breaking' under the proper construction of the common law."

The contention now made by petitioner has been rejected by authoritative decisions of this Court.

In *S. v. Fleming*, 107 N.C. 905, 12 S.E. 131, a burglary case, the trial judge charged the jury as to the breaking as follows: "In order to constitute a breaking in this case, either the window blind must have been fastened or else the door to the dining-room and cook-room opening to the outside must have been fastened. To constitute a fastening in either instance it is not necessary that the inmates of the house should have resorted to locks and bolts. If held in their position (having been shut by the witness, Denby James), by their own weight and in that position relied on by the inmates as a security against intrusion, it is sufficient. It would not be sufficient breaking if the blinds, or door were ajar however slightly, and the prisoner simply increased the size of the opening and through it entered. The jury must be fully satisfied from the evidence in the case that either the window blind or the dining-room door was so shut, fastened and relied upon as a security against intrusion at the time of the entry into the house; for burglary cannot be committed by the entering through an open door or window."

Referring to the quoted portion of the charge, *Clark, J. (later C.J.)*, for the Court, said: "The charge of the court as to what would be a sufficient 'breaking' is fully sustained by the precedents. If a door or window is firmly closed. it is not necessary that it should be bolted or barred. *S. v. Boon*, 35 N.C. 244; Whart. Cr. Law, Secs. 759 and 767, and cases cited. Take the case of raising a window not fastened, although there was a

hasp which could have been fastened (*Reg. v. Hyams,* 7 Car. & P. 441, and *S. v. Carpenter,* 1 Houston (C.C.) 367); or where the prisoner, by raising or pulling down the sash, kept in its place merely by pulleyweight (*Rex v. Haines,* Russ & Ryan, 451); or by pushing open a closed door, not latched (*S. v. Reid,* 20 Iowa 413); or closed but not locked (*Hild v. State,* 67 Ala. 39); or firmly closed, though there was no fastening of any kind on the door (*Finch v. Commonwealth,* 14 Grat. 643); or (*Ryan v. Bird,* 9 Car. & P.) where the glass of a window had been cut, but every portion of the glass remained in its place until the prisoner pushed it in and so entered; or where a window was on hinges, with nails behind it as wedges, but which, nevertheless, would open by pushing, and was so opened by the prisoner; in all of which cases the 'breaking' was held to be sufficient. If the entrance was either by pulling open the blinds which had been firmly closed, whether fastened by the catch or not, or through the door, which had been bolted, the above decisions apply."

In *S. v. Johnston,* 119 N.C. 883, 26 S.E. 163, where the only evidence of breaking was the raising of the sash of one of the bedroom windows, the trial judge instructed the jury, in part, as follows: "So, where the sash of a window is down, and there is no fastening above the sash, and one lifts or raises the sash, it constitutes a case of breaking." The charge was held correct by this Court; and the sentence of death imposed, upon conviction for burglary in the first degree, was upheld.

In later cases, the raising of a closed window or the opening of a closed door has been recognized as a sufficient breaking; and where the evidence was to this effect, the State's case was held sufficient to warrant a verdict of guilty of burglary in the first degree. *S. v. Allen,* 186 N.C. 302, 119 S.E. 504; *S. v. Ratcliff,* 199 N.C. 9, 153 S.E. 605; *S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Feyd,* 213 N.C. 617, 197 S.E. 171; *S. v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278.

The rule established by our decisions is in accord with the great weight of authority in other jurisdictions and in accord with the rule as stated by text writers. 9 Am. Jur., Burglary secs. 10 and 12; 12 C.J.S., Burglary sec. 3(b); Bishop on Criminal Law, 9th Ed. (1923), Vol. II, sec. 91; Cyclopedia of Criminal Law, Ch. 14, sec. 465; Clark and Marshall on Crimes (5th Ed., Kearney), sec. 410; McClain on Criminal Law, sec. 500; Miller on Criminal Law, sec. 108; Wharton's Criminal Law (11th Ed.), sec. 981.

Since a new trial was awarded in the Allen, Ratcliff, Feyd and Chambers cases, cited above, on other grounds, attention is called to the fact that, under Judge Armstrong's instruction, the jury was at liberty to return any one of five possible verdicts, viz.: (1) a verdict of guilty of burglary in the first degree without recommendation that the punishment be imprisonment for life in the State's Prison; or (2) a verdict of guilty of burglary in the first degree with recommendation that the punishment be imprisonment for life in the State's Prison; or (3) a verdict of guilty of a nonburglarious breaking or entering the dwelling house of another with intent to commit a felony or other infamous crime therein; or (4) a verdict of guilty of a nonburglarious breaking or entering the dwelling house of another wrongfully but without intent to commit a felony or other infamous crime therein; or (5) a verdict of not guilty.

Since all the evidence tended to show that the dwelling house was actually occupied at the time of the alleged offense, there was no evidence of burglary in the second degree. Hence, burglary in the second degree was not and should not have been submitted to the jury.

In this connection, it should be noted that in *S. v. Johnson, supra,* and cases cited therein, this Court held that, notwithstanding the provisions of Ch. 434, sec. 3, Public Laws of 1889, codified as Revisal 3270 and C.S. 4641, it was improper, on a trial for the crime of burglary in the first degree, to instruct the jury that it might return a verdict of guilty of burglary in the second degree if there was no evidence tending to support such verdict. The dissents in the Johnson case were based solely on the provisions of C.S. 4641. This statute was amended by Ch. 7, Public Laws of 1941 and, as amended, was codified as G.S. 15-171. It was then held in *S. v. McLean,* 224 N.C. 704, 32 S.E. 2d 227, that, even if the jury found that the defendant was guilty of burglary in the first degree and there was no evidence of burglary in the second degree, the jury "may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do" and that the trial judge was required to "so instruct the jury." Thereafter, G.S. 15-171, upon which the decision in *S. v. McLean, supra,* was based, was repealed by Ch. 100, Session Laws of 1953.

Judge Armstrong charged the jury fully and accurately as to each essential element of the crime of burglary in the first degree and as to each element of each of the lesser crimes upon which the jury might return a verdict of guilty. Moreover, he instructed the jury, in the event the jury found from the evidence beyond a reasonable doubt that the State had established

facts sufficient to constitute all elements of the crime of burglary in the first degree, as follows:

"Now, Gentlemen of the Jury, Section 14-52 of the General Statutes of North Carolina reads as follows:

" 'Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's Prison, and the Court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's Prison for life, or for a term of years, in the discretion of the Court.'

"So, in obedience to this Statute, the Court instructs you that prior to the enactment of this Statute which the Court has just read to you, the punishment for the crime of burglary in the first degree was death, and a recommendation of mercy by a jury had no legal effect. Now, the Court charges you, that under this Statute which I have just read to you, a recommendation by the jury in open court at the time of rendering its verdict of a prisoner convicted, according to due course of law, of burglary in the first degree, that his punishment shall be imprisonment in the State's Prison for life instead of death has the legal effect of reducing the punishment from death to life imprisonment in the State's Prison.

"The Court charges you that the Statute therefore vests in the trial jury the unrestrained discretionary right to mitigate the punishment of one convicted, according to due course of law, of the crime of burglary in the first degree from death to life imprisonment in the State's Prison, by recommending in open court at the time of rendering its verdict that his punishment shall be imprisonment for life in the State's Prison.

"The Court instructs you that if you should find from the evidence in this case beyond a reasonable doubt that the prisoner committed acts sufficient to constitute the crime of burglary in the first degree, and should not elect in your unrestrained discretion that his punishment should be reduced from death to life imprisonment, then you would return a verdict finding the prisoner Guilty of Burglary in the First Degree, without any recommendation that his punishment be imprisonment for life in the State's Prison instead of death.

"On the contrary, however, if you should find beyond a reasonable doubt from the evidence that the prisoner committed acts sufficient to constitute burglary in the first degree, and should find the prisoner guilty of burglary in the first degree, and you should elect in your unrestrained discretion that his

punishment should be reduced from death to life imprisonment, then your verdict would be guilty of burglary in the first degree with a recommendation that the prisoner's punishment be imprisonment for life in the State's Prison instead of death."

A careful consideration of the record fails to disclose any error of law prejudicial to defendant. Rather, it discloses that the case was carefully and correctly tried.

Having been instructed as indicated, and having found the defendant guilty of burglary in the first degree, the jury, in its discretion, elected *not* to recommend that defendant's punishment be imprisonment for life in the State's Prison.

The scene depicted by the evidence reveals a young married woman of courage, stamina and resourcefulness, subjected to a burglarious violation of her home and a felonious assault upon her person by a lewd, brutal, albeit a blundering, man.

No error.

EARL ALLRED v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 6 November, 1957)

1. **Insurance § 38—**

In order to recover on a double indemnity clause in a policy of life insurance for death effected through external, violent and accidental means, death of insured must not only be accidental but must be produced by accidental means, and if death, although unexpected, flows from an ordinary act in which insured voluntarily engages, such death is not deemed to have been produced by accidental means.

2. **Same—**

Evidence tending to show that insured's death resulted from being struck by an automobile after he had voluntarily lain prone in the center of the highway, discloses that the death flowed directly from the voluntary act of insured, and therefore nonsuit is proper in an action under the double indemnity clause of a policy predicated upon the death of insured by accidental means.

Johnson and Bobbitt, JJ., dissent.

APPEAL by plaintiff from *Armstrong, J.*, at May 6, 1957 Civil Term, of FORSYTH.

Civil action, under Small Claims Act, to recover face amount of policy of life insurance, plus like amount for accidental death within meaning of policy; and there was no jury.

These facts appear to be uncontroverted:

1. The defendant Prudential Insurance Company of America, on 16 February, 1953, issued its life insurance policy No. M50 990 111, insuring the life of John L. Allred, in the sum of $500, and an additional sum of $500 should the death of insured occur as a result, "directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means * * * The aforesaid injuries must be evidenced by a visible contusion or wound on the exterior of the body * * *," and named therein as beneficiary the plaintiff Earl Allred.

2. On 25 August, 1956, the insured, John L. Allred, died as the result of physical contusions and wounds on the exterior of his body, after being struck by an automobile. Said policy of insurance was then in force and effect, and due notice of the death was given, and the deceased, John L. Allred, was more than five years of age at the time of his death.

3. Plaintiff has made demand upon the defendant for the payment of $1000 under said policy contract, and defendant has refused to pay said amount. However, defendant admits that it is indebted to plaintiff for the face amount of said policy, $500, plus $5.50 paid-up additions, and has tendered its check in amount of $505.50 to plaintiff, and plaintiff has refused to accept said amount in settlement of his alleged claim.

Defendant further answering the complaint of the plaintiff, avers:

(a) That the policy of insurance which is described in the complaint contains a provision for an accidental means death benefit after age 5, as limited and defined in said policy, the pertinent portions being as quoted in paragraph 1 herein above recited.

(b) "That with respect to the plaintiff's claim for recovery of the accidental means death benefit under said policy of insurance, the defendant avers that no proof has been given the defendant that the death of the insured was under such circumstances as to bring his death within the coverage of the aforesaid provisions for accidental means death benefits, and the defendant specifically denies that the death of the insured was the result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means. On the contrary, the insured was killed in the performance of a voluntary act so obviously dangerous as naturally to result in loss of life. The defendant is informed and believes and upon information and belief alleges that the insured just prior to his death, late at night, while accompanied by two companions, was walking along a traveled highway, being Rural

Hall Road in Forsyth County; that the insured voluntarily went out into the middle of the highway and laid himself down in the middle of the road; that the insured was warned by one of his companions that he had better watch out or he would get killed; that notwithstanding said warning and an approaching automobile, he laid down lengthwise on the white center line in the highway and was struck by the automobile and killed.

Upon trial in Superior Court the plaintiff offered evidence tending to show in substance the following: John L. Allred was born 15 August, 1942. He was the adopted son of plaintiff and lived with him since early infancy. Plaintiff saw him about 9 o'clock on the evening of 24 August at a shopping center west of the city of Winston-Salem. He was with two boys, Cofer and Crosby, and three other companions,—all together. At around 11:15 that night John called plaintiff to ask, and was granted, permission to "stay over-night" at the home of the Cofer boy.

And the Cofer boy, 15 years of age, as witness for plaintiff, gave this narrative, quoting: "I saw John L. Allred on August 25th. I first got up with him at the Thruway Shopping Center, at the Ray Burke dance. He and I attended the dance. I left the dance in the company of John L. Allred, Steve Crosby, and Chester Locklear * * * From the dance we went to Lexington Barbecue * * * located north of Winston-Salem, on Highway 52, a mile or maybe two miles out of the city * * * We got to Lexington Barbecue at about 11:15 p.m. * * * We stayed there until about 11:30. We left there going to my home, riding with Mr. Hill, the man that runs Lexington Barbecue * * * We went to the Winston-Salem Drive-In Theatre on N. Cherry Street Extension * * * a drive-in picture theatre. We stayed there about twenty minutes. We did not attend the show. From the drive-in we went back to the Duplan bus stop. We stayed at the bus stop about thirty minutes. It was around 1 a.m. of August 25th then. When we left there we started thumbing. We got a ride with a guy who took us out to the old Rural Hall Road, near the place the Highway patrolman and the Sheriff described on the witness stand, on Highway 52, between Winston-Salem and Rural Hall. I don't know what time it was when we got there. I guess it was around 2:00, 2:30, or maybe longer than that. At that time John L. Allred and Steve Crosby were with me. John L. Allred called his father that night from Lexington Barbecue * * * John was to spend the night with me that night.

"After we got to this point on the highway, we stood there and talked a good while. John said something about going out in the middle of the road and just laying down, and he laid out in the middle of the road * * * He said, 'I'm going to go out

there and lay out in the road and show you all how brave I am' * * * just kidding. I didn't think he was going to lay out there * * * He did lay down on the road * * * in the middle * * * with his head up toward Rural Hall and his feet toward Winston-Salem. He laid right in the white line, with his head on the white line * * * and toward Rural Hall. Steve and I walked across the road * * * toward Rural Hall. We seen a car coming. I told Johnny to get up, he might get killed. At that time I was about three feet, maybe four or five feet, not too far away, from Johnny. Johnny did not answer me back; he kind of laughed * * * I had seen a car approaching from direction of Rural Hall. When I made that statement the car was about 100 yards up the road, and it was 'moving', it was going about 80 miles an hour. When the car approached him, Johnny just laid there, and it run over him * * * I was about ten or fifteen yards away at the time * * * When it passed, the car was in the middle of the road * * * I called the officers * * * I did not notice any signs of life after he was hit."

Then on cross-examination the Cofer boy continued: "I thought the car * * * was a '50 Nash, brown * * * It wasn't making no loud noise or no small noise either one. I would describe it as the noise you would normally expect an automobile to make driving at 80 miles an hour down the road * * *."

And, again, "There had been another occasion, prior to that time" Cofer testified, "on which John got in the highway in front of an approaching vehicle. At that time he stood out there when a truck came by, and made a sign for him to blow his horn * * * and he jumped back when the truck got close to him."

On re-direct examination the witness Cofer continued, saying: "There had been other occasions when we boys had been out in the highway. We had laid down in the highway * * * On these other occasions when we'd see a car coming, we'd get up."

And the witness Cofer testified that "the deceased had not been drinking anything intoxicating."

Plaintiff offered testimony of other witnesses in respect to the scene of the death of John L. Allred, and of the injuries apparent upon his body, which, in the Coroner's opinion, produced death.

At the scene the highway ran north and south. It was 24 feet wide, and to the north it was straight, as variously estimated, for nine-tenths of a mile, or six to eight hundred yards; and to the south there was a slight curve to the south. The night was

clear. There was nothing to obstruct the vision of one driving southwardly to the scene. And the automobile has not been located.

The cause having been heard before the Judge presiding, without a jury, pursuant to the Small Claims jurisdiction of Superior Court, and the parties by their counsel having stipulated the liability of defendant to the extent admitted in defendant's answer, and the only issue for determination is the question whether defendant is liable for "double indemnity," or accidental death benefit, pursuant to the terms of the policy; and the court having heard the evidence introduced by plaintiff, and defendant having moved at the close of plaintiff's evidence for dismissal and judgment of nonsuit, and demurred to the evidence, relating to plaintiff's claim for accidental death benefit, without prejudice to the right of plaintiff to recover the admitted amount due as stated in defendant's answer; and the court being of opinion that the evidence of plaintiff is insufficient to sustain a cause of action for accidental death benefit as defined by the policy, and that, therefore, defendant's motion should be allowed, the court ordered, adjudged and decreed that plaintiff have and recover the admitted amount, and that plaintiff's cause of action as to accidental death benefit be and the same was dismissed, and that plaintiff have and recover nothing further.

To the signing of this judgment plaintiff objects and excepts, and appeals to Supreme Court and assigns error.

Buford T. Henderson for plaintiff appellant.
Wharton & Wharton for defendant appellee.

WINBORNE, C. J.: In the light of the evidence offered upon trial in Superior Court, taken most favorably to plaintiff, and giving to him the benefit of every reasonable inference, did the death of the insured result, directly and independently of all other causes, of bodily injuries effected through external, violent and accidental means, within the meaning of the accidental means death benefit provision contained in the policy of insurance in suit? Principles applied in decisions of this Court dictate a negative answer. See *Clay v. Ins. Co.*, 174 N.C. 642, 94 S.E. 289; *Mehaffey v. Ins. Co.*, 205 N.C. 701, 172 S.E. 331; *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d, 687; *Scarborough v. Ins. Co.*, 244 N.C. 502, 94 S.E. 2d, 558, and cases cited.

In the Mehaffey case, *supra*, opinion by Brogden, J., the Court, in treating of liability clause of a policy of insurance resting upon death or injury "solely through external, violent and accidental means," declared that "in order to warrant recovery for

death in such event, such death must not only be accidental but must be produced by 'accidental means'." Then after citing and referring to cited cases, the Court concluded that "upon conditions of these authorities and others of like import, it seems that 'accidental means' implies 'means' producing a result, which is not the natural and probable consequence of such means. If the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by accidental means."

In the Fletcher case, *supra,* Barnhill, J., later C. J., drew distinction between "accidental" and "accidental means" as these terms are used in accident insurance policies, and pointed out that the term "accidental means" refers to the occurrence or happening which produced the result, rather than the result.

And in the Scarborough case, *supra,* after referring to the Fletcher case, it is said "Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury."

The principle is approved and applied in *Thompson v. Prudential Ins. Co. of America,* 84 Ga. App. 214, 66 S.E. 2d, 119, and in *Baker v. The National Life & Accident Ins. Co.* (Tenn.), 298 S.W. 2d, 715, where factual situations are comparable to that in case in hand.

In the Thompson case the insured was killed while engaged in game of Russian Roulette. And the opinion of the Court is epitomized in these headnotes: "1. Under life policies containing provisions for double indemnity for death caused by accidental means, death which is the natural and probable consequence of an act or course of action is not an accident nor is it produced by accidental means, and, if not the result of actual design, insured must be held to have intended the result.

"2. Where insured engaged in game of 'Russian Roulette' and removed all but one cartridge from revolver cylinder, spun cylinder, and without ascertaining position of cartridge, placed revolver to head, pulled trigger and was killed, death was not caused by 'accidental means', within double indemnity provisions of life policies.

"3. In action by beneficiary for double indemnity under life policies providing for such payment for death caused by accidental means, evidence on issue of whether insured, who had

killed himself while playing 'Russian Roulette' with loaded revolver, was killed by accidental means was insufficient to take case to jury."

And in the Baker case, *supra*, (of "William Tell" import), these headnotes portray opinion of Supreme Court of Tennessee: "1. Where insured placed a pepper can on his head and invited friend to fire at the can with a revolver and insured moved his head just as revolver was fired with bullet entering insured's head causing his death, insured should have reasonably foreseen that death or injury might result and his death was not through 'accidental means' within double indemnity provisions of life policy.

"2. Death is not caused by accidental means if it is the natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured."

Applying these principles to case in hand, this Court is constrained to hold that the facts and circumstances shown by the undisputed evidence disclose that the death of the insured was "the natural and probable consequence of an ordinary act in which he voluntarily engaged." *Mehaffey v. Ins. Co., supra.*

Cases relied upon by appellant are distinguishable.

Hence no recovery can be sustained, and the judgment as of nonsuit must be

Affirmed.

Johnson and Bobbitt, J.J., dissent.

W. H. M. JENKINS v. WASHINGTON CORTEZ FOWLER AND MRS. SALENA FOWLER COLEY.

(Filed 6 November, 1957)

1. **Judgments § 32—Adjudication that party was not guilty of actionable negligence is res judicata on that issue in subsequent action.**

Where the passenger in one car sues the driver of the other car involved in the collision, and the driver of that car has the owner and driver of the passenger's car joined for contribution, in which action it is determined by verdict of the jury that the owner and driver of the car in which the passenger was riding was not guilty of negligence constituting a proximate cause of the accident, and judgment is entered that the defendant therein recover nothing on the cross-action for contribution, such judgment is conclusive as to the issues therein determined and precludes the defendant therein from thereafter instituting action against the owner and driver of the other car to recover for alleged negligence proximately causing the same accident.

2. Judgments § 35: Trial § 21—

It is the duty of the court to allow motion for judgment as of nonsuit when all the evidence fails to establish a right of action on the part of plaintiff, and also when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover, and therefore where the defendant's affirmative proof discloses that plaintiff's cause of action is barred under the doctrine of *res judicata*, nonsuit is proper.

APPEAL by plaintiff from *Hall, J.*, April 1957 Term of FRANKLIN.

Plaintiff seeks by this action compensation for personal injuries and damage to his automobile resulting from a collision between the automobile owned and operated by plaintiff and an automobile operated by defendant Coley as agent of the owner, defendant Fowler, which collision was alleged to be due to the negligence of defendants.

Defendants answered. They denied they were negligent and pleaded contributory negligence. Thereafter, defendants, acting under G.S. 1-167, filed a supplemental answer pleading in bar of plaintiff's right to recover an adjudication of the matters in controversy as disclosed by the record in an action lately pending in the Superior Court of Granville County by *Mrs. Fannie Franklin Fowler versus W. H. M. Jenkins*, the original defendant, and W. Cortez Fowler and Mrs. Selena Fowler Coley, made additional defendants on motion of the original defendant for contribution, if he should be adjudged liable to plaintiff.

At the trial defendants offered in evidence the judgment roll in the action referred to in their answer.

At the conclusion of the evidence defendants moved for judgment of nonsuit. This motion was allowed and judgment was entered accordingly. Plaintiff, having duly noted his exception, appealed.

Royster & Royster for plaintiff appellant.
Reade, Fuller, Newsom & Graham and Gantt, Gantt & Markham for defendant appellees.

RODMAN, J. Plaintiff offered evidence tending to establish the allegations of negligence as set out in the complaint. Defendants offered evidence tending to negative plaintiff's allegations of negligence. Defendants also offered the record in the Granville County action pleaded as an estoppel.

That was an action brought by Mrs. Fannie Fowler, mother of the present defendants, to recover damages from Jenkins, the present plaintiff, for personal injuries sustained in the collision forming the basis of the present action. Mrs. Fowler

alleged that she was a passenger in the car of her son, Washington Cortez Fowler, operated at the time by Mrs. Coley; that her injuries were due to the negligence of the defendant Jenkins, present plaintiff. Jenkins answered. He denied any negligent conduct proximately causing the collision. He asserted that the collision was caused by the sole negligence of Mrs. Coley who was operating her brother's car as his agent. He then averred that if, in fact, he was negligent, Mrs. Coley and her principal were joint *tortfeasors* from whom he was entitled to contribution. On his motion, the defendants in this action were made additional parties to the Granville County suit. The additional defendants answered. They denied the allegations of negligence asserted by the then defendant Jenkins. The cause was tried at the October 1956 Term of Granville. The jury answered the issue as to Jenkins' negligence in the affirmative and fixed the amount of Mrs. Fowler's damages. In addition, an issue was submitted and answered thus: "Was the defendant, Mrs. Salena Fowler Coley, negligent and did her negligence concur with the negligence of the defendant, Jenkins, and contribute to the injuries of the plaintiff, Mrs. Fannie Franklin Fowler, as alleged in the answer of the defendant, Jenkins? Answer: No." Judgment was entered in accord with the verdict that Mrs. Fowler recover of Jenkins the damage assessed by the jury. It was further adjudged: "that the defendant W. H. M. JENKINS, have and recover nothing of the defendants, W. Cortez Fowler and Mrs. Salena Fowler Coley, by reason of his action for contribution against them, which alleged cause of action is set out in the answer of the said defendant, Jenkins, and that the defendant Jenkins be taxed by the Clerk with the costs of his action against the said defendants, W. Cortez Fowler and Mrs. Salena Fowler Coley." Jenkins noted an appeal from the judgment so entered. His appeal was dismissed in March 1957.

When the present defendants were, at the instance of the present plaintiff, made defendants in the Granville County action, Jenkins became as to them a plaintiff with the burden of establishing their negligence. *Norris v. Johnson,* 246 N.C. 179. The foundation of the claim then asserted is identical with the facts asserted to form the basis of the present claim. A jury has heard the facts, determined them adversely to the present plaintiff, and judgment has been entered on that verdict. This judgment is conclusive and prevents further inquiry into the facts forming the basis of the present action. *Thompson v. Lassiter,* 246 N.C. 34; *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505; *Tarkington v. Printing*

Co., 230 N.C. 354, 53 S.E. 2d 269; *Crawford v. Crawford*, 214 N.C. 614, 200 S.E. 421; *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157; *Gay v. Stancell*, 76 N.C. 369.

The judgment roll in the prior action having been offered in evidence, it became the duty of the court on a proper motion to again enter a judgment denying plaintiff's right to recover from defendants.

Is a motion to nonsuit, made at the conclusion of the evidence, a proper method of disposing of the case? The answer is yes.

At common law a defendant could test the sufficiency of the evidence to permit a recovery by demurrer to the evidence. If the court should overrule the demurrer, defendant could not offer evidence. *Stith v. Lookabill*, 71 N.C. 25; *S. v. Adams*, 115 N.C. 775; *S. v. Groves*, 119 N.C. 822.

"A demurrer to evidence withdraws a case from the jury, and it is laid down in Tidd, 865, that when the evidence is in writing, or if parol, is certain, the adverse party will be required to join in the demurrer; but when the parol evidence is loose and indeterminate or is circumstantial, he will not be required so to do, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove." *Nelson v. Whitfield*, 82 N.C. 46; 88 C.J.S. 514; 53 Am. Jur. 262.

A defendant could also test plaintiff's right of recovery by motion for directed verdict. Such a motion was not circumscribed by the limitations relating to a demurrer to the evidence. McIntosh, N.C. P.&P., 2d ed., sec. 1488.

The Hinsdale Act, G.S. 1-183, first enacted in 1897, was designed to permit more extensive use of a demurrer to the evidence by permitting the court to consider all of the evidence and if, upon all the evidence, it appeared that plaintiff was not entitled to recover, the court could then allow the motion to nonsuit.

On a motion to nonsuit the court does not now have any more right to weigh the evidence and pass on the credibility than it possessed prior to the adoption of the Hinsdale Act.

Justice Seawell aptly stated the rule when he said in *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330: "While the statute, C.S., 567, requires a consideration of the whole evidence, it is clear that only that part of the defendant's evidence which is favorable to the plaintiff can be taken into consideration, since otherwise, the court would necessarily pass upon the weight of the evidence, the credibility of which rests solely with the jury."

But that does not mean that when all of the evidence has been examined and all inferences which may be drawn there-

from favorable to plaintiff have been accorded him, it nevertheless appears, as a matter of law, he cannot recover, that the express language of the statute should be ignored and the court held powerless to render a judgment of nonsuit.

It is the duty of the court to allow the motion in either of two events: first, when all of the evidence fails to establish a right of action on the part of plaintiff; second, when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Bryant v. Shields, supra; Crawford v. Crawford, supra.* The motion made on defendants' affirmative proof is the equivalent of a motion for a directed verdict under the old practice. Here, if an issue on the plea of estoppel by judgment had been submitted to the jury, defendants would have been entitled to a peremptory instruction. Hence the judgment of nonsuit is proper. *Ferrell v. Insurance Co.*, 208 N.C. 420, 181 S.E. 327; *Hood v. Bayless*, 207 N.C. 82, 175 S.E. 823; 23 N.C.L.R. 243.

There is nothing in *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125, in conflict with what is here said. In that case the plea of *res judicata* did not establish the identity of the parties or the identity of the controversial facts in the two suits. Here, the parties are identical, and an examination of the pleadings in the two suits shows that the issue of the defendants' negligence is the same in each suit.

Since a jury has heretofore decided that the collision between the two automobiles was not caused or produced by any negligent act of the defendants, the court was correct in not submitting that issue to another jury. The judgment is

Affirmed.

CAROLINA WOOD TURNING COMPANY, A CORPORATION v. JESS WIGGINS, CECIL WELCH, FRED J. HALL, NEAL J. PROCTOR, HORACE BIRCHFIELD, ALBERT JENKINS, GEORGE CLINE, ANDY CLINE, OLIN L. PROCTOR, CLINT BURNETT, ODIS BIRCHFIELD AND ALL OTHER MEMBERS OF LOCAL NO. 251, OF THE UNITED FURNITURE WORKERS OF AMERICA, AND ANY OTHER PERSONS UNKNOWN TO THIS PLAINTIFF TO WHOM THIS ACTION MAY BECOME KNOWN.

(Filed 6 November, 1957)

1. Contempt of Court § 8—

An appeal lies from judgment holding respondents in contempt for disobedience of the court's order when the contempt is not committed in the immediate presence of the court.

2. Same—

On appeal from judgment holding respondents in contempt for wilful disobedience of the court's order restraining unlawful picketing, the findings of fact by the judge are conclusive and not reviewable if supported by any competent evidence.

3. Contempt of Court § 7—

Punishment in this case for contempt not committed in the presence of the court *held* not to exceed that provided by law. G.S. 5-4.

APPEAL by respondents from *Moore (Dan. K.), J.*, at Chambers in Sylva, North Carolina, on 31 July 1957. From SWAIN.

The petitioner instituted this action in the Superior Court of Swain County, North Carolina, on 17 May 1957, against the above-named parties and others, including the appellants.

The labor contract between the petitioner and Local No. 251 of the United Furniture Workers of America expired on 13 April 1957. When the parties could not agree upon a new contract, the Union called a strike. The strikers picketing the plant blocked the entrance to the plant on several occasions between 13 April and 17 May 1957, and interfered with employees entering and leaving the plant and prevented the petitioner from shipping any merchandise therefrom.

A temporary restraining order was issued on 17 May 1957 by his Honor Dan K. Moore, Resident Judge of the Thirtieth Judicial District of North Carolina, restraining the above-named parties and all other persons to whom notice or knowledge of the order may come, from doing, among other things, the following: (1) Loitering or congregating within 200 feet of any part of any premises owned, occupied or used by the petitioner as a place of business or warehouse at Bryson City, North Carolina, except as follows: (a) At no time more than four persons may peaceably picket anywhere within 200 feet of said premises. (b) None of the said four persons peaceably picketing, nor any other persons shall physically block the entry or the exit of any person desiring to enter any premises used or occupied by the petitioner or to leave therefrom by walking in front of said person or by placing an automobile, truck or other obstruction in the driveways leading to and from said premises or shall otherwise interfere in any manner with the free ingress and egress of any and all persons to and from said premises and, further, shall not interfere with any persons desiring to go to his or her place of work with the petitioner or to his or her home from work with the petitioner.

The order likewise prohibited interference with the ingress and egress to and from the premises of petitioner of trucks or

automobiles owned by the petitioner or its agents and employees, or others, including motor trucks operated by common carriers.

The respondents were ordered to appear before his Honor at the Jackson County Courthouse, Sylva, North Carolina, on 25 May 1957, at 10:00 a.m. and show cause, if any they have, why the restraining order should not be continued until the hearing.

The temporary restraining order was served on the respondents named in the caption of this cause, and copies thereof posted at conspicuous places on each side of the entrance gate to petitioner's plant.

When this motion came on for hearing on 25 May 1957, the original order was amended and continued until the hearing, the amendment in pertinent part being, "There shall be no picketing of any kind within 10 feet of the driveway or entrance from the highway to the plaintiff's (petitioner's) premises," and a new paragraph was added permitting the respondents to use the house which they had leased, located across the highway from the petitioner's premises.

The order as amended was also served on the respondents named in the caption of this cause and copies posted in conspicuous places on each side of the entrance gate to petitioner's plant, and a copy was also posted on the building across the highway from the petitioner's plant, used by the pickets.

On 22 July 1957 the petitioner filed a verified motion stating in substance that the respondents named therein had on that date engaged in mass picketing at the entrance gate to petitioner's plant in violation of the aforesaid restraining order, there being more than four persons within 200 feet of petitioner's premises, and that the respondents had physically blocked the entrance to numerous persons desiring to enter petitioner's premises, and prayed for an order to show cause why the respondents named therein should not be attached for contempt. Said respondents were cited to appear before his Honor on 24 July 1957 at the Jackson County Courthouse, Sylva, North Carolina, at 2:00 p.m. and show cause, if any there be, why they should not be attached for contempt of court and be punished as provided by law.

When the matter came on for hearing on 24 July 1957, at the request of counsel for respondents, the hearing was continued until 9:00 a.m., 25 July 1957. The respondents filed a demurrer to the motion, which was overruled. They then filed an answer, which was used as an affidavit.

His Honor heard the evidence as submitted by affidavits and found the facts. Based on his findings, he held the respondents named in paragraph three of the judgment, and each of them, did on 22 July 1957, between the hours of 6:30 a.m. and 2:40 p.m., intentionally and wilfully violate the terms of the restraining order theretofore issued.

From the punishment imposed, the respondents appeal, assigning error.

William Medford, Robert Leatherwood, III for petitioner appellee.

Robert S. Cahoon, Martin Raphael (of New York), for respondents appellant.

DENNY, J. In a proceeding in which a judge of the superior court has adjudged a party guilty of contempt for disobedience of the court's order and the contempt was not committed in the immediate presence of the court, an appeal lies from the judgment entered. However, in such a proceeding, the findings of fact by the judge are conclusive and not reviewable on appeal, if supported by any competent evidence. *Cotton Mill Co. v. Textile Workers Union,* 234 N.C. 545, 67 S.E. 2d 755; *Bank v. Chamblee,* 188 N.C. 417, 124 S.E. 741; *In re Fountain,* 182 N.C. 49, 108 S.E. 342, 18 A.L.R. 208; *Flack v. Flack,* 180 N.C. 594, 105 S.E. 268; *In re T. J. Parker,* 177 N.C. 463, 99 S.E. 342; *Green v. Green,* 130 N.C. 578, 41 S.E. 784; *Young v. Rollins,* 90 N.C. 125.

We have carefully examined the record in this cause, and the findings of the court below are supported by competent evidence and such findings support the judgment.

Furthermore, the punishment imposed does not exceed that provided by law. G.S. 5-4. Hence, the judgment is affirmed. *Erwin Mills v. Textile Workers Union,* 235 N.C. 107, 68 S.E. 2d 813; *Cotton Mill Co. v. Textile Workers Union, supra; Cotton Mills v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803; *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577, and cited cases.

Affirmed.

STATE v. JAMES WILLIAM FLINCHEM

(Filed 6 November, 1957)

Automobiles § 71: Criminal Law § 63—

A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion

on which the witness observed him, and in a prosecution for driving while under the influence of an intoxicant, the action of the court in sustaining an objection to testimony of defendant's witness to the effect that he had an opinion as to whether defendant on the occasion in question was under the influence of any intoxicant and that the witness thought the defendant was perfectly normal, must be held for prejudicial error.

APPEAL by defendant from *Armstrong, J.*, at August 1957 Term, of WILKES.

Criminal prosecution upon bill of indictment charging that defendant "did unlawfully and willfully operate an automobile upon the public highways of Wilkes County while then and there being under the influence of intoxicating liquors or narcotic drugs, contrary to the form of the statute," etc.

Upon the trial in Superior Court the State offered the testimony of a State Highway patrolman, Mr. Gentry, tending to show that about 11 o'clock on the night in question, 19 January, 1957, he saw defendant stagger as he entered his automobile, and that he, the patrolman, followed along the public highway and, on stopping defendant, smelled on his breath the odor of alcohol—beer, in his opinion; and that in his opinion defendant was under the influence of some intoxicating liquor or narcotic drug to such an extent that his mental or physical faculties, or either of them, were materially impaired; and that he, the patrolman, told defendant "he was under arrest for driving under the influence," and took him to jail. And, on cross-examination, the patrolman testified that in his opinion "defendant had had some beer to drink, and that defendant told him he had had two bottles of beer."

On the other hand, defendant, as a witness for himself, testified that while at the time of his arrest he had drunk part of two bottles of beer, (using his language), "I was just as normal as I am right now. I was not under the influence of any intoxicant. He took me to jail * * * I told him I wanted a blood test." And on cross-examination defendant testified: "I wasn't staggering when I went out to get in my car. Mr. Gentry was mistaken about that. I was walking straight."

Defendant also introduced as his witness one Billy Tom Dowell, who testified: That he was with defendant on the occasion when he was arrested. And in the course of his testimony defendant's attorney undertook to elicit from him whether, in his opinion, defendant was under the influence of any intoxicant, and the following ensued: "Q. Now, do you have an opinion satisfactory to yourself as to whether he was under the influence of some intoxicant the last time you saw him?" State objects. "A. As far as I could tell he was perfectly normal."

Court: "No, you have got to first answer whether you have an opinion or not, then you can say, do you or not, Yes or No?"

Witness: "Yes, I have an opinion. I think he was perfectly normal."

Court: "No, objection sustained."

The above is the subject of defendant's Exception No. 8, assignment of error No. 5.

There are other incidents of similar nature to which other assignments of error relate, as well as other exceptions.

And the record shows that after the jury had come into open court and, in response to inquiry as to whether it had agreed upon a verdict, had stated that it found defendant "Guilty of violating the State Highway Law, but not drunkenness," the court declined to accept such as the verdict, stating that it was not one of the verdicts the court had instructed the jury could return. The court directed the jury to return to jury room, calling attention to instruction given. (Exception No. 1.) The jury upon further deliberation returned a verdict of guilty as charged.

Then the record shows that after verdict a colloquy between the court and attorney for defendant followed in respect to whether judgment would be suspended upon fine and cost. The judgment of the court was that "defendant be confined in the common jail for a term of six (6) months and assigned to do labor under the State Prison Department, as provided by law." Defendant excepted.

And from judgment entered defendant appeals to Supreme Court, and assigns error.

Attorney General, Assistant Attorney General Love for the state.

W. H. McElwee, W. L. Osteen for defendant appellant.

WINBORNE, C. J.: Among the exceptions taken by defendant in the course of the trial in Superior Court, this Court is of opinion that the matter of exclusion of testimony of the witness Dowell to which Exception No. 8 is directed, constitutes error prejudicial to defendant, and entitles him to a new trial.

In this State a lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which the witness observed him. See *S. v. Willard*, 241 N.C. 259, 84 S.E. 2d, 899, and cases there cited.

Since there is to be a new trial, it is not deemed expedient to treat other assignments of error. The matters to which they relate may not then recur.

For error pointed out, let there be a

New trial.

HERBERT B. HOFFMAN AND WIFE, REMONA H. HOFFMAN v. JAMES P. MOZELEY AND WIFE, JULIA P. MOZELEY.

(Filed 6 November, 1957)

1. **Trusts § 4c—**

Allegations and evidence to the effect that plaintiffs furnished the full purchase price for certain lots, that defendants took title thereto in their own names, that defendants built a dwelling on one of the lots for plaintiffs, for which plaintiffs paid them in full, and that defendants thereafter conveyed only part of the lots to plaintiffs, is sufficient to make out a cause of action against defendants to compel the conveyance of the rest of the land on the theory of a resulting trust.

2. **Compromise and Settlement—**

Where there is evidence that the owners of land by operation of a resulting trust accepted from the trustor a deed to part of the land, with an executory agreement in regard to the balance, but without agreement that the conveyance of part should settle all claims and differences between the parties, the finding of the jury adverse to defendant determines the issue of settlement or estoppel.

3. **Frauds, Statute of, § 5—**

The statute of frauds has no application to a resulting trust.

4. **Trial § 36—**

Where the issues submitted arise on the pleadings and are supported by the evidence, and are determinative of the controversy, an assignment of error to the refusal to submit other issues cannot be sustained.

APPEAL by defendants from *Moore (Clifton L.), J.*, May, 1957 Term, LENOIR Superior Court.

Civil action by plaintiffs to establish title and right to possession of a certain described portion of lot No. 217 in Mount Vernon Park Subdivision, Falling Creek Township, Lenoir County, and to have the court declare the defendants to be trustees for the benefit of the plaintiffs.

It appears from the pleadings and the evidence that the plaintiffs furnished the defendant James P. Mozeley $1,250.00 for which to purchase lots Nos. 217, 218, 219, and 220 in the above

described development, upon which the defendant James P. Mozeley agreed to, and did, erect a dwelling house for a stipulated price. The said defendant made the purchase of the lots with plaintiffs' money and took title to himself and his wife. The plaintiffs paid for the dwelling. The defendants then executed a deed in fee to the plaintiffs for all of the described lots except a small triangular portion extending along the west side of lot No. 217. Prior to the execution of the deed to the plaintiffs, the parties discussed a sale of a part of lot 217, the purchase price to be applied to a reduction of the amount due the defendants for the erection of the dwelling. The sale was not consummated. The plaintiffs, having knowledge that their deed did not cover all of lot 217, nevertheless accepted it.

The plaintiffs contend they had paid for the lots and paid for the erection of the dwelling thereon, and they accepted the deed as written without waiving their right to require a further conveyance in the event a sale was not consummated for the small portion of lot No. 217 not covered by their deed.

On the other hand, the defendants contend (1) that agreement was made by which the defendants were to sell that part of lot No. 217 not conveyed to the plaintiffs and apply the purchase price on the cost of the dwelling; (2) that a controversy arose and that the plaintiffs accepted the deed in settlement of all claims and obligations on the part of the defendants; (3) that the contract between the parties involved the title to real estate and was not signed by the party to be charged, and was void and unenforceable under the statute of frauds. The defendants tendered the following issues:

"1. Did the parties to this action enter into a verbal agreement under the terms of which defendants were to sell a portion of the residence lot and apply the proceeds to the cost of constructing the house?

"2. Is this agreement barred by the statute of frauds?"

The court submitted the following issues which the jury answered as indicated:

"1. Did the defendants, with moneys previously paid by the plaintiffs as the purchase price, purchase and take title in their names the land involved in this action?
Answer: Yes.

"2. Did the plaintiffs accept delivery from the defendants of the Deed dated February 14, 1956, in settlement of all claims and differences between them?
Answer: No."

From the judgment on the verdict, the defendants appealed.

Albert W. Cowper, for defendants, appellants.

La Roque & Allen, By: G. Paul La Roque, for plaintiffs, appellees.

HIGGINS, J. The plaintiffs alleged and offered evidence to sustain the allegation that the plaintiffs furnished the defendant James P. Mozeley the full purchase price for the four lots involved, and that Mozeley had title thereto made to himself and his wife. After building a dwelling on the lots for the plaintiffs, for which they paid in full, the defendants conveyed only part of the lots. This action is to compel conveyance of the remaining portion upon the ground that a resulting trust in the property existed in favor of the plaintiffs by reason of their having furnished the purchase money. "Under such circumstances equity creates a trust in favor of such other person commensurate with his interest in the subject-matter. A trust of this sort does not arise from or depend upon any agreement between the parties. It results from the fact that one's money had been invested in land and the conveyance taken in the name of another." *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321; *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289; *Davis v. Davis*, 228 N.C. 48, 44 S.E. 2d 478; *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83; *Ricks v. Wilson*, 154 N.C. 282, 70 S.E. 476; *Summers v. Moore*, 113 N.C. 394, 18 S.E. 712; *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222; *Paul v. Neece*, 244 N.C. 565, 94 S.E. 2d 596; *Grant v. Toatley*, 244 N.C. 463, 94 S.E. 2d 305.

The jury found the plaintiffs did not accept the deed in settlement of all claims and differences between the parties. That finding, which is supported by competent evidence, left the defendants under obligation to convey to the plaintiffs all lands bought with their money. "To constitute an abandonment or renunciation of a claim there must be acts and conduct, positive, unequivocal, and inconsistent with their claim of title." * * * ". . . estoppel stands practically upon the same footing . . ." *Furniture Co. v. Cole*, 207 N.C. 840, 178 S.E. 579.

Unsupported in law also is defendants' contention the contract to convey was void and unenforceable under the statute of frauds. It is well settled that "If one agrees, by parol, to buy land for another, and he does buy the land and pays for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, hold him to be a trustee, and compel him to make title to the principal; for the statute which requires all contracts 'to sell or convey land' to be in writing has

no application." *Greensboro Bank & Trust Co. v. Scott,* 184 N.C. 312, 114 S.E. 475.

The only errors assigned by the defendant relate to the nonsuit and the court's refusal to submit the issues tendered by the defendants. The evidence was ample to support plaintiffs' cause of action. The issues submitted arose on the pleadings. They were determinative of the controversy.

No error.

MRS. HELEN HAYES v. BON MARCHE, INC.

(Filed 6 November, 1957)

1. **Negligence § 16; Pleadings § 31—**

In an action to recover for injuries received by plaintiff while using an automatic "magic eye" door in the entrance of defendant's retail store, plaintiff may allege prior similar occurrences.

2. **Appeal and Error § 22a—**

An exception to the refusal of the court to strike designated subparagraphs of a pleading is a broadside exception and must fail if the paragraphs challenged contain any proper factual allegations.

On writ of *certiorari,* treated as an appeal, to review order of *Sink, E. J.,* at 27 May, 1957, Special Term of BUNCOMBE.

Civil action by the plaintiff to recover damages for personal injuries alleged to have been caused by negligence of the defendant in the operation and maintenance of an automatic "magic eye" door in the entrance to its retail store in the city of Asheville.

The defendant, before answering or otherwise pleading, moved under G.S. 1-153 to strike certain portions of the complaint, including all of paragraph 7, wherein the plaintiff alleges injuries of a similar nature sustained by other persons, before and after the occurrence in suit.

The motion to strike paragraph 7 was allowed in respect to a portion of the preamble, but was denied as to all allegations contained in the body of the paragraph, including subparagraphs a, b, and c, in which the plaintiff alleges three similar occurrences. To the order entered by the court, the defendant excepted to so much thereof as overruled its motion to strike subparagraphs a, b, and c of paragraph 7 of the complaint, and petitioned for writ of *certiorari* under Rule 4 (a), 242 N.C. 766.

The petition was allowed 28 August, 1957.

Meekins, Packer & Roberts for appellant.
N. Johnson DuBose for appellee.

JOHNSON, J. The essential rules governing appeals from lower court rulings on motions to strike are collected and assembled in *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. Under application of principles there stated, we conclude that paragraph 7 of the complaint contains some factual allegations which withstand the defendant's motion to strike. *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; 65 C.J.S. Negligence, Sec. 234.

Conceding as we may that the challenged paragraph contains irrelevant and redundant matter, nevertheless it is noted that the refusal of the court to strike all three subparagraphs is challenged by a single broadside exception. Such exception does not require this Court to go through all three subparagraphs of paragraph 7 and separate the "good from the bad." *Nance v. Telegraph Co.,* 177 N.C. 313, p. 315, 98 S.E. 838. Ordinarily, an exception taken to several distinct matters, some of which are clearly correct, is insufficient to present any error for review. *Wheeler v. Cole,* 164 N.C. 378, 80 S.E. 241. See also *Harris v. Light Co.,* 243 N.C. 438, 90 S.E. 2d 694; *Dobias v. White,* 240 N.C. 680, 689, 83 S.E. 2d 785; *Insulation Co. v. Davidson County,* 240 N.C. 336, 81 S.E. 2d 925; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609. In 3 Am. Jur., Appeal and Error, Sec. 275, it is stated: ". . . where an exception covers several propositions, it is a general one, and is unavailing if any one of them is correct."

The judgment below is
Affirmed.

STATE v. WILLIAM DALTON WOOD

(Filed 6 November, 1957)

Automobiles §§ 3, 72—

The stipulations between counsel for defendant and the solicitor, together with defendant's admissions and the State's evidence, considered in the light most favorable to the State, *held* sufficient to support conviction of defendant of driving on a public highway while under the influence of intoxicating liquor and operating a motor vehicle on a public highway after permanent revocation of driver's license.

APPEAL by defendant from *Hobgood, J.*, at July 8, 1957 Regularly Assigned Criminal Court, of WAKE.

Criminal prosecution upon three warrants issued out of Recorder's Court of Garner, North Carolina, charging defendant with these offenses on 5 June, 1957:

In Number 7055, "driving an automobile on the public highway of North Carolina while under the influence of some intoxicating liquor, this being the fourth offense";

In Number 7056, "operate a motor vehicle on a public highway in North Carolina during the time his driver's license had been permanently revoked"; and

In Number 7057, "display or cause to be displayed and have in his possession an operator's license, knowing the same to have been revoked, suspended or altered."

Upon trial in said Recorder's Court, defendant pleaded not guilty as to each charge, but was adjudged guilty as to each. And from judgments pronounced thereon, defendant appealed to Superior Court of Wake County.

In Superior Court the cases were consolidated for the purpose of trial, and came on for trial. Again defendant pleaded not guilty to the charges preferred in the respective warrants.

And upon trial motions of defendant were aptly made for nonsuit as to each charge. The trial court allowed the motion as to the charge set forth in case Number 7057, but overruled the motions as to the charges in cases Numbers 7055 and 7056. And as to these two charges the jury returned verdict that the defendant is guilty on both counts.

Thereupon the judgment of the court is that the defendant be confined in the common jail of Wake County for a term of one year, and assigned to work the public roads under the supervision of the State Prison Department. Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney General Patton, Assistant Attorney General Harry W. McGalliard for the state.

Carl E. Gaddy, Jr., Daniel F. Lovelace for defendant appellant.

PER CURIAM: The question is: Did the court err in denying defendant's motions for judgment as of nonsuit, and in failing to direct a verdict of not guilty as to the charges in the warrants.

The case on appeal discloses stipulation between counsel for defendant and the Solicitor of the State (1) that on 5 June, 1957, defendant's operator's license had been suspended by the Department of Motor Vehicles for the State, and had been re-

voked permanently; and (2) that prior to said date defendant had been convicted three times for driving motor vehicles upon the public highways of the State of North Carolina while under the influence of intoxicating liquor. And defendant, as witness for himself, testified that he was "pretty drunk at the time * * * was pretty high * * * and appreciably under the influence of intoxicating liquor,"—though he denied that he was driving on public highway.

In the light of this stipulation, and testimony of witnesses for the State and testimony of defendant, taken in the light most favorable to the State, the evidence is of sufficient probative force to support the verdict rendered by the jury.

Hence in judgment from which appeal is taken, there is

No error.

WILLIAM L. HUMPHREY, SARAH H. ALBRITTON, MARY HUMPHREY FISHER, VIRGINIA H. GRIFFIN, NELL H. GRIFFIN AND C. E. HUMPHREY, JR. v. MRS. WILLIE B. FAISON, EXECUTRIX OF THE ESTATE OF INDIA B. HUMPHREY, DECEASED, AND MRS. WILLIE B. FAISON, INDIVIDUALLY.

(Filed 20 November, 1957)

1. **Judgments § 19—**

Where the judge holding a term of court in another district by consent hears an action in which no issues of fact are raised, all parties being present in person or by counsel, contention that judgment therein was void because rendered out of the district is untenable.

2. **Judgments § 32: Wills § 39—**

A final judgment rendered in an action to construe a will, from which no appeal is perfected, is binding on the parties thereto with respect to the construction of the will and the rights of the parties thereunder.

3. **Judgments §§ 27e, 32—**

The efficacy of a judgment as *res judicata* is not affected by an asserted agreement of the parties not to prosecute the action when there is nothing to suggest that the action was not prosecuted and defended in good faith or that any pertinent fact was withheld from the court at the hearing.

4. **Wills § 33a—**

The will in question devised and bequeathed all testator's property to named beneficiaries and in subsequent items stated that it was the "desire" of testator that the estate be held intact as nearly as practicable for the benefit of testator's nieces and nephews upon the marriage or death of the beneficiaries named. *Held:* The named beneficiaries take the fee simple unaffected by the precatory provisions.

5. **Trusts § 2—**

An agreement by the beneficiaries named in the will that they would devise and bequeath the remainder of the property to the nieces and nephews of testator if the nieces and nephews agreed not to prosecute or appeal from judgment in an action to construe the will in which the nieces and nephews claimed the remainder in testator's property, *held* insufficient predicate for a parol trust when the nieces and nephews were without title or interest in the property under the terms of the will.

6. **Same—**

Any parol agreement to engraft a trust on property falls within the statute of frauds when title to the property has passed at the time of the asserted agreement, and therefore where, in an action to construe a will, judgment is entered that testator's nieces and nephews took no interest under the will, an agreement thereafter made by the nieces and nephews not to prosecute an appeal from the judgment if the beneficiaries named in the will would devise and bequeath the remainder in the property to them, is insufficient predicate for a parol trust in favor of the nieces and nephews.

7. **Frauds, Statute of, § 9: Wills § 4—**

A contract to devise and bequeath property comes within the statute of frauds, G.S. 22-2, and is unenforceable, even in regard to the personalty when the contract is indivisible.

8. **Frauds, Statute of, § 3—**

The denial by the beneficiaries named in the will of their asserted agreement to devise and bequeath the remainder in the property to testator's nieces and nephews invokes the statute of frauds as effectively as if the statute had been expressly pleaded.

APPEAL by plaintiffs from *Moore, Clifton L., J.*, January-February Term 1957 of WAYNE.

This is a civil action for specific performance of an alleged oral contract to devise real and personal property.

Hugh Miller Humphrey died testate while a resident of Wayne County, North Carolina, on 21 January, 1933; on 25 January, 1933 his last will and testament, including a codicil thereto, was filed in the office of the Clerk of the Superior Court of Wayne County. Mary H. Humphrey, his sister, duly qualified as executrix of said will.

The pertinent part of the last will and testament of Hugh Miller Humphrey dated 25 January 1909, provides: "I give, bequeath and devise unto my wife, India B. Humphrey, all my real estate, for the term of her natural life, and widowhood, and upon her death or remarriage, I then give, bequeath and devise said real estate unto such of my children, born of the said India, as shall then be living, and to the issue of such as shall then be dead, leaving issue, such issue to represent the parent, and to take such share as the parent would take if living; but if there

should then be no issue, I then give, bequeath and devise said real estate unto my mother, for the terms of her natural life; and upon her death, I give, bequeath and devise said real estate to my sister, Mary H. Humphrey, and her heirs, in fee simple forever." The testator bequeathed all his personal property to his wife, Mrs. India B. Humphrey, and his sister, Mary H. Humphrey.

The codicil to his will was executed on 15 July 1927, and in pertinent part is as follows: "FIRST: I give, devise, and bequeath to my wife India B. Humphrey and my sister, Mary H. Humphrey, share and share alike, all of my property, both real and personal.

"SECOND: I nominate and appoint my sister, Mary H. Humphrey, my Executrix to serve without Bond.

"THIRD: It is my desire that the estates herein bequeathed and devised shall be held intact as nearly as practicable, and at the death of the devisees, the same shall be divided equally among my nieces and nephews and the issue or issues of such as may not then be living.

"FOURTH: It is further my desire that should the said Mary H. Humphrey marry, or the said India B. Humphrey remarry, they shall make a marriage contract to hold the said estate intact as nearly as practicable to the end that it may inure to the benefit of my nieces and nephews, and the issue of such as may not then be living, as hereinbefore set out."

Hugh Miller Humphrey died without leaving children or issue of a child him surviving, and was not survived by his mother. He was survived by his widow, India B. Humphrey, and his sister, Mary H. Humphrey.

On 23 November 1934, Mary H. Humphrey, the sister and duly qualified executrix of said testator, and India B. Humphrey, the widow of the testator, instituted an action in the Superior Court of Wayne County against the nieces and nephews of the testator and all other persons, in being and not in being, who had or claimed to have an interest in the subject matter of the action. The complaint alleged "that a controversy exists between the plaintiffs and the defendants concerning their respective rights and status under the will and codicil; that the plaintiffs, Mary H. Humphrey and India B. Humphrey, claim a fee simple estate in all the real and personal property as tenants in common; that the defendants claim that they are entitled to the remainder in fee, subject to the life estate of said plaintiffs." The plaintiffs prayed the court for a construction of the will and codicil of Hugh Miller Humphrey and for a declaration of the rights and status of the several plaintiffs and defendants in respect to said estate.

The defendants in that action, who are the plaintiffs in the present action, filed an answer. On 23 March 1935, by consent of all the parties, the matter was heard by Judge Grady, without a jury, at Clinton, North Carolina, and judgment was duly rendered by his Honor, adjudging "that the plaintiffs Mary H. Humphrey and India B. Humphrey take an absolute and fee simple title as tenants in common under the will and codicil of Hugh Miller Humphrey, deceased, in and to all the property, real, personal and mixed, of which the said testator died seized and possessed. It is further considered, ordered and adjudged that the defendants, neither jointly nor severally, have any right, title or interest in said property, real, personal, or mixed." It was further adjudged that the property be distributed equally between Mary H. Humphrey and India B. Humphrey.

On 30 March 1935, W. A. Dees, attorney for the defendants, gave notice of appeal to the Supreme Court. Thereafter, on 19 April 1935, said attorney withdrew the appeal in accordance with written instructions from all the defendants, the plaintiffs herein.

The plaintiffs alleged in their complaint in this action that, subsequent to the entry of the decree by Judge Grady on 23 March 1935, and the giving of notice of appeal to the Supreme Court of North Carolina, the said India B. Humphrey and Mary H. Humphrey agreed "that if the plaintiffs would not contest or fight the proceeding instituted on November 23, 1934, by Mary H. Humphrey, executrix of the estate of Hugh Miller Humphrey, deceased, and individually, and India B. Humphrey, individually, for the purpose of having the will and codicil of Hugh Miller Humphrey, deceased, construed, and would not appeal to the Supreme Court from such judgment as was entered in the said action, each of the said parties, to wit: Mary H. Humphrey and India B. Humphrey, would make a will devising to the said plaintiffs the respective one-half interest in the said properties distributed to each of them from the said estate, and which might be adjudged to be vested in them under the terms and provisions of such decrees as might be entered in said proceeding."

It is further alleged that plaintiffs, acting and relying upon the statements and representations made to them by the said Mary H. Humphrey and India B. Humphrey that they would execute valid wills vesting these plaintiffs with the absolute title to the properties distributed to them respectively, pursuant to the terms and provisions of said decree of the court, they did not appeal to the Supreme Court from said judgment.

In the hearing below, the deposition of the Honorable W. A. Dees, attorney for these plaintiffs in the original proceeding, was introduced. In his deposition Mr. Dees, among other things,

testified that his clients, these plaintiffs, never informed him at any time that an agreement had been entered into between the plaintiffs in the original proceeding and the nieces and nephews of Hugh Miller Humphrey, whom he represented, that if the appeal in that case were withdrawn that India B. Humphrey would make a will devising to his clients, the nieces and nephews, all the property which she had derived from the estate of Hugh Miller Humphrey, real, personal, and mixed.

India B. Humphrey died on 27 November 1953, leaving a last will and testament dated 12 July 1933, in pertinent part reading as follows: "That, I, India Bumgardner Humphrey, age 53, widow of late Hugh M. Humphrey, Goldsboro, North Carolina, being of sound mind and good health, do hereby will, grant and devise and give to my only sister, Mrs. Willie Bumgardner Faison, widow of the late Edward Livingston Faison, Jr.—all of my property, real and personal, to be used and disposed of (by) her as she may desire." This will was admitted to probate on 8 December 1953 in the office of the Clerk of the Superior Court of Wayne County, and Mrs. Willie B. Faison duly qualified as the executrix of the estate of the said India B. Humphrey, in which capacity she is now serving.

Evidence was offered by both the plaintiffs and the defendant, and at the close of all the evidence the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiffs appeal, assigning error.

Thomson & Thomson, Jones, Reed & Griffin for plaintiffs appellant.

Edmundson & Edmundson, Butler & Butler for defendant appellee.

DENNY, J. This appeal may be disposed of on its merits, by a consideration of the assignment of error based on plaintiffs' exception to the allowance of the defendant's motion for judgment as of nonsuit and certain other contentions of the plaintiffs, without a *seriatim* discussion of the numerous exceptions and assignments of error set out in the record.

The plaintiffs contend that the proceeding instituted on 23 November 1934 in the Superior Court of Wayne County, in what was then the Fourth Judicial District, for the purpose of having the court construe the last will and testament of Hugh Miller Humphrey, including the codicil to said will, was never removed, for any purpose, to Sampson County, which was then a part of the Sixth Judicial District. That since the matter was heard and Judgment entered in Sampson County, the judgment is null and void.

It appears from the record that no issues of fact were raised on the pleadings in that proceeding; that the parties waived a trial by jury and that the cause was heard by consent of all parties who had or claimed to have any interest in the estate of Hugh Miller Humphrey. Furthermore, all parties were present in person or represented by counsel at the hearing. Therefore, the contention of the plaintiffs in this respect is without merit. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658; *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576; *Killian v. Chair Co.,* 202 N.C. 23, 161 S.E. 546; *Henry v. Hilliard,* 120 N.C. 479, 27 S.E. 130.

The plaintiffs further contend in their brief that upon the death of Hugh Miller Humphrey, Mary H. Humphrey, his sister and executrix, and his widow, Mrs. India B. Humphrey, entered into an oral agreement with the nieces and nephews of Hugh Miller Humphrey (the plaintiffs herein), to hold in trust for them all the properties of which Hugh Miller Humphrey died seized and possessed, and to execute valid wills devising to the plaintiffs all properties that might be distributed to each of them from the said estate, provided, these plaintiffs would not contest the proceeding instituted against them in the Superior Court of Wayne County, North Carolina, on 23 November 1934, which proceeding was instituted for the purpose of having the last will and testament of Hugh Miller Humphrey, and the codicil thereto, construed by the court. And provided further, that these plaintiffs would not appeal from any judgment entered in that proceeding. The plaintiffs also contend that this oral agreement was entered into before his Honor, Judge Grady, entered the judgment on 23 March 1935 in said proceeding; that such title as passed under the terms of the judgment was subsequent to the oral agreement between the executrix, the widow, and the nieces and nephews.

The record does not support this contention with respect to the time the oral agreement was entered into. The plaintiffs, in their original and amended verified pleadings, expressly allege that the oral agreement upon which they rely to create a trust, and as a contract upon the part of Mrs. India B. Humphrey, the widow, to execute a will which at her death would vest in these plaintiffs title to the properties distributed to her from the estate of Hugh Miller Humphrey, was entered into "subsequent to the entering of said decree and the giving of the notice of appeal therefrom to the Supreme Court of North Carolina."

Since the defendants in the original proceeding (the plaintiffs herein) did not appeal from the judgment entered by Judge Grady in that proceeding, they are bound thereby with respect

to the construction of the will and codicil and the rights of the parties pursuant thereto.

In *Armfield v. Moore,* 44 N.C. 157, in defining estoppel by judgment, Pearson, J., said: "The meaning of which is, that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *Pinnell v. Burroughs,* 172 N.C. 182, 90 S.E. 218; *Hardison v. Everett,* 192 N.C. 371, 135 S.E. 288; *Distributing Co. v. Carraway,* 196 N.C. 58, 144 S.E. 535; *Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666, 136 A.L.R. 1411; *King v. Neese,* 233 N.C. 132, 63 S.E. 2d 123; *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909.

It affirmatively appears that if any agreement was entered into by the plaintiffs not to contest the proceeding instituted for the purpose of having the court declare the rights of the parties under the will and codicil executed by Hugh Miller Humphrey, it was breached. The evidence of the Honorable W. A. Dees, a reputable attorney of the City of Goldsboro, North Carolina, is to the effect that he was employed by these plaintiffs to represent them in the proceeding and to contest it on their behalf. That he filed an answer on their behalf and contested the proceeding to the best of his ability. That his clients, these plaintiffs, never informed him that any such agreement had been made. He likewise testified that he was never requested to abandon the contest or not to present their contentions to the court, as set forth in the complaint and answer. That his duties with respect to the litigation were not terminated until he received written instructions, signed by all the defendants (the plaintiffs herein), to withdraw the appeal to the Supreme Court.

There is nothing disclosed by the record on this appeal that would justify any conclusion or inference that the original proceeding under consideration was not prosecuted and defended in good faith, or that any pertinent fact was withheld from the court in the hearing in that proceeding.

In our opinion, the plaintiffs' evidence is insufficient to establish a parol trust as alleged by them. In the first place, the last will and testament of Hugh Miller Humphrey, including the codicil thereto, never vested any interest in these plaintiffs. The terms of the codicil to the will, according to our decisions, and Judge Grady's judgment, vested in Mrs. India B. Humphrey, the widow of Hugh Miller Humphrey, deceased, and his sister, Mary H. Humphrey, share and share alike, the absolute fee simple title to all the properties, both real and personal. G.S. 31-38. The third and fourth items in the codicil, under our decisions, would seem to be mere precatory provisions. *Barco v. Owens,* 212 N.C.

30, 192 S.E. 862; *Dixon v. Hooker,* 199 N.C. 673, 155 S.E. 567; *Brown v. Lewis,* 197 N.C. 704, 150 S.E. 328; *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626, *Weaver v. Kirby,* 186 N.C. 387, 119 S.E. 564; *Springs v. Springs,* 182 N.C. 484, 109 S.E. 839; *Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730; *Hardy v. Hardy,* 174 N.C. 505, 93 S.E. 976.

In the second place, conceding, without deciding, that the judgment entered by Judge Grady did pass title in remainder from these plaintiffs to Mrs. India B. Humphrey and Mary H. Humphrey, the judgment was signed and notice of appeal to the Supreme Court given before the alleged oral agreement was entered into. Hence, it was too late to engraft a parol trust thereon. It is settled law that, after title to real propery has passed, any oral agreement to engraft a trust thereon falls within the statute of frauds and no action for a breach thereof can be maintained. G.S. 22-2; *Loftin v. Kornegay,* 225 N.C. 490, 35 S.E. 2d 607; *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619; *Hamilton v. Buchanan,* 112 N.C. 463, 17 S.E. 159; *Blount v. Washington,* 108 N.C. 230, 12 S.E. 1008; *Pittman v. Pittman,* 107 N.C. 159, 12 S.E. 61, 11 L.R.A. 456.

Moreover, if Mrs. India B. Humphrey did make a verbal agreement with these plaintiffs to execute a will that would vest in them, at her death, title to all the property she received from her husband's estate, it would be unenforceable. *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Daughtry v. Daughtry,* 223 N.C. 528, 27 S.E. 2d 446; *Price v. Askins,* 212 N.C. 583, 194 S.E. 284; *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331.

In *Jamerson v. Logan, supra,* this Court, speaking through Stacy, C. J., said: "An agreement to devise real property is within the statute of frauds, as is also an indivisible contract to devise real and personal property. *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760."

The defendant in this action denied in her answer that the alleged oral agreement was ever made. Such denial invoked the statute of frauds as effectively as if it had been expressly pleaded. Furthermore, a denial of the agreement is equivalent to a plea of the statute. *Jamerson v. Logan, supra; Ebert v. Disher,* 216 N.C. 36, 3 S.E. 2d 301; *McCall v. Institute,* 189 N.C. 775, 128 S.E. 348. Therefore, any testimony offered to prove the parol agreement to devise the real and personal property Mrs. India B. Humphrey received from the estate of her husband, was incompetent and properly excluded on objection. *Jamerson v. Logan, supra.*

Applying the law to the facts disclosed on the record in this appeal, we hold that the judgment as of nonsuit entered in the court below was properly granted and should be upheld.

Affirmed.

BESSIE FAIR v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 20 November, 1957)

1. **Insurance § 34a—Evidence held insufficient to show total and permanent disability within coverage of insurance policy.**

The evidence disclosed that plaintiff's intestate was employed in a tobacco processing plant and was discharged for putting a metal bolt or pin in a bundle of tobacco. Plaintiff's evidence tended to show that intestate began to show signs of mental disturbance about a year before her discharge and that her mental condition became progressively worse until her death more than two years after her discharge, and that on the date she was discharged she was insane and by reason of her insanity was totally and permanently unable to work. However, all the evidence disclosed that plaintiff's intestate was able to perform and did perform every day the duties of her employment up to and including the day of her discharge, which terminated her insurance, and that she was paid regularly for her work. *Held:* The evidence, considered in the light most favorable to plaintiff, does not show that intestate at the time of her discharge was totally and permanently disabled from performing or engaging in any work of financial value within the coverage of the disability clause sued on, and nonsuit was proper.

2. **Same—**

Total and permanent disability as used in a disability clause of an insurance policy cannot logically be construed to mean partial disability or disability to a limited degree.

BOBBITT, J., dissenting.

HIGGINS, J., concurs in dissent.

APPEAL by plaintiff from *Crissman, J.*, 11 February 1957 Civil Term of FORSYTH.

Civil action to recover on a certificate of insurance issued by defendant to Mallie F. Grier as an employee of the R. J. Reynolds Tobacco Company of Winston-Salem, North Carolina, pursuant to the provisions of a policy of Group Life Insurance issued by the defendant to the R. J. Reynolds Tobacco Company, brought by plaintiff, the mother of Mallie F. Grier, who was designated the beneficiary in the certificate of insurance.

From a judgment of nonsuit entered at the close of the plaintiff's and the defendant's evidence, plaintiff appeals.

Leake & Phillips and W. Z. Wood for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice for defendant, appellee.

PARKER, J. The Group Life Insurance Policy and the certificate of insurance issued to Mallie F. Grier are not in the Record

before us. The Record merely sets forth, what it says are "the essential portions of the certificate of insurance, which are deemed necessary to the understanding of the appeal."

According to the Record before us the certificate of insurance contains the following provisions:

"TERMINATION. The insurance of any Employee under the above mentioned policy shall automatically cease . . . upon the termination of his employment with the Employer in the specified classes of Employees . . . ."

"TOTAL AND PERMANENT DISABILITY PROVISION. In the event that any Employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the Society will, in termination of all insurance of such Employee under the policy, pay equal monthly Disability-instalments, the number and amount of which shall be determined by the Table of Instalments below; . . . ."

Mallie F. Grier was an employee of the R. J. Reynolds Tobacco Company continuously from 30 April 1930 until 7 August 1952, when her employment was terminated by discharge for putting an iron hogshead bolt or pin in a bundle of tobacco, and placing such bundle of tobacco on a conveyor belt with a tipper on the end that cuts the head off the bundle of tobacco. The conveyor belt carried this bundle of tobacco under the tipper, which nicked the iron bolt or pin, and a magnet caught the bolt or pin when the tobacco and bolt or pin went from the fifth to the fourth floor on a metal chute. If the magnet had not caught the bolt or pin, it would have gone in the machinery of the mill. The machinery is filled with knives turning at a very high rate of speed, and if a piece of metal hits the knives, it tears them off. During this period she was insured under the policy of Group Life Insurance issued by the defendant to the R. J. Reynolds Tobacco Company.

Plaintiff's evidence comes from ten relatives or friends of Mallie F. Grier, and tends to show these facts:

During the time that Mallie F. Grier was employed by the R. J. Reynolds Tobacco Company she never missed a day from work, until she was discharged. She went to work every day, and worked regularly, and was working regularly on 7 August 1952, when she was discharged. She was paid regularly for her work, and was paid for the part of the day she worked on 7 August 1952, the day of her discharge. She started to acting

queer in the middle of 1951, and her mental condition became progressively worse until her death on 4 May 1955. On the night before she was discharged her mother testified "she hollered and cried, and stretched her eyes, and foaming at the mouth." Plaintiff's witnesses testified that in their opinion Mallie F. Grier prior to, and on, the date she was discharged was insane, and by reason of her insanity was totally and permanently unable to work. Such mental condition did not improve up to the time of her death. No report was made by any one to the R. J. Reynolds Tobacco Company that she was insane or mentally disordered before she was discharged, or at any time.

Mallie F. Grier went to a hospital in November 1952. In 1954 she was operated on, and on 4 May 1955 died from cancer of the liver, when she was between forty and fifty years of age.

She did no work after her discharge. After her discharge she made application to the North Carolina Employment Security Commission for unemployment benefits. She was never placed in a mental institution, but lived in the house with her mother, the plaintiff. During her life, she made no claim under her certificate of insurance. Her mother knew she had this certificate of insurance, which was in the house all the time, knew its provisions with reference to total and permanent disability, but no claim was made on it until after Mallie F. Grier's death in 1955. Plaintiff is a retired worker of the R. J. Reynolds Tobacco Company, and on several occasions has filed claims for sick benefits under the policy she has. Plaintiff commenced this action by the issuance of summons on 2 May 1956.

Defendant's evidence tends to show these facts: Mallie F. Grier had one of the best work records any employee R. J. Reynolds Tobacco Company has ever had. According to the daily work record kept by the R. J. Reynolds Tobacco Company, Mallie F. Grier did not lose a single day from her work in 1952 prior to her discharge on 7 August 1952, she was not absent from her regular duties a single day in 1951, 1950, 1949 and 1948, except when on paid vacations. The same applies to 1947, except for absence on strike from 1 May to 9 June. Her employment record for prior years is substantially similar. Her work record shows that "she was discharged for putting a bolt in a hand of tobacco and running it through a machine." She was considered one of the best and most prompt employees the Reynolds Tobacco Company ever had, until she was discharged. She did her work in a satisfactory manner up until her discharge. She never made any complaint about her mental condition, and her foreman under whom she worked considered her sane. "She was never laid out on account of sickness." The suggestion that she was crazy when discharged was first made when the case started. Her rate

of pay was $1.10 an hour. The insurance of Mallie F. Grier is called a "contributory insurance plan," and the employee makes contributions each month to the payment of the premiums. Prior to 7 August 1952 the tobacco company had had two or three mills a week torn up by these hogshead's bolts or pins. The workers were cautioned, if they found any bolts or pins, to turn them in to the supervisor of the blending unit. Every one did except Mallie F. Grier. These bolts or pins had been coming through two or three weeks on the middle line where she was working. She was watched, and seen putting the bolt or pin in a bunch of tobacco, and placing the tobacco on the conveyor belt. The North Carolina Employment Security Commission had given Mallie F. Grier certain benefits after her discharge. The Reynolds Tobacco Company lodged a protest. A hearing was had. Curtis Lane, Personnel Assistant, Manufacturing-Personnel Department, of the tobacco company, Frank E. Johnson, the foreman under whom Mallie F. Grier worked, and Mallie F. Grier, were sworn and testified. The witnesses for the tobacco company testified that the basis of the tobacco company's objection to the giving of benefits to Mallie F. Grier was that she had been seen placing a hogshead pin in a bundle of tobacco in an attempt to damage machinery of the company, and she had been discharged for it. Mallie F. Grier denied putting the hogshead pin in a bundle of tobacco, as she always did. The deputy hearing commissioner asked her if she was able to work, and she replied she was. He asked her was she actively seeking work, and she said she was.

In *Boozer v. Assurance Society,* 206 N.C. 848, 175 S.E. 175, the plaintiff was a former employee of the R. J. Reynolds Tobacco Company, and the defendant was the same defendant as in the instant case. The Boozer Case was an action to recover on a certificate of insurance which was issued on 3 December 1929, by the defendant to the plaintiff as an employee of the R. J. Reynolds Tobacco Company, pursuant to the provisions of a policy of Group Life Insurance, by which the defendant had insured certain employees of the said tobacco company. The provisions in the policy as to termination of employment, and total and permanent disability are identical with such provisions in the policy in the instant case. The evidence showed that while Boozer was insured under said policy, he became disabled as the result of a disease which he had contracted while in the employment of the tobacco company; this disease by its very nature affected the mind of Boozer, and was progressive and incurable. Prior to his discharge, and while he was insured, he suffered a disability by disease, which was permanent. On 26 September 1932 his employment terminated by his discharge for a violation

of a rule of the company in having whisky in his possession on the premises of the company while at work. The evidence further showed that notwithstanding Boozer's disability, he continued to perform his work as an employee of the tobacco company up to and including the day of his discharge. His services were satisfactory to his employer. Boozer tried without success to get other work. In January 1933 he was adjudged insane, as the result of the disease from which he was suffering prior to his discharge. Since 13 January 1933, and up to and during the trial, Boozer has been in the State Hospital for the Insane. His action was prosecuted by his duly appointed next friend. The jury found that Boozer on the date of his discharge was totally and permanently disabled by bodily injury or disease, and judgment was signed in accord with the verdict. This Court in reversing the trial court said:

> "Conceding that there was evidence at the trial tending to show that plaintiff suffered a permanent disability from disease, while he was insured by the defendant, and before he had attained the age of 60 years, we must hold that there was no evidence tending to show that the disability was total. All the evidence shows that plaintiff was able to perform and did perform the duties of his employment up to and including the day of his discharge, which terminated his insurance. For this reason there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. See *Thigpen v. Ins. Co.*, 204 N.C. 551, 168 S.E. 845."

Corsaut v. Equitable Life Assurance Society of the U. S., 203 Iowa 741, 211 N.W. 222, 51 A.L.R. 1035, was an action upon an insurance policy. On 30 January 1922 the defendant issued its policy of insurance upon the life of Dr. James Calvin Corsaut. The insured died on 31 December 1923. The plaintiff was the wife of the insured, and the beneficiary named in the policy. The premium on the policy was due on the 19th day of January of each year. The policy contained the following provision: "If the insured becomes wholly and permanently disabled before age 60, the society will waive subsequent premiums payable upon this policy, subject to the terms and conditions contained on the third page hereof." The petition alleged that at the time the premium became due on 19 January 1923, and for some time prior thereto, and thereafter until the date of the death of the insured, he was totally and permanently disabled by disease, and was totally insane and incompetent to transact any business. It was undisputed in the evidence that the premium due on 19 January 1923 was never paid. The plaintiff offered evidence to this effect: In November 1922 plaintiff noticed that her husband had despondent spells, he would cry, and have spells of laughing. He could

not remember people, he could not recognize his best friends, he would walk the floor, and hold his head, and that in making calls in town he would sometimes return home, and say he could not find the place where he wanted to go. He complained of pressure in his head, and that he could not remember. He spent money recklessly, and had bills he claimed had been paid, which had not been paid. He wrote cheques when he had no money in the bank, and when spoken to about it said he thought he had plenty of money in the bank. He was examined by a doctor at a Psychopathic Hospital in Iowa City. One doctor testified that he had known the insured for eleven or twelve years, that he occupied a suite of rooms with the insured, that they had the same reception room and office girl, and that this arrangement continued until four or five months before the insured's death, that he saw insured nearly every day, that during the fall and winter of 1922-23 he noticed that the insured acted differently, became despondent, talked about not feeling well, that insured assisted in performing an operation with the witness and another doctor by administering the anaesthetic, and gave more than was necessary, and they were compelled to resort to artificial respiration to restore the patient, and that in his opinion insured was of unsound mind in January 1923. Another doctor who had an adjoining office testified that he saw insured nearly every day, that he was present when insured overanaesthetized the patient on 26 December 1922, and that in his opinion in January 1923 the insured was of unsound mind. A banker testified that about the early part of 1922 the insured had overdrafts in his bank, that he asked insured to make a financial statement, and the insured did so, but the banker "could not make head or tail out of it," and put it in the waste basket. Other facts are stated in the excerpt from the court's opinion quoted below. In reversing a judgment based on a jury verdict for the plaintiff, the Supreme Court of Iowa said:

> " 'Wholly and permanently disabled' cannot logically be construed to mean partially disabled, or disabled to a limited degree, or disabled from doing certain things while able to do others. Under the record it cannot be said that this case presents an instance of an insured who is 'wholly and permanently disabled.' Undoubtedly the insured was affected with a mental breakdown, and this began to be noticeable in the year 1922; but at or about the time that the premium in question was due, and for several months thereafter, the insured was carrying on the practice of his profession, was treating patients, and, so far as the record discloses, without making mistakes in the very delicate and, in a sense, dangerous business of administering medicine. The only specific instance in the record looking toward a lack of

judgment in this regard is the one instance where, as late as December, 1922, physicians closely acquainted with him evidently deemed him competent to undertake the delicate task of administering an anaesthetic, and it appears that he administered too much of the anaesthetic, and it became necessary to resuscitate the patient. In the light of common knowledge it cannot be said that this incident is evidence of 'total and permanent disability.' The number of patients shown by the books of the physician to have been treated during the period from January to June, 1923, runs into the hundreds. According to the testimony of the office girl, some of these entries were erroneous, and the physician doubtless made charges against people whom he did not treat. He was forgetful and negligent and subject to spells of exhilaration and of depression, but the undisputed fact remains that during this entire period of time he was in regular attendance at his office, and was continuously engaged, more or less, in treating patients, administering medicine, and practicing his profession. In June of 1923 he made an examination of an applicant for insurance, filling out the somewhat extensive blank form required for such examination in detail, and received a check therefor, and endorsed the same. Without reviewing the record further, we are constrained to hold that a verdict to the effect that during this period of time the insured was 'wholly and permanently disabled' is contrary to the record in the case and cannot be permitted to stand. The trial court should have sustained the appellant's motion for a directed verdict made at the close of all of the testimony."

All the evidence shows that plaintiff's intestate was able to perform, and did perform regularly every day the duties of her employment up to and including the day of her discharge, which terminated her insurance, and that she was paid regularly for her work. Up to the day of her discharge she had a most remarkable work record with the R. J. Reynolds Tobacco Company. It is true that plaintiff's witnesses testified that in their opinion Mallie F. Grier prior to, and on, the date she was discharged was insane, and by reason of her insanity was totally and permanently unable to work. Nevertheless her work record is a stubborn fact that flinches not, and it is beyond question that her services were satisfactory to the tobacco company, and it actually paid her $1.10 an hour for her work. What the Court said in *Thigpen v. Ins. Co.*, 204 N.C. 551, 168 S.E. 845, is applicable here: "The law is designed to be a practical science, and it would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation." The only specific instance in the rec-

ord as to Mallie F. Grier's inefficiency in her work is her putting a hogshead bolt or pin in a bundle of tobacco, and placing it on the conveyor belt the day she was discharged. In the light of her work record it cannot be said that this incident is evidence of total and permanent disability to perform any work for compensation of financial value as provided for in the policy.

Viewing the plaintiff's evidence in the light most favorable to her, we hold that plaintiff has not offered evidence that her intestate was totally and permanently disabled from engaging in any occupation or performing any work for compensation of financial value sufficient to require the submission of her case to the jury. *Drummonds v. Assurance Society,* 241 N.C. 379, 85 S.E. 2d 338; *Johnson v. Assurance Society,* 239 N.C. 296, 79 S.E. 2d 776; *Ireland v. Ins. Co.,* 226 N.C. 349, 38 S.E. 2d 206; *Ford v. Ins. Co.,* 222 N.C. 154, 22 S.E. 2d 235; *Jenkins v. Ins. Co.,* 222 N.C. 83, 21 S.E. 2d 832; *Medlin v. Ins. Co.,* 220 N.C. 334, 17 S.E. 2d 463; *Mertens v. Ins. Co.,* 216 N.C. 741, 6 S.E. 2d 496; *Lee v. Assurance Society,* 211 N.C. 182, 189 S.E. 626; *Whiteside v. Assurance Society,* 209 N.C. 536, 183 S.E. 754; *Carter v. Ins. Co.,* 208 N.C. 665, 182 S.E. 106; *Hill v. Ins. Co.,* 207 N.C. 166, 176 S.E. 269; *Boozer v. Assurance Society, supra; Thigpen v. Ins. Co., supra; Corsaut v. Equitable Life Assurance Society of the U. S., supra; Hickman v. Aetna Life Ins. Co.,* 166 S.C. 316, 164 S.E. 878; *Du Rant v. Aetna Life Ins. Co.,* 166 S.C. 367, 164 S.E. 881; *Morgan v. Traveler's Ins. Co.,* 172 S.C. 404, 174 S.E. 235.

The judgment of nonsuit is
Affirmed.

BOBBITT, J., dissenting: This is a borderline case; and I find myself "over the border" from the majority of my brethren.

Decision is based largely on *Boozer v. Assurance Society,* 206 N.C. 848, 175 S.E. 175. Certainly, that is the most favorable North Carolina decision for defendant's position. But there is an important distinction between the facts in the Boozer case and the facts in the case now before us.

Nothing connected with Boozer's work reflected inability to perform the services of his employment. His work was satisfactory up to and including the date of his discharge. He was discharged for violation of a company rule prohibiting an employee to have whiskey in his possession while at work.

Here the insured's work was not satisfactory up to and including the date of her discharge. On August 7, 1952, she was *caught* putting a bolt or pin in a bundle of tobacco and then placing the bundle on the conveyor; and it may be inferred from evidence offered by defendant that she had been doing this sort of thing for two or three weeks. No motive or reason in explanation of

such conduct is made to appear. Bearing in mind her splendid work record, this conduct of the insured, when considered with plaintiff's evidence as to her mental condition during this period, all in the light most favorable to plaintiff, would seem to indicate total mental disability to perform her work. In any event, I think this a permissible inference.

HIGGINS, J., concurs in dissent.

BARBRE-ASKEW FINANCE, INC. v. MAURICE WOOTEN THOMPSON, INDIVIDUALLY, AND R. J. ROBINSON, TRADING AS R. J'S. AUTO SERVICE.

(Filed 20 November, 1957)

1. **Chattel Mortgages and Conditional Sales § 15—**

Nothing else appearing, the mortgagee in a duly registered instrument is, upon default, entitled to possession, and the burden is upon one claiming right to possession under a mechanic's lien to prove his lien and that it has priority over the lien of the chattel mortgage. Therefore, nonsuit is correctly denied in the mortgagee's action to enforce his lien with ancillary claim and delivery proceedings.

2. **Mechanics' Liens § 1—**

The mortgagor in possession of the chattel with the consent of the mortgagee is "the owner or legal possessor" within the meaning of G.S. 44-2 and has implied authority from the mortgagee to contract for repairs, and therefore the mechanic making repairs authorized by such mortgagor is entitled to possessory lien for such repairs.

3. **Mechanics' Liens § 2—**

G.S. 44-2 affirms the common-law mechanic's lien and gives the superadded right of foreclosure by sale in order to make the lien effective, and the statute is self-executing so that compliance with G.S. 44-38 *et seq.* is not required to perfect the lien.

4. **Same—**

The common-law mechanic's lien is based upon possession, so that if the mechanic voluntarily and unconditionally surrenders possession of the chattel to the owner, the lien is lost and cannot be revived by any subsequently acquired possession by the mechanic.

5. **Chattel Mortgages and Conditional Sales § 12: Mechanics' Liens § 2—Later possession acquired by mechanic under agreement cannot reinstate lien.**

Where a mechanic makes certain repairs to the chattel and thereafter voluntarily surrenders possession thereof to the owner under an agreement that the owner should later return the chattel for the completion of the repairs, the mechanic may have a contractual lien as against such owner under the agreement, but loses his common-law possessory lien to which G.S. 44-2 relates, and upon his reacquisition of possession for the purpose of completing the repairs may assert as against the mortgagee in a prior registered chattel mortgage a lien only

for the cost of completing the repairs, notwithstanding that all the repairs were made under an indivisible contract.

6. Same—

The only lien that takes precedence over a duly recorded chattel mortgage is a mechanic's possessory lien, which does not include any lien created or subsisting by any contractual agreement of the mortgagor.

APPEAL by defendant Robinson from *Moore, (Clifton L.), J.*, May Civil Term, 1957, of LENOIR.

This appeal relates solely to priority as between plaintiff's valid (recorded) chattel mortgage lien on a Chevrolet automobile and defendant Robinson's asserted mechanic's lien thereon.

Defendant Thompson filed no answer.

Undisputed facts include the following:

On November 7, 1956, Thompson, the owner of the Chevrolet, for money borrowed, executed and delivered to plaintiff a first lien chattel mortgage thereon as security for his promissory note for $913.58, payable in installments; and, on account of Thompson's failure to pay an installment due on or about February 5, 1957, he became and is indebted to plaintiff in the amount of $796.38 with interest. On November 7, 1956, the chattel mortgage was duly recorded.

Thompson had the possession and use of the Chevrolet thereafter except when Robinson had possession thereof at the times and under the circumstances stated below.

On December 9, 1956, the Chevrolet was involved in a wreck and was damaged. Thereafter, on or about December 12, 1956, it was delivered by Thompson to Robinson for repairs. On or about December 17, 1956, after making the major repairs, Robinson delivered the Chevrolet to Thompson for his use; and on January 9, 1957, Thompson returned it to Robinson who made further minor repairs thereon. From January 9, 1957, Robinson had exclusive and continuous possession of the Chevrolet.

This action was commenced February 21, 1957; and on that date, in claim and delivery proceedings ancillary to this action, the sheriff seized the Chevrolet. Its fair market value when so seized, as established by the verdict, was $650.00. Robinson gave a replevy bond and has had possession *pendente lite*.

The issues relating to Robinson's asserted mechanic's lien on the Chevrolet, and the jury's answers, were as follows: "5. In what amount is the defendant, Maurice Wooten Thompson, indebted to the defendant, R. J. Robinson, for all repairs to said automobile? Answer: $338.90. 6. In what amount is the defendant, Maurice Wooten Thompson, indebted to the defendant, R. J. Robinson, for repairs made to said automobile on January 9, 1957? Answer: $30.00. 7. Does the defendant, R. J. Robinson, have a lien on said automobile for repairs? An-

swer: Yes. 8. Were the repairs to said automobile by the defendant, R. J. Robinson, including the repairs on January 9, 1957, if any, made pursuant to an entire and indivisible contract to repair the same? Answer: Yes. 9. After making repairs on said automobile in December 1956, did the defendant, R. J. Robinson, surrender possession of said car to the defendant, Maurice Wooten Thompson, with the understanding that it was to be returned to him later for alignment of the front end and compounding the paint on the automobile? Answer: Yes."

Pertinent to this appeal, it was adjudged that Robinson had a lien on the Chevrolet prior to plaintiff's chattel mortgage lien to the extent of the repairs made by Robinson on January 9, 1957, that is, for $30.00; but, with this exception, it was adjudged that plaintiff's chattel mortgage was a first and prior lien on the Chevrolet as security for Thompson's debt of $796.38.

The judgment provided that the Chevrolet be sold by a commissioner, with directions that the commissioner distribute the net proceeds derived from such sale in accordance with the adjudication of priorities set forth in the preceding paragraph.

Defendant Robinson excepted and appealed, assigning as error (1) the overruling of his motions for judgment of nonsuit, and (2) the said judgment.

Whitaker & Jeffress for plaintiff, appellee.
J. Harvey Turner for defendant Robinson, appellant.

BOBBITT, J. The validity of the debt due by Thompson to plaintiff and of plaintiff's chattel mortgage lien as security therefor was not and is not challenged. Nothing else appearing, plaintiff, on account of Thompson's default, was entitled to possession. The burden of proof was on Robinson to prove his allegations that he had a mechanic's lien on the Chevrolet and that his lien had priority over the lien of plaintiff's chattel mortgage. Hence, the court was correct in overruling Robinson's motions for judgment of nonsuit.

The question for the decision is whether, *upon the facts established by the verdict,* Robinson's lien has priority only to the extent of $30.00, for repairs made January 9, 1957, as held by Judge Moore, or to the extent of $338.90, for all repairs, as contended by Robinson.

As to the work done on January 9, 1957, Robinson testified: "I completed the compounding, a little touching it up, and put it on the bearing machine to align it, compound the paint and rub it."

It is noted that the issues do not refer to the allegations of any pleading but set forth explicitly the matters determined thereby. Compare: *Pruett v. Pruett, ante,* 13. The charge is not in the record. Therefore, decision turns on the legal signif-

icance of the facts spelled out in the verdict, principally the fact that Robinson, after making the repairs in December, 1956, *surrendered possession* to Thompson *with the understanding* that the Chevrolet was to be returned by Thompson to Robinson later for alignment of the front end and compounding the paint on the automobile.

Priority as between the lien of a valid, properly recorded chattel mortgage and a mechanic's lien for repairs subsequently made on the chattel at the request of the "owner or legal possessor," has been the subject of many decisions throughout the country. Annotations: 36 A.L.R. 2d 229; 88 A.L.R. 1185; 32 A.L.R. 1005. Often decision is based in whole or in part upon the provisions of a statute. The decisions are in irreconcilable conflict. The view that such chattel mortgage lien has priority, absent a finding that the mortgagee has expressly or impliedly authorized or consented to the performance of the services, has been adopted in many jurisdictions. On the other hand, there is substantial authority for the rule adopted by this Court and discussed below, that is, the rule most favorable to the mechanic.

G.S. 44-2, in part, provides: "Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid"; and the further provisions vest in such lienor the right of foreclosure and prescribe the procedure for the exercise of such right.

This Court decided in *Johnson v. Yates*, 183 N.C. 24, 110 S.E. 603, and in *Sales Co. v. White*, 183 N.C. 671, 110 S.E. 607, that a mortgagor, in possession of an automobile with the consent of the mortgagee, is "the owner or legal possessor" thereof within the meaning of G.S. 44-2 and has implied authority from the mortgagee to contract for repairs; that, when authorized by such mortgagor, the mechanic who makes such repairs has a lien on the automobile and *may retain possession thereof* until his just and reasonable charges are paid; and that, if he preserves his lien thereon by retaining possession of the automobile, the mechanic's lien is superior to the lien of a duly recorded prior mortgage on the automobile. Compare *Willis v. Taylor*, 201 N.C. 467, 160 S.E. 487.

Ordinarily, where an asserted lien is created and exists solely by statute, it must be perfected in the manner prescribed by G.S. 44-38 *et seq.* But G.S. 44-2, upon which Robinson relies, "is a self-executing enactment"; hence, compliance with G.S. 44-38 *et seq.* is not required to perfect the lien referred to therein. *McDougall v. Crapon*, 95 N.C. 292. This is true because, as stated

by Hoke, J. (later C. J.), G.S. 44-2, then C.S. 2435, simply affirms "the common-law lien given to artisans who have altered or repaired articles of personal property and are in possession of same, with the superadded right of foreclosure by sale in order to make the lien effective, . . ." *Johnson v. Yates, supra.*

"It follows, that the mechanic or artisan may exercise his common-law right to retain the property, and the statute, recognizing the right, authorizes him to advertise and sell and pay himself, after the specified period of possession. It is also a necessary consequence that the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since these rights are incident to and depend on possession, both at common law and under the provisions of the statute." Smith, C. J., in *McDougall v. Crapon, supra.*

Since the lien referred to and affirmed in G.S. 44-2 is the common-law possessory lien, "it is indispensable that the party claiming it have an independent and exclusive possession of the property." 33 Am. Jur., Liens, Sec. 17. "A lien may be acquired by continued possession. The moment that possession is voluntarily surrendered, the lien is gone." Faircloth, C. J., in *Tedder v. R. R.*, 124 N.C. 342, 32 S.E. 714. Nothing else appearing, even as between the mechanic and the owner of the chattel, the lien is lost if and when the mechanic voluntarily and unconditionally surrenders possession to the owner. *McDougall v. Crapon, supra; Sugg v. Farrar,* 107 N.C. 123, 12 S.E. 236; *Block v. Dowd,* 120 N.C. 402, 27 S.E. 129; *Tedder v. R. R., supra; Glazener v. Lumber Co.,* 167 N.C. 676, 83 S.E. 696; *Thomas v. Merrill,* 169 N.C. 623, 86 S.E. 593; *Auto Co. v. Rudd,* 176 N.C. 497, 97 S.E. 477; *Johnson v. Yates, supra; Motor Co. v. Motor Co.,* 197 N.C. 371, 148 S.E. 461; *Reich v. Triplett,* 199 N.C. 678, 155 S.E. 573.

Where the mechanic surrendered possession of the chattel (automobile), after having made repairs thereon, it was held that he did not lose his lien but was entitled to recover possession for enforcement thereof under the factual situations presented in two cases: (1) *Auto Co. v. Rudd, supra,* where he was induced to surrender possession upon receipt of the owner's check, importing a cash payment for the repairs, where such owner, after getting possession by this means, stopped payment on his check; (2) *Reich v. Triplett, supra,* where he was induced to surrender possession upon the false and fraudulent representations of the mortgagor (in possession) incident to the mortgagor's giving a worthless check for the repairs. In these cases, possession was not surrendered upon an understanding or agreement that the car was to be returned later to the lienor for completion of repairs or that the lien was to continue notwithstanding such surrender of possession. The basis of decision was that,

because induced as stated above, there was no voluntary surrender of possession.

Where the mechanic surrendered possession of the chattel (automobile) upon receipt of a chattel mortgage executed to secure the amount of the repair bill, it was held that the mechanic had lost his *possessory* lien and that his chattel mortgage lien was subject to the lien of a prior recorded mortgage. *Motor Co. v. Motor Co., supra.*

"The lien having once been lost by surrender of possession cannot be revived by any subsequently reacquired possession." 19 Am. & Eng. Ency. of Law, p. 28. In *Block v. Dowd, supra,* the plaintiff bought a bicycle from the defendant and executed a conditional sales contract for the purchase price. While in plaintiff's possession, the bicycle was broken; and, at the plaintiff's request, the defendant repaired it and returned it to the plaintiff. Later, the defendant obtained possession of the bicycle. The plaintiff tendered to the defendant the balance due on the conditional sale contract and demanded possession, but the defendant refused to surrender possession unless the plaintiff also paid the repair bill. It was held that the defendant had a lien for the unpaid balance on the conditional sale contract but not for the amount of the repair bill.

The question for decision is whether Robinson lost his *possessory* lien on or about December 17, 1956, when he surrendered possession to Thompson. If so, it was not revived when Robinson regained possession on January 9, 1957. If not, Robinson's possessory lien continued all during the period of three weeks or more when Thompson had exclusive possession of the Chevrolet for his general use; for, it is noted, nothing in the understanding or agreement between Thompson and Robinson purported to restrict Thompson's use of the car.

Robinson lost his possessory lien when he surrendered possession to Thompson on or about December 17, 1956, upon Thompson's agreement that he would return the Chevrolet to Robinson for the completion of the repairs contemplated by their contract. The surrender of possession was voluntarily made in accordance with the terms of their agreement. Conceding that under such agreement Robinson had a lien, notwithstanding his surrender of possession, it was not a *possessory* lien but rather a lien created or subsisting on account of Thompson's agreement. A common-law possessory lien, to which G.S. 44-2 relates, arises by implication of law, not by contract. 33 Am. Jur., Liens Sec. 16; *Williamson v. Winningham* (Oklahoma), 186 P. 2d 644, and cases cited.

After he had surrendered possession, and while Thompson had unrestricted use, Robinson's lien, if any, was based on Thompson's agreement, not on Robinson's possession. It would

be a patent contradiction to say that Robinson had a *possessory* lien during the period of three weeks or more when Thompson had the unrestricted use and possession of the Chevrolet.

Under the rule adopted by this Court in *Johnson v. Yates, supra,* the only lien that takes precedence over a duly recorded chattel mortgage is a mechanic's possessory lien. Such chattel mortgage takes precedence over any subsequent lien, chattel mortgage or otherwise, which is created or subsists by the agreement of the mortgagor.

Sound reason supports the rule that the common-law lien referred to in G.S. 44-2 may be preserved only by retaining possession. It must be kept in mind that a common-law possessory lien is predicated upon the idea that the mechanic has added value to the chattel proportionate to his charges for repairs.

To illustrate what may occur if retention of possession is not required: (1) Suppose the Chevrolet, while in Thompson's possession after December 17, 1956, had been involved in a second wreck. If he permitted the car to remain in its wrecked condition, it might well be that all the value added by Robinson's repairs would be destroyed. (2) On the other hand, if Thompson, after the second wreck, had had the repairs then needed made by a different mechanic, who had no notice of the prior dealings between Robinson and Thompson, the second mechanic's lien for repairs, assuming he retained possession, would have priority over plaintiff's chattel mortgage and any lien Robinson might have. Under such circumstances, would Robinson have a second lien, *i.e.,* a lien prior to plaintiff's chattel mortgage notwithstanding he had delivered the Chevrolet voluntarily to Thompson upon his promise to return it? If this were true, the value of plaintiff's valid recorded chattel mortgage, a first lien when executed and delivered, would be substantially destroyed. The requirement that, as against a prior recorded mortgage, the mechanic must retain possession to preserve his lien is a safeguard against such contingencies.

The division of authority in other jurisdictions seems to depend largely upon whether the particular statute is construed, as G.S. 44-2 has been construed by this Court, as an affirmance of the common-law possessory lien, or is construed as enlarging the lien rights of a mechanic. To illustrate: In accord with our present decision is *Yellow Mfg. Acceptance Corp. v. Bristol* (Oregon 1951), 236 P. 2d 939; *contra, Commercial Acceptance Corp. v. Hislop Garage Co.* (N.H. 1937), 192 A. 627.

We quote with approval this excerpt from the opinion in the Oregon case: "A common-law lien is lost by the lienholder voluntarily and unconditionally parting with possession or control of the property to which it attaches, and such a lien cannot be restored thereafter by resumption of possession. However, the

possessory lien is not necessarily waived or destroyed as between the parties where there is an intention to preserve the lien, the lienholder only conditionally parting with the property, as where by special agreement he allows the owner to take the property into his possession without prejudice to the lien. But such a surrender of possession under such an agreement will destroy the lien as to third persons." See 53 C.J.S. Liens, Sec. 8.

This excerpt from the New Hampshire case is self-explanatory: "Continuous physical control of the property by a lienor is not in all cases a prerequisite to retention of the lien, and since the statute here invoked was designed 'to enlarge the rights of those who perform work on motor vehicles' (citation omitted), the phrase 'so long as the same shall remain in his possession' should be liberally construed."

Appellant stresses the finding that all repairs, including those made on January 9, 1957, were made pursuant to an entire and indivisible contract. The significance of this finding is that all repairs contemplated by their contract were to be made for the contract price of $338.90. This was relevant in determining the amount and due date of Thompson's indebtedness to Robinson. However, it has no bearing upon whether Robinson lost his *possessory* lien. It is noted that the phrase, "entire and indivisible contract," under certain circumstances, is relevant in actions involving the establishment of priority in respect of non-possessory liens. See *Sides v. Tidwell,* 216 N.C. 480, 5 S.E. 2d 316, and similar cases.

Our conclusion is that the priorities as between plaintiff's chattel mortgage and Robinson's lien were correctly determined by Judge Moore's judgment.

It appearing that the value of the Chevrolet is less than the total of (1) the costs of this action, including the expenses of sale, (2) Robinson's first lien for $30.00, and (3) plaintiff's second lien for $796.38, we need not determine the academic question whether, upon the facts established by the verdict, Robinson has a lien as against Thompson for the balance (the amount in excess of $30.00) due on the repair bill. Appellant's brief relates solely to the subject of priority as between plaintiff's chattel mortgage lien and Robinson's asserted mechanic's lien.

No error.

CLYDE E. CHILDRESS AND WIFE, EDITH CHILDRESS v. C. W. MYERS TRADING POST, INC.

(Filed 20 November, 1957)

1. **Contracts § 18—**

A contract to purchase a lot upon which the vendor should erect a residence according to specifications set out in the contract must be

in writing in regard to the agreement to buy and sell realty but in regard to the specifications and the time of completion of the dwelling may be modified by parol agreement of the parties, notwithstanding provision of the contract that in order to be binding, any substantial variations of its terms should be in writing and signed by the parties.

Where plaintiffs assert the material breach by defendant of its con-

2. **Contracts § 16—**

Ordinarily time for completion of a dwelling is not a substantial or vital element of a contract for its construction, and delay in completion may ordinarily be compensated for in damages and does not warrant termination of the contract.

3. **Cancellation and Rescission of Instruments § 5—**

In order for breach of contract to justify cancellation and rescission, the breach must be so material as in effect to defeat the very terms of the contract.

4. **Contracts §§ 18, 28—**

Plaintiffs contracted to purchase a lot from defendant upon which defendant agreed to construct a dwelling according to plans and specifications, and to complete the dwelling by a certain date. Plaintiffs asserted breach of contract by defendant in failing to use the brick and mortar, color of tile, etc., as specified, and also breach by defendant in failing to complete the dwelling by the date designated. Defendant asserted that the contract in these particulars had been modified by agreement of the parties. *Held:* An instruction to the effect that the parties' right to modify the written agreement was limited to those that were not substantial, must be held for prejudicial error.

5. **Cancellation and Rescission of Instruments § 8: Contracts § 25—**

tract to construct a dwelling, including breach of workmanship in that the foundation had cracked across one entire side so that there was danger of the house collapsing, etc., defendant is entitled to have submitted to the jury an issue as to the substantiality of the breaches as ground for rescission.

6. **Cancellation and Rescission of Instruments § 11—**

If breaches of a contract are of sufficient magnitude as to justify rescission, the injured parties are entitled to be restored to the condition they occupied on the day the contract was entered into, viz. the return of consideration, or if the properties given as consideration cannot be returned, then the fair market value of such properties, including, if the jury should allow it, interest on their value ascertained from the date possession was delivered to defendant.

7. **Contracts § 29—**

Plaintiffs, in an action for breach of contract, are entitled to fair compensation in money for the loss sustained by them as the result of defaults of defendant as established by the jury.

APPEAL by defendant from *Crissman, J.*, May 20, 1957 Term of FORSYTH.

Plaintiffs and defendant, on 21 April 1956, contracted in writing for the construction by defendant of a dwelling on the lot

owned by it in Old Town, near Winston-Salem. The contract obligated defendant to convey and plaintiff to purchase the lot and the house to be erected thereon. The purchase price was fixed at $15,000, payable by allowing plaintiffs $7,500 for a house and lot then owned by them, conveyed to defendant contemporaneously with the execution of the contract and the sum of $500, likewise paid at that time. The balance of $7,000 was to be financed, payable in stipulated monthly installments and secured by a purchase money mortgage.

The contract obligated defendant to commence work "immediately and completing the same by the 21st day of August 1956 or less if practicable." The specifications written in the contract provide for "a first class turn-key job" of high quality materials following the plans and specifications of House #1 on Linda Drive, which had been constructed by defendant. It calls for "nile green tile on bathroom wall and nile green tile on bathroom floor . . . dark mingle brick with white morter, full size basement with fireplace installed overhead . . . Main part to be same size as Linda Dr. #1—40 ft. long."

Section 3 of the contract reads: "It is agreed that any substantial variation from the terms of this contract to be binding shall be in writeing and signed by the Parties hereto."

On 23 November 1956 plantiffs began this action. They alleged the contract, their compliance by the payment of the $500 and conveyance of their home which defendant had subsequently sold, and a breach of the contract provisions by defendant. They ask for damages in the sum of $12,000. They do not pray for a rescission. Plaintiffs specify the particulars in which the contract was breached as follows:

1. The house was not constructed with dark mingled brick and white mortar but with ordinary textured brick and plain mortar.

2. The house was not constructed in a first-class manner for that the foundation wall had cracked its entire length. The foundation had bulged, and because of this inadequate and defective foundation, the house was apt to collapse at any time.

3. The house was not constructed in a first-class manner for that the roof was apt to collapse because the rafters used for its support were not of first-class material and because of size, inadequate.

4. The phrase of the contract reading "full size basement with fireplace installed overhead" had, by mistake of the parties, been incorrectly transcribed when the contract was reduced to writing, that the agreement was and the contract should read "full size basement with fireplace, insulated overhead"; and failure to insulate the house in accordance with the agreement.

5. It was agreed between the parties that the house was to be thirty feet wide, but as constructed it was only 28 feet, 11½ inches in width.

6. The tile in the bathroom was not nile green, as the parties had agreed upon.

7. The house was not completed by 21 August, and not until 18 October 1956 was the house ready for occupancy and the plaintiffs so advised.

Defendant, by its answer, admitted that the house was not built with dark mingled brick but with red brick and white mortar, averring "this was done at the request of the plaintiffs and the plaintiffs approved and required the use of the brick and mortar used." It was admitted that the tile in the bathroom was not nile green but averred that plaintiffs had selected a different color and defendant had used the tile and color selected and requested by plaintiffs. Defendant admitted the house was not completed and ready for occupancy until 18 October 1956, but it averred the delay was at the request of or consented to by the plaintiffs during the course of construction. Defendant denied each of the other asserted breaches of the contract. It averred complete compliance with the contract provisions as modified by the parties, its ability and willingness to convey in accordance with the contract as modified verbally. It prayed for specific performance.

From a verdict and judgment in favor of plaintiffs, defendant appealed.

Womble, Carlyle, Sandridge & Rice for plaintiff appellees.
Deal, Hutchins and Minor for defendant appellant.

RODMAN, J. Notwithstanding the reduction of the contract to writing, the parties are not in agreement as to the terms of the original contract. Was the house to be 30 feet or 28 feet wide? The writing is specific as to length but silent as to width. Was the fireplace to be *installed* over a full-size basement as the writing says, or was the fireplace to be installed in a full-sized basement and the house insulated overhead? If plaintiffs' version of the contract is correct, defendant has admittedly breached the contract. Neither of these conditions has been met.

Did the parties subsequently and by parol agree, (a) to change the color of the tile in the bathroom, (b) to change the color of the brick and mortar on the exterior, and (c) to extend time for the completion of the house? If the parties did not agree to these changes, the contract has admittedly been breached.

Did defendant fail to do the work in a first-class manner by providing defective and inadequate foundations and support for the house or roof?

If the defendant breached its contract in some but not all of these particulars, was the breach of such a character as to justify a rescission, restoring to plaintiffs their property or its value, or could plaintiffs be fairly compensated by an award of damages?

These questions arose on the pleadings and the evidence. They required answers before the rights of the parties could be determined. The court elected to submit only two issues to the jury, namely breach and damages. This restriction, it seems to us, unnecessarily complicated the problem of correctly instructing the jury.

That portion of the contract binding the parties to buy and sell had to be in writing because the statute so provides, but the portion relating to the kind of dwelling to be erected, its size, the materials to be used, and the time for completion could rest in parol, and this is true notwithstanding the provisions of Section 3 of the written contract.

"The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. *Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 168 S.E. 517; *Bixler v. Britton*, 192 N.C. 199, 134 S.E. 488. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. *Allen v. Bank*, 180 N.C. 608, 105 S.E. 401." *Whitehurst v. FCX Fruit and Vegetable Service*, 224 N.C. 628, 32 S.E. 2d 34.

Defendant alleged in its answer and offered evidence to support its allegation that the delay in completing the house was approved by plaintiff. Touching this question and the materiality of delay as affecting the rights of the parties, the court charged the jury: "Now, members of the jury, one of the provisions in the written contract was as to the time that the house was to be completed. The question, whether a contract must be performed at or within the exact time specified therein, is usually expressed in the inquiry as to whether the time is of the essence of the contract. Where the time is of the essence of a contract and there has been a failure of performance at or within the time promised, a breach of the contract results, which brings some of the consequences attendant upon a breach. The right to recover on a contract is conditioned upon performance within the time limit, where time is of the essence.

"Now, members of the jury, the plaintiffs say and contend that in this contract time is of the essence; that there wasn't any point in putting that in the contract if it didn't mean some-

thing, and that certainly the defendant didn't deliver in accord with those terms."

The quoted portion of the charge was made the subject of exceptions by defendant. Following these statements of the law and contentions of the plaintiffs the court charged the jury that the defendant contended that plaintiffs had waived the provision of the contract requiring delivery by 21 August. It then charged: "Now, members of the jury, the Court charges you that if you are satisfied from this evidence and by its greater weight that this contract was breached on the part of the defendant, that the defendant couldn't deliver according to the terms of the contract, then it would be your duty to answer that first issue YES. If you are not so satisfied, you would answer it No."

Dealing with defendant's assertion of verbal modifications and waiver as to manner and time of construction, the Court charged the jury: "Now, members of the jury, the Court instructs you that, although the written contract between the parties, that is, PLAINTIFFS' EXHIBIT A, is the written contract and provided that any substantial variations from the terms of the contract should be in writing, it was nevertheless permissible for the parties to the written agreement to waive that, or any other provision of the contract, and orally to agree to change the plans and specifications for the house, to be constructed by the defendant. In other words, members of the jury, if, after the written instrument was signed by the parties, *they orally agree to changes that were not substantial changes,* that that would be all right; it would be considered as a part of the contract." (Italics added.)

The quoted portion of the charge in effect told the jury only nonsubstantial changes in the contract could be made by parol and only such of these as related to plans and specifications.

Time for completion is not normally regarded as a part of the plans or specifications for the construction of a dwelling nor is time normally a substantial or vital element in a contract of purchase and sale. *Douglass v. Brooks,* 242 N.C. 178, 87 S.E. 2d 258; *Cadillac-Pontiac Co. v. Norburn,* 230 N.C. 23, 51 S.E. 2d 916; *Crawford v. Allen,* 189 N.C. 434, 127 S.E. 521; *Davis v. Martin,* 146 N.C. 281; *Scarlett v. Hunter,* 56 N.C. 84; *Bryson v. Peak,* 43 N.C. 310.

"As a general rule, time is not of the essence of a building or construction contract, in the absence of a provision in the contract making it such. Failure to complete the work within the specified time does not *ipso facto* terminate the contract, but only subjects the contractor to damages for the delay." 9 Am. Jur. 36.

If the parties verbally assented to extend the time for the completion of the building to October, the parties would be bound thereby notwithstanding Section 3 of the contract which required "substantial variations from the terms" to be in writing. It makes no difference whether the extension of time for completion be denominated a substantial or a nonsubstantial variation.

Did the parties agree to substitute another shade of green for the "nile green" called for as the color of the tile to be used in the bathroom? If so, was this a material or substantial change which could only be effected by written agreement under the rule laid down by the court in its charge?

Defendant admits that the tile used in the bathroom is not nile green. It justifies the different color by asserting that the change was made upon request of plaintiffs. If that be true, the contract has not in that respect been breached and the change was effective notwithstanding the fact that it may have been regarded by the jury as a substantial variation in the plans and specifications.

Not every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract. *Brannon v. Wood*, 239 N.C. 112, 79 S.E. 2d 256; *Jenkins v. Myers*, 209 N.C. 312, 183 S.E. 529; *Moss v. Knitting Mills*, 190 N.C. 644, 130 S.E. 635; *Westerman v. Fiber Co.*, 162 N.C. 294, 78 S.E. 221; *Highway Commission v. Rand*, 195 N.C. 799, 143 S.E. 851; *Twitty v. M'Guire*, 7 N.C. 501.

A delay of two months in completion during which time plaintiffs occupied the house they had conveyed to defendant could not, standing alone, be regarded as of sufficient magnitude to justify cancellation. Plaintiffs, if they had suffered inconvenience and expense as a result of the delay in completion, would be entitled to compensation therefor.

Where there is such a breach as permits a rescission, the parties are entitled to be placed in *status quo*, but if the breach is not so material as in effect to defeat the purpose of the contract, the injured party is compensated by damages.

The distinction is important and pointedly illustrated by many of the asserted breaches in this case.

Plaintiffs asserted that the foundation had a crack across one entire side, so weakening the foundation as to endanger the house. Such condition might well be found to render the house worthless. Defendant conceded there was a small crack which it asserts did not in any way impair the effectiveness of the foundation and which could be covered and corrected at a nominal cost. If defendant's version is in fact correct, to permit the plaintiffs to abandon the contract for such a trivial de-

fect would be unjust and unfair. On the other hand, if plaintiffs' version of the condition of the foundation is correct, it may be that no fair compensation could be awarded and that in truth and in fact the house has no substantial value and hence rescission should be permitted.

Defendant tendered an issue for the purpose of having the jury pass upon the substantiality of the asserted breaches. The court declined to submit this issue and defendant excepted. The exception is well taken.

Only when the terms of the contract as finally agreed upon have been ascertained and the breach or defaults in performance, if any, ascertained, and the nature and extent of those defaults determined can the court fix the rights and liabilities of the parties. If the defaults are of sufficient magnitude to justify cancellation, then plaintiffs are entitled to be restored to the condition they occupied on the day the contract was entered into, that is, a return of their properties. If the properties cannot be returned, then the fair market value of those properties, including, if the jury should allow it, interest on the value ascertained from the date possession was delivered to defendant. If, on the other hand, the defaults established are insufficient to justify cancellation and rescission, then plaintiffs are entitled to fair compensation measured in dollars and cents for the loss they have sustained by the defaults so fixed. *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *Moss v. Knitting Mills, supra; Twitty v. M'Guire, supra.*

New trial.

GOOD WILL DISTRIBUTORS (NORTHERN), INC. v. EUGENE. G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 20 November, 1957)

1. **Taxation § 23½—**

Where it is necessary to apply a taxing statute to a factual situation not contemplated when the statute was enacted, resort may be had to all other statutory provisions which may assist in a proper application of the statute in question.

2. **Corporations § 32—**

Upon the merger of corporations, one corporation survives and the corporate existence of the other parties to the merger ceases, and the surviving corporation becomes vested with all of the rights which each party to the merger could exercise, but the merger does not create new or additional rights. G.S. 55-165, G.S. 55-166.

3. **Taxation § 23½—**

Statutory provision permitting exemption from tax liability should be construed so as to bring within the exemption only those clearly entitled to its provision.

4. **Taxation § 29—**

Whether a successor corporation is entitled to deduct from its gross income an economic loss sustained by another corporation depends upon whether the successor corporation is for practical purposes the same and is engaged in continuing the business of the kind and character conducted by the corporation whose loss is claimed as a deduction.

5. **Same—Right of corporation surviving merger to deduct loss carry-over of submerged corporation.**

Where a corporation surviving a merger seeks to establish its right to deduct from its gross income an economic loss of one of its submerged corporations for a prior year as a carry-over under G.S. 105-147(6d), and it appears from the facts alleged that the submerged corporation had a profit in the months of the fiscal year prior to the merger and that it had deducted its prior economic loss from such net income, leaving a balance on the loss side, and further, that as far as the facts alleged disclosed, to allow the surviving corporation to make such deduction would result in reducing the surviving corporation's income tax liability which had accrued on the date of the merger, judgment on the pleadings permitting the surviving corporation to make such deduction must be reversed.

APPEAL by defendant from *Rudisill, J.*, May Term 1957 of GASTON.

The pleadings establish these facts:

Goodwill Distributors (Northeast) Inc. was incorporated under the laws of North Carolina on 31 July 1951. On 2 April 1953 it changed its name to Catholic Books (Northeast) Inc.

Good Will Distributors (Northeastern) Inc. was incorporated under the laws of North Carolina on 1 January 1953. On 27 April 1954 it changed its name to Good Will Distributors (Northern) Inc.

Good Will Distributors (Mid-Atlantic) Inc. was incorporated under the laws of North Carolina on 31 January 1953.

On 1 July 1954 Catholic Books (Northeast) Inc. and Good Will Distributors (Mid-Atlantic) Inc. were merged with and into Good Will Distributors (Northern) Inc. as permitted by Art. 16, Ch. 55, N. C. General Statutes.

Good Will Distributors (Mid-Atlantic) Inc. sustained an economic loss of $9,587.75 between the date of its incorporation and 31 October 1953, the end of its first fiscal period. Between 31 October 1953 and 1 July 1954 it had a net taxable income of $1,758.93 which was deducted from its prior net loss, leaving it with an economic net loss of $7,828.82.

Good Will Distributors (Northern) Inc., when it filed its income tax return for the fiscal year ending 31 October 1954, deducted from its earnings and taxable income the sum of $7,828.82, the difference between the net economic loss sustained by Good Will Distributors (Mid-Atlantic) Inc. during its first fiscal year and its taxable income to the date of the merger in its second fiscal year.

The Commissioner of Revenue held that the deduction was not permissible and assessed a tax against plaintiff in the sum of $564.23. The tax assessed was paid under protest; demand for the amount so paid was made and refused. Plaintiff then brought this suit to recover the amount paid with interest thereon.

When the cause was called for trial, plaintiff moved for judgment on the pleadings. The motion was allowed and defendant appealed.

Whitener & Mitchem for plaintiff appellee.
Attorney General Patton and Assistant Attorneys General Abbott and Behrends for defendant appellant.

RODMAN, J. This case requires a construction of G.S. 105-147(6d) which permits, under certain conditions, a deduction of a prior economic loss from current gross income to determine taxable income. We must apply "legislative intent" to a factual situation which we feel certain was not contemplated when the statute was enacted. Hence to determine the proper application of that statute to the facts of this case, we do not confine ourselves to that particular section of the tax law but look at all other statutory provisions which may assist in finding an answer to the question presented.

Express statutory authority is given domestic corporations to merge, G.S. 55-165. When the merger is consummated, one corporation survives and the corporate existence of the other parties to the merger ceases. The surviving corporation becomes vested with "all the rights, privileges, powers and franchises . . . of each of said constituent corporations . . . and (they) shall be thereafter as effectually the property of the surviving corporation as they were of the several and respective constituent corporations. . . ." G.S. 55-166.

The language is clear and specific. The surviving corporation, plaintiff here, is vested with all of the rights which each party to the merger could exercise but only those rights. A merger does not create new or additional rights. Having ascertained that plaintiff has all of the rights which the parties to the mer-

ger could exercise and only those rights, we turn to the statutory provisions relating to the computation and assessment of income taxes.

We find every domestic corporation is required to pay a tax on its net income received during the income year, G.S. 105-134. Net income is gross income less allowable deductions, G.S. 105-140. Gross income is defined in G.S. 105-141. No question with respect to gross income is presented by this case.

What deductions may plaintiff, the survivor, take to determine its net income? May it, as it asserts and the court adjudged, deduct from *its* gross income an economic loss sustained prior to the merger by another party thereto?

Ever since the adoption of our first income tax statute a *taxpayer* has been permitted to deduct certain losses in computing his net income. Prior to 1943 a loss could only be deducted in the income year in which the loss was sustained. The 1943 Legislature broadened the statute and permitted the taxpayer to carry forward certain kinds of losses as a deduction against income accruing in either of the two succeeding tax years. S.L. 1943, Ch. 400. The 1945 Legislature rewrote that portion of the Act dealing with the deduction of loses. See Sec. 4, Ch. 708, S.L. 1945. The Act is substantially the law today and is applicable to the facts of this case.

Statutory provision permitting exemption from tax liability should be so construed as to bring within the exemption only those clearly entitled to its provisions. *Sabine v. Gill,* 229 N.C. 599, 51 S.E. 2d 1; *Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754; *White v. U. S.,* 305 U.S. 281, 83 L. ed. 172, 59 S.C. 179. Applying this principle to this very provision, it was said by Denny, J., in *Rubber Co. v. Shaw,* 244 N.C. 170, 92 S.E. 2d 799: "Our Legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income."

Most of the cases involving the right of one corporation to claim as a deduction from its income a loss sustained by another corporation have arisen under Federal income or excess profits acts. The right of a successor corporation taking by conveyance, or a corporation resulting from a consolidation of corporations, or a corporation surviving as the result of a merger, to claim a loss sustained by another corporation, party to the consolidation or merger, has been repeatedly denied on the ground that the corporation claiming the deduction was not the taxpayer

within the meaning of the statute. See *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 78 L. ed. 1348, 54 S.C. 788; *Shreveport Producing & Refining Co. v. Commissioner of Int. Revenue*, 71 F. 2d 972; *Brandon Corporation v. Commissioner of Int. Revenue*, 71 F. 2d 762; *Pennsylvania Co. Etc. v. Commissioner of Internal Rev.*, 75 F. 2d 719; *Weber Flour Mills Co. v. Commissioner of Internal Revenue*, 82 F. 2d 764; *Standard Paving Co. v. Commissioner of Internal Rev.*, 190 F. 2d 330.

On the other hand, the right to deduct has been allowed where the transaction was a mere matter of form and the new or surviving corporation was for all practical purposes the same as the old, continuing the business of its predecessor. *Industrial Cotton Mills Co. v. Commissioner of Int. Rev.*, 61 F. 2d 291; *Helvering v. Metropolitan Edison Co.*, 306 U.S. 522, 83 L. ed. 957, 59 S.C. 634; *Stanton Brewery v. Commissioner of Internal Revenue*, 176 F. 2d 573; *Newmarket Manufacturing Company v. U. S.*, 233 F. 2d 493. These cases emphasize the necessity of a continuing business of the kind and character conducted by the corporation whose loss is claimed as a deduction from income earned by another.

The right of a corporation surviving a merger to claim losses sustained by another member of the merger was presented to the Supreme Court of the United States in *Lisbon Shops v. Koehler*, decided in May of this year, 353 U.S. 382, 1 L. ed. 2d 924, 77 S.C. 990. The Court said: "The issue before us is whether, under Secs. 23(s) and 122 of the Internal Revenue Code of 1939, as amended, a corporation resulting from a merger of 16 separate incorporated businesses, which had filed separate income tax returns, may carry over and deduct the premerger net operating losses of three of its constituent corporations from the post-merger income attributable to the other businesses. We hold that such a carry-over and deduction is not permissible."

We think the reason there assigned for denying the right to deduct is sound and is applicable to the facts of this case.

Here the right to deduct was adjudged to exist on the facts alleged in the complaint. The facts alleged are important in determining the right, but of equal or greater importance to that right are facts *not alleged*. The complaint alleges the merger on 1 July 1954 of three domestic corporations whose fiscal year terminated 31 October. One of these corporations had an economic loss for the year ending 31 October 1953. That corporation had a net income to the date of the merger. It applied its loss to its net income, leaving a balance on the loss side. The survivor corporation, for the year ending 31 October 1954, had an income equal to or greater than the net loss of the submerged

corporation. The survivor sought to apply this loss against *its* net income. It filed claim for refund, which was denied.

The complaint does *not* tell any of these material and important facts: What kind of business did each of the corporations do before the merger? Were they competitors in the same field or were they engaged in different kinds of businesses? Did they engage in business in the same or different territories? Was the same character of business conducted after the merger and in the same territories in which the constituent companies had operated prior to the merger? As bearing on the capacity to earn income, what was the relative net worth of the different corporations on the date of the merger? What part of plaintiff's income, which it now wishes excluded from tax liability, was in fact earned prior to the merger?

It is we think manifest that "Mid-Atlantic," one of the submerged corporations, could not on 1 July sell to plaintiff "Mid-Atlantic's" loss to be used by plaintiff to reduce plaintiff's income tax liability accrued to that date. Yet so far as the facts disclose, that is exactly the result accomplished if the judgment should be affirmed.

It is noted that "Mid-Atlantic," the submerged corporation, had, during the seventeen months of its corporate existence, an average monthly income of $103.47. During the first eight months of the fiscal year in which the merger took place and when it was alive and active in business, its monthly income averaged $219.75, but in the four months following its drowning it is credited with having a monthly earning capacity of $1,982.20. This attributes to a dead corporation a monthly earning capacity more than nine times what it was able to produce per month when alive.

"The availability of this privilege depends on the proper interpretation to be given to the carry-over provisions. We find nothing in those provisions which suggest that they should be construed to give a 'windfall' to a taxpayer who happens to have merged with other corporations. The purpose of these provisions is not to give a merged taxpayer a tax advantage over others who have not merged." *Libson Shops v. Koehler, supra.*

Continuity of business constitutes a sound basis for permitting the successor corporation to carry over the loss. The Commissioner of Revenue in his regulation promulgated shortly after this provision of our law became effective said: "The Commissioner construes this Amendment to be a relief provision designed to modify to the extent hereinafter indicated the effects of the strict annual accounting rule on those taxpayers who have incurred economic misfortune, or who are engaged in

businesses the income of which fluctuates greatly from year to year." Income Tax Regulation No. 2, issued 10 February 1944.

Plaintiff cites and relies on *Aspinook Corp. Suc. v. Commission of Corp. & Tax.*, 326 Mass. 327, 94 N.E. 2d 366. That case depended on the right of plaintiff to maintain an action to recover a tax illegally assessed against a corporation which merged with the plaintiff, the assessment antedating the merger. The question there presented is entirely different from the question here under consideration.

When one examines the statutory provisions relating to consolidation and mergers, it is difficult to think that the Legislature intended to make a tax distinction between a merged and a consolidated corporation, allowing the survivor of a merger to claim the right to carry over but denying that right to a corporation resulting from a consolidation. That would be looking at form rather than substance. It would seem that a far more logical and equitable method of determining tax liability would be to apply the yardstick prescribed for subsidiary and affiliated corporations, G.S. 105-143, but that question is not before us. We are not called upon to determine what relief, if any, plaintiff might be entitled to upon a further development of the facts. The judgment is

Reversed.

GOOD WILL DISTRIBUTORS (EASTERN), INC. v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 20 November, 1957)

APPEAL by defendant from *Rudisill, J.*, May Civil Term 1957 of GASTON.

Plaintiff and Catholic Books (Southeast) Inc., domestic corporations, merged on 1 June 1954. Plaintiff is the surviving corporation. Catholic Books (Southeast) Inc. sustained an economic loss of $15,221.23 in its fiscal year ending 31 May 1953 and for the year ending 31 May 1954 a loss amounting to $5,022.85. Plaintiff, the surviving corporation, deducted these two losses from its income for the fiscal year ending 31 May 1955. The deduction was disallowed and a tax assessed on the amount so deducted. The tax was paid under protest and refund was refused. This suit is to recover the amount so paid. The

Court rendered judgment on the pleadings which establish the above facts. Defendant appealed.

Whitener & Mitchem for plaintiff appellee.
Attorney General Patton and Assistant Attorneys General Abbott and Behrends for defendant appellant.

PER CURIAM. The law as interpreted this day in the companion case of *Good Will Distributors (Northern), Inc. v. Shaw, Commissioner,* is applicable to the facts of this case. For the reasons there given the judgment of the Superior Court is

Reversed.

GOOD WILL DISTRIBUTORS (WESTERN), INC. v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 20 November, 1957)

APPEAL by defendant from *Rudisill, J.*, May Civil Term 1957 of GASTON.

Plaintiff and Good Will Distributors (Southwest) Inc., which had changed its name to Catholic Books (Southwest) Inc., domestic corporations, merged on 1 May 1954. For the fiscal year ending 30 April 1954 Catholic Books, the submerged corporation, sustained an economic loss of $60,834.13. Plaintiff, the surviving corporation, sustained an economic loss for the same period of $4,217.33. Plaintiff, when it filed its tax return for the tax year ending 30 April 1955, asserted a right to deduct the loss of the submerged corporation in the year preceding the merger. This deduction was disallowed. A tax was assessed on the deduction taken. The tax so assessed was paid under protest and this suit brought to recover. The facts stated are established by the pleadings. Judgment was rendered on the pleadings in favor of plaintiff and defendant appealed.

Whitener & Mitchem for plaintiff appellee.
Attorney General Patton and Assistant Attorneys General Abbott and Behrends for defendant appellant.

PER CURIAM. The law as interpreted this day in the companion case of *Good Will Distributors (Northern), Inc. v. Shaw, Commissioner,* is applicable to the facts of this case. For the reasons there given the judgment of the Superior Court is

Reversed.

TROY L. CHAMBERS v. PALMA EDNEY, ADMINISTRATRIX OF THE ESTATE OF CALVIN EDNEY.

(Filed 20 November, 1958)

1. **Trial § 22a—**

On motion to nonsuit, the evidence must be taken in the light most favorable to plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. G.S. 1-183.

2. **Negligence § 19b(1)—**

In an action to recover for actionable negligence, plaintiff must show failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury.

3. **Negligence § 5—**

Proximate cause is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could foresee that such result was probable under all of the facts as they existed.

4. **Negligence § 19b(1)—**

If plaintiff's evidence fails to establish either defendant's negligence or that it was a proximate cause of the injury, nonsuit is proper.

5. **Trial § 19—**

Whether there is enough evidence to support a material issue is a matter of law.

6. **Master and Servant § 15a—**

Where, under the terms of the contract of employment, an employee is required to construct an instrumentality, the employer's duty is discharged by furnishing suitable materials with which it may be constructed, and the employer is not liable for an injury caused by a defect in its construction or adjustment.

7. **Same: Master and Servant § 20—Evidence held insufficient to support recovery for injuries from fall by employee constructing a scaffold.**

Evidence tending to show that an employee engaged in constructing a scaffold was experienced in handling lumber, was in a position to observe the materials he himself was using, and had an opportunity to make examination of the materials, that he stepped on a board, which broke under his weight, causing him to fall to his injury, with testimony by him that the board looked sound and without evidence to indicate that the employer could have anticipated that plaintiff would step on a board of such dimensions, fails to show negligence on the part of the employer proximately causing the fall, but further, if it be conceded that there was evidence of negligence of the employer, the evidence discloses contributory negligence on the part of the employee.

APPEAL by plaintiff from *Campbell, J.*, at Regular February 1957, Civil Term of BUNCOMBE.

Civil action to recover for personal injuries sustained by plaintiff in a fall from a scaffold being constructed by him and another on side of a tobacco barn, allegedly as proximate result of negligence of defendant.

The record indicates that the action was originally instituted against Calvin Edney and his wife, Palma Edney, as tenants by the entirety; that after summons was served Calvin Edney died, and his widow, Palma Edney, duly qualified as administratrix of his estate, and was duly and properly made a party defendant in this action, and as such has duly filed answer. And the record shows that the parties "stipulated that the property upon which the tobacco barn in question was being constructed was the sole and exclusive property of Calvin Edney, deceased," and that thereupon plaintiff took a voluntary nonsuit as to the individual defendant, Palma Edney.

Upon the trial in Superior Court plaintiff offered evidence tending to show substantially the following: Beginning on 25 August, 1954, plaintiff did work and labor with others in the construction of a tobacco barn on land of Calvin Edney near Mars Hill. This was done with the knowledge of Calvin Edney. Plaintiff helped around the barn, and in putting the roof on. He worked until the 3rd of September, 1954. The roofing was finished during the morning of that day. After lunch plaintiff resumed work on the barn building a scaffold. He climbed back up inside the barn holding on between the boards to the level of 22 feet above the ground. There were spaces between the boards that made a sort of natural ladder. Floyd Moore was working on the scaffold on same level with plaintiff. There was nothing between that level and the ground. Hoover Moore was assisting in the operation of building the scaffold. He was on the ground "tackling" up planks to plaintiff and Floyd Moore, that is, "pulling planks up" to them "by using a rope hoist" operated from a tackle on the top of the barn, "right up in the column of the barn." For support of platform of scaffold, pieces of lumber had been fastened in the wall and projected out about 3 feet. They were made of oak boards about 4 feet long. They * * * were of "good sound stuff". These projecting pieces, or supports, were some 12 feet apart. In the language of plaintiff's father, "The boys were putting boards across the projecting pieces, just laying them up there."

About four such planks had been hoisted up to the position where plaintiff was on the scaffold. In plaintiff's language, "they were placed over on this side here. Floyd Moore assisted me in placing these boards. They were just laid across here, across those arms coming out this way * * * ." Plaintiff helped to lay one side and, as he said, "One board over here * * * at that

stage of it there was another board hoisted up to my position * * * I was standing over here and I couldn't reach this board over here, and I had to step out on it and when I stepped out on it and put my weight on the board, it just broke without any warning * * * With reference to the board that I couldn't reach, I was going to take it up and lay it right beside the one that broke with me * * * The cross pieces on the scaffold were about 7 or 8 inches wide, one inch thick and 8 to 12 feet long. They were all different kinds of boards. * * * The particular one that broke was just an old rough looking board. When the board broke, I fell to the ground," sustaining injury.

Before the injury plaintiff did sawmill work, practically all of the time, and farming. The sawmill work was packing lumber. Plaintiff testified, "On the day I got hurt, I weighed 177, about maybe 180."

Then on cross-examination plaintiff testified: "I was 21 and ½ when this accident occurred * * * There was a pile of lumber down on the ground just below me. I don't know just how much material was there on the ground; quite a large pile of boards of all sorts and sizes. Hoover Moore was hoisting the boards up to me * * * Just one at a time * * * When I laid the board down the whole thing was in my view so I could look at it, see it from one end to the other. * * * In other words, there was distance of some 12 feet between these two supports and that board was about one inch thick, no less. It was about 6, 7, or 8 inches wide. I did not have the same opportunity to look at that board as the man on the ground * * * I could see one side of it * * * If I had turned it over I could have seen both sides. I did not turn it over to see what was on the other side. The board looked good enough to me. It looked like a sound board. There was not anything discoverable by looking at it. I could not tell it was not a sound board by looking at it."

Then plaintiff was asked these two questions, to which he answered as indicated: "Q. And the board is hanging there and you could just turn it and look on both sides as easily as you pleased, couldn't you? In fact it had to be swung up here before you could handle it, didn't it? A. Yes, sir. Q. So you could easily see both sides of that board before you laid it down, couldn't you, if you had looked? A. If you had looked you could."

Then plaintiff continued: "I said the Moore boy was down on the ground hoisting those boards from a large pile of boards which were available down on the ground * * * It was mill cull lumber * * * that is, rough lumber that is customarily used in making barns * * * This was the customary type of lumber that was used in Madison County for making tobacco barns in some places. This is a better barn than the average Madison

County barn. It is a gretty good barn * * * . I was holding on to the vertical joist, and I fell in spite of it * * * When I was working at the sawmill I packed the first-grade lumber, cull lumber. I handled the board. * * * I separated oak, pine and poplar, hemlock, etc. I could tell one from another. I observed what kind of board this was on the platform that broke with me. It was oak. That is the board which I previously laid out across there myself with help * * * Floyd Moore held one end of it and I laid it out. My hands were on the other end. No one had told me to double those boards before stepping on them. I had never heard anyone say anything about doubling scaffolding boards before putting weight on them. It was my intention to double those boards. * * * When the board was hoisted up to me I untied it from the rope."

Then plaintiff's witness Floyd Moore testified sustantially as follows: "On the 3rd day of September, 1954, I was working for Mr. Calvin Edney at Mars Hill * * * I was just helping the carpenters, just put up lumber and tin and stuff * * * The barn was 35 to 40 feet high * * * I wouldn't be positive who was the foreman on there at that time * * * My brother was reaching up boards on the ground to me and Troy Lee (plaintiff) and we was up on the scaffold together, me and Troy Lee was, and Troy Lee walked out on the board from where I was at on the columns and the plank broke with him. He come to the ground * * * After they took him (plaintiff) on to the hospital, I went back around where he was working. I saw the board laying there * * * broke. It was an oak plank and there was a knot hole in the plank. It was broke. Out kindly around the knot and kindly slanting like. I just notices that one knot * * * in the plank. * * * The crack ended some distance on the right of the knot hole and some distance on the left of the knot hole * * * ."

Hoover Moore, as witness for plaintiff, testified in pertinent part: "* * * I was pulling planks up to my brother and Troy. They were up on the scaffold * * * 20 or 25 feet, somewhere along there, above the ground. I saw Troy fall. I was pulling a plank up there and it was nearly up to him. He 'rech' to get it some way there * * * He was standing on a plank and it broke * * * I was just getting the boards what I come to and hoisting them up; just getting them out of the pile. There was a big pile there * * * it was just lumber is all I know * * * it looked pretty good in some ways."

Then the witness was asked this question: "Q. Looked sound? You didn't see anything wrong with this board when you hoisted it up?", to which he answered: "I was reaching pretty fast. We were working pretty hard. They just told me to pull them

up to them * * * I don't know exactly how the board broke, it was broke through the middle." And again the witness testified: "I didn't see anything wrong with the board I hoisted up. I was not testing them. I was reaching and getting them out of the pile. I knew they were going to be used for a scaffold. * * * I was getting them as I come to them."

At the close of plaintiff's evidence, motion of defendant for judgment as of nonsuit was allowed. Plaintiff excepted thereto, and from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Henry C. Fisher, Lee & Marler for plaintiff appellant.
George Pennell, Clyde M. Roberts, Ward & Bennett for defendant appellee.

WINBORNE, C. J.: Careful consideration of the many assignments of error, based upon exceptions to the admission and to the exclusion of evidence, presented on this appeal, fails to disclose error of a prejudicial character.

Indeed, the evidence offered, taken in the light most favorable to plaintiff, giving to him the benefit of every reasonable inference to be drawn therefrom, as is done when considering demurrer to the evidence, G.S. 1-183, is insufficient to make out a case of actionable negligence.

In an action for recovery of damages for injury resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of the defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff under the circumstances in which they were placed; and, Second, that such negligent breach of duty was the proximate cause of the injury,—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84, and numerous similar cases.

If the evidence fails to establish either one of the essential elements of actionable negligence, judgment as of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d, 661, and cases cited.

In this connection the obligation of an employer to furnish his employees with reasonably safe appliances, and a reasonably safe place to work, does not impose upon him the duty of supplying instrumentalities in a completed form. Where, under the terms of a contract of employment, the employees are required

to construct an instrumentality, the employer's duty is discharged by furnishing suitable materials with which it may be constructed, and he is not liable for an injury caused by a defect in its construction or adjustment. It is said that this frequently has been held in the case of scaffolds, staging, derricks, and like instrumentalities. 35 Am. Jur. p. 609.

The principles of liability growing out of use of scaffolds, platforms, and walkways are discussed by this Court in *Fowler v. Conduit Co.*, 192 N.C. 14, 133 S.E. 188, in opinion by *Brogden, J.* In this case plaintiff was injured when an unloading platform which he had helped erect collapsed under weight of lumber loaded from a standing boxcar. The Court said: "In our examination of the authorities in this State, relating to loaders, platforms and walkways, there is found no direct decision dealing with the question of a platform or walkway actually constructed by the party injured, and the effect this would have upon his right to recover. There are, however, in several of the cases referred to, statements to the effect that the party injured had no part in constructing the instrumentality causing the injury. These intimations are strong and suggestive; and, while it may be urged that they involve only negative reasoning, there are cases in other jurisdictions expressly holding that when the injured party himself constructs the platform causing the injury, in his own way, and the employer has exercised due care in furnishing reasonably fit and suitable material therefor, no recovery can be allowed. The principle is thus declared in *Lagler v. Roch.* (Ind.) 104 N.E. 111, 'When the master in person or by another, provides or undertakes to build for the use of his servants a scaffold or like structure, and turns it over to such servants in a completed or supposedly completed stage for their use in prosecuting their work for the master, it is undoubtedly his duty to exercise reasonable care to see that it is reasonably safe for the contemplated purposes. But, where the master has used reasonable care in the selection of materials from which to erect such a structure with design and purpose that the servants shall build it for their own use, and where the servants, with knowledge of such purpose and design, erect such structure from such material in such a manner as their own judgment dictates to them, the master having no direction or control of such construction, he cannot be held liable for injury sustained by one of such servants by reason of defects in such structure growing out of the manner of the construction thereof.' Of course, it must be conceded that the age (17½ years) and experience of a plaintiff and his capacity to observe and appreciate danger, must be considered in applying the rules of liability for injuries in such cases * * * There

is no evidence in this record that the plaintiff was inexperienced in unloading cars of lumber, or that he did not possess the capacity to reasonably apprehend and appreciate any danger that might be incident thereto."

In the light of these principles, applied to factual situation in hand, it is seen that plaintiff himself was in the process of constructing the scaffold, and was in position to observe the materials he himself was using, and had opportunity to make examination of the materials. And the board, which broke under his weight, looked to him "like a sound board. There was nothing discoverable by looking at it." And there is no evidence to indicate that Edney, the owner, could have anticipated that plaintiff, weighing approximately 180 pounds, would step on a board of the dimensions shown. Indeed defendant argues and contends, and this Court holds properly so, that there is an absence of negligence on the part of Edney proximately causing the injury sustained by plaintiff.

But if it be conceded that there is evidence of such negligence, plaintiff, 21½ years of age, weighing 180 pounds, experienced in handling of lumber of various kinds, in a place of his own choosing, by his own negligence contributed to his injury.

Cases cited and relied upon by plaintiff have been considered and found to be distinguishable from instant case.

For reasons stated, the judgment as of nonsuit from which appeal is taken will be, and it is hereby

Affirmed.

D. H. TUCKER v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 20 November, 1957)

1. **State § 3a: Trial § 5½—**

In a proceeding under the Tort Claims Act, where, prior to the hearing, the parties stipulate the name and position of the State employee charged with negligence, such stipulation meets the statutory requirement that the negligent employee be named and obviates error in naming the employee in the affidavit and claim, and the allowance of an amendment to this effect on appeal to the superior court is immaterial.

2. **State § 3a—**

Where, in a proceeding under the Tort Claims Act, the claimant asserts injury resulting when the car in which claimant was riding hit obstructions at each end of a narrow bridge, the fact that the

claimant asserts the obstructions were ditches, while the evidence discloses that the obstructions were mounds some 8 or 10 inches high, is too immaterial to require an amendment, and an amendment allowed in the superior court on appeal to make the allegations conform to the evidence adds nothing to the claim.

3. State § 3e: Appeal and Error § 55—

Where it is apparent that the Industrial Commission on the hearing of a claim under the Tort Claims Act may have found the facts under the misapprehension that the claim related to negligence on the part of one State employee, while the claim and evidence involved as a matter of law the negligence of a different employee, the cause must be remanded.

4. State § 3b—

This proceeding under the State Tort Claims Act is governed by the statute as written at the time the accident occurred, under which contributory negligence of claimant was a defense rather than a part of claimant's cause of action, and when recovery was allowed for injury resulting from a negligent omission as well as a negligent act on the part of a State employee. Chapters 400 and 1361, Session Laws of 1955.

5. Appeal and Error § 3—

Judgment of the superior court remanding proceedings under the Tort Claims Act to the Industrial Commission is not a final judgment, but nevertheless an appeal will lie from such judgment when it deprives appellant of some substantial right which might be lost if the order is not reviewed before final judgment. G.S. 1-277.

6. State § 3e—

On appeal, in a proceeding under the Tort Claims Act, the superior court is limited to review of alleged errors of law made by the Commission and presented by exceptions duly entered.

7. Same—

Where the superior court properly remands a proceeding under the Tort Claims Act to the Industrial Commission, but includes in the judgment provisions directing what conclusions should be made by the Commission from specified findings, which conclusions involve both questions of law and of fact, the provisions encroaching on the functions of the Commission will be stricken on appeal.

APPEAL by defendant from *Hall, J.*, February, 1957 Civil Term, FRANKLIN Superior Court.

This proceeding originated before the North Carolina Industrial Commission upon an affidavit and claim (G.S. 143-297) filed by the plaintiff against the State Highway & Public Works Commission for damages alleged to have been caused by "the negligence of John Billie Harris, supervisor under Bob Moore, superintendent, both of Henderson, North Carolina. . . . The injury giving rise to this claim occurred at a bridge across a small branch on the Weldon public road on April 20, 1955."

"That the injury occurred in the following manner: Claimant was riding in a 1947 four-door Chevrolet automobile driven by Lewis Clayton upon a public highway in Franklin County known as the Weldon Road, when said automobile struck a deep ditch across said highway in front of a bridge which was over a small stream, causing claimant to be thrown against the top and back seat of the automobile and claimant was again thrown against the top of the automobile, landing on the floor, when the car struck a second ditch that was across the road on the other side of the said bridge. The said Weldon Road was under the authority, control and supervision of the North Carolina State Highway Department whose agents and employees knew or by the exercise of reasonable care could and should have discovered the said ditches across said road which had remained some considerable time prior to the date and hour of the injury mentioned. There was no warning sign to cause the driver of said automobile to know there was danger in crossing said ditches or that there were such ditches across said road and that the negligence of the employees of the North Carolina State Highway Department was the sole and proximate cause of this claimant's injury who was guilty of no contributory negligence."

In addition to the above, the claim described the nature and extent of claimant's injuries and the amount of hospital, medical, and other expenses incurred in treatment.

Similar claims were filed by the other occupants of the Chevrolet, one by L. W. Clayton, the owner and driver of the Chevrolet, and the other by T. L. Clayton, a passenger. Since the filing of his claim, T. L. Clayton has died and his personal representative has been substituted as a party plaintiff. Except as to the nature and extent of the injuries and damages, the three cases are identical. They present the same questions of law.

A hearing on the claim was held before Commissioner Gibbs on December 5, 1955. At the beginning of the hearing the following stipulation was entered into:

> "1. That the accident giving rise to this claim occurred at or near a bridge across a small stream on a county road between Kearney and Vance County line, said place being about ten miles north of Louisburg, in Franklin County, North Carolina, on April 20, 1955, at approximately 11:30 a.m.
>
> "2. That said road above named was a part of the County Road System of the State Highway & Public Works Commission, and that the work done on the said road was

done by employees of the State Highway & Public Works Commission in the course and scope of their employment and that R. W. Moore was employed by the State Highway & Public Works Commission as County Maintenance Supervisor for Franklin County and as such was in charge of the supervision of the County Road System of the State Highway & Public Works Commission in Franklin County at the time of the alleged accident herein complained of.

"3. That for the purpose of this hearing Dockets T-2570, T-2571, and T-2572 shall be consolidated."

The Commissioner made the following findings:

"1. That the county road which crossed the bridge where this accident occurred was paved with asphalt and was known as the Weldon Road; that said bridge was a narrow, one-way bridge located at the bottom of a hill, and was approximately thirty feet long; that at the time herein complained of, the pavement on said road adjacent to the bridge had been removed for a width of about eighteen inches at each end of the bridge; that in place of the removed pavement, there was a dirt mound eight or ten inches high at its peak and about eighteen inches wide at each end of said bridge and adjacent thereto; and that said road at this point had been in this condition for at least ten days prior to said accident. * * *

"That at the time of the accident, and prior thereto, L. W. Clayton was driving his automobile at a rate of speed of between twenty and twenty-five miles per hour; that he did not observe the dirt mound at the end of the bridge he was approaching until he was practically on it; that from a distance the road had the appearance of being level at this point, and it was only when one was very close to the bridge that the mound could be detected; that there were no warning signs of any kind on the road leading to said bridge; that as L. W. Clayton drove his automobile over said mound, D. H. Tucker and T. L. Clayton were thrown with great force and violence against the top of the automobile and the front seat thereof; that it took much effort on the part of L. W. Clayton to control said automobile, but he did so; that as the automobile reached the other end of the bridge it struck the second mound of dirt and D. H. Tucker and T. L. Clayton were again thrown with great force and violence against the top of said vehicle."

The Commissioner also found that the claimants by reason of the accident sustained damages as follows: D. H. Tucker, $2,000.00; T. L. Clayton, $500.00; and L. W. Clayton, $275.00.

The Commissioner's finding of fact No. 6 is as follows: "That there was no negligence on the part of any named employee of the defendant." As a consequence of finding No. 6, the commissioner concluded the defendant was not liable, and made an award denying the claim. Upon review, the full Commission adopted the findings, conclusions, and awards made by Commissioner Gibbs. Whereupon, the plaintiffs appealed to the Superior Court of Franklin County upon exceptions filed.

At the hearing before Judge Hall at the February, 1957 Term, Franklin Superior Court, the claimants were allowed to amend their claims "to correct mistakes therein and to make said complaint conform to the facts developed at the trial," to the effect that R. W. Moore was a named employee and that the obstructions at the bridge where the pavement had been broken consisted of elevated mounds of earth rather than trenches. Judge HALL made an order remanding the claims to the Industrial Commission for further hearing on the claims as amended. The defendant tendered judgment affirming the findings, conclusions, and award of the full Commission, and excepted to the court's refusal to sign the judgment. The defendant appealed, assigning errors.

George B. Patton, Attorney General; R. Brookes Peters, Asst. Attorney General and Parks H. Icenhour, Staff Attorney, for the State.

Gaither M. Beam, for plaintiff, appellee.

HIGGINS, J. The defendant brings the case here upon the ground the trial court, as stated in the brief, "erred not only in refusing a proper judgment, but also in entering an order remanding the cause to the Industrial Commission when the decision and order of the Commission should have been affirmed. Not only did his Honor refuse the tendered judgment but entered an order allowing plaintiff to amend his affidavit to name R. W. Moore as the negligent employee . . . This cause was tried before the Industrial Commission on the plaintiff's allegations that John Billie Harris, supervisor under Bob Moore, was the employee . . . against whose negligence the defendant was called upon to defend . . . The amendment permits the defendant to state a different cause of action."

In considering the validity of the defendant's contentions, it must be borne in mind that the purpose of the statute requiring the negligent employee to be named is to enable the department of the State against which the claim is made to investigate, not all of its employees, but the particular ones actually involved. *Floyd v. Highway Commission*, 241 N.C. 461,

85 S.E. 2d 703. The claim as filed is against the State Highway & Public Works Commission, arising by reason of the negligence of John Billie Harris, supervisor under Bob Moore, superintendent. Conceding that Bob Moore is not charged as being a negligent employee, John Billie Harris, *supervisor* under Bob Moore, is so charged. The name of the negligent employee and his position (supervisor) are both designated. At the beginning of the hearing both parties stipulated that R. W. (Bob) Moore was Supervisor for Franklin County and was in charge of maintenance at the time of the accident. Thereafter, the plaintiff, at least, dismissed Harris from further consideration.

We hold the stipulation of the parties was equivalent to and served all the purposes of an amendment to the claim. The stipulation eliminated Harris because he was not the supervisor and included R. W. Moore because he was. The amendment in the Superior Court substituting Moore for Harris added nothing to the claim.

The accident was caused by obstructions at either end of the narrow bridge. The Industrial Commission found the pavements at both places had been broken or removed and that instead of trenches, as stated in the claim, mounds of earth had been built up eight or ten inches high with the result "that from a distance the road had the appearance of being level at this point, and it was only when one was very close to the bridge that the mound could be detected; that there were no warning signs of any kind on the road leading to the bridge; and that said road at this point had been in this condition for at least 10 days prior to the accident." The location of the obstructions was fixed by the plaintiff's claim. Whether the broken pavement left a depression below the surface or an elevation above it that could not be discovered until one was "very close" would seem to be too immaterial to require amendment. This amendment added nothing to the claim.

The defendant's brief makes clear the defendant's view that only the negligence of Harris was involved. In this connection it must be conceded there was no evidence of negligence on the part of Harris. If the Commission took the same view the defendant did, that only the negligence of Harris was involved, it acted under a mistaken view of the law. "When this occurs, the usual practice with us is to remand the case for another hearing." *Realty Co. v. Planning Board,* 243 N.C. 648, 92 S.E. 2d 82. The claim and the evidence involved Moore's negligence.

The accident occurred at a time when the statute made contributory negligence a defense, Ch. 400, Session Laws of 1955, and not a part of the plaintiff's cause of action. *Floyd v. Highway Commission, supra.* The accident occurred during that 55-day

period when the law permitted recovery "when the claim arose as the result of a negligent act *or omission* on the part of a State employee." Chapters 400 and 1361, Session Laws of 1955. *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571.

This Court is unable to determine whether the Industrial Commission's finding of fact No. 6 involved the negligence (acts or omissions) of Harris only, or whether the finding also involved negligence on the part of R. W. Moore. The record does not answer this question. Only the Industrial Commission can give the answer, and the case must go back to the Commission for that answer and for any modification of the conclusion and of the award made necessary by such finding.

The order appealed from is not a final judgment. Appeal does not lie unless it deprives the appellant of some substantial right which might be lost if the order is not reviewed before final judgment. G.S. 1-277. *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273; *Veazey v. City of Durham,* 231 N.C. 357, 57 S.E. 2d 377. The order appealed from states: "That the stipulated facts and additional findings of fact Nos. 1, 2, and 3, supported by the evidence, compel the conclusion that a dangerous condition existed on the road or highway referred to in the complaint for a period of at least 10 days prior to April 20, 1955; that prior to said date nothing was done to correct said condition or to warn those traveling upon said road of the condition, and that the plaintiff's injuries and damages proximately resulted from said dangerous condition. . . . Under the fact found it is the opinion of the court that whether or not R. W. Moore, the named employee, was negligent would depend upon whether or not he had notice, or in the exercise of ordinary care should have known of the dangerous condition of the said highway."

The function of the superior court judge is to "review alleged errors of law made by the Commission and presented . . . by the exceptions entered. He should overrule or sustain each and every exception addressed to alleged errors of law thus designated, so that the party aggrieved by his rulings may except thereto and present the question to this Court for review." *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467. "The findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." G.S. 143-293; *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173.

Negligence is a mixed question of fact and law. *Lowe v. Department of Motor Vehicles,* 244 N.C. 353, 93 S.E. 2d 448. On a mixed question of fact and law, the finding of the Industrial Commission is conclusive if there is sufficient evidence to sustain the facts involved. *Lewter v. Enterprises,* 240 N.C. 399,

82 S.E. 2d 410. The appellant's exception to the inclusion of the above quoted portion of the Superior Court's order is sustained. The Industrial Commission must be left free to make its own findings. If the prior hearing did not relate to and involve the question of Moore's negligence, then the Industrial Commission should re-open the inquiry as to that question, giving both parties opportunity to be heard.

The order of the Superior Court is modified by striking therefrom all except the direction that the case go back to the Industrial Commission for a finding as to the negligence of R. W. Moore and for any modification of the award made necessary by such finding. The order of the Superior Court to the extent here indicated is

Modified and Affirmed.

L. W. CLAYTON v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 20 November, 1957)

APPEAL by defendant from *Hall, J.*, February, 1957 Civil Term, FRANKLIN Superior Court.

Proceeding under Tort Claims Act for damages alleged to have been caused by the negligence of an employee of the defendant.

George B. Patton, Attorney General; R. Brookes Peters, Asst. Attorney General and Parks H. Icenhour, Staff Attorney, for the State.

Gaither M. Beam, for plaintiff, appellee.

PER CURIAM. The facts in this case are fully stated in the case of *D. H. Tucker v. State Highway & Public Works Commission, ante,* 171, decided this day, and the decision in that case controls here. It may or may not be necessary in the view of the Industrial Commission to reconsider this case with reference to any claim on the part of the defendant that the plaintiff was contributorily negligent. To the extent here indicated, the order of Judge HALL is

Modified and Affirmed.

MRS. T. L. CLAYTON, ADMINISTRATRIX OF F. L. CLAYTON, DECEASED v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 20 November, 1957)

APPEAL by defendant from *Hall, J.*, February, 1957 Civil Term, FRANKLIN Superior Court.

Proceeding under Tort Claims Act for damages alleged to have been caused by the negligence of an employee of the defendant.

George B. Patton, Attorney General; R. Brookes Peters, Asst. Attorney General and Parks H. Icenhour, Staff Attorney, for the State.

Gaither M. Beam, for plaintiff, appellee.

PER CURIAM. The facts in this case are fully stated in the case of *D. H. Tucker v. State Highway & Public Works Commission, ante,* 171, decided this day. Under the authority of that case, the order of Judge HALL is

Modified and Affirmed.

INEZ BEASLEY v. MALAH MCLAMB, EXECUTOR OF THE ESTATE OF OSCAR MCLAMB.

(Filed 20 November, 1957)

1. **Appeal and Error § 38—**

Assignments of error not discussed in the brief are deemed abandoned. Rule of Practice in th Supreme Court No. 28.

2. **Husband and Wife § 6—**

Earnings of a married woman by virtue of a contract for her personal services are her sole and separate property, and she may sue to recover under such contract alone. G.S. 52-10.

3. **Executors and Administrators § 15d—Evidence held sufficient for jury in this action to recover for personal services rendered under contract.**

Allegations and evidence to the effect that testate asked his niece and her husband to live with him so that she could look after him, that testate promised that he would see that they were well paid for such services, that in reliance thereon the niece performed menial services, often of an onerous nature, for testate for a period of over a year, that testate repeatedly stated to others that he wished her to be well paid, that thereafter testate offered to give his niece and her husband a deed to testate's farm if they would stay with him and look

after him until his death, that they stated they would accept the offer unless it stirred up controversy among his relatives, in which event they would deed the farm back and leave, that testate executed the deed and upon controversy the niece and her husband reconveyed the property and left testate's home, *held* sufficient to overrule nonsuit in the niece's action to recover the value of the services rendered, and further, the charge of the court in this action was without error.

4. **Same—**

When one person performs personal services for another in expectation of payment and in reliance upon such other's promise to pay, the person performing the services may recover the reasonable value of such services under the contract, and the express promise to pay will overcome any implication that the services were intended to be gratuitous, even when the person rendering the services is kin to the promisor.

5. **Appeal and Error § 19—**

An assignment of error to the issues submitted, which assignment of error is not supported by an exception or the tender of other issues, will be disregarded by the Supreme Court on appeal *ex mero motu.*

6. **Appeal and Error § 42—**

Where the court's statement of a contention is fully supported by the evidence and appellant makes no objection thereto prior to the retirement of the jury, an assignment of error to the statement of the contention cannot be sustained.

7. **Trial § 39—Record held not to show that jury disregarded court's instruction in determining amount of recovery.**

Plaintiff sued to recover the reasonable value of personal services for a stipulated number of days and alleged that such services were reasonably worth a specified amount. The court charged that plaintiff could not recover for the full number of days stipulated and that the jury should not consider any services rendered after a specified date. The jury allowed recovery for the full amount sought. *Held:* Exception to the refusal of the court to set aside the verdict on the ground that the jury obviously disregarded the court's instructions will not be sustained when it is apparent from the record that in view of the menial and onerous character of the services, the recovery was not excessive for that period for which plaintiff clearly established the right to recover.

APPEAL by defendant from *Seawell, J.,* April Term 1957 of JOHNSTON.

Civil action to recover for services rendered by plaintiff to Oscar McLamb from 18 December 1953 to 12 March 1955 (Oscar McLamb died 12 September 1955), it being alleged in the complaint that Oscar McLamb told plaintiff and her husband that he was unable to wait upon himself and needed someone to wait upon him, that he wanted them to move into his home and wait upon him, and that he would pay them well if they accepted his proposition; and it is further alleged in the complaint that Oscar McLamb knowingly and voluntarily

accepted services rendered by plaintiff, and received such services in expectation of paying the reasonable value thereof.

Upon the denial of liability by defendant and issues joined, the jury returned the following verdict:

> "1. Did the plaintiff render services to Oscar McLamb under a contract, as alleged in the Complaint? Answer: YES.
>
> "2. What amount is plaintiff entitled to recover of the defendant as the fair and reasonable value of the services so rendered? Answer: $2500.00."

Judgment was entered on the verdict for the plaintiff, from which defendant appeals.

Duncan C. Wilson, Levinson & Levinson for plaintiff, appellee.
J. R. Barefoot and E. A. Parker for defendant, appellant.

PARKER, J. Defendant's two assignments of error as to the admission of evidence are taken as abandoned for the reason that they are neither mentioned nor referred to in his brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 563; *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222.

The defendant offered no evidence. He assigns as error the denial of his motion for judgment of nonsuit made at the close of plaintiff's evidence.

Plaintiff's evidence shows these facts: Oscar McLamb's wife died in October 1953 leaving him alone in his home on his 29-acre farm. At that time plaintiff and her husband and their children were living in a rented house about three miles from Oscar McLamb, plaintiff's uncle. Plaintiff was regularly employed at a shirt factory at a wage of $33.00 a week, and her husband was employed at a veneer plant at a wage of $32.00 a week. Two or three weeks after his wife's death Oscar McLamb went to plaintiff's home, and said to them, according to plaintiff's husband, that he was left alone, and wanted someone to stay in his home, look after him, cook for him, and attend to him, and that, if they would come and do that, that "after twelve months he would see that we were paid and satisfied well for staying there with him." Plaintiff and her husband did not at that time accept his offer. A little later Oscar McLamb returned to their home, ate dinner with them, repeated his offer, and said they could wait a few days, and think it over. Later, he came back, and plaintiff and her husband agreed to move to his house, and "he agreed that we would be satisfied and sufficiently paid after we had stayed twelve months."

Plaintiff and her husband moved into Oscar McLamb's house on 18 December 1953. At that time Oscar McLamb had heart trouble, and was under a doctor's care. He was on a diet, could not eat salty food, and his meals had to be prepared separately. Plaintiff cooked, washed, waited on, and cared for Oscar McLamb. In April 1954 a mule kicked Oscar McLamb on the leg, causing an abscess on the bone. As a result of this injury and his physical condition he got in such bad shape, plaintiff quit her job in the factory on 4 July 1954 to wait on him. He had no "control of his person," he would sit in a chair, and mess his clothes up, and plaintiff had to wash and change his clothes and bathe him. She had to change his bed linen, and dry his bed as much as three times a night. He had no control over his bowels until he went to a hospital in November 1954. On another occasion Oscar McLamb suffered an injury in a car wreck that disabled him for two or three weeks, and plaintiff waited on him day and night. Plaintiff rendered such services until March 1955, when she and her husband moved away from Oscar McLamb's home for reasons which will be stated later.

Brastus Barefoot testified that he visited Oscar McLamb's home at least once a week, and saw plaintiff washing, cooking and waiting on Oscar McLamb. That he did not know what their agreement was, but that Oscar McLamb told him "they (plaintiff and her husband) were good to him and he wanted them paid for looking after him." He further testified: "He (Oscar McLamb) was sick a lot, and had to have attention, and he told me that nobody could be any better to him than they were, and that he wanted them to have pay for it."

Oscar McLamb was a member of Rev. Chester Davis' church. Rev. Chester Davis visited his home regularly. After plaintiff quit work at the shirt factory, he saw her there all the time cooking, washing, giving Oscar McLamb medicine, and moving him around. He testified Oscar McLamb told him, "I just hate to have that little lady have to wait on me like she does, but I can't help it, I just got to have somebody to help me." He further testified: "He (Oscar McLamb) didn't tell me how much they were to get. He did say that he wanted them to have their pay. He made that statement several times."

After Christmas 1954 Oscar McLamb offered to give plaintiff and her husband a deed for his farm if they would stay with him and look after him until his death. They told him that they would accept his offer, "unless it stirred up confusion among his people, and that if it did, we would give it back to him and leave, which we did." On 14 January 1955, he conveyed by deed his farm to them, reserving to himself a life estate. At that

time the farm was worth $10,000.00 to $12,000.00. Oscar McLamb at that time also made a will bequeathing plaintiff and her husband his personal property, which he later destroyed. Because of the fussing of Oscar McLamb's brothers and sisters and the confusion with them over the deed, plaintiff and her husband conveyed the farm back to Oscar McLamb on 10 March 1955, and left his home. After they moved out, Carlyle McLamb, a brother of the defendant, moved in, lived with Oscar McLamb about four months before his death, and Oscar McLamb conveyed his farm to him.

Plaintiff testified: "I have never been paid anything by him (Oscar McLamb) or his executor for services rendered, and I filed a claim with his executor, which was rejected."

G.S. 52-10 provides "the earnings of a married woman by virtue of any contract for her personal service, . . . can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

"It is undeniable that an express contract to pay for services may be made with a member of the family as well as with any other person. Proof of a specific agreement to remunerate for given services will overcome any implication that they were intended to be gratuitous. . . . The clearest and most definite proof of the existence of an agreement is, of course, that which is supplied by direct evidence that the services were performed in reliance on an explicit, formal promise by their recipient that remuneration would be given. The fact that a claimant who can establish such a promise is entitled to recover cannot be and has never been disputed." 58 Am. Jur., Work and Labor, Sec. 13.

This is said in 34 C.J.S., Executors and Administrators, Sec. 370: ". . . a claim for services rendered to decedent may be allowed against his estate where the services have not been paid for and they were rendered under, and in conformity with, an agreement or contract that they would be paid for. . . ."

"Where an express contract for services . . . does not specify the amount of the compensation, a promise to pay the reasonable value of the services . . . is implied, and the person performing the services . . . is entitled to recover on a *quantum meruit* for their worth. The fact that a contract to pay one well for services does not fix a definite amount of compensation does not prevent an action for the reasonable value of such services from being an action on contract rather than on *quantum meruit*." 58 Am. Jur., Work and Labor, Sec. 39.

There is ample evidence to show the contract as alleged, and that plaintiff in reliance on Oscar McLamb's explicit promise and agreement that he would pay sufficient remuneration, ren-

dered valuable services—some of an onerous and menial character—to him from 18 December 1953 to 14 January 1955. The evidence also clearly shows that this contract was terminated on 14 January 1955, and that on that day plaintiff and her husband and Oscar McLamb entered into a new contract as set forth above in the statement of the evidence. The court properly overruled the motion for judgment of nonsuit.

No exception was taken by the defendant to the form of the issues submitted by the judge to the jury. The defendant tendered no other issues. The issues submitted were proper. Defendant's assignments of error Nos. 6 and 7 to the submission of the issues have no exceptions to support them, and will be disregarded. The rule is mandatory, and will be enforced *ex mero motu. Suits v. Ins. Co.*, 241 N.C. 483, 85 S.E. 2d 602; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223.

Defendant's assignment of error No. 12 relates to a part of the charge in which the Court stated a contention of the plaintiff. The contention was fully supported by the evidence. Defendant did not say anything about the statement of the contention before the jury retired. This assignment of error is without merit.

Defendant's assignment of error No. 8 is to this part of the charge:

> "If you answer the first issue YES and come to consider the second issue, your answer to the second issue should be in such amount, if any, as you may find from the evidence, by its greater weight, will fairly compensate her for services rendered during the period from the 18th of December, 1953, to January 14, 1955. The Court will not let you consider for the purposes of this case, any services rendered after the 14th day of January, 1955, but only such services as plaintiff may have satisfied you from the evidence, by its greater weight, might have been rendered from the 18th of December, 1953, to January 14, 1955."

This assignment of error has no merit.

Defendant's assignment of error No. 19 is "to the refusal of the Court to set aside the verdict and have a new trial." Defendant contends that the verdict was excessive and contrary to law, in that plaintiff in her complaint sued for $2,500.00 for services for 449 days, and that the Court erred in its refusal to set aside the verdict for $2,500.00, although the jury was instructed to consider no services for the period from 14 January 1955 to 10 March 1955. Defendant cites to support his contention authority to the effect that a plaintiff cannot recover an amount greater than he sues for, and a statement from Am. Jur. that a verdict should be set aside, when it is clear that the jury disregarded the evidence or the rules of law.

Plaintiff alleged in her complaint that under the contract she rendered services to Oscar McLamb from 18 December 1953 to 12 March 1955, a period of 449 days, and that $2,500 was the reasonable value of such services. It is true that the Court in its charge limited the recovery to the period from 18 December 1953 to 14 January 1955, a period less than 449 days, but the jury did not answer the second issue in an amount larger than the plaintiff sued for. It seems clear by its verdict, considered in connection with the charge of the court, that the jury was satisfied by the greater weight of the evidence that plaintiff was entitled to recover $2,500.00 as the fair and reasonable value of the services she rendered to Oscar McLamb by contract from 18 December 1953 to 14 January 1955. Considering the faithful and menial services plaintiff rendered Oscar McLamb during that period, his statement that nobody could be any better to him than they were, and his repeated statements to the Rev. Chester Davis that he wanted them to have their pay, it cannot be said that the verdict for $2,500.00 is excessive. This assignment of error is overruled.

All of the other assignments of error of the defendant are deemed abandoned, as they are not set out in his brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 563.

Defendant has not shown any sufficient reason to disturb the verdict and judgment.

No error.

STATE v. FRANK COFIELD

(Filed 20 November, 1957)

1. **Intoxicating Liquor § 2—**

The possession of illicit liquor for the purpose of sale, G.S. 18-50, and the possession of whisky upon which the Federal and State taxes have not been paid, G.S. 18-48, are separate offenses, and the one is not included in the other.

2. **Criminal Law § 18—**

Upon appeal from conviction in the recorder's court of possession of illicit liquor for the purpose of sale, the superior court is without jurisdiction to amend the warrant so as to charge defendant also with possession of liquor upon which the Federal and State taxes had not been paid.

3. **Criminal Law § 26—**

Where verdict establishing defendant's guilt of a specified offense is properly set aside by the court for want of jurisdiction, such verdict will not support a plea of former jeopardy.

4. **Intoxicating Liquor § 9d—**

Evidence that officers found in defendant's house less than a gallon of whisky in containers not bearing Federal and State tax stamps, is sufficient to overrule nonsuit in a prosecution under G.S. 18-48, since the possession of nontax-paid whisky in any quantity anywhere in this State is unlawful.

5. **Criminal Law § 16—**

Where, on appeal from conviction in the recorder's court of possession of whisky for the purpose of sale, the warrant is amended to charge, in addition, possession of liquor upon which the Federal and State taxes had not been paid, but nonsuit is allowed on the charge of possession for sale and the conviction of possession of nontax-paid whisky is set aside for want of jurisdiction, defendant may thereafter be prosecuted in the superior court upon an indictment charging possession of nontax-paid liquor, when the superior court has concurrent jurisdiction of this offense, since it first took cognizance thereof.

6. **Criminal Law § 122—**

Where the court sets aside the verdict for want of jurisdiction but through inadvertence fails to vacate the judgment imposed on such verdict, the vacation of such judgment will be directed on appeal.

APPEAL by defendant from *Bickett, J.*, March Term 1957 of WAKE.

Criminal prosecution upon a bill of indictment containing two counts found by the Grand Jury of Wake County at the December Term 1956. The first count charges that the defendant on 3 December 1956 did unlawfully possess for the purpose of sale alcoholic liquors upon which the taxes imposed by the laws of the United States and by the laws of this State had not been paid, a violation of G.S. 18-50: the second count charges that the defendant on the same day did unlawfully possess alcoholic liquors upon which the taxes imposed by the laws of the United States and by the laws of the State had not been paid, a violation of G.S. 18-48.

The defendant pleaded "Not Guilty on the ground of double jeopardy."

At the close of the State's evidence the defendant made a motion for judgment of nonsuit. The motion was allowed as to the first count in the indictment, and denied as to the second count in the indictment.

The jury's verdict was guilty of the unlawful possession of nontax-paid liquor as charged in the bill of indictment.

From a judgment of imprisonment the defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Jack Senter and Charles W. Daniel for defendant, appellant.

PARKER, J. On 3 December 1955 W. L. Pritchett and Hoke Smith, one a deputy sheriff of Wake County, and the other a

liquor law enforcement officer of the Wake County A.B.C. Board, armed with a search warrant, went to the home of the defendant. The officers searched the whole house. They found sitting on the kitchen table a half-gallon jar filled with corn whisky and some five or six drinking glasses. They also found in the house another half-gallon fruit jar with about half an inch of corn whisky in it. These jars did not have on them any where any revenue stamps of the United States Government, or any stamps of any A.B.C. Stores of the State of North Carolina.

On the same date a warrant was issued returnable to the Fuquay Springs Recorder's Court, Middle Creek Township, Wake County, charging the defendant on 3 December 1955 with the unlawful possession of nontax-paid liquor for the purpose of sale, to-wit, one-half gallon. On 26 January 1956 the defendant was tried on this warrant in the aforesaid Recorder's Court. He was found guilty, and from the judgment imposed he appealed to the Superior Court.

The case came on for trial at the July Term 1956 of the Wake County Superior Court before Judge Bone. Before the defendant pleaded to the warrant, Judge Bone allowed an oral motion of the solicitor to amend the warrant so as to charge the additional offense of the unlawful possession of nontax-paid liquor, a violation of G.S. 18-48. Whereupon the defendant pleaded Not Guilty. The jury found the defendant Not Guilty of the possession of nontax-paid spirituous liquor for the purpose of sale, but Guilty of the possession of nontax-paid spirituous liquor. Judge Bone sentenced the defendant to imprisonment for three months. During the term of court Judge Bone on his own motion and in the defendant's absence set aside the verdict in his discretion, and ordered a new trial, but did not vacate his judgment of imprisonment, which appears in the court's Judgment Docket over his signature.

Defendant's first assignment of error is that Judge Bone erred in setting aside in his discretion the verdict of Guilty rendered at the July Term 1956, and in failing to vacate his three months' sentence of imprisonment based on such verdict. Defendant's fourth assignment of error is that Judge Bickett at the March Term 1957 failed to submit to the jury an issue of former jeopardy. Defendant's fifth assignment of error is that Judge Bickett erred in denying defendant's motion to set aside the verdict as being contrary to the evidence. Defendant states in his brief that assignments of error Nos. 1, 4 and 5 "are specifically abandoned by the appellant."

After the jury was impaneled, and before the introduction of evidence began, the defendant moved to dismiss the case "on

the grounds of double jeopardy." Judge Bickett denied the motion, the defendant excepted, and this is his second assignment of error.

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. Morgan,* 246 N.C. 596, 90 S.E. 2d 764; *S. v. Daniels,* 244 N.C. 671, 94 S.E. 2d 799; *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189; *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591; *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629. Judge Bone had no power to permit the warrant charging a violation of G.S. 18-50 to be amended so as to charge also a violation of G.S. 18-48. *State v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885; *S. v. Mills,* 246 N.C. 237, 98 S.E. 2d 329; *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, 24 S.E. 526.

The trial, conviction and sentence of the defendant on the amended count in the warrant at the July Term 1956 charging the unlawful possession of nontax-paid liquor, a violation of G.S. 18-48, "offends Sections 12 and 13 of Article I of the Constitution of North Carolina, which 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.*" *S. v. Hall, supra.* It would seem that Judge Bone set the verdict of Guilty aside in his discretion because of the decision in the Hall Case.

This Court said in *S. v. Bell,* 205 N.C. 225, 171 S.E. 50: ". . . jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case."

Jeopardy did not attach at the July Term 1956 on the amended change in the warrant charging a violation of G.S. 18-48, because the court had no jurisdiction to try him for such offense.

The defendant contends that he cannot be brought to trial a second time for a violation of G.S. 18-48, because Judge Bone set the verdict aside of his own motion, and without the defendant's instigation, and cites in support of his contention 22 C.J.S.,

Criminal Law, Sec. 271. This section states: "Where the verdict is set aside or judgment arrested at instigation of the accused, he may be tried again for the same offense; but where the verdict is set aside on motion of the court a different rule applies. Ordinarily there is no jeopardy where such action is taken on the ground of lack of jurisdiction, defective indictment, or illegal verdict." This section also states on page 407: "Where judgment is arrested or vacated upon the ground that there is no jurisdiction, there is no jeopardy, and accused may be tried again on the same indictment." This section does not support defendant's contention.

Doubtless the defendant abandoned his assignment of error as to the failure of the court to submit an issue on the question of former jeopardy to the jury because of what was said in *S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424: "When no issues of fact are involved as to the identity of the parties or of the offenses, the question of jeopardy is to be decided by the court."

Judge Bickett properly refused to dismiss the second count in the indictment on the ground of former jeopardy. Whether he erred in failing to dismiss the first count in the indictment on that ground is now moot, for the reason that he sustained the defendant's motion for judgment of nonsuit on that count.

Defendant's assignment of error as to the failure of the Court to nonsuit the second count in the indictment for lack of sufficient evidence is overruled. The possession of nontax-paid whisky in any quantity anywhere in the State is, without exception, unlawful. G.S. 18-48; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907; *S. v. Avery,* 236 N.C. 276, 72 S.E. 2d 670; *S. v. Brown,* 238 N.C. 260, 77 S.E. 2d 627.

By virtue of G.S. 7-64 the Wake County Superior Court has concurrent jurisdiction with the Fuquay Springs Recorder's Court to try a person for a violation of G.S. 18-48, such jurisdiction to be exercised by the court first taking cognizance thereof. The Wake County Superior Court first took cognizance with jurisdiction of the charge of a violation of G.S. 18-48 by the defendant, when a bill of indictment charging him with such an offense was found by the Grand Jury at the December Term 1956, and it had jurisdiction to try him on such bill of indictment for a violation of G.S. 18-48.

In *S. v. Clegg,* 214 N.C. 675, 200 S.E. 371, this Court said: "The defendant's objection to the amending of the warrant as permitted in this case seems to have been well taken, and the court below was in error in ruling the defendant to trial without a bill of indictment duly found. The cause is remanded with directions that the verdict and judgment be set aside, and that

upon the warrant issued the defendant be held under bond pending action by the grand jury, or until the case is disposed of according to law." When Judge Bone set the verdict aside, by inadvertence, he did not vacate his judgment of imprisonment. The Superior Court of Wake County is directed to vacate Judge Bone's judgment.

Defendant's other two assignments of error are without merit.

In the trial below we find

No error.

AMELIA FAIRCLOTH, BY HER NEXT FRIEND, MRS. CHELLIE FAIRCLOTH v. ATLANTIC COAST LINE RAILROAD COMPANY

and

MARTHA JO ANNE FAIRCLOTH, BY HER NEXT FRIEND, MRS. CHELLIE FAIRCLOTH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1957)

1. **Railroads § 4—Evidence held to disclose that negligence of driver was sole proximate cause of crossing accident.**

Evidence disclosing that the truck in which plaintiffs were riding as passengers ran into the side of a freight train between the first and second cars, after the engine and tender had passed, that the truck left skid marks for a distance of 35 feet prior to the point of impact, and that from a point more than 96 feet from the crossing the lights of the locomotive could be seen for more than 2,000 feet, *is held* to show gross negligence on the part of the driver continuing to the moment of impact, and constituting the sole proximate cause of the accident so as to preclude recovery against the railroad company, notwithstanding evidence of negligence on the part of the engineer in failing to give warning of his approach by bell or whistle.

2. **Same—**

The sole purpose of warning by bell or whistle is to give notice of the approach of the train, and members of a train crew are not required to foresee that the operator of a motor vehicle fully able to observe the headlights on the locomotive for nearly half a mile will rely solely on his hearing and not use his sight to ascertain the train's approach.

APPEAL by plaintiffs from *Morris, J.*, May, 1957 Term, SAMPSON Superior Court.

Civil actions to recover for personal injuries received in a crossing accident at Autryville, North Carolina. The accident occurred on Saturday, November 5, 1955, at about 9:50 at night. The plaintiffs, at the time the complaints were filed, were respectively 13 and nine years of age. The village of Autryville has a

population of about 500. The defendant's rail line runs near east and west. Approaching from the west along the track the Hall Bridge Road crossing is visible for more than 1,500 feet. Hall Bridge Road runs near north and south and crosses the defendant's track in the edge of the village. The road is paved and about 20 feet wide. From the point where it crosses the defendant's track the road is straight to the south for 615 feet. West of the highway and not closer than 75 feet, and south of the rail line and not closer than 96 feet, is a wooded area. From a point in the highway 96 feet south of the crossing a train approaching from the west is visible for probably 2.000 feet. At the time of the accident there was a railroad crossing sign (cross-arms) on the right near the track. Immediately prior to the accident the plaintiffs were riding north on Hall Bridge Road in the cab of a pickup truck driven by their father, J. C. Faircloth. Also in the cab were the grandmother of the plaintiffs and their cousin, Judy Faircloth. The grandmother was sitting on the right with Judy in her lap and the plaintiffs were sitting between the grandmother and the driver. The window on the driver's side of the cab was closed. The window on the other side was broken out.

The plaintiffs testified that as the truck rounded the curve 615 feet south of the crossing, "they were all talking." They remembered nothing more until they regained consciousness in the hospital. The pickup truck ran into the moving train at the crossing, apparently striking the rear of the first freight car and the front of the second. Skid marks extended back from the point of impact about 35 feet to the south. Skid marks nine and one-half feet to the side extended in the direction the truck was carried by the impact. It came to rest 47 feet to the east of the road and 15 feet to the south of the track. The driver, the grandmother, and Judy Faircloth were killed. The two plaintiffs received serious, permanent and disfiguring injuries. The father had worked near the crossing and was familiar with it.

The defendant's train consisted of the locomotive, 50 or 60 feet long, and 24 freight cars, each estimated to be about 35 feet long. Only one train, the freight, ran east on Saturday. It passed usually between eight and twelve o'clock at night. Apparently the train was not scheduled to stop at the village of Autryville and apparently no station was maintained there.

The plaintiffs' witnesses, Mrs. Hill, her daughters, Mrs. Williams and Mrs. Van Ness, were in Mrs. Hill's apartment which was located in a building 65 feet north of the railroad track and 35 feet east of the Hall Bridge Road. The building consisted of a warehouse to the west, Mrs. Hill's apartment in the middle, and another apartment to the east. The Hill apartment consisted

of four rooms; two bedrooms on the south next to the track, the kitchen and livingroom on the north, away from the track.

Mrs. Hill testified on the night of the accident there were five adults and five children in the apartment. They were in the kitchen on the side of the house away from the track. Mrs. Williams testified: "We told my sister, Mrs. Van Ness, how close the train would come to our apartment and how fast it would go by. We were especially listening for the train to blow and when it blowed we would have time to get outside . . . but the train didn't blow. The first thing we knew we had to jump up from the table and run to the window at the back of the apartment in the bedroom . . . by the time we had done that the engine was by the window and the only recognition we had of the train approaching was the sound of it. No bells were ringing before the train crossed the crossing at our apartment."

Mrs. Van Ness testified: "No whistle was blown nor bell rung before and as it crossed the crossing. . . . I would say the train was running about 50 miles per hour. All I could see was the flash of the lights between the cars. I saw sparks from the wheels."

H. C. Bullard testified: "I am familiar with the crossing. I have passed it a thousand times or more. I made observations of it on the night of the accident. There were street lights burning. Well, I looked down to the left, down the railroad track, and you couldn't see down the track there, out of that light—that is, towards Fayetteville. The lights shining prevented me from seeing, for one thing, and all the weeds and broom sage, at the time grown up around the track there. * * * I have crossed this crossing a large number of times. There is a lot of traffic over it. . . . This is the main crossing in Autryville of the A.C.L. Track. Plaintiffs' exhibit 2 correctly shows the railroad crossing and sign at the time of the accident. I made my observation that night immediately after the accident. With respect to the cross-arm sign, you couldn't see it on account of the lights that were shining there and then it was grown up around there."

The plaintiff introduced, for the purpose of illustrating the testimony, a map showing the railroad for more than 2,000 feet to the west and 1,100 feet to the east, and the highway from the curve to the south on into the village. This map was filed with the case on appeal.

At the close of the plaintiffs' evidence the court sustained the defendant's motion for nonsuit and from the judgment dismissing the actions, the plaintiffs appealed.

Maurice Holland, Hubbard & Jones, By: Howard H. Hubbard for plaintiffs, appellants.

Poisson, Campbell & Marshall for defendant, appellee.

HIGGINS, J. For reasons readily apparent, the Court has encountered difficulty in laying down hard and fast rules governing liability in train-automobile grade crossing accidents. "Many cases involving injuries due to collision between motor vehicles and trains at grade crossings have found their way to this Court. No good can be obtained from attempting to analyze the close distinctions drawn in the decisions of these cases, for, as was said in *Cole v. Koonce, supra,* 214 N.C. 188, each case must stand upon its own bottom, and be governed by the controlling facts there appearing." *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227.

It is a matter of common knowledge that a train cannot leave the track; that it cannot be stopped quickly; how quickly depends upon the grade, the speed, and the weight. A 24-car freight train moving 50-55 miles per hour would undoubtedly travel a considerable distance after the application of brakes before it could be stopped.

The plaintiffs in their very excellent brief, however, argue the evidence is sufficient to go to the jury by reason of the defendant's negligent failure (1) to keep a proper lookout; (2) to give timely warning; and (3) to operate at a safe speed. There is no evidence here the train was violating any speed law or regulation. A plaintiffs' witness testified that sparks were flying from the wheels as the train ran through the crossing, indicating that the brakes had been applied. There was no evidence the engineer failed to look or to see what he should have seen, or to do all in his power to stop the train or to slow it down as soon as he was able to see the automobile entering a zone of danger. There is neither allegation nor proof the train did not display proper lights.

Somewhat more troublesome is the factual question whether the evidence is sufficient to show the defendant gave timely warning signals of its approach to the crossing. Three women drinking coffee in an apartment with two other adults and five children neither heard a whistle blow nor a bell ring. Two bedrooms separated them from the track. A warehouse was a part of the building between them and the direction from which the train approached. Another apartment in the same building was to the east. The record is silent as to how far down the track the witnesses could have heard the signals if given. The evidence they were not heard is negative in character.

If it be conceded the warning signals were not given, nevertheless, from the skid marks it is plainly indicative the driver knew of the danger in time to leave skid marks 35 feet south of the crossing. From a point more than 96 feet south of the crossing the driver of the pickup was in a position to see the lights

from the locomotive for more than 2,000 feet. Gross negligence, continuing to the moment the truck crashed into the train, is shown on the part of the driver.

If it be conceded the members of the train crew did not ring the bell and did not blow the whistle, they could not foresee that a driver, fully able to observe the headlights of the aproaching train for nearly half a mile, would rely solely on his hearing and not use his sight to ascertain the train's approach. The purpose of warning signals is to show the approach of the train. "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable foreseeability." *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673. ". . . if it be conceded that defendants were required to give a signal of the approach of its train at the crossing in question, and failed to do so, it is clear from the evidence that the negligence of Branch (the driver) . . . was the sole proximate cause of the collision between his automobile and the train." *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561. "The evidence offered by plaintiffs . . . fails to make out a case sufficient for consideration by the jury. It may be fairly doubted that plaintiffs show any evidence of negligence on the part of defendants. But on the other hand, the evidence clearly shows the negligence on the part of the operator of the truck here involved was the sole proximate cause of the collision, and comes within the principles applied in the case of *Johnson v. R. R.,* 214 N.C. 484, 199 S.E. 704; and *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561; and cases there cited." *Hensley v. R. R.,* 230 N.C. 617, 54 S.E. 2d 926.

". . . if it be conceded that the defendant was negligent in allowing the corn to grow up on the edge of its right of way and in failing to give warning signal of the approach of its train to the crossing, nevertheless, it is clear that the active negligence of the driver of the automobile . . . was the real, efficient cause of the injury to the plaintiff. It is manifest that the negligence of the husband . . . became the sole proximate cause of the plaintiff's injury." *Jones v. R. R.,* 235 N.C. 640, 70 S.E. 2d 669.

Somewhat divergent views have been expressed by this Court, notably in *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876; *Butner v. R. R.,* 199 N.C. 695, 155 S.E. 601; *James v. R. R.,* 236 N.C. 290, 72 S.E. 2d 682. "Insulated" and "intervening" negligence have been discussed frequently in the decided cases. Decision in this case is determined by the application of the law of proximate cause, which makes unnecessary any discussion of insulated or intervening negligence.

The nonsuits entered in the court below were in accordance with established authorities, and the judgment is

Affirmed.

ANN DALY MEHEGAN HARRIS v. NACHAMSON DEPARTMENT STORES COMPANY, A CORPORATION.

(Filed 20 November, 1957)

1. **Negligence § 4f—**

In order for an invitee to recover from the owner or lessor of a building for injuries resulting from a fall on the premises, plaintiff must show some breach of duty owing to her by the owner or lessor.

2. **Same—**

The fact that the tread of the bottom step of a stairway extends one inch beyond the end of the handrail provided for those using the stairs does not show negligent construction or maintenance of such rail.

3. **Same—**

Where the evidence discloses that lessor provided lights with convenient switches at the top and bottom of a stairway for use of employees of lessees, without evidence of any defect or inadequacy of the lighting facilities, an employee falling on the stairs after failing to use the switch to turn on the light does not establish negligence on the part of the lessor in this respect.

4. **Same—**

A lessor contracting to provide janitorial services for halls and stairs is under duty to exercise reasonable diligence to keep these facilities in a reasonably safe condition, but is not an insurer and is liable only for dangerous conditions known or which should have been known by it and which are unknown or not to be anticipated by an invitee.

5. **Same—Evidence held not to disclose liability on part of lessor for failure to provide adequate janitorial service.**

Lessor was under contractual duty to provide janitorial service for the halls and stairways of the building. Plaintiff, an invitee, slipped and fell on mud and water upon the steps. The evidence tended to show that plaintiff had been familiar with the premises for sometime, knew that mud and water were necessarily tracked onto the stairs in wet weather, that plaintiff failed to turn on lights in the stairwell although light switches were conveniently maintained for her use, and also that another dry stairway was available for plaintiff's use. *Held:* Nonsuit was proper since the evidence discloses that plaintiff had actual knowledge of the conditions superior to any actual or imputed knowledge of defendant lessor, and further that defendant could not reasonably foresee that plaintiff would choose the less safe stairway.

APPEAL by plaintiff from *Moore, (Clifton L.), J.*, April Term 1957 of LENOIR.

Plaintiff seeks compensation for personal injuries sustained in a fall on a staircase of a building in possession of defendant. The negligence charged to defendant is the failure to have and maintain adequate handrails on the side of the stair, failure to properly light, and failure to keep and maintain the stair reasonably free from mud, water, slime, or other substances apt to cause those using it to slip and fall.

Defendant denied all allegations of negligence and as a further defense pleaded contributory negligence.

The evidence, viewed in the light most favorable to plaintiff, tends to establish these facts: Defendant leases from the owner a two-story brick building situate on the south side of North and west side of Queen Street in Kinston. The lower floor is subleased to H. L. Green Company and is used as a mercantile establishment. Green Company also subleases a portion of the second floor for offices. Other lessees of offices on the second floor are the Red Cross, a dentist, an insurance agency, and a beauty shop. Plaintiff was, at the time of her injury, an employee of the Red Cross, whose offices were at the southeast corner of the building. She had been so employed for approximately eighteen months. At the time of her injury and during the period of her employment the offices of her employer were in the same place.

Access from the Red Cross offices to the street was provided by either of two stairways. To go from the Red Cross office to the ground, one would travel north along a hallway approximately half the width of the building on Queen Street. He would then turn to the west, his left, and proceed approximately half the length of the building on North Street. At this point there is a stairway leading directly to North Street. The offices are between the exterior of the building and the hallway.

If one preferred not to use the stairway leading directly to North Street, he could continue along the corridor several feet, then turn south along another hall or corridor to a stair which leads into Green Company's store. He could pass from the store directly to Queen Street. The store was open from 8:00 in the morning until 5:30 in the afternoon. Access to Queen Street through the store and stairway was available whenever the store was open.

In the hall just outside of the Red Cross office is an electric switch which can be used to turn on the lights in the hall. On the hall wall at the head of the stairway leading to North Street is another electric switch to turn on hall lights at that point. On the hall wall and just a few feet beyond the head of the stair is a

switch to turn on the lights in the stairwell. At the bottom and west side of the stairs is another switch to operate the lights for the stairs.

The sidewalks along Queen and North Streets are paved. At the North Street entrance, there is a door with glass in the top portion. This door swings in and to the left, and when fully open just clears the bottom step. There is a railing on each side of the stair fastened to the wall by brackets. The ends of these rails are flush with the walls on the second floor but on the ground they lack about an inch of extending the full width of the tread of the bottom step. The ends were not marked with knobs or other devices to indicate the end of the rail to one relying solely on his sense of touch.

As a part of its rental contracts with tenants of the second floor, defendant agreed to provide access by means of the two stairways and to furnish heat, electricity, water, and janitorial services for the offices, janitorial services for the corridors and stairways and lights for the stairs and corridors through the fixtures then existing, and to maintain the same in the condition existing at the time of its lease.

It was cloudy with intermittent rain on 6 February 1956. At 5:13 p.m. on that date plaintiff left the office of her employer. As her fellow employee had left the office a few minutes earlier, she switched off the office lights before closing the office door. It was dusk, but there was sufficient light in the hallway for her to see to walk. No lights were burning in the hall nor on the stairs leading to North Street. Plaintiff proceeded along the hall to the North Street stairway, and, taking hold of the railing on her right side, proceeded to descend without having switched on the stair lights. When she reached the third step from the bottom, her foot slipped. She tried to support herself by the railing, but her hand slipped off the end of the railing and she fell and sustained serious injuries. When she got up and opened the door at the street entrance, she "saw slimy mud, it looked like it was slick, too; there was more on the third step; there was some on all three. That mud showed that it had been brought in by muddy feet. The steps were wet and the mud was wet. As I came down the steps, I was not able to see well enough to see anything that was on the steps; I just had hold of the handrail and I knew I was perfectly safe until my foot slipped." She also testified: "On rainy days it was impossible to go up and down the steps without leaving some muddy tracks. There was no foot mat or anything at the bottom of the steps and it was impossible not to carry some mud up and down the steps, but the maid we had tried her best to keep it the best she could but she had so many duties that always she could not look after that stairway."

She testified she did not know where the water came from: ". . . it could have come from umbrellas, dripping rain coats or anything . . ." She noticed this condition nearly every time it rained.

There were two lights in the stairwell, one near the upper portion of the stair, the other near the lower portion. When the lights were burning the stairways were adequately illuminated.

At the conclusion of plaintiff's evidence, defendant's motion for nonsuit was allowed and plaintiff appealed.

Jones, Reed & Griffin for plaintiff appellant.
Wallace & Wallace for defendant appellee.

RODMAN, J. Plaintiff, to recover, must predicate her right of action on some breach of duty owing to her as an employee or invitee of Red Cross. *Jordan v. Miller,* 179 N.C. 73, 101 S.E. 550. Her asserted right to recover is particularized in three respects: (1) failure to provide adequate handrails along the sides of the stairs; (2) failure to provide adequate lights; and (3) failure to provide adequate janitorial service.

The rental contract imposed no duty to provide rails different from those then in use. There is no suggestion of failure to properly maintain the then existing rails. The fact that the tread of the bottom step extended one inch beyond the end of the rail is not evidence of negligent construction or maintenance. Plaintiff failed to establish her first asserted breach of duty. *Carter v. Realty Co.,* 223 N.C. 188, 25 S.E. 2d 553.

Defendant was under a contractual obligation to maintain the lighting fixtures so that the corridor and stairs could be adequately lighted. There is no evidence which in any manner suggests any defect in fixtures or lack of capacity to properly light the corridor and stair if the existing facilities were put to use by pressing a switch. Defendant was under no obligation to do more than furnish the fixtures. It was not obligated to provide someone to turn the lights off and on to meet plaintiff's needs. Plaintiff failed to establish her second asserted breach of duty.

The rental contract imposed on defendant a duty to provide janitorial services for the halls and stairs. This did not make defendant an insurer. It only imposed on defendant the duty of exercising reasonable diligence in keeping these facilities in a reasonably safe condition. *Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; *Barnes v. Hotel Corp.,* 229 N.C. 730, 51 S.E. 2d 180; *Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242.

The law imposes liability on the owner of property for injuries sustained by an invitee which are caused by dangerous

conditions known, or which should have been known, by the property owner but are unknown and not to be anticipated by the invitee. *Copeland v. Phthisic, supra; Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652; 38 Am. Jur. 757; note 25 A.L.R. 1294.

Here plaintiff's evidence discloses her actual knowledge of conditions superior to any actual or imputed knowledge of defendant. She knew that it was or had been raining. She knew that she might find mud or water on the steps under then existing conditions. She knew how much light she had and how much was needed for a safe descent to the street. She knew that additional light, if needed, could be had by the touch of a button. She knew of the other stairway which would not have mud or water and which would safely carry her to her destination. These facilities were all available and provided by defendant. Defendant could not reasonably foresee that plaintiff would choose a way that she now says was unsafe.

Plaintiff cannot free herself from responsibility for her injury. *Hedrick v. Akers,* 244 N.C. 274, 93 S.E. 2d 160.

Affirmed.

MRS. JOHN LOOKABILL, ADMINISTRATRIX OF RUTH L. WORKMAN, DECEASED v. HENRY G. REGAN.

(Filed 20 November, 1957)

1. **Automobiles § 38—**

Any person of ordinary intelligence, who has an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile.

2. **Same: Evidence § 45—**

Testimony of a witness, who observed the physical facts, that he "supposed" defendant's car was 250 or 300 or 400 feet distant when he saw it and was coming "at a high rate of speed," will not be held incompetent as being merely deductive conclusions of the witness, and certainly cannot be held prejudicial when the witness thereafter testifies without objection as to the high rate of speed the car was traveling.

3. **Same—**

A question asked the witness as to which side of the road a person indicated his car was on cannot be held prejudicial as inviting the witness to give a deductive conclusion when the answer of the witness obviates any error in the question by explicitly stating that the car in question was on the east side of the road at the time.

4. **Appeal and Error § 41—**

Any error in the admission of testimony over objection is rendered harmless by the later admission of testimony of the same witness to the same effect without objection.

5. **Evidence § 29—**

Objection that the court permitted defendant's counsel to read the record of the cross-examination of defendant taken at a former trial, instead of the court reading the record itself, *is held* without merit.

6. **Appeal and Error § 20—**

Appellant may not object to a portion of the charge relating to an issue answered in his own favor.

7. **Negligence § 20—**

The use by the court of a hypothetical illustration in explaining the doctrine of proximate cause to the jury *held* not prejudicial.

8. **Appeal and Error § 42—**

Where the court gives equal stress to the respective contentions of the parties, the charge will not be held objectionable on the ground that the court necessarily consumed more time in stating the contentions of the one party than it did of the other.

9. **Automobiles § 46—**

Where the court in stating abstract rules of law charges that the violation of certain motor vehicle statutes constitutes negligence or contributory negligence, without relating such violations to the question of proximate cause, but in each instance in which the law is applied to the evidence correctly instructs the jury upon the element of proximate cause, and the charge is clear and understandable when read contextually, it will not be held for error.

APPEAL by plaintiff from *Armstrong, J.*, at April 1957 Civil Term, of DAVIDSON.

Civil action instituted by plaintiff to recover damages for the alleged wrongful death of Ruth L. Workman, intestate of plaintiff, as result of injury sustained in overturning of automobile operated by her,—proximately caused by alleged negligence of defendant.

The case was before this Court on former appeal—opinion therein granting a new trial for error pointed out is reported in 245 N.C. 500, 96 S.E. 2d, 421, reference to which is made for summary of basic factual situation.

Upon retrial in Superior Court both plaintiff and defendant offered evidence, and the case was submitted to the jury upon these three issues:

"1. Was the plaintiff's intestate, Ruth L. Workman, injured and killed by the negligence of the defendant, Henry G. Regan, as alleged in the complaint? Answer: Yes.

"2. If so, did plaintiff's intestate, Ruth L. Workman, by her own negligence, contribute to her said injuries and death, as alleged in the answer? Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: ....."

The first two the jury answered as indicated.

And upon the verdict so found the court entered judgment that plaintiff have and recover nothing of the defendant, and that the action be dismissed.

Philip R. Craver, Charles W. Mauze for plaintiff appellant.
Deal, Hutchins & Minor for defendant appellee.

WINBORNE, C. J. Appellant states in her brief filed on this appeal six questions as being involved here. These incorporate eight assignments of error, embracing twenty-five exceptions.

Question I: (Exceptions 1 and 4—assignments 1 and 3) "Did the trial court err in permitting opinion evidence and deductive conclusions by lay witnesses?"

The matter to which Exception 1 relates arose in this manner: The case on appeal shows that in course of his direct examination defendant testified: "I met a 1955 model Chevrolet and I saw it, I suppose, 250 or 300 feet from it—possibly 400 feet—and it was coming at a high rate of speed. I don't know what, but it was a high rate of speed, and I didn't think the driver saw me until he got * * * ." Objection and motion to strike. Motion denied. Plaintiff's exception No. 1.

This is the question to which exception 4 relates: "Q. As he pointed, which side of the road did he indicate his car was on by pointing?" Objection—overruled. Exception No. 4.

The answer is that "He was on the east side of the road. He stated he saw the car coming at a high rate of speed, and he immediately cut to the right, and the car passed * * * ." The answer removes any objection there may have been in the question. There is no deductive conclusion as to which side of the road he was on. The answer is explicit.

It is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile. *S. v. Roberson,* 240 N.C. 745, 83 S.E. 2d, 798, and cases cited. See also *S. v. Roberts,* 188 N.C. 460, 124 S.E. 833; *Hill and Brooks v. RR Co.,* 186 N.C. 475, 119 S.E. 884; *S. v. Journegan,* 185 N.C. 700, 117 S.E. 27; *S. v. Jessup,* 183 N.C. 771, 111 S.E. 523; *Shepherd v. Sellers,* 182 N.C. 701, 109 S.E. 847; *Taylor v. Security L & A Co.,* 145 N.C. 383, 59 S.E. 139; *Horne v. Power Co.,* 144 N.C. 375, 57 S.E. 19.

Indeed, applicable principle is stated in *Gilliland v. Board of Education,* 141 N.C. 482, 54 S.E. 413, opinion by Hoke, J., in this manner: "A witness who undertakes to testify to objective facts and qualifies his testimony by using the terms, 'I think', or 'I have an impression', etc., if the witness had had no physical observation or has made no note of the facts, but is merely stating to the court and jury his mental inference or deduction, this, as a rule, is incompetent. But if the witness has had opportunity to note relevant facts himself and did observe and note them, and simply qualifies his testimony in this way because his impression or memory is more or less indistinct, this, while in the form of opinion, is really the statement of a fact, and will be so received. *Greenleaf Ev.* (16 Ed.) Sec. 430 (i)."

And Hoke, J., continued: "And so it is here. The witness was a neighbor of Jeffrey Graham for four years or more and speaks from his own observation. He is giving to the jury impressions of things he saw and noted, and not an inference or deduction from things he had not seen, and the evidence was properly received."

Indeed, it is noted that at other times, defendant testified without objection to the high rate of speed intestate of plaintiff was traveling. This had the effect of waiving any objection to the evidence as first given.

Question II: This relates to exception 2, assignment 2, to the trial court refusing the request of plaintiff's counsel to read the record of the cross-examination of defendant taken at a former trial,—the vice charged is that the reader may emphasize certain portions as he reads, etc. The court permitted defendant's counsel to read the whole of the testimony. And the case on appeal fails to show that plaintiff suffered any damage, or that defendant obtained any advantage by so doing. The objection is without merit.

Question III: This question is based upon exception 6, assignment 5, to alleged prejudicial failure of the trial court to charge the jury on the allegations and evidence offered by the plaintiff to show violation of the reckless driving statute by the defendant. If it be conceded that the trial court did fail to so charge the jury, the verdict of the jury finding on the first issue that plaintiff's intestate was injured and killed by the negligence of the defendant as alleged in the complaint, that is, that defendant's negligence was a proximate cause of the death of plaintiff's intestate, renders harmless such failure to charge.

Question IV: This question is based upon assignment of error 4, exception 5, to the use of a hypothetical illustration to explain the doctrine of proximate cause. The illustration was plain and

simple. The use of it does not appear prejudicial, but would seem to give the jury clear understanding of what is meant by the term proximate cause in considering the evidence in the case. Appellant cites no authority in support of her contention.

Question V: This question is that "The trial court failed to give equal stress to the contentions of the plaintiff that it gave to the defendant in its charge to the jury." It relates to assignment of error 6, which is based upon exceptions 7, 8, 9, 11, 12, 13, 14, 16 and 24, and to assignment of error 8, based on exception 25. All of these exceptions are to portions of the charge as given.

Appellant does not contend that the trial court either misstated the evidence or the applicable principles of law.

What is said by this Court in *Edgewood Knoll Apts. v. Braswell,* 239 N.C. 560, 80 S.E. 2d, 653, is appropriate here. It is stated there: "The chief argument advanced is that the case on appeal discloses that the trial judge devoted more words, as shown by the number of printed lines, in stating contentions of plaintiff than in stating those of defendant. This is not the test. It is a question whether the judge gives 'equal stress' to the contentions of the plaintiff and of the defendant. Otherwise than as above stated appellants Braswell fail to point out wherein the judge failed to give 'equal stress'." Indeed the record of case on appeal in present case fails to disclose that unequal stress, or emphasis, was displayed by the trial judge in stating the contentions of the respective parties, and in charging the law as to applicable principles.

Question VI: This question "Did the trial court commit error in repeatedly charging that mere violations of various sections of the motor vehicle law by the plaintiff constituted contributory negligence?", is predicated upon assignment of error 7, based on exceptions 10, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22 to portions of the charge as given.

In this connection appellant states in her brief filed in this Court that "the trial court charged the jury in eleven different instances that if the plaintiff violated certain motor vehicle laws she would be guilty of contributory negligence," and that "in seven of the instances the court further instructed the jury that if the contributory negligence was one of the proximate causes of the accident, that the plaintiff could not recover," citing exceptions 12, 14, 15, 16, 17, 19, and 22, "but in four of the instances the court failed to charge that the contributory negligence had to be one of the proximate causes to prevent plaintiff's recovery," citing exceptions 10, 18, 20 and 21.

A reading of the charge reveals that in the instances to which the last four exceptions relate the court was only stating abstract rule of the law of negligence as well as of contributory negligence. For instance, the court, referring to provisions of G.S. 20-141 (a), that "no person shall drive a motor vehicle on a highway at a rate of speed greater than is reasonable and prudent under the conditions then existing," charged the jury "that if a person operates a motor vehicle upon a public highway at a rate of speed greater than is reasonable and prudent under the conditions then existing at the time and place mentioned in the pleadings, said person is guilty of negligence or contributory negligence." This is the matter to which exception 10 relates. The other three, 18, 20 and 21, are of like import. And read in context the meaning is clear and understandable.

In each of the other seven instances enumerated above, when the court came to apply the law to the facts in respect to the second issue, the court included in each instance both the element of contributory negligence and proximate cause.

While the charge is quite long, it treats in minute detail the contentions of the respective parties clearly—without undue repetition. And error is not made to appear.

No Error.

ETHEL M. DURHAM v. McLEAN TRUCKING COMPANY

(Filed 20 November, 1957)

1. **Appeal and Error § 51—**

On appeal from involuntary nonsuit, evidence offered by plaintiff and not challenged by defendant must be treated as being before the jury and considered in determining the question of the sufficiency of the evidence.

2. **Automobiles § 13—**

While the mere skidding of a motor vehicle does not imply negligence, skidding which is the result of the negligent operation of the vehicle, may be the basis of recovery.

3. **Automobiles § 41j—Evidence that skidding resulted from negligent operation of the vehicle held to take issue to jury.**

Evidence that some 200 feet beyond the crest of a hill, plaintiff's vehicle was standing disabled on the side of the road as the result of skidding on unexpected ice, that the operator of defendant's tractor-trailer, upon clearing the crest of the hill, applied his brakes, that the trailer "jack-knifed" and struck plaintiff's vehicle, causing the injuries in suit, with further testimony that the trailer skidded be-

cause of excessive speed, improper braking, or improper steering, and that defendant's driver stated immediately after the wreck that he was so excited that he just lost control, *is held* sufficient to overrule nonsuit.

APPEAL by plaintiff from *Crissman, J.*, at 18 March, 1957, Term of FORSYTH.

Archie Elledge and Clyde C. Randolph, Jr., for plaintiff, appellant.

W. Dennie Spry for defendant, appellee.

JOHNSON, J. This is a civil action brought by the plaintiff to recover damages for personal injuries sustained when a passenger car in which she was sitting was hit by the defendant's tractor-trailer.

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.

Early on the morning of Sunday, 18 December, 1955, the plaintiff, driving her husband's Oldsmobile passenger car, left her home in Winston-Salem to visit relatives in Durham. She left the house about 7:15 o'clock. It was cold, and a drizzling rain was falling.

The record of weather observations made by the U. S. Department of Commerce Weather Bureau at the Smith Reynolds Airport, Winston-Salem, at 7:31 a.m. showed cloudy weather with light rain falling and a temperature of 33 degrees. The Weather Bureau records also show that the rain began at 6:12 a.m. and that the temperature reached the freezing mark of 32 degrees one or two times between 7:00 a.m. and 8:00 a.m.

The plaintiff left Winston-Salem on N. C. Highway No. 150. At a point about two miles west of Kernersville she hit a slick place on the road. She said she didn't know whether it was ice or "just the wet road." She slowed down and drove on at about 25 miles per hour. On topping the crest of a hill about a mile west of Kernersville she observed at the bottom of the hill an overturned tractor-trailer belonging to the defendant. It was on the right side, off the paved portion of the highway. The tractor was about 400 feet from her when she first saw it. She also observed a Ford car parked on the opposite side of the road from the overturned vehicle. Some men were standing in the middle of the road. They appeared to be carrying on a conversation with someone in the car. After observing the situation at the bottom of the hill, the plaintiff started to slow down. When she put on brakes "the car went into a skid and slid off on the right-hand shoulder of the road, with the front

wheels on the shoulder and the rest of the car kind of hanging down the bank," at an angle of about 30 degrees, with the back end settled on a clump of dirt. The pavement was 18 feet wide. The car came to rest about halfway down the hill and about 200 feet up the hill from the overturned tractor-trailer.

The plaintiff, knowing there was a drop-off on both sides of the car and that she could not get out by herself, started blowing her horn for help. One of the men who had been standing in the road ran up to the car and offered to help get her out. He asked if she was hurt and she said she was not. About that time they heard a truck coming. The man told her to stay in the car until the truck passed and he would help her get out. An instant later another tractor-trailer belonging to the defendant trucking company, driven by Robert S. Griffith, came over the hill. The plaintiff heard the hiss of air brakes two or three times as the tractor-trailer approached her. "The tractor stayed in his lane, but the trailer started jack-knifing," and the back end of the trailer left the highway and hit the plaintiff's car "with an awful bang," striking it "from the door on the left-hand side to the front." In the collision the plaintiff sustained the personal injuries in suit.

The plaintiff testified that the road surface on the hillside was icy, and on cross-examination she admitted this was the first icy place she had encountered on the road, except "one short little patch about two miles west of Kernersville," and that until her car started skidding on the hillside she did not know there was any ice on the road.

The defendant's driver Griffith was examined by the plaintiff. He testified that when he left the terminal that morning his load was something over 28,000 pounds and his destination was Norwich, Connecticut; that he was familiar with the hill—had been over it before; that as he approached the hill crest that morning he was going about 25 miles per hour; that he saw a fusee on the crest of the hill, on the pavement to the right of the center line, which indicated danger over the hill; that he slowed down some; that he had shifted previously from high third gear into low fourth. The speed range of low fourth is higher than the range of high third; that after he topped the hill he saw plaintiff's car some 200 feet down the hill and the overturned vehicle at the bottom of the hill; that the front end of the car appeared to him to be sticking over on the pavement; that he steered to the left and applied his brakes, and then for the first time discovered he was on ice; that "the vehicle then jack-knifed" and the trailer slid around to the right and was at an angle to the tractor at the time of the collision. He said he stopped his "rig" at the bottom of the hill

by "light-braking." He testified further that he had driven tractor-trailers in the winter of 1953 and 1954 in New England and had had experience in the operation of a tractor-trailer combination in snow and ice. He said he had not encountered any ice on the highway that morning before reaching this particular hill and did not see or notice it then until he started over to the left and his tractor jackknifed. He stated that "the usual procedure for bringing a tractor out of a jackknife . . . is to apply your trailor brakes lightly and accelerate (the tractor) a little. I did that prior to my collision with Mrs. Durham's car, but I don't know at what point I did that."

The plaintiff alleges numerous phases of negligence against the defendant as proximate causes of the collision. Among them are these: (1) that driver Griffith was driving at a speed greater than was reasonable and prudent under the conditions then existing, in violation of G.S. 20-141, and (2) that Griffith was negligent in failing to maintain a proper lookout and in failing to keep the tractor-trailor under proper control.

R. V. Durham, plaintiff's husband, who was called as a witness, qualified as an expert in the operation of trucking equipment with air brakes similar to the defendant's unit involved in this wreck. In response to a hypothetical question to which there was no objection, he stated that what caused the trailer to go off the highway and strike the plaintiff's automobile in his opinion "would be three things: would be excessive speed, improper braking on that condition of road, or improper steering." "Q. (by defendant's counsel). One of three things? A. It could be either of the three. Q. (by defendant's counsel). Either one of three things? A. Yes, sir, or it could be a combination of two of the three, or three of the three at the same time."

The plaintiff, on being recalled to the stand, testified without objection that after the wreck the defendant's driver Griffith told her "that he was so excited that he just lost control. . . ."

The admissibilty of the foregoing testimony of the plaintiff and of R. V. Durham not having been challenged, it must be treated as being before the jury with all its natural probative force. *Lambros v. Zrakas*, 234 N.C. 287, 66 S.E. 2d 895. When so treated, and considered along with other supporting evidence, it suffices to make out a *prima facie* case of actionable negligence.

While the mere skidding of a motor vehicle does not imply negligence (*Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251), nevertheless, skidding may be caused or accompanied by negligence on which liability may be predicated. Accordingly, skidding may form the basis of a recovery where it results from some fault of

the operator amounting to negligence on his part. *Hoke v. Greyhound Corporation,* 227 N.C. 412, 42 S.E. 2d 593; *Williams v. Thomas,* 219 N.C. 727, 14 S.E. 2d 797; *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627. Here we have evidence which, when considered in its light most favorable to the plaintiff, is sufficient to justify the inferences that the defendant's driver failed to exercise due care under existing conditions in controlling the movement of the tractor-trailer combination, and that such failure to exercise care proximately caused plaintiff's injuries. This makes it a case for the jury.

It is unnecessary to review or discuss the evidence bearing on other allegations of negligence relied on by the plaintiff, and we express no opinion on the ultimate merits of the controversy. The appeal limits us to a consideration of the evidence in its light most favorable to the plaintiff.

The judgment is

Reversed.

STATE v. PRESTON LUCAS

(Filed 20 November, 1957)

1. **Perjury § 4—**

In a prosecution for subornation of perjury, the State must establish *inter alia,* that the perjurer made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue.

2. **Criminal Law § 168—**

In passing upon defendant's exception to the refusal of his motion to nonsuit, evidence offered by the State without objection must be treated as being before the jury and considered in determining the question of the sufficiency of the evidence.

3. **Perjury § 7—**

In this prosecution for subornation of perjury, the State's evidence that defendant procured false testimony in a prosecution against him, which testimony was under oath before a court of competent jurisdiction and was material to the issue involved in that prosecution, together with proof of the falsity of the oath by the testimony of two witnesses or of one witness and corroborating circumstances, *is held* amply sufficient for submission to the jury.

4. **Perjury § 6—**

In a prosecution for subornation of perjury, testimony of the perjurer and of two other witnesses that the perjurer had pleaded guilty in a prosecution for perjury "growing out of this case," is incompetent as substantive evidence, and is also incompetent as corroborative

evidence of the perjurer's testimony in the prosecution for subornation of perjury when it is not made to appear that the perjured testimony was the same or substantially the same in both prosecutions, and defendant's general objection to such testimony should have been sustained.

5. Perjury § 8—

In a prosecution for subornation of perjury, the court must charge that the alleged perjury must be established by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances.

6. Same—

In a prosecution for subornation of perjury, the court must charge that the perjured testimony procured by defendant must have been material to the issue involved in the action in which the perjured testimony was given.

APPEAL by defendant from *Seawell, J.*, April Term, 1957, of JOHNSTON.

Criminal prosecution for subornation of perjury.

The State, in support of the charges set forth in the bill of indictment, offered evidence tending to establish the facts summarized below.

On Tuesday, November 1, 1955, the car of John Davis was parked on a street in Selma. Defendant drove up on his right side of the street and stopped a short distance from the Davis car. The two cars then faced each other. After making inquiry as to where a certain person lived, defendant attempted to drive away. In so doing he "knocked one headlight off (the Davis car) and beat up another." Defendant, while driving on the Selma street, was under the influence of intoxicating liquor.

On Friday, November 4, 1955, defendant was tried in the Recorder's Court of Selma upon a warrant charging that on said occasion he was operating a motor vehicle upon a public street of Selma while under the influence of intoxicating liquor. At this trial, J. D. Stancil testified that he, not Lucas, drove the Lucas car and parked it in front of the Davis car; that, leaving the Lucas car, he crossed the street to make an inquiry; and that, from his position on the opposite side of the street, he saw a black car, traveling at high speed, come around the corner, "hit the back of the Lucas car," and knock it into the Davis car.

Stancil's said testimony was wholly false. Stancil was at his farm home, some five miles from Selma, when the incident occurred. He had not driven the Lucas car on November 1,

1955, or on any other occasion. Stancil gave said false testimony because of defendant's request and insistence that he do so.

Defendant offered no evidence.

The jury returned a verdict of guilty of subornation of perjury as charged in the bill of indictment. Thereupon, the court pronounced judgment that defendant be confined in the State's Prison for a term of five years. Defendant excepted and appealed, assigning errors.

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

W. H. Yarborough for defendant, appellant.

BOBBITT, J. In a former prosecution of this defendant on a fatally defective bill of indictment, judgment was arrested in this Court. *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401. The essential elements of perjury and of subornation of perjury, under G.S. 14-209 and G.S. 14-210 and decisions cited, are stated in opinion by Winborne, J. (now C. J.). It was held that, since "the commission of the crime of perjury is the basic element in the crime of subornation of perjury," G.S. 15-145 and G.S. 15-146, which relate, respectively, to the sufficiency of bills of indictment for perjury and subornation of perjury, are to be read "in reference to each other"; hence, in an indictment charging subornation of perjury the crime of perjury constituting the basis therefor must be set forth in conformity with the requirements prescribed in G.S. 15-145 for an indictment for perjury.

It is noted that the present prosecution is on a bill of indictment drawn in conformity with the requirements of G.S. 15-145 and G.S. 15-146.

Pertinent to the present prosecution, the State was required to establish, *inter alia,* that Stancil made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue. *S. v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191; *S. v. Smith,* 230 N.C. 198. 52 S.E. 2d 348, and cases cited.

It is noted that the State did not offer the warrant or other record of the Recorder's Court of Selma relating to what occurred in that court. See 41 Am. Jur., Perjury, secs. 61-64. However, testimony was offered as to the contents of the warrant and as to the trial; and if this testimony was incompetent, in whole or in part, it was in evidence without objection and for consideration by the jury. *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895, and cases cited.

The court properly overruled defendant's motion for judgment of nonsuit. Under the rule that, in a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances, *S. v. Sailor, supra,* and cases cited, the State's evidence was amply sufficient for submission to the jury.

The court admitted, over defendant's general objection, the testimony of Stancil and of two other witnesses that Stancil had pleaded guilty in the Superior Court of Johnston County to an indictment for perjury "growing out of this (case)," that is, the case in the Recorder's Court of Selma; and also the testimony of Stancil that, upon such plea, he had been sentenced and had served his sentence. The testimony as to the imposition and service of sentence would seem to be immaterial but hardly of such prejudice to defendant as to justify a new trial.

As to the asserted incompetency of the testimony relating to Stancil's plea of guilty, our attention is directed to *S. v. Justesen* (Utah), 99 P. 456, and to *Conn v. Commonwealth* (Ky.), 27 S.W. 2d 702, in which, in criminal prosecutions for subornation of perjury, evidence of the alleged perjurer's plea of guilty to an indictment for perjury was held incompetent. We agree that evidence of such plea of guilty is incompetent *as substantive evidence* for the reasons stated in the opinions in the cited cases. But in each of these cases the alleged perjurer did not testify. The situation was analogous to that considered by this Court in *S. v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876.

Here Stancil testified. Hence, our question is whether evidence of such plea of guilty was competent as corroborative evidence. Stancil's plea of guilty to a perjury indictment against him would be competent as corroborative of his testimony *if* it appeared that the perjury indictment to which his plea was addressed charged that he gave the same or substantially the same false testimony as that charged in the present indictment against defendant for subornation of perjury. But neither the Stancil perjury indictment nor evidence of its contents was in evidence; and so there was no basis for the admission as corroborative evidence of the testimony relating to Stancil's plea of guilty thereto. Hence, this evidence was incompetent as corroborative evidence; and its admission, over defendant's general objection, was prejudicial error.

Defendant excepted to the following excerpt from the charge, being the portion thereof in which the court applied the law to the facts, viz.:

"I charge you if you find from the evidence, and beyond a reasonable doubt, that the testimony of J. D. Stancil, a witness in the case of *State v. Preston Lucas*, was false; that it was given by him wilfully and corruptly, knowing it to be false; that the defendant Lucas knew or believed such testimony would be false; that the defendant also knew or believed that the said witness, J. D. Stancil, would wilfully and corruptly so testify, and that the defendant induced or procured the said J. D. Stancil to give such false testimony, then the defendant would be guilty of subornation of perjury, and if you so find beyond a reasonable doubt, it will be your duty to render a verdict of guilty against the defendant of the crime of subornation of perjury as charged in the bill of indictment; . . ."

We are constrained to hold that, while otherwise correct and well expressed, this charge is erroneous for inadvertent failure to instruct the jury on two essential matters, viz.:

1. A failure to instruct the jury that the alleged perjury must be established by the testimony of two witnesses, or by one witness and corroborating circumstances. *S. v. Arthur*, 244 N.C. 582, 94 S.E. 2d 646, and cases cited. In a prosecution for subornation of perjury, the proof of the alleged perjury as well as the indictment must be in conformity with the rules applicable to a prosecution for perjury.

2. A failure to instruct the jury that the State was required to establish, *inter alia*, that Stancil testified in the Recorder's Court of Selma as charged in the bill of indictment. The instruction given is predicated upon a finding by the jury that Stancil's testimony in the Recorder's Court of Selma was false. What was Stancil's testimony in that court? Was it material to the matter then in issue? True, if it were established that Stancil testified in the Recorder's Court of Selma as set forth above in the statement of facts, the materiality of this testimony would appear as a matter of law. But, absent a finding as to what Stancil testified in that court, the materiality of his testimony was not established by a verdict rendered under the instruction given. *S. v. Smith, supra*, and cases cited.

For the reasons stated, a new trial is awarded.

New trial.

SHERWOOD PERRY, ADMINISTRATOR OF THE ESTATE OF JAMES PERRY, DECEASED v. C. P. GIBSON.

(Filed 20 November, 1957)

Arrest and Bail § 3: Death § 3—

In an action for wrongful death growing out of the mortal wounding of intestate in a scuffle while a police officer was attempting to arrest

him, an instruction that the officer had the right to make the arrest without a warrant if intestate had committed a misdemeanor in his presence or if the officer had reasonable grounds to believe that intestate had committed a misdemeanor in his presence must be held for prejudicial error in failing to give further instructions that the jury and not the officer must be the judge of the reasonableness of the grounds on which the officer acted. G.S. 15-41(a).

APPEAL by plaintiff from *Hall, J.*, February Civil Term 1957 of FRANKLIN.

This is a civil action to recover damages from the defendant for the alleged wrongful death of plaintiff's intestate.

The defendant, a police officer of the Town of Franklinton, North Carolina, and constable for Franklinton township, shot and killed plaintiff's intestate under the circumstances hereinafter set out.

The evidence tends to show that Charlie McKnight, around 10:00 p.m. on 5 March 1956, drove his automobile from Water Street into Main Street in the Town of Franklinton at an excessive rate of speed, and proceeded south on the left-hand side of Main Street at an excessive rate of speed. The defendant Gibson gave chase in a marked police car. McKnight's car continued to a roadhouse a short distance out of town; finding the place closed, he turned his car around and proceeded back towards town. He met the defendant Gibson, who turned around on the highway and stopped McKnight about 150 yards from the town limits. The plaintiff's intestate was in the front seat with McKnight. The defendant testified that he asked McKnight for his driver's license; that McKnight got out of his car and showed him his license. He asked him why he drove so recklessly when he came out of Water Street; that McKnight cursed and said "that they were not driving reckless." Perry got out of the car on the other side and said, "No d.....n body has drove reckless." That he put them both under arrest and told them to go to the police station, and he drove in behind them. They did not go to the police station, but stopped at the old police department, although Perry knew the department had been moved; that when they stopped, Gibson parked his car and got out; that "Perry got out, cursing and went across the street, I called him and asked him where he was going. He didn't listen to me the first time. Then he said, 'What in the g..... d.....n hell do you want with me?'" This witness further testified that Perry had his hand in his pocket; that he asked him to take his hand out of his pocket, and he said, "I am not going to do it." (Defendant testified that when he first stopped McKnight's car, he saw Perry take something from the seat of the car and put it in his right-hand pocket.) That

he took hold of Perry's hand and pulled it out of his pocket; that Perry had his knife open in his hand and about the time he got his hand out of his pocket he struck at him and cut him across his hand. That while crossing the street, this officer testified, he had taken his gun out of his holster and was holding it in his left hand; that when he grabbed the knife, Perry turned it loose and grabbed the barrel of the gun. "When he grabbed the gun, we got down. I was trying to keep him from taking it away from me. I asked him to turn it loose. We were down just like two cows butting heads. He had hold of the barrel of the gun. In the tussle I jerked the gun and it went off accidentally the first time. When he hit me beside the head and knocked my cap and glasses off, I pulled it (the gun) a couple more times. * * * I was just about out of wind and had to do something. I was cut on the hand in the scuffle with a knife and ever since then I have had a ruptured disc and have been down in my back * * *."

The defendant further testified that he placed McKnight and Perry under arrest for disorderly conduct. He also testified that he put McKnight under arrest for reckless driving, and, further that when he got across the street where the tussle took place, "I placed him (Perry) under arrest for disorderly conduct."

The plaintiff offered the testimony of witnesses who were some distance from Gibson and Perry, some of whom testified that a tussle did take place between the officer and Perry.

The case was submitted to the jury on the following issues: 1. Did the defendant wrongfully and unlawfully assault and kill the plaintiff's intestate, James K. Perry, as alleged in the complaint? 2. If so, what amount of damages, if any, is plaintiff entitled to recover of the defendant? The jury answered the first issue "No."

The plaintiff appeals, assigning error.

Taylor & Mitchell, for plaintiff appellant.
Arendell & Green, Alton T. Cummings, for defendant appellee.

DENNY, J. The plaintiff assigns as error the failure of the trial court to instruct the jury "that the jury and not the defendant is the judge of whether or not the defendant had reasonable grounds to believe that a misdemeanor had been committed in the presence of the defendant."

The court read G.S. 15-41, as amended by Chapter 58 of the Session Laws of 1955, to the jury, and instructed the jury "that while it is not necessary that a crime, a misdemeanor, or a felony actually has been committed in the officer's presence, in order to justify the officer's making an arrest, it is necessary

that the officer have reasonable grounds to believe that an offense has been committed in his presence, in order for him to make a lawful arrest."

The trial judge likewise instructed the jury "that under the laws of this State, a peace officer, that is a police officer, has a right to make an arrest without a warrant if there is a breach of the peace or a threatened breach of the peace in the presence of the officer. * * * To have a breach of the peace there must be a disturbance of public order and tranquility by act or conduct not merely amounting to unlawfulness but tending also to create public tumult and incite others to break the peace. To justify an arrest on ground of necessity to suppress a breach of the peace the conduct of the person arrested must amount to an act or breach of the peace in the presence of the person making the arrest. To justify an arrest in order to prevent a breach of the peace ordinarily there must be at least a threat of a breach of the peace, together with some overt act in attempted execution of the threat."

The court further instructed the jury "that where an officer has the right to make an arrest, that is where there is a breach of the peace in his presence or a threatened breach of the peace in his presence, or if he has reasonable grounds to believe that a misdemeanor has been committed in his presence, where one has in fact been committed or not, if he has reasonable grounds to so believe, then I instruct you that officer making an arrest may meet force with force sufficient to overcome any force offered by the person to be arrested, even to the taking of life, if necessary, and the officer is not required to afford the person arrested an equal opportunity."

The vice of the charge is to the failure of the court to apply the law to the facts in the case (*Chambers v. Allen*, 233 N.C. 195, 63 S.E. 2d 212) and to instruct the jury that the defendant had the right to arrest James K. Perry, without a warrant, at the time in question, if Perry had committed a misdemeanor in his presence, or if the defendant had reasonable grounds to believe that he had committed a misdemeanor in his presence; but the jury and not the defendant must be the judge of the reasonableness of the grounds on which the defendant Gibson acted. *S. v. McNinch*, 90 N.C. 695; *S. v. Bland*, 97 N.C. 438, 2 S.E. 460; *S. v. Pugh*, 101 N.C. 737, 7 S.E. 757; *Sigmon v. Shell*, 165 N.C. 582. 81 S.E. 739; G.S. 15-41 (a). *Cf. S. v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100, in light of the amendment to G.S. 15-41.

In our opinion, the plaintiff is entitled to a new trial and it is so ordered.

New Trial.

STATE v. MURRAY B. BALLENGER

(Filed 20 November, 1957)

1. **Courts § 11: Statutes § 2—**

An Act (Chapter 998, Session Laws of 1953), eliminating a county from the list of counties excepted in G.S. 7-264 and making the provisions of Article 24, Subchapter VI, of Chapter 7 of the General Statutes, as amended, applicable to the municipalities of the county, is tantamount to a reenactment of the general law authorizing the establishment of municipal recorder's courts in regard to such county, and is not a special Act relating to the establishment of inferior courts within the purview of Art. II, Sec. 29 of the Constitution.

2. **Courts § 14: Criminal Law § 16—**

Where a municipality establishes a recorder's court under G.S. 7-190 with exclusive original jurisdiction of offenses below the grade of felony, the statute gives such court jurisdiction not only of such offenses committed within the municipality, but also of such offenses committed within a radius of five miles thereof.

APPEAL by defendant from *Seawell, J.*, April Criminal Term 1957 of JOHNSTON.

The defendant was tried in the Recorder's Court of Benson, North Carolina, upon a warrant issued by the clerk of said court, charging that the defendant on or about 3 March 1957 did unlawfully and wilfully operate a motor vehicle upon the public highways of the State of North Carolina and upon the public streets of the Town of Benson, while under the influence of intoxicating liquor or narcotic drugs; and that he, Murray B. Ballenger, did on said date unlawfully and wilfully operate a motor vehicle upon the public highways of North Carolina and the public streets of the Town of Benson after his North Carolina operator's license had been permanently revoked.

The defendant was tried and convicted on both counts in the warrant. From the judgment imposed he appealed to the Superior Court of Johnston County where he was tried on the original warrant and the jury found him "guilty as charged on both counts."

The court sentenced the defendant to the common jail of the County for a period of two years on each count and assigned him to work the roads under the supervision of the State Highway and Public Works Commission, the sentences to run consecutively.

The defendant appeals, assigning error.

Attorney General Patton, Asst. Attorney General McGalliard, Asst. Attorney General Behrends, for the State.

E. R. Temple, for defendant.

DENNY, J. The defendant's first assignment of error is purportedly based on a motion to quash the warrant "as being contrary to law." It cannot be ascertained from the record whether or not this motion was actually made and ruled upon either in the Recorder's Court or in the Superior Court. Even so, the argument in this Court with respect to the motion is based on the contention that the Recorder's Court of Benson is not a legally constituted court; that it lacked the power to issue the process which brought the defendant into court, and the court was without jurisdiction to try him, citing *S. v. Baskerville,* 141 N.C. 811, 53 S.E. 742 and Article II, Section 29 of the Constitution of North Carolina.

Subchapter VI of Chapter 7 of the General Statutes constitutes a series of general laws authorizing the establishment by cities and counties of various types of recorders' courts. G.S. 7-264 originally provided that said Subchapter VI should not apply to certain judicial districts and certain counties including Johnston County. However, Chapter 998 of the Session Laws of 1953 struck out the word "Johnston" in the list of excepted counties in G.S. 7-264 and, further, provided specifically that Article 24 of Chapter 7, relating to municipal recorders' courts, should be applicable to municipalities in Johnston County. The defendant contends that the 1953 Act above referred to removing Johnston County from the list of counties excepted from the Article authorizing the establishment by municipalities of municipal recorders' courts, is unconstitutional in that, he argues, it violates that portion of Article II, Section 29, of the Constitution which prohibits the enactment of any local, private, or special act relating to the establishment of courts inferior to the superior court.

The identical question now raised was considered and settled in the case of *In re Harris,* 183 N.C. 633, 112 S.E. 425. In that case, Iredell County had been excepted from a general law authorizing the creation of inferior courts. Later the General Assembly passed an act eliminating Iredell County from the list of excepted counties. This Court held that the enactment of the statute eliminating a county from a list of those excepted from an earlier General Statute did not violate Article II, Section 29 of the Constitution, and was not a local, private, or special act, but was rather a re-enactment of the general law making it applicable to Iredell County. Consequently, we hold that Chapter 998 of the Session Laws of 1953, eliminating Johnston County from the list of counties excepted in G.S. 7-264 and making the provisions of Article 24 of Subchapter VI of Chapter 7 of the General Statutes, as amended, applicable to the municipalities in Johnston County, was tantamount to

a re-enactment of the general law making it applicable to Johnston County.

The defendant does not contend that the Town Board of Benson failed in any respect to comply with the provisions of Chapter 7 of our General Statutes in establishing the Recorder's Court of Benson. He does contend, however, that the above chapter does not vest any power and authority in any town board to create a court with jurisdiction to try cases which involve criminal acts committed outside its corporate limits.

The jurisdiction of the Recorder's Court of Benson is defined in G.S. 7-190, which in pertinent part reads as follows: "The court shall have the following jurisdiction within the following named territory: 1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the Constitution and general laws of the State, including offenses of which the mayor or other municipal court now has jurisdiction. 2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the Constitution and general laws of the State. 3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. 4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction."

In *S. v. Brown*, 159 N.C. 467, 74 S.E. 580, the defendant was charged in the Municipal Court of the City of Greensboro with the common law offense of keeping a disorderly house, and was convicted. She appealed and was again convicted in the Superior Court, but judgment was arrested upon the ground that the crime was not committed within the corporate limits of Greensboro although it was committed within one mile of the same. The State appealed. The contention was that the Legislature could not confer jurisdiction upon the Municipal Court of Greensboro to hear and determine criminal cases where the offense was committed not within the city but within one mile thereof, and that the defendant should have been indicted originally in the Superior Court. The Acts establishing the

Municipal Court of Greensboro gave it jurisdiction to try misdemeanors where such crimes were committed within the city or within one mile of its corporate limits. Public Laws of 1909, Chapter 651, as amended by Private Laws of 1911, Chapter 430. This Court reversed the ruling in the Superior Court and held that the Municipal Court of the City of Greensboro had jurisdiction to try the defendant. See *In re Barnes,* 212 N.C. 735, 194 S.E. 499, *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *S. v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312. The questions raised in *S. v. Baskerville, supra* and *S. v. Doster,* 157 N.C. 634, 73 S.E. 111, are not presented on this appeal. Hence, they are not controlling here.

The remaining exceptions and assignments of error are without merit. The evidence was sufficient to carry the case to the jury on both counts, and in the trial below we find

No Error.

STATE v. MURRAY B. BALLENGER

(Filed 20 November, 1957)

APPEAL by defendant from *Seawell, J.,* June Term 1957 of JOHNSTON.

The defendant was tried and convicted in the Recorder's Court of Benson, North Carolina on a warrant issued out of said court, charging that on or about 17 May 1957, at and in said County and within the jurisdiction of said court, the defendant did unlawfully and wilfully operate a motor vehicle upon the public highways of North Carolina after his North Carolina operator's license had been permanently revoked. From the judgment imposed the defendant appealed to the Superior Court where he was tried *de novo* on the original warrant.

The defendant, through his counsel, stipulated that on 17 May 1957 his North Carolina operator's license had been permanently revoked by the Commissioner of Motor Vehicles of the State of North Carolina.

The State offered evidence to the effect that the defendant drove a motor vehicle on 17 May 1957 upon the public highways of Johnston County within five miles of the Town of Benson. The jury returned a verdict of guilty. The defendant was sentenced to two years in the common jail of Johnston County

and assigned to work the roads under the supervision of the State Highway and Public Works Commission.

The defendant appeals, assigning error.

Attorney General Patton, Asst. Attorney General Moody, for the State.

E. R. Temple, for defendant.

PER CURIAM. On this appeal the defendant raises the same questions with respect to the validity and jurisdiction of the Recorder's Court of Benson that he raised in *S. v. Ballenger, ante,* 216. What we said there is applicable here.

In the trial below we find

No Error.

NINA JOYNER SPEIGHTS v. STEPHEN CARRAWAY, ADMINISTRATOR OF THE ESTATE OF JESSIE MAE BEASLEY, DECEASED.

(Filed 20 November, 1957)

1. **Executors and Administrators § 15d—**

Allegations and evidence to the effect that plaintiff performed personal services and advanced funds for the care of defendant's intestate in reliance upon intestate's promise to pay for same by willing to plaintiff all of the intestate's property, and that intestate breached the agreement by failing to will plaintiff any property, are sufficient to overrule nonsuit in plaintiff's action against the estate to recover the reasonable value of the services and the funds advanced.

2. **Same: Limitation of Actions § 5—**

Plaintiff's cause of action to recover for personal services rendered and funds advanced for the care of intestate in reliance upon intestate's promise to pay for same by willing property to plaintiff does not accrue until the death of intestate without having willed property to plaintiff, and the three-year statute can have no application when the action is commenced within three years of intestate's death.

3. **Appeal and Error § 38—**

Exceptions not set out in the brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Moore, (Clifton L.), J.,* at May 1957 Civil Term, of LENOIR.

Civil action to recover on contract for services rendered by plaintiff to Jessie Mae Beasley, intestate of plaintiff, and for advancements made by plaintiff to and for said intestate.

Plaintiff alleges in her complaint, and upon the trial in Superior Court offered evidence tending to show substantially the following:

(1) That for several years prior to her death on 18 February, 1956, Jessie Mae Beasley, intestate of plaintiff, was afflicted with the disease of arthritis, which became acute about 1943, and she continued to suffer from it until her death;

(2) That for many years prior to the death of Jessie Mae Beasley, at her instance, plaintiff nursed and cared for her until her death, and paid for (a) all the repairs on the house, of which Jessie Mae Beasley was tenant in common with another, (b) all the furnishings and equipment which went into the house, (c) all food, clothing, and medicine for Jessie Mae Beasley, and (d) the doctors' bills;

(3) That Jessie Mae Beasley proposed to and agreed with plaintiff that she would pay her for all of her services to be rendered and for all funds advanced by plaintiff for her, to take effect at the death of Jessie Mae Beasley, by willing to plaintiff all of her property, both real and personal, she owned at her death;

(4) That plaintiff, relying upon the promises of Jessie Mae Beasley, entered into the performance of her duties under said contract and agreement, and continued to perform the same at all times so long as she, Jessie Mae Beasley, lived,—advancing approximately $2,000 on repairs to the house;

(5) That Jessie Mae Beasley failed to fulfill her part of the agreement in that she failed to execute a will or in any way to pay the sums due by her to plaintiff.

Defendant aptly moved for judgment as of nonsuit. Motion was denied, and defendant excepted.

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

"1. Did the plaintiff Nina Joyner Speights render services to Jessie Mae Beasley, or make repairs to Jessie Mae Beasley's home under a contract and agreement, express or implied, that Jessie Mae Beasley would compensate the plaintiff Nina Joyner Speights therefor, as alleged in the complaint? Answer: Yes.

"2. Did the said Jessie Mae Beasley breach said contract on her part? Answer: Yes.

"3. In what amount, if any, is the estate of Jessie Mae Beasley indebted to the plaintiff Nina Joyner Speights on account of the matters and things alleged in the complaint? Answer: $4500.00."

Defendant moved to set aside the verdict as contrary to the evidence, and for error committed in the trial. Motion denied—

defendant excepts. And to the signing and entry of judgment defendant excepts and in open court gives notice of appeal and appeals to Supreme Court, and assigns error.

White & Aycock, Harvey W. Marcus, for plaintiff appellee.
Harvey E. Beech, Taylor & Mitchell, for defendant appellant.

WINBORNE, C. J.: On this appeal defendant challenges the correctness of judgment from which appeal is taken on several grounds.

First: It is contended that the trial judge erred in overruling defendant's motion for judgment as of nonsuit. However, taking the evidence in the light most favorable to plaintiff, giving to her the benefit of every reasonable inference, it is sufficient to take the case to the jury and to support the verdict rendered. *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E. 2d, 764; *Dills v. Cornwell*, 238 N.C. 435, 78 S.E. 2d, 167.

In the Wyrick case, *supra*, this Court in opinion by Stacy, C. J., in respect to demurrer to the evidence, declared: "When services are performed by one person for another under an agreement or mutual understanding (fairly to be inferred from their conduct, declarations and attendant circumstances) that compensation therefor is to be provided in the will of the person receiving the benefit of such services, and the latter dies intestate or fails to make such provision, a cause of action accrues in favor of the person rendering the services," citing cases. And the Court goes on to elaborate on the method of enforcing such claim. What is said there is appropriate and applicable to factual situation in hand, and need not be repeated.

Second: It is contended that the trial judge erred in declining to submit an issue tendered by defendant pertaining to the three-year statute of limitations as alleged in the answer, and to charge the jury in respect thereto. In this connection, "When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time." *Stewart v. Wyrick, supra,* and cases cited. Indeed, under like circumstances, it follows that payment for advancements made would not become due until death of the recipient of the advancements. Hence the court properly declined to submit the issue, and instructions on the subject would have been inappropriate.

Lastly, the matters to which other assignments of error are directed fail to show error sufficient to justify disturbing the verdict of the jury.

Other exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, are taken as abandoned by him. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562-3.

In the judgment below, there is

No Error.

JOHN O. SMITH v. MYRTLE IRENE KINNEY SMITH (BURROW)

(Filed 20 November, 1957)

1. **Contempt of Court § 3: Divorce and Alimony § 20—**

A decree of court entered in divorce proceedings that the husband, pursuant to the agreement of the parties, should pay a stipulated sum monthly for the support of the child of the marriage in the custody of the mother, is sufficient in form to be enforced by attachment for contempt, G.S. 50-13, since even though the payments were fixed by consent they were decreed by the court to be fulfilled by the husband.

2. **Contempt of Court § 6: Divorce and Alimony § 20—Court must find that disobedience of decree was willful in order to impose punishment for contempt.**

Where, upon the hearing of an order to show cause why the husband should not be attached for contempt for failure to make payments for the support of his child as decreed by the court in accordance with an agreement between husband and wife, the husband offers evidence that he reduced the amount of the monthly payments for the support of the child because the mother had breached the agreement between the parties, not incorporated in the decree, that the husband should take the child as a dependent for income tax deduction, and that he was unable to make payments in excess of the smaller sum, it is error for the court to adjudge the husband in contempt without a finding that his failure to comply with the terms of the decree was willful.

APPEAL by plaintiff from *Sink, E. J.*, at September Term, 1957, of RANDOLPH.

Contempt proceedings in civil action for absolute divorce.

The plaintiff husband instituted the action. It was tried at the December Term, 1952, and resulted in a decree of absolute divorce. At the same term the presiding judge entered an order fixing custody and providing for the support of John Wayne Smith, child of the parties. The pertinent parts of the order are as follows:

"This cause coming on to be heard before the undersigned Judge Presiding at the December 1952 Civil Term of Superior

Court of Randolph County on the matter of custody of John Wayne Smith, age 5, the child of the parties hereto, and the provision of maintenance and support for said child, and it appearing to the Court that the parties have agreed to such matters:

"It is, therefore, ordered, adjudged and decreed pursuant to the agreement of said parties that Myrtle Irene Kinney Smith shall be, and she is hereby awarded the permanent custody of the minor child, John Wayne Smith, and that the plaintiff shall so long as he is a member of the U. S. Army, regular or reserve on active duty, guarantee that the sum of $77.10 be deposited in the office of the Clerk of Superior Court of Randolph County monthly beginning December, 1952, to be paid by the Clerk to Myrtle Irene Kinney Smith for the use and benefit of the plaintiff's son, John Wayne Smith. That the plaintiff shall have deposited this monthly sum and it shall come from either his quarters allowance, dependency pay of the U. S. Army, or from his own pay regardless of his rank or dependency pay or quarters allowance by the U. S. Government and shall continue so long as he stays in the Armed Forces."

There has been no modification of the foregoing order. The child is still in the custody of the mother. Both parents have remarried.

On motion of the defendant and by order of Judge Olive dated 3 September, 1957, the plaintiff was required to show cause why he should not be attached for contempt for failure to comply with the terms of the former order. On return of the order to show cause, the motion of the defendant was heard before Judge SINK at the September, 1957, Term of court. The plaintiff offered evidence tending to show that for some considerable time after the original order was entered he made the required monthly payments of $77.10 for the support of the child; that thereafter he reduced the monthly payments to $44.10; that in all he has paid the sum of $4,542.86 for the support of the child. The plaintiff by answer, used as an affidavit, asserted that when the original order was entered in 1952 it was agreed between the parties, though not incorporated in the order, that the plaintiff, in recognition of the payments he was to make for the support of the child, should claim him as a dependent for income tax purposes; that the defendant thereafter breached the agreement and claimed the child as a dependent for herself for income tax purposes; that the Federal Department of Internal Revenue has allowed the defendant's claim and has disallowed the plaintiff's; that as a result, a deficiency levy has been made against the plaintiff by the Federal Government. The plaintiff in his answer asserted

he is unable to pay more than $44.10 per month for the support of the child and prayed the court that the original order be modified so as to require the payment of only that amount.

At the conclusion of the hearing Judge Sink entered an order, dated 30 September, 1957, in which he found and concluded that the collateral agreement asserted by the plaintiff was no defense to the citation for contempt, and held as a matter of law that the plaintiff is in contempt of the court.

From the order entered in accordance with the foregoing ruling, the plaintiff appeals.

Ottway Burton for plaintiff, appellant.
No counsel *contra.*

JOHNSON, J. The order requiring the plaintiff to make payments for the support of his child is sufficient in form to be enforced by attachment for contempt. True, the order was entered by consent of the parents, but even so, the child was under the protective custody of the court. G.S. 50-13. And the terms of the order in respect to maintenance payments to be made by the father, though fixed by consent, were nonetheless decreed by the court to be fulfilled by the father. The case is controlled by the principles applied in *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576. The decision in *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118, is factually distinguishable.

However, the order attaching the plaintiff for contempt is fatally defective in that it is not supported by a finding of fact that the conduct of the plaintiff in failing or refusing to make the payments required by the former order of the court was willful. Our contempt statute, G.S. 5-1, provides: "Any person guilty of any of the following acts may be punished for contempt: . . . 4. Willful disobedience of any process or order lawfully issued by any court." Our decisions uniformly hold that in contempt proceedings it is necessary for the court to find the facts supporting the judgment and especially the facts as to the purpose and object of the contemner, since nothing short of "willful disobedience" will justify punishment. In *re Odum,* 133 N.C. 250, 45 S.E. 569; *West v. West,* 199 N.C. 12, 153 S.E. 600; In *re Hege,* 205 N.C. 625, 172 S.E. 345; *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403; *Ponder v. Davis,* 233 N.C. 699, 65 S.E. 2d 356.

For failure of the court to find the necessary supporting facts, the order must be stricken out, and the cause will be remanded for further proceedings. See *Basnight v. Basnight,* 242 N.C. 645, 89 S.E. 2d 259.

Error and Remanded.

MRS. BLANCHE W. HUNTER v. M. L. FISHER, M. H. CLARK, AND H. S. KIMREY, T/A WACCAMAW OIL TRANSPORT COMPANY, AND JAMES M. CAMERON, ORIGINAL DEFENDANTS,
and
SILAS N. HUNTER, ADDITIONAL DEFENDANT.

(Filed 20 November, 1957)

1. **Damages § 13a—**

Instruction in this case on the measure of damages for personal injury, including medical expenses, loss of time, suffering, both past and prospective, *held* without prejudicial error.

2. **Automobiles § 41h—**

Evidence *held* sufficient to support finding that additional defendant was negligent in that he made a left turn in the original defendant's line of travel without ascertaining the movement could be made in safety and that such negligence was one of the proximate causes of the accident and resulting injury to the passenger in the additional defendant's vehicle.

3. **Trial § 31b—**

Where the court correctly charges on all essential features of the case, a party desiring additional instructions or amplification must aptly tender request therefor.

APPEAL by plaintiff and by the additional defendant from *Huskins, J.*, Regular B. Civil Term, MECKLENBURG Superior Court.

Civil action for damages alleged to have been sustained by the plaintiff and proximately caused by the negligence of the original defendants in a motor vehicle collision at North Graham and West 11th Streets in the City of Charlotte. Involved in the accident were a Ford automobile operated and owned by Silas N. Hunter, plaintiff's husband, and a tractor-trailer unit operated by James M. Cameron and owned by the other original defendants trading as Waccamaw Oil Transport Company. The plaintiff was a passenger in her husband's Ford. The original defendants, upon motion, had Silas N. Hunter made an additional party defendant for the purpose of contribution. The jury answered the issues as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant James M. Cameron, as alleged in the complaint?

Answer: Yes.

"2. If so, what amount of damages is the plaintiff entitled to recover of the original defendants?

Answer: $5,000.00.

"3. Did the defendant, Silas N. Hunter, by his joint and concurring negligence contribute to the injuries and dam-

ages of the defendant as alleged in the cross action against him?

Answer: Yes."

From a judgment that the plaintiff recover of the original defendants $5,000.00, and that the original defendants recover from the additional defendant the sum of $2,500.00, the plaintiff and the additional defendant appealed.

Blakeney & Alexander, By: J. W. Alexander, Jr., Ernest W. Machen, Jr., for plaintiff, appellant.

Helms & Mulliss, James B. McMillan, for additional defendant Hunter, appellant.

Kennedy, Covington, Lobdell & Hickman, By: Hugh L. Lobdell, for original defendants, appellees.

HIGGINS, J. The trial of this cause developed into a contest between the plaintiff and the additional defendant on the one side and the original defendants on the other. Each sought to have the jury find the collision and resulting damages were caused by the negligence of the other. The evidence was voluminous and in conflict with respect to the traffic lights and the right of way. The jury found that both drivers were negligent. The evidence was sufficient to support the findings.

The assignment of error mainly relied upon by the plaintiff relates to the Court's charge on the issue of damages. After reviewing in detail the evidence of plaintiff's injuries, the Court charged:

"The rule of law . . . with respect to damages is as follows: If Mrs. Hunter is entitled to recover anything at all, she is entitled to recover as damages one compensation in a lump sum for all injuries past and prospective in consequence of the defendants' wrongful or negligent acts. These are understood to embrace indemnity for nursing and medical expenses and loss of time, if she had any loss of time, or loss from inability to perform ordinary labor if she had any such loss, and capacity to earn money . . . She is to have a reasonable satisfaction, if she be entitled to anything at all, for loss of both bodily and mental powers, or for actual suffering both of body and mind which are the immediate and necessary consequences of the injury, and it is for the jury to say under all the circumstances what is a fair and reasonable sum which the defendants should pay the plaintiff by way of compensation for the injuries she has sustained. The age and occupation of the injured party . . . the nature and extent of her business . . . the value of her services, the amount she was earning

> . . . or whether she was employed or unemployed, are all matters properly to be considered by the jury in arriving at the amount of damages. The sum fixed by the jury should be such as fairly compensates her for injuries suffered in the past and those likely to occur in the future. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective."

The foregoing charge is in substantial compliance with the rule for the assessment of damages in cases of this character. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163; *Mintz v. R. R.*, 233 N.C. 607, 65 S.E. 2d 120; *Helmstetler v. Power Co.*, 224 N.C. 821, 32 S.E. 2d 611; *Smith v. Thompson*, 210 N.C. 672, 188 S.E. 395; *Patrick v. Bryan*, 202 N.C. 62, 162 S.E. 207; *Campbell v. R. R.*, 201 N.C. 102, 159 S.E. 327; *Cole v. Wagner*, 197 N.C. 692, 150 S.E. 339; *Mangum v. R. R.*, 188 N.C. 689, 125 S.E. 549; *Murphy v. Lumber Co.*, 186 N.C. 746, 120 S.E. 342; *Batts v. Tel Co.*, 186 N.C. 120, 118 S.E. 893; *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421.

The evidence was sufficient to support the finding the additional defendant was negligent in that he made a left turn in the original defendant's line of traffic without ascertaining the movement could be made in safety and that such negligence was one of the proximate causes of the accident and resulting injury to the plaintiff. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Smith v. Supply Co.*, 214 N.C. 406, 199 S.E. 392.

The trial judge reviewed the evidence and correctly charged on all essential features of the case. If additional instructions or amplification were desired by either appellant, request for them should have been made in apt time. *Metcalf v. Foister*, 232 N.C. 355, 61 S.E. 2d 77. Reason to disturb the verdict does not appear.

On plaintiff's appeal

No error.

On additional defendant's appeal

No error.

STATE v. ERNEST ROOSEVELT ST. CLAIR

(Filed 20 November, 1957)

1. Criminal Law §§ 135, 141—

A judgment that defendant pay the costs and a fine in a stipulated amount is a final judgment, and further provision in the judgment that defendant not be convicted of a similar offense for a period of twelve months is merely surplusage.

2. Criminal Law § 169—

Where it appears that on a prior appeal, there was no error in the trial, but through inadvertence the cause was remanded for final judgment when in fact the judgment entered in the superior court, as distinguished from that entered in the recorder's court, was a final judgment, upon subsequent appeal from the judgment entered after remand, that judgment will be stricken and the original judgment of the superior court declared in effect.

APPEAL by defendant from *Rousseau, J.*, at August 1957 Term, of CABARRUS.

Criminal prosecution upon a warrant issued in the County Recorder's Court of Cabarrus County, as the record and addendum to record show, charging defendant with operation of a motor vehicle upon public highway while under the influence of intoxicants in violation of G.S. 20-138.

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

Llewellyn & Green, Marshall B. Sherrin, John R. Boger, Jr., for defendant appellant.

WINBORNE, C. J.: By reference to the opinion on appeal of this case reported in 246 N.C. 183, 97 S.E. 2d, 840, no error was found in the matters to which assignments of error relate. However, in the statement of the case, paragraph 4, on which the opinion was made to rest, the judgment of the Recorder's Court of Cabarrus County as shown in addendum to the record, was inadvertently referred to, instead of the judgment of the Superior Court "that the defendant pay fine of $100 and cost; and that he be not convicted of a similar offense for a period of 12 months," entered at the October 1956 Term,—and pursuant thereto, in the last paragraph of the opinion, the cause was remanded for proper judgment on verdict rendered.

In this connection the Court holds that the judgment of Superior Court that the defendant pay fine of $100 and cost is a final judgment. *S. v. Griffin,* 246 N.C. 680, ... The super-added provision is merely surplusage. Consequently the order remanding the cause to Superior Court of Cabarrus County for judgment, and the judgment rendered pursuant thereto at the August 1957 Term of Superior Court of said County are hereby striken out. And the original opinion as amended herein will be, and is upheld.

No error.

STATE v. DAVID HARAM LEE

(Filed 20 November, 1957)

1. **Automobiles § 75: Constitutional Law § 36: Criminal Law § 131—**

G.S. 20-179 fixes no maximum period of imprisonment as punishment for the first offense of a violation of G.S. 20-138, and therefore judgment of imprisonment for not less than 18 months nor more than 24 months is within the limitation authorized by statute and therefore cannot be held cruel or unusual in the constitutional sense. Constitution of North Carolina, Art. I, Sec. 14.

2. **Constitutional Law § 36: Criminal Law § 131—**

The 8th Amendment to the Federal Constitution prohibiting the infliction of cruel and unusual punishment is a limitation upon the Federal Government, and not upon the States.

3. **Criminal Law § 132—**

Sentence upon conviction of violating G.S. 20-138 that defendant be imprisoned for not less than 18 months nor more than 24 months is an indeterminate sentence authorized by G.S. 148-42.

APPEAL by defendant from *Seawell, J.*, April Criminal Term 1957 of JOHNSTON.

Criminal prosecution upon a bill of indictment charging the defendant with unlawfully driving an automobile upon a public highway within the State, while under the influence of intoxicating liquor, a violation of G.S. 20-138.

The defendant, who was represented by his counsel, Albert A. Corbett, entered a plea of *nolo contendere* to the indictment.

From a judgment of imprisonment of not less than 18 months nor more than 24 months, the defendant appeals.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

E. R. Temple for defendant appellant.

PARKER, J. The State's evidence shows that the defendant was operating his automobile upon a public highway within the State in a drunken condition at a terrific speed, and that an elderly constable, who attempted to apprehend him, was forced from, or ran off, the highway, and was killed.

Defendant's assignment of error that the judgment of the court was the infliction of cruel or unusual punishment within the meaning of Art. 1, Sec. 14, of the State Constitution, is overruled. G.S. 20-179 fixes no maximum period of imprisonment as punishment for the first offense of a violation of G.S. 20-138, and it is well settled law in this jurisdiction that when no maximum time is fixed by the statute an imprisonment for two years

will not be held cruel or unusual punishment, as prohibited by Art. I, Sec. 14, of the State Constitution. *S. v. Driver,* 78 N.C. 423; *S. v. Miller,* 94 N.C. 904; *S. v. Farrington,* 141 N.C. 844, 53 S.E. 954; *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; *S. v. White,* 230 N.C. 513, 53 S.E. 2d 436. The judgment entered in this case was within the limits authorized by G.S. 20-179. *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77; *S. v. White,* 246 N.C. 587, 90 S.E. 2d 772.

Defendant also invokes the 8th Amendment to the U. S. Constitution, with its prohibition of cruel and unusual punishment. This amendment is a limitation upon the Federal Government, and not upon the States. *Collins v. Johnston,* 237 U. S. 502, 510; 59 L. Ed. 1071, 1079; *Pervear v. Commonwealth,* 72 U.S. 475, 18 L. Ed. 608; *Barron v. Baltimore,* 7 Pet. 243, 8 L. Ed. 672; *S. v. Blake,* 157 N.C. 608, 72 S.E. 1080.

The indeterminate sentence imposed was authorized by G.S. 148-42.

Defendant's other assignments of error have been examined, and they are without merit.

In the bill of indictment the defendant's name is given as David Lee. The case on appeal, which was settled by Judge Seawell, is entitled *State v. David Haram Lee.* The record states that the defendant David Haram Lee tendered to the solicitor his statement of the case on appeal, which was signed by E. R. Temple, his attorney of record in this Court.

In the trial below we find

No error.

STATE v. DAVID STEPHENSON

(Filed 20 November, 1957)

Criminal Law § 127—

Upon plea of guilty to a charge of public drunkenness, G.S. 14-335, sentence of defendant "to the roads for a term of 30 days" is not in compliance with G.S. 148-30 or G.S. 148-32, and upon appeal the judgment must be vacated and the cause remanded for a new and proper judgment.

APPEAL by defendant from *Fountain, Special Judge,* August Term, 1957, of HARNETT.

On defendant's appeal from judgment of Recorder's Court of Dunn, this case came on for trial in superior court on the original warrant which charged, *inter alia,* that defendant on or about July 1, 1956, did unlawfully and wilfully "engage in public drunkness and disorderly conduct at a public place in town of Dunn to wit: the bus station," etc.

As to what occurred in the superior court, the record shows the following, nothing more:

"Defendant plead guilty to public drunkenness, whereupon the defendant was sentenced to the roads for a term of 30 days. Defendant in open court gives notice of appeal to the Supreme Court of North Carolina . . ."

Defendant's sole assignment of error is that said judgment is "incomplete, illegal and void."

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

E. R. Temple for defendant appellant.

PER CURIAM. Upon his plea of guilty to the charge of public drunkenness, defendant was subject to punishment as provided by G.S. 14-335. In such case, where the judgment is one of imprisonment, the sentence imposed should be as provided by G.S. 148-30 or by G.S. 148-32. Also, see G.S. 15-6.

The sentence imposed by the judgment *as appears in the record* was not in compliance with G.S. 148-30 or with G.S. 148-32. Hence, since defendant's appeal constitutes an exception thereto, the judgment is vacated; and the cause is remanded for a new and proper judgment upon defendant's plea of guilty to the charge of public drunkenness.

We are not unmindful that the judgment *as recorded* may reflect the interpretation placed thereon by the clerk who prepared the minutes rather than the judgment as pronounced by the presiding judge.

Remanded for proper judgment.

STATE v. DAVID STEPHENSON

(Filed 20 November, 1957)

APPEAL by defendant from *Fountain, Special Judge,* August Term, 1957, of HARNETT.

Defendant was, at the November Term 1955 of the Superior Court of Harnett County, placed on trial on a bill of indictment charging him with breaking and entering. The bill signed by the foreman of the grand jury with the name of the witness examined checked was returned into court reading: "Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found——A TRUE BILL." Defendant pleaded not guilty. The jury returned a verdict of

guilty, prison sentence of five to seven years was imposed and suspended and defendant placed on probation for a term of five years with a special provision "that defendant not possess or drink any alcoholic beverages of any kind during the period of probation."

At the August Term 1957 defendant entered a plea of guilty to a charge of public drunkenness on 1 July 1956.

On motion to put the suspended sentence into effect a hearing was had. Judge Fountain found a wilful violation of the terms of probation including, *inter alia,* public drunkenness in accord with defendant's plea. He ordered the suspended sentence into effect. Defendant appealed.

Attorney General Patton and Assistant Attorney General Moody for the State.

E. R. Temple for defendant appellant.

PER CURIAM. No right of appeal is given. G.S. 15-180; *S. v. Tripp,* 168 N.C. 150, 83 S.E. 630; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525. No error appears on the record. G.S. 15-141. *S. v. Harrison,* 104 N.C. 728.

The motion of the Attorney General to dismiss is allowed.

Appeal dismissed.

BEN F. AYCOCK v. THERMAN L. RICHARDSON AND GLENN A. WINECOFF.

(Filed 20 November, 1957)

Appeal and Error § 11—

G.S. 1-279 requiring that an appeal from a judgment rendered in term be taken within ten days after its rendition unless appeal is taken at the trial, and G.S. 1-280 which requires that appellant shall cause his appeal to be entered by the clerk on the judgment docket and notice thereof be given the adverse party, are jurisdictional, and when not complied with the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it.

PURPORTED APPEAL from *Gwyn, J.,* at June 1957 Civil Term, of CABARRUS.

Civil action by plaintiff to recover of defendants personal injury and property damage resulting from alleged actionable negligence of defendants in automobile collision at about 6:20 a.m. on 13 August, 1955, in which defendants answering deny

allegations of negligence against them as set forth in complaint of plaintiff, and plead contributory negligence of plaintiff; and allege cross-action and counterclaim for damages arising out of same automobile collision.

Upon trial in Superior Court plaintiff and defendants each offered evidence bearing upon their respective contentions, and the case was submitted to jury upon issues arising upon the pleadings. The jury for verdict found that the plaintiff was not injured and damaged by the negligence of defendant, as alleged; and, further, that defendants were not injured and damaged as a result of the negligence of the plaintiff, as alleged in the counterclaim and cross-action. Thereupon the court rendered judgment that plaintiff have and recover nothing of defendants in this action, and that defendants recover nothing of plaintiff, and that plaintiff be taxed with the costs of court.

The record and case on appeal do not show that an appeal to Supreme Court was taken at the trial from the judgment so rendered; nor does the record on appeal show notice of such appeal having been given to defendants, and they direct attention to the state of the record.

Llewellyn & Green, M. B. Sherrin for plaintiff appellant.
John Hugh Williams for defendants appellees.

PER CURIAM. It is provided by statute, G.S. 1-279, that the appeal from a judgment rendered in term must be taken within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient. And it is provided by statute, G.S. 1-280, that within the time prescribed in G.S. 1-279 the appellant shall cause his appeal to be entered by the Clerk on the judgment docket and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient.

Interpreting these two statutes the Court holds the provisions are jurisdictional, and unless complied with this Court acquires no jurisdiction of the appeal, and must dismiss it. See *Mason v. Commrs. of Moore*, 229 N.C. 626, 51 S.E. 2d, 6, and cases cited.

Moreover, the Clerk of this Court, at its direction, has obtained from Clerk of Superior Court of Cabarrus County certificate in which he certifies that: "I have examined the minutes in the above entitled action; that said minutes contain no entries of appeal either by the plaintiff or by the defendant."

Nevertheless, in case in hand, the Court has reviewed the record and purported case on appeal, and finds no prejudicial error. The case appears to have been fairly and fully presented to the

jury, and the jury has found that neither plaintiff nor defendants were guilty of negligence proximately causing the alleged injuries and damage.

Appeal dismissed.

STATE v. L. D. ALLEN, JR.

(Filed 20 November, 1957)

1. **Criminal Law § 26—**

Suspension of the hearing of a case before the jury has been impaneled will not support a plea of former jeopardy.

2. **Escape § 4—**

Evidence *held* sufficient to be submitted to the jury in this prosecution of defendant for aiding and assisting a prisoner to escape with knowledge that the prisoner had escaped from the prison to which he was lawfully assigned.

APPEAL by defendant from *Seawell, J.*, June, 1957 Term, JOHNSTON Superior Court.

Criminal prosecution upon a two-count bill of indictment charging (1) conspiracy with Hoke Smith to aid and assist him in escaping from a prison camp to which he was lawfully committed, and (2) the substantive offense of aiding and assisting Hoke Smith in the escape, having knowledge that he had escaped from the prison to which he was lawfully assigned. The Court withdrew the first count and the jury returned a verdict of guilty on the second. From a jail sentence of not less than 18 nor more than 24 months, the defendant appealed.

George B. Patton, Attorney General, T. W. Bruton, Assistant Attorney General, for the State.
L. L. Levinson, for defendant, appellant.

PER CURIAM. The defendant's plea of former jeopardy cannot be sustained. At the time hearing of this case was suspended for a short time for the consideration of other court matters, the jury had not been impaneled. Hence jeopardy had not attached. *State v. Brock*, 234 N.C. 390, 67 S.E. 2d 282. The evidence was sufficient to require the submission of the case to the jury and to sustain the verdict.

No error.

STATE v. CHESTER CROWDER

(Filed 20 November, 1957)

APPEAL by defendant from *Olive, J.*, September Term 1957 of RANDOLPH.

The defendant was tried on 18 July 1957 in the Recorder's Court of Randolph County, North Carolina, upon two warrants. One warrant charged that the defendant on 6 April 1957 did unlawfully and wilfully possess three gallons of nontax-paid whiskey and that he did possess the same for the purpose of sale. The other warrant charged that the defendant on 18 April 1957 did unlawfully and wilfully possess one-half gallon of nontax-paid whiskey and that he did sell to one C. W. Williams one-half gallon of nontax-paid whiskey for five dollars.

The defendant was convicted in the Recorder's Court on all counts set out in the warrants. From the judgment entered on the verdict he appealed to the Superior Court. In the Superior Court the cases were consolidated for trial. The jury returned a verdict of guilty as charged. From the judgment imposed, the defendant appeals, assigning error.

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

Deane F. Bell, for defendant.

PER CURIAM. The State's evidence was sufficient to require its submission to the jury. Moreover, we have carefully examined each exception and assignment of error set out in the record and, in our opinion, no prejudicial error that would justify a new trial is made to appear.

The verdict and judgment of the court below will be upheld.

No error.

HAYWOOD DUKE, DOING BUSINESS AS HOTEL KING COTTON v. STATE OF NORTH CAROLINA EX REL EUGENE G. SHAW, COMMISSIONER OF REVENUE.

(Filed 27 November, 1957)

1. **Taxation § 38—**

A taxpayer must follow procedure prescribed by statute to challenge the validity of a tax or the interpretation of the tax laws by those charged with the responsibility of collecting taxes.

2. **Taxation § 30—**

The Legislature has power to levy sales and use taxes. G.S. 105, Arts. 5 and 8.

3. Administrative Law § 4—

Provision for judicial review of an administrative ruling, G.S 143-306, contemplates the review of an administrative order entered in a quasi-judicial hearing in which the parties are permitted an opportunity to offer evidence and a decision is rendered applicable to a specific factual situation, and the statute does not authorize the filing of a petition in the superior court seeking an advisory opinion on the correctness of an administrative interpretation of a statute.

4. Same: Taxation § 38—

A taxpayer seeking to challenge his liability for a particular tax has two remedies: he may pay the tax under protest and maintain an action against the State for its recovery, G.S. 105-267; or he may, without payment of the tax assessed by the Commissioner of Revenue, apply to the Tax Review Board for determination of his liability for the tax upon the specific factual situation, and appeal from the decision of the Tax Review Board to the Superior Court by complying with the statutory procedure. G.S. 105-241.3.

5. Same—

The administrative procedure under G.S. 143-306 to determine tax liability applies by appeal to the Superior Court from determination of the Tax Review Board upon a particular factual situation and does not lie by petition directly to the Superior Court to have an administrative interpretation promulgated by the Commissioner of Revenue declared to be erroneous, unlawful or improper. G.S. 105-262.

APPEAL by plaintiff from *Preyer, J.*, September 1957 Regular Civil Term of WAKE.

Petitioner filed in the office of the clerk of the Superior Court a paper which he denominates *"Petition for Review."* A copy of his petition was served on the Commissioner of Revenue.

As the basis for judicial action the petition states: The Commissioner of Revenue prepared regulations for the interpretation and enforcement of the sales and use tax articles of the Revenue Act; these regulations, approved by the Tax Review Board, were, on 25 June 1957, filed with the Secretary of State; the regulations interpreted supplies and equipment sold to hotels, motels, and others renting rooms to be sales to a consumer and as such subject to 3% sales tax. The petition lists a variety of items of personal property customarily purchased by the operators of hotels such as beds, bedding, bathroom supplies, chairs, rugs, desks, tables, lamps, chests, bureaus, vanities, soaps, towels, curtains, air conditioners, radios, television sets, and numerous other items of tangible personal property. It avers that petitioner operates a hotel in Greensboro, and he and other operators of hotels, motels, and lodging houses will, if the regulations are not invalidated, have to pay a tax not authorized by law. He prays that the court act under the provisions of Article 33, Ch. 143, of the General Statutes and declare the regulations

as prepared and approved erroneous, unlawful, and improper interpretations of Ch. 1340, S.L. of 1957, which amended the Revenue Act, and adjudge and declare that purchases which may be made by operators of hotels and other places listed in the regulations are not subject to the 3% tax prescribed by said statute.

The Commissioner of Revenue demurred for that (1) the petition did not state a cause of action since it did not allege the payment by or assessment of any taxes against petitioner; (2) the court was without jurisdiction since the State had not consented to be sued in the manner attempted.

The demurrer was sustained and petitioner appealed.

Ehringhaus & Ellis for petitioner appellant.

Attorney General Patton, Assistant Attorneys General Behrends and Abbott, and Kenneth Wooten of Staff for respondent appellee.

RODMAN, J. The monies to maintain and operate our public school system, nine State colleges, a University, Departments of Health, Public Welfare, mental and correctional institutions, a retirement system for State employees, to pay principal and interest on monies borrowed, as well as the many other general functions of State government are provided by taxes of the kind and character specified in Ch. 105 of the General Statutes as amended by Ch. 1340, S.L. of 1957. Appropriations for these General Fund purposes exceed for the current fiscal year $200,000,000.

Since 1933 the sales tax, supplemented in 1937 by the use tax, has been a vital factor in providing General Fund revenues. The sales-use tax is counted upon to produce approximately one-third of the current year's General Fund revenues. This simple factual statement demonstrates the wisdom of our rule that one who would challenge the validity of a tax or the interpretation of the tax laws by those charged with the responsibility of collecting must follow the method prescribed by the Legislature. *Gill, Comr. of Revenue v. Smith,* 233 N.C. 50, 62 S.E. 2d 544; *Employment Security Com. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580; *Unemployment Comp. Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Insurance Co. v. Unemployment Comp. Com.,* 217 N.C. 495, 8 S.E. 2d 619; *Caldwell County v. Doughton,* 195 N.C. 62, 141 S.E. 289; *Hart v. Commissioners,* 192 N.C. 161, 134 S.E. 403; *Mfg. Co. v. Comrs.,* 189 N.C. 99, 126 S.E. 114.

The power of the Legislature to levy taxes of the character provided in Articles 5 and 8 of Ch. 105 of the General Statutes has long been settled. *Stedman v. Winston-Salem,* 204 N.C. 203.

167 S.E. 813; *Powell v. Maxwell,* 210 N.C. 211, 186 S.E. 326; *Hinson v. Lott,* 8 Wall 148, 19 L. ed. 387; *Ward v. Maryland,* 12 Wall 418, 20 L. ed. 449.

The prompt collection of taxes legally owing is facilitated by administrative interpretations thoughtfully made and widely publicized. Recognizing this fact, the Legislature of 1955 imposed on the Commissioner of Revenue the duty of initiating such regulations as might be necessary and useful in assessing and collecting revenues. These regulations cannot be promulgated until submitted to and approved by the Tax Review Board. When so approved, the Commissioner is required to publish the regulations. Ch. 1350, S.L. 1955. G.S. 105-262.

Any interested citizen may procure copy of these regulations and apply the administrator's interpretation of the law to the citizen's tax situation. If, under the regulations, tax liability seems likely, he may present the matter to the Commissioner of Revenue for examination and determination. G.S. 105-241.2. If the Commissioner assesses a tax, the party who deems himself aggrieved may, as provided by statute, protect himself against an illegal assessment. An intolerable situation would be presented if the person charged with the duty of collecting could be prohibited from making an assessment, leaving the person charged with liability the privilege of determining when and how the question should be settled.

Two methods are prescribed for the taxpayer's protection. The first requires the taxpayer to pay the amount asserted to be owing under protest; and when so paid, he may then maintain an action against the State to recover. G.S. 105-267. Historically this method has been available to taxpayers for more than half a century. Rev. 1905, Sec. 2855.

The remedy afforded by G.S. 105-267 may at times place an undue burden on the taxpayer. The Legislature of 1955 took recognition of that fact and broadened the provisions by which the taxpayer might have his liability determined.

It found ready at hand an appropriate instrument fashioned by the Legislature of 1953, now incorporated as Article 33 of Ch. 143 of the General Statutes. The 1953 statute permits judicial review of any decision rendered by an administrative agency in a proceeding in which the legal rights of specific parties are determined after an agency hearing. G.S. 143-306.

Manifestly this statute contemplated a quasi-judicial hearing in which the parties were permitted an opportunity to offer evidence and a decision rendered applicable to a specific factual situation. *In re Berman,* 245 N.C. 612, 97 S.E. 2d 232.

It does not authorize the filing of a petition in the Superior Court seeking an advisory opinion on the correctness of an ex-

ecutive interpretation of a statute. *Boswell v. Boswell,* 241 N.C. 515, 85 S.E. 2d 899; *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532; *In re Eubanks,* 202 N.C. 357, 162 S.E. 769; *Person v. Board of State Tax Comrs.,* 184 N.C. 499, 115, S.E. 336; *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117, 70 L. ed. 494; 42 Am. Jur. 590.

The 1955 Legislature gave a person charged with tax liability the benefit of this statute. Ch. 1350, S.L. 1955. When the Commissioner has determined a tax liability exists, the person assessed may now, without the payment of the tax so assessed, apply to the Tax Review Board for a determination of his tax liability. G.S. 105-241.2. The procedure for this method of determining tax liability is set out in detail in the statute. The Board, after a review of the factual situation and the application of the statute to that situation, renders its decision. If not satisfied with the decision of the Tax Review Board, an appeal may be taken by complying with statutory procedure and without the payment of the tax. This appeal is to the Superior Court. G.S. 105-241.3. The jurisdiction thus conferred on the Superior Court is not original but appellate.

Having taken advantage of the opportunity for a review by the Tax Review Board, the person assessed may, if he so elects, abandon the process of administrative review and seek relief from the Superior Court under its original jurisdiction. G.S. 105-241.4. Of course, if he asks the Superior Court to exercise its original jurisdiction he must, as a condition precedent thereto, pay his tax under protest and sue to recover as provided by G.S. 105-267.

It is immaterial whether the Superior Court determine the taxpayer's liability in an action originally instituted in that court or as an appellate court. The taxpayer is permitted in either event to review the judgment by appeal to this Court. G.S. 105-241.4.

The judgment sustaining the demurrer is

Affirmed.

STATE v. JOSEPH JOHNSON

(Filed 27 November, 1957)

Criminal Law § 15: Indictment and Warrant § 11½—Defendant waives any irregularity in issuance of warrant by failing to object in apt time.

A warrant charging every essential element of the offense was issued by a municipal recorder's court, and upon the hearing the cause was transferred to the county recorder's court upon defendant's plea

in abatement to the jurisdiction of the municipal recorder's court. Defendant was tried in the county recorder's court and in the superior court on appeal upon the original warrant. *Held:* Defendant, by making no plea in abatement or objection to the jurisdiction in either the county recorder's court or the superior court, waives the right to object to any irregularity in the issuance of the warrant, and his plea in abatement in the Supreme Court on further appeal cannot be sustained.

APPEAL by defendant from *Seawell, J.*, June Term 1957 of JOHNSTON.

This is a criminal action. Originally, the defendant was charged in a warrant issued by the clerk of the Municipal Recorder's Court of Smithfield, North Carolina, on 14 October 1956, "that at and in said county, on or about the 14th day of October, 1956, Joseph Johnson did unlawfully and wilfully operate a motor vehicle on the State highways of North Carolina: (1) in a careless and reckless manner without due regard to the rights and safety of others; (2) while under the influence of intoxicants or narcotics," etc.

When this cause came on for hearing in the Municipal Recorder's Court of Smithfield, the defendant entered a plea in abatement on the ground that said court had no jurisdiction of the person of the defendant or of the cause of action because the offense charged was committed a distance of more than five miles from Smithfield. The defendant alleged in his verified motion that the Recorder's Court of Johnston County had jurisdiction of the offense and the person and was, therefore, the proper court to try the case, and prayed the court to transfer the case to said court for trial. The motion was allowed and the case was so transferred on 29 October 1956.

The defendant was tried in the Recorder's Court of Johnston County on 28 February 1957 on the original warrant and convicted as charged. From the judgment entered he appealed to the Superior Court. The State placed the defendant on trial in the Superior Court, upon the original warrant, on the drunken driving charge only. After hearing the evidence, argument of counsel, and the charge of the court, the jury returned a verdict of guilty.

From the judgment imposed the defendant appeals, assigning error.

Attorney General Patton, Assistant Attorney General Bruton, Assistant Attorney General McGalliard, Assistant Attorney General Behrends for the State.

E. R. Temple for defendant.

DENNY, J. The defendant takes the position in this Court, for the first time, that the judge of the Recorder's Court of Smith-

field committed error in not sustaining his plea in abatement and dismissing the case, instead of transferring it to the Recorder's Court of Johnston County for trial as requested by him in his motion. Consequently, he insists that his plea in abatement interposed in this Court should be allowed and the action dismissed.

The warrant upon which the defendant was tried in the Recorder's Court of Johnston County and in the Superior Court, sufficiently charged the offenses for which he was tried. Moreover, it is disclosed by the record that the offenses charged were committed within the territorial jurisdiction of the Recorder's Court of Johnston County. Furthermore, there is nothing on the face of the warrant to indicate otherwise. The defendant entered no plea in abatement in the Recorder's Court of Johnston County but instead entered a plea of not guilty and went to trial on the warrant as issued by the Municipal Recorder's Court of Smithfield. From his conviction and the judgment imposed in that court, he appealed to the Superior Court where he was tried only upon the charge of drunken driving. He interposed no plea in abatement in the Superior Court, but entered a plea of not guilty and again went to trial on the original warrant.

Here, as in the case of *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642, the defendant makes no contention that the warrant fails to charge the criminal offense for which he was tried, or that the punishment imposed by the court is in excess of that authorized by law for driving a motor vehicle upon the public highways of the State while under the influence of intoxicating liquors or narcotics.

In the last cited case, the defendant contended that the warrant issued in the Trial Justice's Court, on which he was bound over to the Recorder's Court of Edgecombe County, was absolutely void. He was tried upon the warrant in the Recorder's Court and found guilty. From the judgment imposed he appealed to the Superior Court where he was again tried on the original warrant and convicted. The defendant excepted to the judgment entered and appealed to the Supreme Court. This Court, speaking through Parker, J., said: "The defendant by his general appearance in the Trial Justice's Court and the Recorder's Court and his plea of guilty in the Superior Court waived irregularity, if any, in the issuance of the warrant or any objection predicated upon any irregularity in the warrant, provided the warrant charged every element of an assault with a deadly weapon. *S. v. Harris,* 213 N.C. 648, 197 S.E. 142; *S. v. Abbott,* 218 N.C. 470, 11 S.E. 2d 539; *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019; *S. v. Cale,* 150 N.C. 805, 63 S.E. 958; *People v.*

Jury, 252 Mich. 488, 233 N.W. 389. * * * Any defect in the process by which a defendant is brought into court may be waived by him by appearing before the court having jurisdiction of the case. *S. v. Turner, supra; S. v. Cale, supra.* The defendant may waive a constitutional right relating to a mere matter of practice or procedure. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. If the law were otherwise, a defendant could take his chance of acquittal on a trial on the merits and, if convicted, contend that he was not in court."

In the case of *S. v. Harris,* 213 N.C. 648, 197 S.E. 142, the defendant was convicted in the Municipal Court of the City of High Point of operating a motor vehicle upon the public highways of the State while under the influence of intoxicating liquor. He appealed to the Superior Court and upon a trial *de novo* was again convicted and appealed to the Supreme Court. The defendant assigned as error the refusal of the court below to allow his motion in arrest of judgment for the reason that the warrant was not signed by a proper officer. It appears from the record that the defendant entered a general appearance both in the Municipal Court and in the Superior Court. In overruling the assignment of error, this Court said: "Such an appearance was a waiver by the defendant of any objection predicated upon any irregularity in the warrant."

In *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019, the defendant was convicted in the Municipal Court of High Point for having liquor in his possession for the purpose of sale, and he appealed to the Superior Court. In the Superior Court he moved to quash the proceeding on the ground that the officer who issued the warrant had no authority to do so. The defendant was again found guilty and made the same motion in arrest of judgment. This Court said: "There is no defect here in the charge of the offense, and the defendant waived any objections to the regularity of the process by which he had been brought into court by appearing generally in the municipal court and going to trial."

Likewise, in *S. v. Cale,* 150 N.C. 805, 63 S.E. 958, the warrant of the justice was unsigned and the deputation of the special officer was unwritten. The statute, in express terms, requires the one (Revisal Sec. 3158, now G.S. 15-20) to be written and by fair intendment would seem to so require the other (Revisal Sec. 935, now G.S. 151-5). Speaking for the Court, Hoke, J., later C. J., said: "When considered in reference to process by which a defendant may be brought into court on a criminal charge, they may be waived by him, and if a defendant voluntarily appears or is forcibly brought before a court having jurisdiction to hear and determine the cause, and such court does hear and decide it, whatever may be the rights of the defendant

against the officers, *in the absence of other objection*, the defects suggested in the process do not in any way affect the validity of the judgment rendered." (Emphasis added.)

In the case of *S. v. Oliver*, 186 N.C. 329, 119 S.E. 370, the defendant was indicted for false pretense in New Hanover County. After the indictment had been returned, the defendant appeared in court and made a motion for a continuance. The motion was granted and the case set for trial on a day certain at the next term. A plea in abatement was filed on the date set for the trial on the ground that the offense, if committed, was committed in Sampson County and not New Hanover. This Court said, "By procuring the order of continuance, and thereby submitting himself to the jurisdiction of the court, the defendant waived his right to insist upon a plea in abatement."

It is prescribed by G.S. 15-134 that in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement.

This Court stated in *S. v. Williamson*, 81 N.C. 540, "The want of an averment of a proper and perfect venue is not fatal to a bill of indictment where much greater strictness is required than in forms used before a justice, and still less should be deemed essential to the sufficiency of a warrant." *S. v. Francis*, 157 N.C. 612, 72 S.E. 1041.

In light of our decisions, we hold that since the defendant did not enter a plea in abatement in either the Recorder's Court of Johnston County or in the Superior Court, but instead entered a plea of not guilty in these respective courts, and went to trial on the warrant, he waived any defect or irregularity therein and is bound by the judgment from which he now appeals.

In the trial below we find

No error.

STATE v. EDWARD COLLINS, JR.

(Filed 27 November, 1957)

1. **Automobiles § 71: Criminal Law § 38—**

Testimony of an officer that when he apprehended defendant some 45 minutes after the accident in question defendant was in a sordid, drunken condition, and testimony of an expert, based upon a blood test taken while defendant was still in the custody of the officer, that defendant was intoxicated, *held* not too remote in point of time and was competent.

2. Automobiles § 72—Evidence of defendant's guilt of driving on a public highway while under the influence of an intoxicant held sufficient.

Evidence tending to show that defendant drove his automobile on the left side of the highway, crashing into a vehicle being operated in the opposite direction, which had two wheels off the highway on its right side of the road, together with testimony that defendant was in a sordid and drunken condition when apprehended by the officer some 45 minutes after the collision, together with other evidence in the case, considered in the light most favorable to the State, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for driving upon a public highway while under the influence of intoxicating liquor. G.S. 20-138.

APPEAL by defendant from *Olive, J.*, May Criminal Term 1957 of GUILFORD, Greensboro Division.

Criminal prosecution upon two warrants: one, charging the defendant with operating an automobile upon a highway within the State, while under the influence of intoxicating liquor, a violation of G.S. 20-138, and the other, apparently charging him with a violation of G.S. 20-166(c)—duty to stop in event of accident; accident reports—, heard upon appeal by the defendant from a judgment holding him guilty in both cases and imposing punishment upon him in the Municipal County Court of the City of Greensboro.

The defendant entered a plea of Not Guilty in both cases.

At the close of the State's case, the court sustained defendant's motion for a judgment of nonsuit on the warrant apparently charging a violation of G.S. 20-166(c), and overruled his motion for judgment of nonsuit on the warrant charging him with driving an automobile while under the influence of intoxicating liquor. The warrant apparently charging a violation of G.S. 20-166(c) is not in the record. It is referred to as a hit and run warrant.

The jury returned a verdict of Guilty as charged in the warrant charging defendant with driving an automobile upon a highway within the State, while under the influence of intoxicating liquor.

From the judgment imposed, defendant appeals.

George B. Patton, Attorney General, and Kenneth Wooten, Jr., Assistant Attorney General, for the State.

Elreta Melton Alexander for defendant, appellant.

PARKER, J. The State's evidence—the defendant offered none—shows these facts:

About 11:00 p.m., or a little earlier, on 26 December 1956, James Robert Ore was driving an automobile about 15 or 20 miles an hour in a northerly direction on Church Street approximately one-half mile north of Greensboro. He first noticed the

automobile driven by the defendant, which was meeting him, about a city block away. Defendant's automobile was coming over on Ore's side of the highway. Ore pulled his two wheels off the highway, and defendant's automobile hit his automobile, and knocked it off the highway over into a ditch. Defendant's automobile went about 30 feet beyond Ore's automobile. Ore got out of his automobile, and went to the defendant's automobile. The defendant had been thrown out of his automobile, and Ore picked him up. Defendant was holding his head: he seemed like a person who was hurt. He smelt no alcohol on defendant's breath. Ore asked him if he wanted him to carry him to a doctor. He replied, No. Ore left to call an officer. The officer came to the scene in about 15 minutes, and the defendant was gone.

In response to a call State Highway Patrolman W. F. Clay arrived at the scene of the collision about 11:20 p.m. He saw Ore there. A taxicab passed the scene of the collision at 11:45 p.m. The patrolman got in his automobile, and stopped the taxicab about a half mile north of the scene. The defendant was in the taxicab. The defendant had a strong odor of alcohol on his breath, and had urinated in his pants. His speech was incoherent, and he was unable to stand without assistance. He walked with a stagger. In the opinion of the officer, he was drunk. Defendant said he had had nothing to drink, and was trying to get home in the taxicab. The officer saw no cuts, bruises or abrasions on defendant's head. Defendant said his head was not hurting. Defendant told the officer he was driving the automobile that collided with Ore's automobile. The officer explained the blood test system to defendant, and asked him if he would like to have one. The defendant said that he would.

R. B. Davis, Jr., at the defendant's request, drew blood from the defendant at 12:15 a.m. the same night. At the trial defendant's counsel stated to the court "for the record, we will admit that Mr. Davis is an expert in any field that the Solicitor desires to qualify him." The court held that R. B. Davis, Jr., was an expert as a "clinical technologist, chemist, toxicologist and hematologist." Davis testified that the results of the test of defenddant's blood showed the presence of .22% alcoholic concentration in the blood of defendant, and that in his opinion defendant was under the influence of alcohol.

The defendant's assignments of error as to the evidence are without merit, and are overruled.

The defendant assigns as error the failure of the court to allow his motion for judgment of nonsuit, and relies on *S. v. Hough*, 229 N.C. 532, 50 S.E. 2d 496. The facts in that case are distinguishable from the facts here. In the *Hough* case all the evidence as to whether or not the defendant was guilty of the

same offense as in the instant case came from officers who reached the scene of the wreck 25 or 30 minutes after it occured. The Court said: "If the witnesses who observed the defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of the injuries he had just sustained, we do not see how the jury could do so."

We held in *S. v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454, which was a prosecution for drunken driving, that evidence that defendant was found intoxicated at his place of business some 12 or 14 hours after the time of the offense charged, without evidence that the defendant was continuously intoxicated during this time, was incompetent as evidence. We have also held in *Raynor v. R. R.,* 129 N.C. 195, 39 S.E. 821, that evidence that a passenger was drunk at 3:45 in the afternoon is inadmissible to corroborate evidence that he was drunk at 11:00 o'clock in the forenoon. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263, was a prosecution for drunken driving. A State Highway Patrolman reached the scene of the accident about 10 minutes after it occurred, and testified that in his opinion the defendant was intoxicated. This Court held the evidence made out a case for the jury.

S. v. Barham, 244 N.C. 80, 92 S.E. 2d 434, is a case in which a *Per Curiam* Opinion was written. The evidence is not set forth in the opinion. An examination of the record on file in the Clerk's Office shows these facts: State Highway Patrolman Robert R. East testified that his investigation disclosed that the wreck occurred a few minutes after 8:00 o'clock p.m. He reached the scene of the wreck about 9:00 o'clock p.m., 15 minutes after he received a call. There he saw two wrecked cars and the defendant. In the opinion of the officer the defendant was very much under the influence of intoxicating liquor. The defendant told the officer he had had nothing to drink, and was driving the car. The door of the defendant's car was open, and a bottle of whisky was lying on the ground near the right-hand door of his car. Defendant said he knew nothing about this whisky. W. O. Nuckles, a Police Officer of the Town of Wake Forest, arrived at the scene after Mr. East did. In his opinion the defendant was under the influence of intoxicating liquor. The State had only two witnesses: the defendant offered no evidence. The Court held that the evidence was sufficient to support the defendant's conviction of driving an automobile on the highways of the State, while under the influence of intoxicating liquor.

In *Commonwealth v. Lyseth,* 250 Mass. 555, 146 N.E. 18, the defendant was convicted of operating an automobile while under the influence of intoxicating liquor. The Court said:

"The only statement in the record as to the testimony is, that in addition to other evidence there was evidence that the defendant when seen by the witnesses at the place of the accident within half an hour thereafter, was under the influence of intoxicating liquor. We accordingly assume the jury could find, that the charge in the complaint had been proved."

The State's evidence shows that the defendant drove his automobile over on Ore's side of the highway, and crashed into Ore's automobile, when Ore had two wheels of his automobile off the highway. Some 45 minutes later defendant passed the scene of the wreck in a taxicab. He was stopped by Patrolman Clay, who testified he was in a sordid, drunken condition. Defendant told the Patrolman he was trying to get home. Considering this evidence, and the other evidence, in the light most favorable to the State, and giving to the State the benefit of every reasonable inference which may fairly be drawn from the evidence, (*S. v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241), the evidence of defendant's intoxication was not too remote in point of time, or too speculative, to permit a legitimate inference that the defendant was under the influence of intoxicating liquor at the time of the collision of his automobile with Ore's automobile. The evidence was sufficient to carry the State's case to the jury, and the court properly overruled his motion for judgment of nonsuit.

The defendant's assignments of error to the charge have been considered, and are overruled.

No error of law is shown sufficient to justify a new trial.

No Error.

STATE v. EDWARD COLLINS, JR.

(Filed 27 November, 1957)

1. **Criminal Law §§ 135, 143—**

Where the defendant accepts conditions under which sentence is suspended and undertakes to comply with such conditions, he cannot, after his breach of the conditions, challenge their validity.

2. **Criminal Law § 135—**

Upon conviction of defendant for driving on a public highway while under the influence of intoxicating liquor, suspension of execution of a road sentence on condition that defendant not be convicted of a similar offense for a period of three years, is not unreasonable or for an unreasonable length of time.

3. Same—

Order putting into effect a suspended sentence for condition broken is punishment for the offense of which defendant had been convicted, and not for his breach of conditions of suspension.

APPEAL by defendant from *Olive, J.*, May Criminal Term 1957 of GUILFORD, Greensboro Division.

Appeal by defendant from a judgment putting into effect a suspended sentence.

George B. Patton, Attorney General, and Kenneth Wooten, Jr., Assistant Attorney General, for the State.

Elreta Melton Alexander for defendant, appellant.

PER CURIAM. At the November Term 1955 of the Guilford County Superior Court, Greensboro Division, Judge L. Richardson Preyer Presiding, the defendant pleaded guilty to a bill of indictment charging him with being the driver of an automobile involved in an accident resulting in injury to Charlotte M. Donohoe, and with failing to stop said automobile at the scene of such accident, *et cetera*, a violation of G.S. 20-166. The judgment of the court was that the defendant be confined in the common jail of Guilford County for a term of six months, to be assigned to work under the supervision of the State Highway and Public Works Commission. By consent of defendant in open court, this road sentence was suspended for a period of three years on certain conditions, one of which was that he be not convicted of a similar offense, and particularly of driving an automobile while under the influence of intoxicating liquor, for a period of three years. Judge OLIVE found as a fact that at the May Criminal Term 1957 of the Superior Court of Guilford County, Greensboro Division, over which he was the presiding judge, the defendant was convicted by a jury of driving an automobile upon a highway within the State, while under the influence of intoxicating liquor, and that defendant had violated the condition of the suspended sentence of Judge PREYER in respect to drunken driving within a period of three years from the November Term 1955 of the Guilford County Superior Court, Greensboro Division. Whereupon, Judge OLIVE activated Judge PREYER'S six months road sentence against the defendant. The defendant appealed the case of his conviction for drunken driving at the May Term 1957 of the Superior Court of Guilford County, Greensboro Division, to the Supreme Court, and the Supreme Court on this day has found no error in that trial, *ante*, 244.

The defendant consented to, and accepted the conditions upon which the road sentence was suspended by Judge Preyer,

and having undertaken to comply with them, he cannot, after his failure to do so, challenge their validity now. *S. v. Henderson,* 207 N.C. 258, 176 S.E. 758; *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850.

The condition in Judge Preyer's judgment that the defendant be not convicted of a similar offense, and particularly for driving under the influence of intoxicating liquor, for a period of three years was not unreasonable or for an unreasonable length of time. *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508.

When Judge Olive put into effect the road sentence of Judge Preyer, he imprisoned the defendant for his breach of the criminal law. G.S. 20-138; *S. v. Simmington,* 235 N.C. 612, 70 S.E. 2d 842.

The judgment of Judge Olive is *(S. v. Simmington, supra)* Affirmed.

CARLTON H. WISE v. MARION LODGE

(Filed 27 November, 1957)

1. Automobiles § 25—

The fact that an automobile is being operated at less than the statutory maximum does not relieve the operator of the duty to reduce speed when special hazards exist with respect to pedestrians, traffic or weather conditions, G.S. 20-141 (a), (c), and a speed of 35 to 40 miles per hour on a highway covered with ice and snow may be excessive under the conditions.

2. Automobiles § 13—

It is not negligence *per se* to drive an automobile on a highway covered with snow or ice, but the driver of a vehicle under such conditions must exercise care commensurate with the danger to keep his vehicle under control so as not to cause injury to another vehicle or an occupant thereof by skidding into it.

3. Same—

While the skidding of an automobile is not in itself evidence of negligence, if it is made to appear that the skidding was caused by the failure of the driver to exercise reasonable precaution under conditions and at a time when skidding of the car is probable in the absence of such precaution, such skidding may be evidence of negligence.

4. Automobiles § 41j—

Evidence tending to show that defendant was driving on a highway covered with ice and snow, that she was aware of the condition of the highway and was driving at a speed of 35 to 40 miles per hour

under conditions from which she could, in the exercise of reasonable care, have foreseen that the speed of her car without chains made the skidding of her automobile probable, and that her car skidded into the car being driven in the opposite direction by plaintiff on his right side of the highway, *is held* to take the issue of negligence to the jury.

APPEAL by plaintiff from *Stevens, J.*, March Term 1957 of NASH.

Civil action to recover damages for personal injuries and damages to an automobile.

Upon motion of the defendant, American Security Insurance Company was made a party defendant to the action, and has filed a pleading alleging it has paid to plaintiff the sum of $907.97 by reason of the terms of the contract of insurance between them, and as to this amount it is subrogated to the rights of plaintiff.

From a judgment of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals.

Battle, Winslow & Merrell for plaintiff, appellant.
S. L. Arrington for defendant, appellee.

PARKER, J. Plaintiff's evidence tends to show the following facts: About 7:45 a.m. on 24 January 1956 plaintiff was driving his automobile in a northerly direction on his right-hand side of U. S. Highway 301, approximately eight miles north of Weldon, North Carolina. At the same time the defendant was driving her automobile in a southerly direction on her right-hand side of the same highway about the same distance north of Weldon. The weather was very cold, and the highway was covered with ice. Snow had fallen the night before, and was falling slightly at the time of the collision. The Highway Commission had done nothing to reduce the danger from ice on the highway. The hard-surfaced portion of the highway was twenty-two feet wide with shoulders ten feet wide on each side, which were hard frozen. Plaintiff was travelling slightly upgrade, and the defendant was travelling slightly downgrade. Neither automobile had chains.

When plaintiff first saw defendant's automobile, it was in the proper place in her lane, and her speed was approximately 35 to 40 miles an hour. Her automobile was 70 to 100 feet away, when plaintiff first saw it. At that time plaintiff was going 20 to 25 miles an hour in his right-hand lane of the highway. He told a patrolman the defendant was going 30 to 35 miles an hour, when he first saw defendant's automobile. Plaintiff testified:

"I saw the approaching car and first really noticed it when it began to skid and veered in my direction. The farther it come the more it skidded in my direction. It appearing that

there would be a collision, I took my foot off the accelerator. I did not apply brakes because I knew if I did I would begin skidding. I put my car in low gear to slow it down to keep from skidding and veered slightly to the right. I did not take to the shoulder of the road because it was slushy and icy and there was a drop beyond the shoulder. When the cars came together I was considerably to the right of the center line. Her car from the front of the front door forward was in my right-hand lane, or the east side of the highway, the right-hand lane going north. Before the impact, her car was going southerly, angling toward me all the time. I could not tell whether it was under control. I did not at any time cross the center line into her lane."

The defendant told a State Highway Patrolman that her automobile started skidding on the ice, and she lost control. She also told him she applied her brakes.

In the collision plaintiff and defendant suffered personal injuries, and their automobiles were damaged.

G.S. 20-141 establishes the maximum speed at which motor vehicles are permitted to travel lawfully on the highways of the State, in a business district, in a residential district, and in other places. Section (a) of this statute provides "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." Section (c) of the same statute reads: "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

This Court said in *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670: "The speed of a motor vehicle may be unlawful, however, under the circumstances of a particular case, even though such speed is less than the definite statutory limit prescribed for the vehicle in the place where it is being driven."

One is not negligent *per se* in driving an automobile on a highway covered with snow or ice. *Linden v. Miller,* 172 Wis. 20, 177 N.W. 909, 12 A. L. R. 665.

However, the driver of an automobile on a highway covered with ice or snow must exercise care commensurate with the conditions existing to keep it under control so as not to cause injury to another automobile, or an occupant thereof, on the highway by skidding into it. 5A Am. Jur., Automobiles and

Highway Traffic, Sec. 341; Anno. 58 A. L. R., p. 278 *et seq.*, where many cases are cited.

In *Webb v. Smith*, 176 Va. 235, 10 S.E. 2d 503, 131 A. L. R. 558, the Court said: "The ice on the hard surface was a condition known to the operator of each vehicle, and each was charged with the duty to take care and caution in the operation of his vehicle proportionate to the known and obvious dangerous condition of the highway."

The skidding of an automobile is not in itself, and without more, evidence of negligence. *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688; *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251.

But the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the conditions at the time made such a result probable in the absence of such precaution. *Coach Co. v. Burrell, supra; Williams v. Thomas*, 219 N.C. 727, 14 S.E. 2d 797; *Waller v. Hipp*, 208 N.C. 117, 179 S.E. 428; *Butner v. Whitlow*, 201 N.C. 749, 161 S.E. 389; 5A Am. Jur., Automobiles and Highway Traffic, Sec. 341; Blashfield Cyc. of Automobile Law and Practice, Per. Ed., Vol. I, p. 680.

Viewing the evidence in the light most favorable to the plaintiff, as we are required to do on a motion for judgment of nonsuit, it permits the legitimate inference that the skidding of defendant's automobile was caused by her failing to exercise due care in the operation of her automobile commensurate with the known and obvious dangerous condition of the highway, in that she was driving it without chains on a highway covered with ice at a speed of approximately 35 to 40 miles an hour, that such speed was greater than was reasonable and proper under the conditions then existing, and that she in the exercise of reasonable care might have foreseen that the ice on the highway and the speed of her automobile without chains made the skidding of her automobile probable, and that from such skidding consequences of a generally injurious nature might be expected.

The evidence presents a case for a jury. The judgment of nonsuit is

Reversed.

STATE v. CHARLES JORDAN

(Filed 27 November, 1957)

1. **Criminal Law § 121—**

Where the indictment is fatally defective, the Supreme Court will arrest the judgment *ex mero motu*.

2. **Indictment and Warrant § 9—**

An indictment for a statutory offense which follows the language of the statute is sufficient only when the language of the statute charges each essential element of the offense, and if the statute fails to do this, the indictment must supplement the language of the statute by other allegations which explicitly and accurately set forth every essential element.

3. **Escape § 2—**

An indictment for escape or attempted escape must specify whether defendant was serving a sentence for a misdemeanor or a felony at the time, regardless of whether the escape is alleged to be a first or second offense, G.S. 148-45, and must allege, *inter alia*, the lawfulness of the custody of the defendant or facts from which the lawfulness of the custody appears.

4. **Criminal Law § 121—**

Arrest of judgment for fatal defect in the indictment does not bar further prosecution if the solicitor deems it advisable.

APPEAL by defendant from *Bickett, J.*, June Special Term, 1957, of WAKE.

The trial was on a bill of indictment charging that defendant on January 9, 1957, "did unlawfully, wilfully and feloniously escape and attempt to escape from the State Prison System, said prisoner having been previously convicted of escape, against the form of the statute in such case made and provided and against the peace and dignity of the State."

There was a verdict of guilty. Judgment, imposing a sentence, was pronounced. Defendant excepted and appealed.

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

Taylor & Mitchell and George R. Greene for defendant, appellant.

BOBBITT, J. It appearing upon the face of the record that the bill of indictment is fatally defective, this Court, of its own motion, arrests the judgment. *S. v. Lucas*, 244 N.C. 53, 92 S.E. 2d 401, and cases cited.

The indictment charges that defendant escaped on January 9, 1957, from the State prison system, and that "said prisoner (had) been previously convicted of escape." No averment purports to answer any of these questions: Who had custody of defendant when the alleged escape on January 9, 1957, occurred? Was defendant then serving a sentence imposed upon conviction of a criminal offense? If so, by what court, and on what charge, had defendant been convicted and sentenced? Was the charge a misdemeanor or a felony? When, and in what court, was he convicted of the alleged prior escape? Did such

conviction relate to an escape from the State prison system? When the prior escape occurred, was he then serving the same sentence as that for which he was in custody on January 9, 1957?

The bill of indictment purports to allege a criminal offense in violation of G.S. 148-45, as amended by sec. 2, ch. 279, Session Laws of 1955. This statute provides (1) that "any prisoner *serving a sentence imposed upon conviction of a misdemeanor* who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than three months nor more than one year"; (2) that "any prisoner *serving a sentence imposed upon conviction of a felony* who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than two years"; and (3) that "any prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years." (Italics added.)

True, a second escape is a felony, punishable by imprisonment for not less than six months nor more than three years, irrespective of whether the original sentence was imposed upon conviction of a misdemeanor or of a felony. Even so, whether the original sentence was imposed upon conviction of a misdemeanor or of a felony is a material fact; for the State might establish guilt for the presently alleged escape but fail, for deficiency in the indictment or the proof, to establish the alleged prior escape. Compare *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77. In such case, the presently alleged escape would be a misdemeanor or a felony, thus materially affecting punishment, depending upon whether the sentence he was serving at the time of his escape was for a misdemeanor or a felony.

An indictment following substantially the language of the statute is sufficient *only when it thereby charges* the essential elements of the offense "in a plain, intelligible, and explicit manner." G.S. 15-153; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. If the statutory words fail to do this, they "must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specified offense intended to be charged." *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917.

We do not undertake on this appeal to specify the exact averments prerequisite to a valid warrant or bill of indictment based on G.S. 148-45. Suffice to say, the bill of indictment on which defendant was tried is fatally defective. There is no averment of any kind, even in general terms, that the alleged escape of January 9, 1957, occurred while defendant was serving a sentence imposed upon his conviction of any criminal offense. In order to charge the offense *substantially in the language* of G.S. 148-45, it would be necessary to allege that the escape or attempted escape occurred when defendant was serving a sentence imposed upon conviction of a misdemeanor or of a felony, irrespective of whether the presently alleged escape or attempted escape is alleged to be a first or a second offense.

The criminal offense(s) defined in G.S. 148-45 may be committed only by a person in the custody of the State prison system and serving a sentence imposed upon conviction of a criminal offense. Compare G.S. 14-256, as amended by sec. 1, ch. 279, Session Laws of 1955, relating to prison breach and escape from county or municipal confinement facilities or officers.

While decision is based on the provisions of G.S. 148-45, it is noted that under the general law relating to criminal escape the indictment or warrant must allege the lawfulness of the custody or facts from which the lawfulness of the custody appears. *S. v. Jones,* 78 N.C. 420; *S. v. Baldwin,* 80 N.C. 390; 30 CJS, Escape sec. 25 (b); 19 Am. Jur., Escape, Prison Breaking and Rescue sec. 24.

The reasons underlying the requirement that the bill of indictment allege all essential elements of the purported offense are summarized by Parker, J., in *S. v. Greer, supra.*

It is noted that arrest of judgment on the ground that the bill of indictment is fatally defective does not bar further prosecution for a violation of G.S. 148-45, if the solicitor deems it advisable to proceed on a new bill. *S. v. Lucas, supra,* and cases cited; *S. v. Eason, supra,* and cases cited.

Judgment arrested.

RALPH FRAZIER AND WIFE, MAGGIE B. FRAZIER v. SUBURBAN RULANE GAS COMPANY, INCORPORATED.

(Filed 27 November, 1957)

1. Appeal and Error § 38—

Where the brief stipulates that appellant is not seeking a new trial, but is appealing solely on the correctness of the court's denial of motion to nonsuit, all other assignments of error are eliminated.

2. **Appeal and Error § 51—**

In passing upon exception to the court's refusal to nonsuit, both properly and improperly admitted evidence must be considered.

3. **Gas § 2—**

Evidence favorable to plaintiff tending to show that he purchased a gas heating system in reliance on defendant's agreement to maintain periodic inspection, that defendant failed to maintain such inspection, together with expert opinion evidence that the fire which destroyed plaintiff's buildings resulted either from leaking pipes or soot in the burners, either of which defects would have been disclosed by adequate inspection, *is held* sufficient to overrule defendant's motion to nonsuit.

4. **Gas § 1—**

A gas company is charged with notice of the nature of its product, the danger incident to its use and that precautions are necessary to minimize that danger.

5. **Negligence § 19b(4)—**

Negligence may be proved by circumstantial evidence from which it may be inferred as the more reasonable probability, even though the possibility of accident may also arise on the evidence.

APPEAL by defendant from *Phillips, J.*, February, 1957 Term, WILKES Superior Court.

Civil action to recover damages for loss of two buildings by fire alleged to have been caused by defendant's negligent failure to inspect the Rulane gas fixtures as it had contracted to do at the time it installed them. The defendant, by answer, denied it installed the fixtures, or agreed to inspect or service them. On January 5, 1956, the fire occurred which completely destroyed the buildings and their contents. Timely motions for nonsuit were made and overruled. The court submitted four issues which the jury answered as indicated:

"1. Did the defendant, by and through its duly authorized agent, contract and agree to regularly inspect equipment of the plaintiff, as alleged in the Complaint? Answer: YES.

"2. If so, was there a breach of said duty to inspect, as alleged in the Complaint? Answer: YES.

"3. Was the property of the plaintiffs injured by the negligence of the defendant, as alleged in the Complaint? Answer: YES.

"4. What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $10,000.00."

From the judgment in accordance with the the verdict, the defendant appealed.

Larry S. Moore, for defendant, appellant.

Max F. Ferree, W. L. Osteen, W. H. McElwee, for plaintiffs, appellees.

HIGGINS, J. The following appears in the defendant's brief: "The appellant only appeals on the correctness of the court's ruling in submission of this case to the jury and is not seeking a new trial." Eliminated, therefore, are all assignments of error except No. 5: That the court erred in overruling the defendant's motion for nonsuit. Since the only question presented is the nonsuit, evidence both properly and improperly admitted must be considered. *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316.

The evidence of the plaintiff tended to show that in 1952 Bob Day was manager of the Rulane Gas Company agency in North Wilkesboro. He communicated with the plaintiff, Ralph Frazier, during that year relative to placing a gas heating system in plaintiff's chicken houses. Day testified: "After a couple of trips with some help from another salesman, we finally persuaded him (Frazier) to put in gas. The other salesman was a representative from Rulane out of Winston-Salem, Walter Scholtz. . . . He was afraid of it (gas) and we assured him there was nothing to be afraid of, that inspection would be made by me to see that the brooders were cleaned out after each brood to assure that safety." . . . The contract was "I was to sell the brooders to Ralph and install the lines and Rulane out of Winston was going to install the bulk system . . . Rulane came up and ran about the last 25 feet of pipe into the house . . . they inspected it at that point." Suburban Rulane Gas Company of Winston-Salem was to put the gas in the system.

The plaintiff, Ralph Frazier, testified in substance that he consented to purchase gas from the defendant; some of the Rulane Gas Company workmen would come and check the system. "They found something wrong in one of the buildings shortly before the fire and stopped me from using some brooders for a day or so, and got some pieces and fixed them up and let me go back to using them. . . . I bought the brooders, installations and all from the Rulane Gas Company and Bob Day, and Mr. Schwartz (Scholtz) . . . they did the pipe work, the Rulane did . . ."

Other plaintiffs' witnesses described the fire, the colored flames shooting out from the gas installations, and the hissing noise which accompanied the blaze. A witness found to be "an expert in the handling and installation of Rulane Gas" testified in answer to a hypothetical question that in his opinion the fire was caused either by an accumulation of soot in the burners or a gas leak in the line from the tank to the burners, and that an adequate inspection would have disclosed either of these defects.

There was evidence that shortly before the fire the defendant had filled the tanks with Rulane gas. There was no evidence of inspection at that time. There was evidence the defendant agreed to inspect and that a proper inspection would have shown any accumulation of soot in the burners, or any defects in the pipes or hose. The expert gave as his opinion the fire started either from the leaking pipes or soot in the burners, either of which adequate inspection would have disclosed.

The defendant's agents overcame the plaintiff's fears of gas by agreeing to inspect the installations. There is no evidence that the pipes, hose, or burners were inspected at the time "the last brood was started" and the tank filled. A considerable interval had intervened between the removal of the last brood and the one just started prior to the fire. The defendant was charged with notice of the nature of its product, the danger incident to its use, and that precautions were necessary to minimize that danger. "Gas is a dangerous substance when it is not under control." *Ashley v. Jones,* 246 N.C. 442, 98 S.E. 2d 667; *Graham v. N. C. 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 perons or property." *Ashley v. Jones, supra;* 24 Am. Jur., Gas Companies, Secs. 20, 21 and 22; 38 C. J. S., Gas, Secs. 40, 41 and 42.

" . . . Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and . . . if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Fitzgerald v. R. R.,* 141 N.C. 530, 54 S.E. 391; *Peterson v. Tidewater Power Co.,* 183 N.C. 243, 111 S.E. 8. "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself." *Henderson v. R. R.,* 159 N.C. 581, 75 S.E. 1092.

Taken in the light most favorable to the plaintiff, we consider the evidence sufficient to carry the case to the jury.

No Error.

STATE v. EDWARD JONES AND MURRAY B. BALLENGER

(Filed 27 November, 1957)

1. **Indictment and Warrant § 12—**

Where motion to quash the bill of indictment is not made until after plea of not guilty, it is addressed to the discretion of the trial court and its denial of the motion is not reviewable on appeal.

2. **Indictment and Warrant § 9—**

An indictment for a statutory offense which follows the language of the statute and charges each essential element of the offense is sufficient.

3. **Indictment and Warrant § 11—**

An indictment charging defendants with feloniously breaking and entering a building with intent to steal merchandise, and in a second count charging that defendants did feloniously steal and carry away merchandise of the named owner, does not charge the offenses in the alternative.

4. **Criminal Law § 162—**

Exception to the exclusion of testimony cannot be sustained when the record fails to show what the answer of the witness would have been had he been permitted to answer.

5. **Burglary § 4: Larceny § 7—**

Circumstantial evidence taken in the light most favorable to the State and giving it the benefit of every reasonable inference therefrom, *held* to point unerringly to the guilt of defendant and to be of sufficient probative value to support verdict of guilty of felonious breaking and entry and larceny of goods of the value of more than $100.

APPEAL by defendant Murray Ballenger from *Seawell, J.*, at April 1957 Criminal Term, of JOHNSTON.

Criminal prosecution upon a bill of indictment containing two counts, in formal language, charging in first count that Edward Jones and Murray Ballenger did on December 10, 1956, feloniously break and enter into certain building occupied by one Hubert Owen McLamb with intent to steal, take and carry away his merchandise, and in second count that Edward Jones and Murray Ballenger did on December 10, 1956, feloniously steal, take and carry away 2700 pounds of sugar and 50 pounds of flour of the value of more than $100.00 of the goods of one Hubert Owen McLamb, consolidated for trial and judgment.

Plea: Not guilty.

Verdict: Both defendants are guilty as charged.

Judgment on the verdict: Murray Ballenger is sentenced to the State Prison for a term of not less than five years

and not more than seven years, from which judgment defendant Murray Ballenger appeals to Supreme Court and assigns error.

Attorney General Patton, Assistant Attorneys General Bruton, McGalliard and Behrends, for the State.
E. R. Temple, for defendant appellant.

WINBORNE, C. J. Careful consideration of the record and case on appeal fails to disclose error for which the judgment below should be disturbed.

FIRST: "Defendants object and except to the bill of indictment as being contrary to law." But the record does not show when defendant made this objection, or on what ground it is contended the bill of indictment is contrary to law. Indeed the exception is inserted after the certificate of Clerk of Superior Court as to organization of court, including indictment, plea, jury, verdict, judgment and appeal entries. And the assignment of error is "that the bill of indictment is defective and defendant moves to quash said bill of indictment." Hence upon the face of the record the objection appears to have been made after verdict and judgment—and comes too late.

Decisions of this Court are uniform in holding that a motion to quash the 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, and cases cited. See also *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d, 623.

Be that as it may, the form of the first count in bill of indictment is substantially accordant with the statute, G.S. 14-54, under which it is laid, as to essential elements and, hence, in conformity with the rule ordinarily applied in the decisions of this Court, meets the requirements of law. *S. v. Gibson, supra,* and cases cited.

Moreover the objection that both counts in the bill of indictment are couched in the alternative does not appear to be well founded, and requires no further elaboration.

SECOND: As to exception No. 2, on which this assignment of error is predicated, that is to sustaining objection to question "How many bags of sugar did you have in your store on the 10th of December, 1956?" is untenable for two reasons—(a) The witness W. C. Allen, to whom the question was asked, had no interest in the sugar in question. Hence it was immaterial how many bags he had in his store. (b) The case on appeal fails to show what the answer of the witness would have been had he been permitted to answer. Exception so taken cannot be sustained. *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d, 342.

THIRD: The exceptions 3 and 4, on which assignments of error of like numbers are based, relate to denial of defendants' motion for judgment as of nonsuit aptly made. While the evidence in this respect is largely circumstantial, when taken in the light most favorable to the State, giving to it the benefit of every reasonable inference, as is done when considering such motions, it points unerringly to the guilt of defendant, and is of sufficient probative value to support the verdict rendered. Recital of the details is deemed unnecessary.

FOURTH: The exceptions 5 and 6, to which assignments of error of same numbers relate, are formal in nature, and require no discussion.

Finally, the case appears to have been fairly presented to a jury, and in the verdict of the jury this Court finds

No error.

ARNOLD B. WILLIAMS v. RICHARD JUNIOR MICKENS AND EMBRA C. MORRIS.

(Filed 27 November, 1957)

Automobiles § 52—

The owner of an automobile, merely because he leaves the keys in the ignition switch when he parks the car in a lawful manner, may not be held liable for injuries inflicted by the negligent operation of the vehicle by a thief who steals the car.

APPEAL by plaintiff from *McKeithen, S. J.*, July, 1957 Term, RANDOLPH Superior Court.

Civil action to recover damages to plaintiff's automobile alleged to have been caused by the negligence of Richard Junior Mickens, agent or employee of Embra C. Morris.

The defendant Morris denied the agency of Richard Junior Mickens and alleged that he stole this defendant's taxicab and was escaping with it at the time he collided with the plaintiff's automobile, causing the plaintiff's damage.

On the trial, the parties entered into the following stipulations:

"(2) On December 25, 1955, the plaintiff was the owner of a certain 1952 Dodge four-door sedan, and the defend-Embra C. Morris was the owner of a certain 1952 Plymouth four-door sedan taxicab.

"(3) At about 7:30 to 7:45 p.m. on December 25, 1955, the defendant Embra C. Morris parked said 1952 model Plymouth sedan taxicab in the taxi stand in front of his

place of business at 905 South Ashe Street in the City of Greensboro, in order to go into his place of business for a few minutes. The defendant Embra C. Morris left the ignition key in the ignition lock of said Plymouth taxicab with the ignition turned off. After the defendant Embra C. Morris had been in his place of business for about two or three minutes, and without the knowledge or permission of said Embra C. Morris, Richard Junior Mickens entered the Plymouth taxicab, turned on the ignition, started the cab and drove the same over and along certain streets in the City of Greensboro until he reached the intersection of Ashe and West Lee Streets at approximately 8:15 p.m., at which time and place the Plymouth taxicab collided with the 1952 four-door Dodge sedan which was owned and being operated at said time and place by the plaintiff.

"(4) Said collision at the intersection of Ashe and West Lee Streets was proximately caused by the negligence of said Richard Junior Mickens, and the plaintiff was not guilty of any contributory negligence.

"(5) Richard Junior Mickens was thereafter indicted for the larceny of the Plymouth taxicab, and at the February 6, 1956 Criminal Term of Superior Court of Guilford County, Greensboro Division, he entered a plea of guilty to the charge of the larceny and receiving of said taxicab, upon which plea of guilty sentence was duly pronounced by the Judge presiding at said term of Superior Court."

From a judgment of nonsuit as to the defendant Embra C. Morris, the plaintiff appealed.

Ottway Burton for plaintiff appellant.
Jordan, Wright & Henson, By: Welch Jordan for defendant, Embra C. Morris, appellee.

HIGGINS, J. The question presented here is this: Does failure to remove the switch key render the owner of an automobile liable for the negligent operation thereof by a thief who steals it?

If the owner is liable for injury inflicted by the thief at the next street crossing, there appears no reason why liability should not extend to the next town, the next county, or the next state. If leaving the key in the switch creates liability, leaving it on the seat, or on the owner's desk where a thief could easily find it, would seem also to imply liability. If liability exists on the day of the theft, does it not continue to the next day, and the next? Surely, ownership of a motor vehicle does not involve such hazard. The rule governing liability is clearly stated in

the case of *Ward v. R. R. Company*, 206 N.C. 530, 174 S.E. 443: "In the final analysis, the case presents an injury inflicted by the criminal act of a third person, and one in nowise connected with the . . . prosecution of the defendant's business.

"Assuming, but not deciding, that the defendant was negligent . . . nevertheless, the general rule of law is that if between the negligence and the injury there is the intervening crime or willful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, 'the causal chain between the original negligence and the accident is broken.' " Citing numerous cases.

"A motor vehicle is inanimate and cannot move of its own volition. . . . Moreover, where a motor vehicle is parked properly, the brakes set and the engine turned off, the owner thereof is not responsible for the independent act of a third party in negligently or maliciously starting the motor vehicle which results in damages or injuries to another." *Ross v. Greyhound Corp.*, 223 N.C. 239, 25 S.E. 2d 852, citing numerous cases. The case of *Campbell v. Laundry*, 190 N.C. 649, 130 S.E. 638, is not in conflict with the foregoing decisions. Negligence in the Campbell case consisted in the leaving of a motor vehicle illegally parked in such condition as rendered it dangerous to heedless children who were known by the owner to be exposed to the hazard.

There was neither ordinance in Greensboro nor State law against leaving a key in the ignition switch of an automobile. While we are not willing to say that the stipulated facts are sufficient to show negligence on the part of the defendant Morris, nevertheless, even if such were the case, to allow recovery would do violence to the rule of proximate cause as understood and applied in this jurisdiction. *McNair v. Richardson*, 244 N.C. 65, 92 S.E. 2d 459; *Welling v. Charlotte*, 241 N.C. 312, 85 S.E. 2d 379; *Boone v. R. R.*, 240 N.C. 152, 81 S.E. 2d 380.

The judgment below is

Affirmed.

JOHN D. PUGH v. HERMAN LEO SMITH

(Filed 27 November, 1957)

Automobiles § 46: Negligence § 20—

An instruction to the effect that the jury must find that defendant's negligence was "the" instead of "a" proximate cause of the accident in order to answer the issue of negligence in the affirmative is prejudicial.

APPEAL by plaintiff from *Crissman, J.*, May, 1957 Term, FORSYTH Superior Court.

Civil action for personal injury to the plaintiff, a pedestrian, alleged to have been caused by the defendant's negligent operation of his automobile at a street crossing in a business district of Winston-Salem. The defendant denied negligence on his part and pleaded contributory negligence on the part of the plaintiff.

Each party introduced evidence tending to support his contentions. The defendant's motions for nonsuit were overruled. Issues of negligence and contributory negligence were submitted. The jury answered the issue of negligence in favor of the defendant. From the judgment dismissing the action, the plaintiff appealed.

Fred M. Parrish, Jr., McKeithen, Graves & Robinson, By: Norwood Robinson for plaintiff appellant.

Ratcliff, Vaughn, Hudson, Ferrell & Carter, By: Ralph M. Stockton, Jr., for defendant appellee.

HIGGINS, J. Throughout the charge the court instructed the jury that in order to prevail on the first issue (defendant's negligence) the plaintiff must establish by the greater weight of the evidence that the defendant was negligent and that his negligence was *the* proximate cause of the plaintiff's injury. The charge places too great a burden upon the plaintiff. A similar error is treated at length in the case of *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844.

When the pleadings and the evidence involve the negligence of a person other than the defendant, it is only necessary for the plaintiff to show the defendant's negligence was *one* of the proximate causes of the injury. In this case the negligence of both parties is involved. If either can prove by the greater weight of the evidence that the other's negligence was *one* of the proximate causes of the injury, he is entitled to have the appropriate issue answered in his favor. Each party is entitled to an equal chance before the jury. Each should carry an equal burden. On the authority of *Price v. Gray, supra*, and the cases there cited this case is remanded to the Superior Court of Forsyth County for a

New trial.

STATE v. CHARLES M. MUSCAT

(Filed 27 November, 1957)

Assault and Battery § 15—

Instruction on defendant's plea of self-defense in this prosecution for assault with a deadly weapon *held* prejudicial on authority of *S. v. Warren*, 242 N.C. 581.

APPEAL by defendant from *McKeithen, S. J.*, at February 1957 Criminal Term (Second Week) of CUMBERLAND.

Criminal prosecution upon bill of indictment as certified to this Court upon suggestion of diminution of record, charging "that Charles M. Muscat, late of the County of Cumberland on the 24 day of July, 1956, at and in the county aforesaid, did, unlawfully, willfully and feloniously assault John W. Blake, Sr., with a certain deadly weapon, to wit, .45 caliber pistol with the felonious intent to kill and murder the said John W. Blake, Sr., inflicting serious injuries not resulting in death, upon the said John W. Blake, Sr.. against the form of the statute in such case made and provided and against the peace and dignity of the State."

Plea: Not guilty.

Verdict: Guilty as charged.

Judgment: That defendant be confined in the State Prison for a period of not less than five (5) nor more than eight (8) years and assigned to work under supervision of the State Highway and Public Works Commission.

Defendant Charles M. Muscat appeals therefrom to Supreme Court and assigns error.

Attorney General Patton, Assistant Attorney General Harry W. McGalliard for the State.

Butler & High, Ervin I. Baer for defendant appellant.

PER CURIAM: Certain portion of the charge of the trial judge to the jury in respect to defendant's plea of self-defense, to which defendant excepts, while proper in trial of a homicide case, the Attorney General confesses is improper in instant case, and is prejudicial to defendant, under authority of *S. v. Warren*, 242 N.C. 581, 89 S.E. 2d, 109; *S. v. Cephus*, 239 N.C. 521, 80 S.E. 2d, 147; *S. v. Carver*, 213 N.C. 150, 195 S.E. 349.

Hence let there be a

New trial.

STATE v. ROLLY J. BRIDGES

(Filed 27 November, 1957)

Automobiles § 72—

Evidence in this prosecution for operating a motor vehicle on a public highway while under the influence of intoxicating liquor *held* sufficient to overrule defendant's motion to nonsuit.

APPEAL by defendant from *Olive, J.*, April 29, 1957 Criminal Term of GUILFORD (Greensboro Division).

Defendant was tried in the Municipal-County Court of Guilford on a warrant charging the operation of a motor vehicle on the public highways while under the influence of intoxicating liquors. He was convicted, sentenced, and appealed to the Superior Court. He was tried in the Superior Court on the original warrant. The jury returned a verdict of guilty. From the judgment he appealed.

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

Z. H. Howerton, Jr. for defendant appellant.

PER CURIAM. Defendant took no exception to the evidence or charge. He relies solely on his motion to nonsuit.

A Ford truck traveling on Springwood Church Road ran off the road and into an embankment. There was evidence from one who heard and saw the wreck that defendant was driving the truck and was at the time, in the opinion of the witness, intoxicated. This evidence was supplemented and supported by statements made by defendant to a police officer who went to defendant's home to investigate, about an hour and a half after the wreck. The officer found the defendant in a drunken condition. The officer testified: "Mr. Bridges told us that he was driving the truck and that he didn't know as he was too drunk to operate, that he'd appreciate it if we would not charge him with it. He said he had been drinking three or four days and nights; you could smell alcohol on him after we got him awake and talked to him. He was unsteady on his feet—staggery; we had to aid him by holding to his arm to keep him from falling from the porch. I held his arm as he went into the station. He looked like he had not had any sleep in several days and he appeared to me to be red-eyed; his face was red and his speech was poor. In my opinion he was drunk."

There is no suggestion that this statement was not freely and voluntarily made. The subsequent statement by the defendant to a police officer that he had not consumed any alcoholic bever-

ages prior to the wreck, and that he only got drunk following the wreck merely presented a question of veracity to be passed on by the jury. Defendant's contentions were fully set forth in the charge. The jury, on plenary evidence coming in part from the defendant, has found him guilty. There is

No error.

J. C. EPTING, JR., BY HIS NEXT FRIEND, J. C. EPTING, SR. v. L. R. STEWART, G. A. STEWART, AND C. A. FERREE, T/A R. K. STEWART & SON.

(Filed 27 November, 1957)

Automobiles § 24—

In this action to recover for injuries sustained when plaintiff pedestrian ran into the end of a steel beam protruding from a truck which had been parked on the school grounds for five to ten minutes, nonsuit was properly allowed.

APPEAL by plaintiff from *Rousseau, J.*, May Civil Term 1957 of GUILFORD (High Point Division).

This is a civil action to recover damages for an injury sustained by plaintiff allegedly resulting from the negligence of defendant.

The plaintiff minor, an eleven-year-old student in Oakview School near High Point, Guilford County, North Carolina, about 2:00 p.m. on 15 October 1955, was returning from a playground area, a part of the school grounds, to the school building, when he ran into the end of steel beam lying across the bed of a pick-up truck which was parked adjacent to a school building addition then under construction. The steel beam, commonly called an "I" beam, was painted a bright red. This beam had been moved on the truck from a place on the school grounds where it had been stored with other building materials. The truck had been parked near the building under construction from five to ten minutes before the accident occurred.

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

Morgan, Byerly & Post for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter for defendant appellee.

PER CURIAM. A review of all the evidence introduced by the plaintiff in the light most favorable to him, in our opinion, is

insufficient to carry the case to the jury and support a verdict in his favor.

The ruling of the court below will be upheld.

Affirmed.

LETA ANDERSON v. W. J. ANDERSON

(Filed 27 November, 1957)

Divorce and Alimony § 12—

Findings, supported by evidence, to the effect that defendant had obtained an absolute divorce in another State prior to the institution of plaintiff's action for alimony without divorce, and that such foreign judgment was binding in this State under the Full Faith and Credit Clause of the Federal Constitution, *held* to support the court's order denying plaintiff's motion for alimony *pendente lite* and counsel fees.

APPEAL by plaintiff from *Preyer, J.*, in Chambers, March 9, 1957.

Civil action for alimony without divorce on the ground of abandonment and failure to provide necessary subsistence, G.S. 50-16. The action was instituted on April 3, 1954. By way of answer the defendant set up an absolute divorce decree granted by the Circuit Court of Duval County, Florida, on May 21, 1954. The plaintiff filed a reply in which she denied the validity of the divorce and alleged that in obtaining it the defendant perpetrated a fraud upon the court. The plaintiff, upon proper motion in the cause, applied for alimony *pendente lite* and counsel fees.

At the hearing of the motion, conflicting affidavits were introduced by the parties relative to the residence of W. J. Anderson in the State of Florida for the statutory period necessary to give the court of that State jurisdiction to try the divorce action. The defendant also introduced a copy of the divorce proceeding in the Circuit Court of Duval County, Florida.

Judge Preyer found the facts as to residence and as to the divorce decree as contended for by the defendant, and concluded the decree of absolute divorce entered by the Florida court was valid, entitled to full faith and credit in the State of North Carolina. From these findings the court entered an order denying the plaintiff's motion for alimony *pendente lite* and counsel fees. To this order the plaintiff excepted, and from it appealed.

Haworth and Riggs, Thomas Turner, By: John Haworth for plaintiff appellant.

Robert M. Martin, James B. Lovelace for defendant appellee.

PER CURIAM. The findings of Judge Preyer are supported by evidence. They are sufficient to and do support his order denying plaintiff's motion for alimony *pendente lite* and counsel fees. The order of the Superior Court of Guilford County is

Affirmed.

STATE v. WALLACE M. PEGELOW, JR.

(Filed 27 November, 1957)

APPEAL by defendant from *Olive, J.*, March Criminal Term 1957 of GUILFORD, Greensboro Division.

Criminal prosecution upon a bill of indictment charging the defendant with the commission of a crime against nature: a violation of G.S. 14-177.

Defendant entered a plea of Not Guilty. The jury returned a verdict of Guilty.

From a judgment of imprisonment the defendant appeals.

George B. Patton, Attorney General, and Ralph Moody, Assistant Attorney General for the State.

William E. Comer for defendant, appellant.

PER CURIAM. The evidence offered by the State—the defendant offered none—is amply sufficient to carry the case to the jury. There is no need to soil the pages of our Reports with a recital of its sordid details. Indeed, the defendant makes no contention that the State should have been nonsuited.

Defendant's assignments of error as to the evidence and as to the charge of the court to the jury have been considered, and none are sufficient to justify a new trial.

In the bill of indictment the defendant's name is stated as Wallace Pegelow. The record is captioned *S. v. Wallace M. Pegelow, Jr.* The defendant's brief is captioned *S. v. Wallace M. Pegelow, Jr.* At the May Term 1957 of the Superior Court of Guilford County the defendant by his counsel of record here, Mr. William E. Comer, made a motion for a new trial on the ground of newly discovered evidence, which the court denied for the reason that the case was pending in the Supreme Court on appeal, and therefore the Superior Court had no jurisdiction to entertain the motion. In this motion for a new trial, which was verified by the defendant, and signed by his attorney here, Mr. William E. Comer, the defendant's name is given as Wallace M. Pegelow, Jr. It is plain that Wallace Pegelow is the same person as Wallace M. Pegelow, Jr.

No error.

STATE v. A. D. OWNBEY, JR.

(Filed 27 November, 1957)

APPEAL by defendant from *Olive, J.*, February, 1957 Criminal Term, GUILFORD Superior Court (Greensboro Division).

Criminal prosecution upon an indictment charging that on November 25, 1956, the defendant did unlawfully, willfully, and feloniously commit the abominable and detestable crime against nature, etc. To the charge the defendant entered a plea of not guilty. A number of witnesses testified for the State and others testified for the defendant; among the latter, six of his neighbors gave evidence of the defendant's good character. The defendant did not testify.

The jury returned a verdict of guilty. From a judgment that the defendant be confined in the State's prison for not less than 20 nor more than 50 years, he appealed.

H. L. Koontz, C. L. Shuping for defendant appellant.

George B. Patton, Attorney General, Harry W. McGalliard, Assistant Attorney General for the State.

PER CURIAM: Counsel have been diligent in behalf of the defendant in this Court and the record shows they were equally so in the Superior Court. The charge is serious. The punishment is afflictive. However, we find nothing in the record to justify a new trial. For that reason no useful purpose can be served by a discussion of the evidence, except to say that if it is true (and the jury so found), it was sufficient to warrant conviction and to support the judgment.

No error.

CALVIN COOK v. EUGENE CHEEK, INDIVIDUALLY, TRADING AND DOING BUSINESS AS CHEEK AUTO SERVICE.

(Filed 27 November, 1957)

APPEAL by defendant from *Johnston, J.*, at 2 September, 1957, Civil Term of GUILFORD (Greensboro Division).

Adam Younce for appellant.

Merritt & Haines for appellee.

PER CURIAM. This is a civil action in tort. It was heard below on motion of the defendant to set aside, on the ground of excusable neglect, the judgment by default and inquiry rendered by the clerk on failure of the defendant to answer or appear and

otherwise plead to the complaint within the time allowed by law after service of summons. The court below, after hearing the evidence *pro* and *con*, found and concluded that the defendant's neglect in failing to answer the complaint in apt time was inexcusable, and entered judgment denying the motion. Our examination of the record discloses that the crucial findings and conclusions are supported by the evidence. The judgment will be upheld on authority of *Sanders v. Chavis*, 243 N.C. 380, 90 S.E. 2d 749; *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849; *Pate v. Hospital*, 234 N.C. 637, 68 S.E. 2d 288. The judgment below is Affirmed.

STATE v. DAVID STEPHENSON

(Filed 27 November, 1957)

APPEAL by defendant from *Fountain, S. J.*, and a jury, at August, 1957, Criminal Term of HARNETT.

E. R. Temple for defendant appellant.

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

PER CURIAM. The defendant stands convicted, as charged in the bill of indictment, of the larceny of an automobile of the value of more than $100, the property of Auto Sales & Service Co., Inc. From judgment imposing a prison sentence, he appeals.

The record on appeal contains neither a statement of the evidence nor a copy of the charge. We have examined carefully the record and find it free of reversible or prejudicial error. The defendant's exceptions are without merit. The trial and judgment will be upheld.

No error.

STATE v. MARVIN WILLIAMS

(Filed 27 November, 1957)

APPEAL by defendant from *Olive, J.*, April 15, 1957, Criminal Term, Greensboro Division, of GUILFORD.

Defendant was indicted and tried for the felony defined in G.S. 14-177 as "the abominable and detestable crime against nature, with mankind or beast"; and, the jury having returned a verdict of guilty, judgment imposing a prison sentence was pronounced. Defendant excepted and appealed.

Attorney-General Patton, Assistant Attorney-General Bruton and F. Kent Burns, member of staff, for the State.
J. V. Morgan for defendant appellant.

PER CURIAM. G.S. 14-177 includes the particular act of perversion charged in the bill of indictment. *S. v. Griffin,* 175 N.C. 767, 94 S.E. 678. Plenary evidence supports the charge. It would serve no needful purpose to discuss the unnatural and depraved conduct to which the evidence relates.

Each of defendant's assignments of error has been carefully considered. None discloses error of law affording a sufficient basis for the award of a new trial.

No error.

IN THE MATTER OF: GUY A. GIBBONS, JR.

(Filed 11 December, 1957)

1. **Infants § 22—**

While parents have a strict legal right to custody of their children as against strangers, the parent's right to custody must yield when the circumstances are such that the custody of the parent will imperil the infant's personal safety, morals or health so that the best interest of the child will be served by awarding its custody to another.

2. **Same—In determining right to custody as between surviving parent and persons to whom parent voluntarily gave custody of child, the best interest of the child is the paramount consideration.**

The findings of fact disclosed that respondent, the surviving parent by adoption of the infant in question, permitted the child for a period of almost five years to live with petitioner and his wife, that during this period respondent made very limited contributions to the child's support, that petitioner requested respondent to take the child because of apprehension that a later separation would be too painful, that respondent refused to do so, but that later, after respondent's second marriage, respondent forcibly took possession of the child from a Sunday School Room. The court made no finding as to whether the infant wished to live with the petitioner or respondent. The court, upon its conclusion that the parent could not be deprived of the right to its custody unless the welfare of the child clearly required it, awarded the custody to respondent. *Held:* It appearing that the court failed to give sufficient consideration to the wishes of the child and found the facts under a misapprehension of the applicable law that the welfare of the child is the paramount consideration under the circumstances disclosed, the cause must be remanded.

3. Appeal and Error § 55—

Where the rulings of the court are based on facts found under a misapprehension of the applicable law, the cause must be remanded.

BOBBITT, J., dissenting.

RODMAN, J., concurs in dissent.

APPEAL by petitioner Richard Bright from *Carr, J.*, June Civil Term 1957 of WAKE.

Proceeding to determine the custody of Guy A. Gibbons, Jr., who was born 26 April 1947.

From a judgment awarding the custody of the boy to Guy A. Gibbons, Sr., with a provision that Guy A. Gibbons, Sr. is not required to permit the boy to visit Mr. and Mrs. Richard Bright, the petitioner Richard Bright appeals.

Emanuel & Emanuel for Petitioner, Appellant.
Manning & Fulton for Respondent, Appellee.

PARKER, J. This proceeding was instituted in the Domestic Relations Court of Raleigh and Wake County on 6 August 1954 by petition of Richard Bright, who in his petition alleged that Guy A. Gibbons, Jr., an infant under 16 years of age, was a neglected child under such improper or insufficient control as to endanger his health and general welfare, and further alleged that his custody is subject to controversy. From a judgment adverse to petitioner, he appealed to the Superior Court of Wake County. In the Superior Court Richard Bright, by leave of court, filed an amended petition, and Guy A. Gibbons, Sr. filed an answer to the amended petition. The proceeding was heard at the March Civil Term 1956 by Hobgood, J., on evidence offered by petitioner and respondent, who made 25 findings of fact and 4 conclusions of law, and awarded the custody of the boy to the respondent Guy A. Gibbons, Sr. Petitioner excepted to the findings of fact and conclusions of law, and appealed from the judgment to the Supreme Court. Upon the appeal, *In re Gibbons*, 245 N.C. 24, 95 S.E. 2d 85, this Court held that Hobgood, J. "committed error in receiving testimony from witnesses without affording petitioner an opportunity to be present and know what evidence was offered."

Judge Carr heard the proceeding on voluminous evidence offered by the petitioner and respondent, which evidence was in sharp conflict, and made findings of fact and conclusions of law. His judgment contains this recital:

"There were certain findings of fact set out in the judgment of Judge Hobgood, which appear in the record, and this Court finds certain facts to be as set out in the Findings of Fact Nos. 1 to 9, inclusive, and 10 to 21, inclusive, of the judgment of Judge Hobgood, which Findings of Fact are

referred to and made a part of the Findings of Fact in this Judgment for all intents and purposes as if they were set out herein at length."

Judge Carr then made further findings of fact. Judge Carr's findings of fact and conclusions of law essential to a decision of the questions presented on this appeal are summarized as follows:

A SUMMARY OF JUDGE HOBGOOD'S FINDINGS OF FACT NOS. 1 TO 21, INCLUSIVE:

Guy A. Gibbons, Jr. was born 26 April 1947. Proceedings to adopt this boy were instituted by Guy A. Gibbons, Sr. and his wife, Rebecca L. Gibbons, in the Superior Court of Wake County on 23 February 1948, and a final order of adoption was entered 30 April 1949. Rebecca L. Gibbons died in June 1949. Respondent then placed this boy with Ruth Lindley until August 1949. Respondent then placed the child in the home of Mrs. Ralph Turner. About two weeks later Mrs. Turner pursuant to a direction of the respondent placed the boy in September 1949 with the petitioner Richard Bright, in whose home the boy remained until 1 August 1954, except for short visits with the respondent. During this period of almost five years respondent made the following contributions for the support of the boy: $110.00 in 1949, $140.00 in 1950, $20.00 in 1951, and nothing in 1952, 1953 and 1954. However, respondent paid certain medical bills for the boy, and furnished him certain small miscellaneous items of clothing and presents. During this five-year period respondent visited the boy in the Bright home, and on a few occasions had the boy with him for brief periods of time. During this five-year period the boy became very closely attached to Richard Bright and his wife, considering them as his parents. In the early part of 1950 Mr. and Mrs. Bright requested respondent to take the child, but he refused to do so, and indicated at the time that he desired that the child should remain permanently with the Brights.

On 6 September 1952 respondent married Harriet Emiline Scott. In the spring of 1954 respondent requested the Brights to let him have the boy, and upon their refusal to do so, he filed a petition in the Domestic Relations Court of Wake County. His petition was dismissed. Thereafter, on Sunday morning, 1 August 1954, respondent accompanied by a man went to the New Hope Baptist Church, which is in Wake County near the Bright home, where Guy A. Gibbons, Jr. was attending Sunday School. Respondent went into the Sunday School Room, and forcibly took the boy away with him in spite of the boy's screaming, pro-

testing and seeking to escape. For this conduct respondent was arrested on a warrant charging him with disturbing religious worship, convicted, and fined $100.00 and the costs.

Mr. and Mrs. Richard Bright are people of excellent character. He is a professor in the Chemical Engineering Department of State College. He and his wife are active in the church, educational, and community life of their neighborhood. They own their home. They have no children, and say they plan to leave their home to Guy A. Gibbons, Jr. at their death.

Mrs. Harriet Scott Gibbons is a person of excellent character, and is an employee in Raleigh of the Federal Government. She and respondent are regular attendants at a local Methodist Church, and take the boy with them.

Guy A. Gibbons, Sr. is not a person of bad character. He operates a service station and a small nursery. From the death of his first wife until a few months ago he was addicted to the excessive use of intoxicating liquor to such an extent that he became frequently intoxicated. He became a member of Alcoholics Anonymous. That he does not appear to have any vices except an addiction to excessive use of alcohol.

The home life of the boy while he lived with the Brights was happy and cheerful, and they took particular pains to see that he appeared neat, clean, and saw to it that he was given proper medical attention at all times.

JUDGE CARR'S FURTHER FINDINGS OF FACT:

The Bright and the Gibbons families differ in their methods of control of the boy. The Brights are inclined to leniency, and the Gibbons to strictness almost bordering on severity. Consequently, the child thinks the Brights love him more, and he is very fond of them. The boy is not a neglected child, and respondent has not abandoned him. Both the Brights and the Gibbons families are fit and proper persons to have the custody of the boy. This is Judge Carr's 4th finding of further facts:

> "Guy A. Gibbons at one time, between the death of his first wife and his remarriage, was such an excessive user of alcohol that he was unfit at that time to have the custody of said child. However, he, since his remarriage, has made remarkable progress in controlling his habits in the excessive use of alcohol but has not reached the point that he does not occasionally get under the influence of intoxicants and was arrested in March, 1957, on a charge of operating a motor vehicle under the influence of intoxicating liquor, was found guilty of the charge in Recorder's Court of Wendell, N. C., and has appealed said conviction to the Superior Court of Wake County and a jury has not heard and passed on his appeal."

The Brights in 1950 realizing that they were becoming attached

to the boy requested respondent to take him, but he declined to do so. After respondent's remarriage in 1952 his conduct was such as to give the Brights notice that he would ultimately ask for the child. This contest for the custody of the boy has created a situation whereby the boy's best interest requires that he be placed in the custody of one or the other family, and that the order should not provide for any visitation of the child by the family not awarded his custody.

JUDGE CARR'S CONCLUSIONS OF LAW:

This is "a contest between one who has the legal custody, and one who does not, and the rule of law in such cases is that it must appear that the welfare of the child clearly requires that he be taken away from the one who has the legal custody." Upon the foregoing facts the court is of the opinion that it does not appear that the best interests of the child clearly require that he be taken away from respondent, who has legally adopted him.

Whereupon, Judge Carr signed a judgment awarding the custody of the child to Guy A. Gibbons, Sr., and provided that he is not required to permit the boy to visit Mr. and Mrs. Richard Bright.

Judge Carr concluded his judgment with this language, except for a final paragraph as to the payment of costs:

"The decision has been all the more hard to make for the reason that Guy A. Gibbons, Sr. has not made the progress in the control of his habit in the use of alcohol that is to be desired when one applies for the permanent custody of a child.

"While this judgment is a final judgment as to the matter and things that have occurred prior to the date of this judgment, it is ordered that the cause be retained for motions to have the same modified for any good reason and particularly any deterioration in the drinking habits of Guy A. Gibbons, Sr. that might justify the modification. The Court has found it difficult to get the full facts in respect to the extent of Mr. Gibbons' drinking in recent months. That the Court finds that Deputy Sheriff O. B. Weatherspoon is an unbiased, disinterested officer, totally disconnected with the parties in this case and the Court requests that he act as an officer of the Court on a Special Mission during the next twelve months and that he on occasions both night and day, when Mr. Gibbons is least expecting him, drop by Mr. Gibbons' place of business and home, and in a friendly manner chat briefly with him, to the end that he may give evidence as to his condition with respect to drink, if such is needed.

"Notice is hereby given to Mr. and Mrs. Gibbons that any lack of cooperation with Mr. Weatherspoon in this respect

may be used against Mr. Gibbons in any subsequent inquiry into his drinking habits; if for any reason at any time Mr. Weatherspoon cannot act in this capacity, a substitute may be named in his stead by the Judge regularly holding the courts of the Tenth Judicial District or the Resident Judge of said District."

G.S. 48-23 provides that "the final order" (of adoption) "forthwith shall establish the relationship of parent and child between the petitioner and child. . . ."

This Court said in *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759: "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it."

In the former appeal of this case the Court said: "The crucial question in this case, as in all cases involving the custody of an infant is: What, in fact, is for the best interests of the child? Schenck, J., in *Tyner v. Tyner*, 206 N.C. 776, 175 S.E. 144, said: 'In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after due judicial investigation, it is found that the best interest of the children is subserved thereby.' "

It is an entire mistake to suppose the court is at all events bound to deliver over a child to his father, or that the latter has an absolute vested right in the child. Doubtless, parents have a strict legal right to have the custody of their infant children as against strangers. However, courts will not regard this parental legal right against strangers as controlling, when circumstances connected with the present and prospective welfare of the child clearly exist to overcome it, or when to enforce such legal right will imperil the personal safety, morals, or health of the child.

By stipulation of the parties Judge Carr privately examined Guy A. Gibbons, Jr. in his chambers; neither the parties, nor their counsel were present. What he said to Judge Carr is not in the record. The stipulation further provided that Judge Carr should also privately examine certain notes written by the boy to Mr. and Mrs. Bright, when he was in respondent's custody after having been forcibly taken by respondent from the New Hope Baptist Church Sunday School on Sunday morning, 1 August 1954. Judge Carr said: "They" (the notes) "may be examined by the court for the purpose of determining whether or not any evidence in them that would tend to corroborate or contradict what the child told the court." Judge Carr also said:

"The question I am concerned with now is whether or not this is a case where the Court can apply the principle that

is usually applied, namely, what is the best interest of the child? Now, in cases where there is an argument between husband and wife who separate, and either one of them is entitled to the custody, the Court has to decide between the two as to which one shall have the custody. Most of the time that question does arise, and is the lodestar that guides the Court's decision as between husband and wife—which one is going to have the child most of the time, the one will have it according to the rule which can care for the child in such a way as will serve the best interest of the child. I have some difficulty in my own thinking as to whether or not we can apply that rule here which is in fact is in the case."

Counsel for petitioner offered these notes in evidence. Judge Carr told petitioner's counsel that he had identified these notes sufficiently and excluded them. Petitioner excepted to the rejection of these notes and assigns it as error. The record shows that there were thirteen of these notes, but their contents are not in the record.

Judge Carr made no findings of fact as to whether this boy wished to live with the Brights or the respondent.

However, he did make these findings of fact: This boy was born 26 April 1947. In September 1949, when he was two and one-half years old, he was placed by direction of respondent in the home of Mr. and Mrs. Richard Bright. The Brights in 1950, realizing that they were becoming attached to the boy, requested respondent to take him, but he declined to do so and indicated at the time that he desired that the boy should remain permanently with the Brights. The inference from this finding is plain that the Brights desired to spare themselves and the boy the heartbreak of a separation, if respondent later wanted to take the boy. Mr. and Mrs. Bright are people of excellent character, and he holds a responsible place at State College. They own their home, and are active in the church, and in the educational and community life of their neighborhood. They have no children of their own. From the time this boy was two and one-half years old until 1 August 1954, when he was over seven years old, respondent voluntarily allowed this boy to live in the Bright home. During these five years the home life of this boy with the Brights was happy and cheerful, he was well cared for, and he became greatly attached to the Brights, considering them as his father and mother. That the Brights returned his love is manifest by their efforts in this proceeding to gain his custody, and from the finding of fact that they say they plan to leave him their home at their death. During this five-year period respondent made meager contributions to the support of this boy, and had the boy with him on a few occasions for brief periods of time. On 1 August 1954 respondent went into the Sunday School Room of the

New Hope Baptist Church, and carried this boy away with him, in spite of his screaming, protests and efforts to escape.

It is significant that Judge Carr made no finding of fact that this boy had any love for respondent. Respondent in his affidavit, which he introduced in evidence, said: "Your affiant went to the New Hope Baptist Church to see his son, and when the child cried at the sight of him, he picked up his child and took him away." Testifying before Judge Carr, he said: "He didn't cry at the time I picked him up. He says, 'I don't want to go.' He was scared."

Respondent by his voluntary act permitted this boy from the time he was two and one-half years old until he was over seven years of age to live with Mr. and Mrs. Bright, where the sweet tendrils of childhood have first clung to all he knows of home.

The wishes of a child of sufficient mental capacity to form them, as opposed to the legal right of a parent, however moral a man may be, are given especial consideration where the surviving parent has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in it, thereby substituting such others in his own place, so that they stand in *loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness. *Tucker v. Tucker*, 207 Ark. 359, 180 S.W. 2d 571; *Marshall v. Reams*, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118; *Hurtt v. Conklin*, 328 Ill. App. 314, 65 N.E. 2d 610; *Bridges v. Matthews*, 276 Ky. 59, 122 S.W. 2d 1021; *Merchant v. Bussell*, 139 Me. 118, 27 A. 2d 816; *Forbes v. Warren*, 184 Miss. 526, 186 So. 325; *Richards v. Collins*, 45 N.J. Eq. 283, 17 A. 831, 14 Am. St. Rep. 726; *Smith v. Smith*, 17 N.J. Misc. 194, 7 A. 2d 829, affirmed 125 N.J. Eq. 384, 5 A. 2d 774; *Ex parte Sidle*, 31 N.D. 405, 154 N.W. 277; *Black v. May*, 152 Okla. 160, 4 P. 2d 17; 39 Am. Jur., Parent and Child, p. 610; 20 R.C.L., Parent and Child, pp. 602-603.

The case of *Merchant v. Bussell, supra*, was a *habeas corpus* proceeding by Francis O. Merchant against Margaret Bussell to recover custody of petitioner's minor daughter. The appeal was to review an order dismissing the writ, and ordering the child restored to the custody of respondent, heard upon petitioner's exceptions. The Maine Supreme Court overruled the exceptions, and closed its opinion with this language:

> "This petitioner for a period of more than four years showed not much more than a formal interest in his child. Circumstances were such that perhaps this was inevitable. He knew that the child was well cared for and was content to let the natural ties which bound him to his offspring grow

very tenuous. Since the death of his wife there is little evidence that he has had any great yearning to have his child with him, to sacrifice for her, or to lavish on her the affection which would have meant so much to her in her tender years. Instead he surrendered this high privilege to the grandmother, who with the help of her unmarried daughters has given to this child the same devotion as it would have received from its own mother. Now having permitted all this to happen he claims the right, because he is the father, to sever the ties which bind this child to the respondent. In this instance the welfare of the child is paramount. The dictates of humanity must prevail over the whims and caprice of a parent."

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

Spears v. Snell, 74 N.C. 210, (1876) was a proceeding concerning the appointment of a guardian for Cyrus A. Snell, an infant of the age of thirteen years. The contest was between the stepfather and mother of the boy and the boy's uncle. *Feme* petitioner is the mother of Cyrus A. Snell by a former marriage. The boy was born at his paternal grandfather's, and has lived with him and been raised by him, until his death in 1874. The boy's mother lived with her father-in-law some three years after the birth of her child, when she went to live with her father, leaving the boy with his grandfather at the grandfather's request. The male petitioner married the *feme* petitioner about seven years since, and after her marriage she applied for her son, but the grandfather persuaded her to let him keep him. Petitioners are persons of good character. The respondent, the boy's uncle, is a man of good character. He lived with his father up to the time of his death, and managed his affairs. The respondent is much devoted to the boy. He has been married for ten years, and has no children. After the grandfather's death, petitioners went to the respondent for the boy, and the respondent asked the boy if he desired to go with them, when the boy cried, and said he did not. Respondent proposed to examine the boy in court as a witness, when petitioners objected on the ground that it was against the policy of the law. The Court sustained the objection, and respondent excepted. The Court rendered judgment that the mother is primarily entitled to the guardianship of the person and estate of her son, and ordered the Probate Court to appoint her accordingly.

Respondent appealed to the Supreme Court. The opinion of the Court was written by Pearson, C. J., who in reversing the judg-

ment below said: "We think there is error in the conclusion of his Honor upon the facts found (which the reporter will set out) and feel confident that he would have given the *uncle* of the boy a right to the custody and control of his person rather than the *stepfather,* which is the effect of the order giving it to the mother, had not his Honor felt cramped by his opinion that in law the mother had a *primary right.* Herein he erred, and by this he was misled. . . . In this contest between the stepfather and the uncle, the interest of the boy seems to have been altogether overlooked. . . . We think the boy was a competent witness, and ought to have been examined in that character. Indeed, we think, being the party mainly concerned, he had a right to make a statement to the Court as to his feelings and wishes upon the matter, and this ought to have been allowed serious consideration by the Court, in the exercise of its discretion, as to the person to whose control he was to be subjected. . . . The boy during a long residence in the family of his grandfather and uncle has formed attachments and associations which he is unwilling to sever. At the age of thirteen, a minor has a right to have his wishes and feelings taken into consideration. . . ." The Court expressly adverts to the fact that the stepfather was under no legal obligation to provide for the child, and that the mother wanted him to remain with his uncle. The Court concluded its opinion with this language: "These and the other facts of the case show beyond all question that it is for the interest of the boy to remain with his uncle, and in the absence of any positive right, either in the mother or stepfather, the Court below in the exercise of its legal discretion, should so order."

It is manifest from Judge Carr's findings of fact that he was gravely perturbed over the question as to whether respondent, due to his drinking intoxicating liquor, was a fit and suitable person to have the custody of this boy. This perturbation is further manifested by the request in the conclusion of his judgment that a Deputy Sheriff of Wake County should act as an officer of the court on a Special Mission during the next twelve months to observe respondent's condition with respect to drinking intoxicating liquor.

There is nothing in the findings of fact to indicate that Judge Carr gave any consideration to the wishes of this ten-year old boy as to the person to whose custody he was to be given, though under the facts here the boy, being the party mainly concerned, had a right to have his wishes and feelings taken into especial consideration by the judge in awarding his custody. It seems that the learned Judge felt so "cramped by his opinion that in law" the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy. This was error.

In the former appeal of this case Rodman, J., speaking for the Court, said: "The crucial question in this case, as in all cases involving the custody of an infant, is: What, in fact, is for the best interest of the child?" Judge Carr, in his statement quoted above, said he had some difficulty in his thinking as to whether or not he could apply the above quoted principle of law in this proceeding. It would seem that the learned and experienced Judge acted under a misapprehension of law. "Where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for further proceedings as to justice appertains and the rights of the parties may require." *Calaway v. Harris*, 229 N.C. 117, 47 S.E. 2d 796.

This proceeding must be heard again, so that the evidence can be considered in its true legal light, according to the applicable principles of law.

Error.

BOBBITT, J., dissenting: The former appeal by petitioner was from an order of Judge Hobgood. On sufficient findings of fact, he awarded to Guy A. Gibbons, Sr., respondent, "the custody, care and control and tuition of Guy A. Gibbons, Jr." *In re Gibbons*, 245 N.C. 24, 95 S.E. 2d 85. This order was vacated and the cause remanded for further hearing. Decision was based in part upon the refusal of the court to permit petitioner to examine Guy A. Gibbons, Jr., in open court, and upon the fact, as stated in Judge Hobgood's findings, that the judge, without the consent of petitioner, had held "three conferences in chambers with Guy A. Gibbons, Jr. without either Mr. or Mrs. Bright or Mr. or Mrs. Guy A. Gibbons, Sr. being present, this being done with the view of obtaining full knowledge of the child's problems and attachment with reference to the petitioner and the respondent."

This appeal by petitioner is from an order of Judge Carr who, after extended hearings and full consideration, awarded custody to Guy A. Gibbons, Sr. The parties consented that Judge Carr might confer privately with Guy A. Gibbons, Jr. Neither petitioner nor respondent requested permission to examine Guy A. Gibbons, Jr., in open court. Judge Carr, like Judge Hobgood, had the advantage of impressions derived from personal contacts, observations and conversations. It is significant that both reached the same conclusion.

The established rule is stated by Rodman, J., in opinion on former appeal, as follows: "The findings of fact made by the trial judge, like a jury verdict, conclude the parties and are binding on us when supported by competent evidence received at a properly constituted hearing."

Our function is to determine whether the court below acted under misapprehension of law or failed to apply pertinent legal principles. It is not our function to find facts, thereby resolving

conflicts in evidence. The underlying reason for the rule is that the hearing judge has the opportunity to observe the parties and the witnesses. An appellate court considers only the cold record.

I cannot say whether, had I been in Judge Carr's place, I would have reached the same conclusion. But this is not the responsibility of this Court. Hence, I refrain from observations bearing upon the relative fitness and suitability of petitioner and of respondent. Certainly, there is nothing in the conduct of the Brights that invites censure.

Guy A. Gibbons, Sr., the adoptive father, has the legal responsibility for his adopted son. Nothing else appearing, he has the legal right to custody. While much may be said in favor of the Brights, the fact remains that petitioner has neither legal responsibility for Guy A. Gibbons, Jr., nor legal right to custody.

Thus, Judge Carr was right, in my opinion, when he gave heed to what was said by this Court in *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759, to wit: "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, *and is subject to judicial control only when the interests and welfare of the children clearly require it.*" (Italics added.) I regard this as a correct statement of a sound legal proposition.

Attention is called to these positive findings of fact by Judge Carr:

"1. The Brights and the Gibbons families differ in their methods of disciplinary control over the child. The Brights are inclined toward leniency and Mr. and Mrs. Gibbons towards strictness almost bordering on severity. Arguments can be made in support of each method. The method of the Brights appeals to the child and causes him to think the Brights love him more generously than Mr. and Mrs. Gibbons. Hence he is very fond of Mr. and Mrs. Bright.

"2. The child is not a neglected child, as alleged in the petition and the amended petition. The said Guy A. Gibbons, Sr. has not abandoned said child, as alleged in said amended petition.

"3. Both couples, Mr. and Mrs. Bright and Mr. and Mrs. Gibbons, are fit and proper persons to have the custody of said child.

"4. (Quoted in opinion of Court.)

"5. The Brights in 1950, realizing that they were becoming attached to the child, requested Gibbons to take him, but he declined to do so. After Gibbons remarried in 1952, the conduct and attitude of Gibbons and his wife was such as to give the

Brights notice that Gibbons would ultimately ask them to let him have the child and this was made more apparent to the Brights in the year 1953.

"6. The contest between the Bright and Gibbons families in respect to the custody of the child has created a situation whereby the child's best interest requires that for the time being he be placed in the custody of one or the other and that the Order should not provide for any visitation of the child to the one who is not awarded the custody."

Under the caption, "CONCLUSIONS OF LAW," Judge Carr reaches this conclusion: "Upon the foregoing findings of fact the Court is of the opinion that it does not appear that the best interests of the child clearly require that he be taken away from his father, who has duly and legally adopted him and for whom the child was named." The phraseology of this conclusion, which is a composite of fact and of law, follows closely the course indicated by this Court in *James v. Pretlow, supra,* as appropriate where one who has no legal right to custody or legal responsibility for the child seeks to obtain custody from one who has a legal right thereto as well as legal responsibility for the child. The essential meaning of the rule stated in *James v. Pretlow, supra,* is that a parent, who has legal responsibility for his child and who is a fit and proper person to have custody, is entitled to custody unless for the most substantial and sufficient reasons the interests and welfare of the child clearly require that custody be awarded to another.

It is noted that Guy A. Gibbons, Sr., has had custody of Guy A. Gibbons, Jr., since August 1, 1954. It is quite evident that the superior court judges who observed the boy and talked with him did not think he had been harmed by this custody.

Of course, the welfare of Guy A. Gibbons, Jr., and his own wishes, should have been considered by the hearing judge. Nothing appears to indicate that Judge Carr did not consider these matters. Rather, it appears that Judge Carr made his findings and reached his conclusions after making appraisal of *all* relevant factors, including the impressions he gained from personal contacts with the boy. Are we to judge the weight he should have given to each phase of the evidence?

Judge Carr, feeling the weight of his responsibility, made provision that respondent be observed, particularly with reference to drinking intoxicating beverages. This, in my view, should not be interpreted as lack of confidence in his decision, but rather as a means of safeguarding the best interests of the boy if *future events* should require a reconsideration of the cause.

I would affirm the judgment of Judge Carr. But, apart from that, since the cause is remanded for a third superior court hearing, I would make it clear that, upon such further hearing,

the judge should weigh the evidence and find the facts according to his, not our, judgment. My principal concern is that the review of facts appearing in the Court's opinion will be construed as a virtual directive to the next superior court judge to award custody to petitioner. I, for one, have no such thought in mind. As to the facts, these are matters for determination by the superior court judge; and I do not want the next judge to feel "cramped" in respect thereof by what is said by this Court in the opinion filed today.

ROMAN, J., concurs in dissent.

WILLIAM J. BAILEY v. DR. JOHN C. McGILL, DR. KENNETH H. McGILL, DR. THOMAS H. WRIGHT, JR.

(Filed 11 December, 1957)

1. **Pleadings § 19c—**

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

2. **Same—**

Upon demurrer the complaint must be liberally construed with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151.

3. **Insane Persons § 1—**

The hearing by the clerk under G.S. 122-46 after certification by two physicians that the person in question should be committed to a State Hospital for observation and admission, G.S. 122-43, is a judicial proceeding and the clerk has the right and duty to subject witnesses to examination and to accept or reject evidence, and, if the person in question is detained and committed, it is perforce by order of the clerk.

4. **Physicians and Surgeons § 14—**

The making of affidavits by physicians at the direction of the clerk in the due course of a proceeding for the admission of a person to a State Hospital is not done by them in the ordinary practice of their profession but in the roll of witnesses.

5. **Malicious Prosecution § 1a: Process § 15: False Imprisonment § 1—**

Allegations that physicians, in making affidavits pursuant to G.S. 122-43 at the direction of the clerk in lunacy proceedings, were guilty of gross negligence amounting to legal malice, without allegations that they were motivated by an ulterior or wrongful purpose or conspired with another in his ulterior and wrongful purpose, fail to state a case for malicious prosecution, or for false imprisonment, or for abuse of process.

6. **Libel and Slander § 7c—**

Physicians, in making affidavits pursuant to G.S. 122-43 at the direction of the clerk, act in the roll of witnesses, and such affidavits are absolutely privileged when pertinent to the proceeding.

7. **Appeal and Error § 7: Pleadings § 19c—**

Where the complaint constitutes a statement of a defective cause of

action as against certain of the parties, the demurrer *ore tenus* of such parties in the Supreme Court will be allowed and the cause dismissed as to them.

8. **Pleadings § 19c—**

A demurrer for failure of the complaint to state a cause of action cannot be sustained if the complaint is sufficient for this purpose in any respect or to any extent.

9. **Process § 15—Complaint held to state cause of action for abuse of process in instigating lunacy proceedings maliciously for wrongful purpose.**

Allegations to the effect that the relationship of physician and patient existed between defendant and plaintiff, that defendant by virtue of his position persuaded and caused plaintiff's parents to execute and file affidavit with the clerk stating that plaintiff was suffering from some mental disorder, that defendant influenced and caused two other physicians to make and execute the affidavit required by G.S. 122-43 for the commitment of plaintiff, that plaintiff was committed to a State Hospital for thirty days and then discharged because he was not and had never been insane, together with allegations that defendant in advising and influencing plaintiff's parents acted through ill will and malice because defendant knew plaintiff was suffering from an incurable disease and wished to rid himself of plaintiff as a patient, *are held* sufficient to state a cause of action for abuse of process.

10. **Attorney and Client § 3: Trial § 5½—**

Where plaintiff's complaint is sufficient to state a particular cause of action only, a statement of plaintiff's counsel that they did not rely upon such cause of action is not binding upon plaintiff in the absence of express authority to the attorney, since ordinarily an attorney has no power by stipulation or agreement to waive or surrender a substantial legal right of his client.

JOHNSON, J., concurs in result.

APPEAL by plaintiff from *Rudisill, J.*, March-April Civil Term 1957 of CLEVELAND.

Civil action heard on a demurrer *ore tenus*. The demurrer was sustained, and plaintiff appealed.

Parker Whedon, Kenneth R. Downs and Hugh A. Wells for Plaintiff, Appellant.

Falls & Falls and Kennedy, Mahoney & Mull for Dr. John C. McGill, Defendant, Appellee.

Carpenter & Webb for Dr. Kenneth H. McGill, Defendant, Appellee.

Robinson, Jones & Hewson for Dr. Thomas H. Wright, Jr., Defendant, Appellee.

PARKER, J. As the defendants' demurrer *ore tenus* challenges plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action, it is necessary to summarize its essential allegations, which are as follows:

Plaintiff is a citizen and resident of Cleveland County, North Carolina. Dr. John C. McGill and Dr. Kenneth H. McGill are, and were at the times complained of, practicing physicians in Kings Mountain, North Carolina. Dr. Thomas H. Wright, Jr. is, and was at the times complained of, a practicing psychiatrist in Charlotte, North Carolina.

Prior to 15 October 1954, plaintiff, as a patient of Dr. John C. McGill, had been confined in a hospital in Kings Mountain. While there Dr. John C. McGill administered, or instructed others to administer, to plaintiff large doses of a pain-killing drug, the direct effect of which was to keep him in an unconscious condition for long periods of time.

Before 15 October 1954 Dr. John C. McGill had various conversations and conferences with plaintiff's parents, and, by virtue of his position as a physician, through these conversations and conferences, influenced, persuaded and caused plaintiff's parents to execute and file an affidavit with the Clerk of the Superior Court of Cleveland County, North Carolina, stating in substance that their son was suffering from some purported mental disorder, and was in need of observation and admission to the State Hospital for the Insane. The parents of plaintiff in executing this affidavit acted not only by reason of the influence of Dr. John C. McGill, but also in complete reliance on his representation to them that their son was insane. Dr. John C. McGill, in advising and influencing plaintiff's parents to execute and file this affidavit, acted solely through ill will and malice toward plaintiff growing out of his anxiety to rid himself of plaintiff as a patient, because he knew plaintiff was suffering from an incurable case of hemophilia, and did not respond to his treatment.

At the request, advice and recommendation of Dr. John C. McGill, the Clerk of the Superior Court of Cleveland County, North Carolina, pursuant to G. S. 122-43, directed Doctors Kenneth H. McGill and Thomas H. Wright, Jr. to make an examination of plaintiff's mental condition.

Dr. John C. McGill, acting through ill will and malice toward the plaintiff, and using his influence as a brother physician, influenced and caused Dr. Kenneth H. McGill, his brother, and Dr. Thomas H. Wright, Jr., to make and execute the necessary affidavit required by statute for committing plaintiff to the State Hospital for the Insane, without making the examination required by G.S. 122-43. Or, if any examination was made by either Dr. Kenneth H. McGill or Dr. Thomas H. Wright, Jr., it was by reason of the influence of Dr. John C. McGill, such a hasty and superficial examination as to be totally inadequate, and not a real or *bona fide* examination as required by G.S. 122-43.

Subsequent to the order or direction of the Clerk of the Superior Court of Cleveland County, Dr. Kenneth H. McGill wholly neglected and failed to make any mental examination of plaintiff, as required by the Clerk's order and the laws of the State, but simply signed and executed the affidavit. Or, if he made any mental examination of plaintiff at any time, it was so superficial, hurried and improper as to be totally inadequate, and not a real or *bona fide* examination as required by G.S. 122-43.

On or about 15 October 1954 plaintiff was carried by ambulance to Charlotte Memorial Hospital for examination by Dr. Thomas H. Wright, Jr., pursuant to the order of the aforesaid Clerk. Upon arrival plaintiff was carried on a stretcher into a hallway of the hospital near the emergency room. Dr. Wright appeared, and, knowing plaintiff was in a drugged and semi-conscious condition, made an examination of him, which was so superficial, hasty and improper as to be totally inadequate, and not a real or *bona fide* examination, as required by G.S. 122-43. The examination consisted entirely of asking plaintiff in his drugged condition a few simple questions, and lasted about five minutes.

Plaintiff was then carried back to Kings Mountain, and for the following two or three days was, under the direction of Dr. John C. McGill, kept in a drugged condition in a hospital there.

About 18 October 1954 plaintiff was carried to Morganton, North Carolina, and there admitted to the State Hospital for the Insane. Plaintiff was not insane, or in need of mental treatment or observation, and has never been in his life in such condition. He was not laboring under hallucinations at any time, nor was he in such condition as to require confinement or restraint to prevent self-injury or violence to others. About 17 November 1954 he was discharged from this hospital, as being a person who was not insane, or in need of mental treatment at the time of his commitment.

Solely by reason of the wrongful conduct of the defendants, plaintiff was wrongfully committed to the State Hospital for the Insane, where he was forced to stay for 30 days or more.

Because of the wrongful conduct of the defendants, and his wrongful commitment to the State Hospital for the Insane, plaintiff has been wronged and damaged by defendants, in that he has been falsely imprisoned for 30 days, suffered the scorn and ridicule of his neighbors and other people in the community where he resides, to whom he has become known as a mental case, and has endured extreme mental anguish and suffering and loss of earnings.

Wherefore, plaintiff prays that he recover $100,000.00 compensatory damages jointly and severally from all the defend-

ants, and $50,000.00 punitive damages from Dr. John C. McGill.

This case came on for trial. After the jury was duly selected, sworn and impaneled, and the pleadings read, the court requested plaintiff's attorneys to prepare the issues which they contended arose upon the pleadings. Plaintiff, through his counsel, tendered eleven issues. Upon a discussion of the tendered issues, plaintiff's counsel stated in open court that they did not rely upon a cause of action for malicious prosecution, or for abuse of process, or false imprisonment. Whereupon, the defendants, and each of them, demurred *ore tenus* to the complaint on the ground that, aside from a cause of action for malicious prosecution, no cause of action is stated in the complaint. The demurrer *ore tenus* was sustained, and judgment was entered to that effect. The above statement appears in the case on appeal, and also in plaintiff's brief.

Plaintiff says in his brief that he "has stated a cause of action for a false certificate of insanity made by two of the defendants, and conspired in by the other, and the plaintiff has also stated a cause of action upon a certificate of insanity negligently made without proper and ordinary care and prudence, and without due examination and inquiry and proof." Plaintiff also says in his brief that "a physician is liable for a certificate of insanity which is false, or a certificate of insanity that was negligently made by said physician without proper and ordinary care and prudence, and without due examination, inquiry and proof of the facts whether plaintiff was sane or insane."

On a demurrer to the complaint, we take the case as made by the complaint. It is familiar learning that the office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440. It is also common knowledge to the bench and bar that the court is required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151; *Barber v. Wooten*, 234 N.C. 107, 66 S.E. 2d 690; *Cathey v. Construction Co.*, 218 N.C. 525, 11 S.E. 2d 571; *Joyner v. Woodard*, 201 N.C. 315, 160 S.E. 288.

G.S. 122-43 reads as follows:

> "When an affidavit and request for examination of an alleged mentally disordered person has been made, or when the clerk of the superior court has other valid knowledge of the facts of the case to cause an examination to be made, he shall direct two physicians duly licensed to practice medicine by the State and not holding any office or appointment except advisory or consultative in the hospital to which

commitment may be made, to examine the alleged mentally disordered person or shall have him brought to them in order to determine if a state of mental disorder exists and if it warrants commitment to one of the State hospitals or insitutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect on a form approved by the North Carolina Hospitals Board of Control."

G.S. 122-46 provides:

"When the two physicians shall have certified that the alleged mentally disordered person is in need of observation and admission in a hospital for the mentally disordered, the clerk shall hold an informal hearing. The clerk shall cause to be served on the alleged mentally disordered person a notice of the hearing. The clerk shall have the hearing without unnecessary delay and shall examine the certificates or affidavits of the physicians and any proper witnesses, and at its conclusion may issue an order of commitment on the form approved by the North Carolina Hospitals Board of Control, which shall authorize the hospital to receive said person and there to examine him and observe his mental condition for a period not exceeding thirty days."

The amendment of G.S. 122-46 by the General Assembly at the Session of 1957, Ch. 1232, which Act was ratified on 10 June 1957, changing thirty days to sixty days, has no application here.

Jurisdiction to direct two physicians to examine an alleged mentally disordered person to determine if a state of mental disorder exists, and, when the two physicians shall have certified that the alleged mentally disordered person is in need of observation and admission in a hospital for the mentally disordered, to have a hearing and examine the certificates or affidavits of the physicians and any proper witnesses, and, where warranted, to commit the alleged mentally disordered person to a State Hospital for the Mentally Disordered is the judicial authority conferred upon the Clerk of the Superior Court by the two statutory sections quoted above. Necessary to the performance of such judicial authority is the right and duty to subject witnesses to examination, and to accept or reject evidence. Otherwise, to what purpose would it be to empower the Clerk of the Superior Court to have a hearing, to "examine the certificates or affidavits of the physicians and any proper witnesses," and to require a decision from the Clerk?

The examination and affidavits by the two physicians to commit an alleged mentally disordered person to a State Hospital for the Mentally Disordered for examination and observation

for a period not exceeding thirty days are required by G.S. 122-43 and G.S. 122-46. But the act of commitment and detention of such person in such a hospital, if any be made, is performed by the Clerk of the Superior Court. See *Dunbar v. Greenlaw*, (17 Dec. 1956), 152 Me. 270, 128 A. 2d 218; *Pennell v. Cummings*, 75 Me. 163, 166; *Appeal of Sleeper*, 147 Me. 302, 310, 312, 87 A. 2d 115.

G.S. 122-43 read with G.S. 122-46 demonstrates that the two physicians are witnesses in the proceeding for the detention and commitment of an alleged mentally disordered person in a State Hospital for the Mentally Disordered for observation and treatment for a period not exceeding thirty days, and that the Clerk of the Superior Court is the judge.

According to the allegations of the complaint Drs. Kenneth H. McGill and Thomas H. Wright, Jr. made the affidavits in the due course of a proceeding for the admission of plaintiff to a State Hospital for the Mentally Disordered for examination and observation of his mental condition for a period not exceeding thirty days, by direction of the Clerk of the Superior Court of Cleveland County, who was acting pursuant to G.S. 122-43 and G.S. 122-46. These two physicians did not institute the proceeding, nor did they, or either of them, have anything whatsoever to do with the institution thereof, according to the complaint's allegations. They were directed by the Clerk of the Superior Court to perform an important duty. In discharging it, they were not engaged in the ordinary practice of their profession. Their role and function in examining plaintiff and signing the affidavits in respect to his mental condition are those of witnesses. These examining physicians did not issue the order of commitment and detention: that was done by the Clerk of the Superior Court of Cleveland County.

Plaintiff seeks to hold Drs. Kenneth H. McGill and Thomas H. Wright, Jr. to the standard of due care under the circumstances in the examination and making of their affidavits, and accuses them of gross negligence amounting to legal malice. Plaintiff, through his counsel, stated in open court in the trial below, and states in his brief, that he does not rely upon a cause of action for malicious prosecution, or for abuse of process, or for false imprisonment. It would seem that plaintiff, as he apparently concedes, has not stated a case against Drs. Kenneth H. McGill and Thomas H. Wright, Jr. for malicious prosecution, *Dunbar v. Greenlaw, supra; Fisher v. Payne*, 93 Fla. 1085, 1093, 113 So. 378; or a case for false imprisonment, *Dunbar v. Greenlaw, supra; Pennell v. Cummings, supra; Ussery v. Haynes*, 344 Mo. 530, 127 S.W. 2d 410; *Dyer v. Dyer*, 178 Tenn. 234, 156 S.W. 2d 445; *Mezullo v. Maletz*, (1954), 331 Mass. 233, 118 N.E. 2d 356;

or for abuse of process, as there is no allegation that Drs. Kenneth H. McGill and Thomas H. Wright, Jr., or either of them, had an ulterior or wrongful purpose in making their affidavits, or conspired with Dr. John C. McGill in his alleged ulterior or wrongful purpose, *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; 72 C.J.S., Process, p. 1189.

Plaintiff says in his brief that he has not placed any precise label on his cause of action, and it is not necessary for him to do so. Plaintiff apparently presents his case against Drs. Kenneth H. McGill and Thomas H. Wright, Jr. as a malpractice suit. The nature of his allegations and charge against these two physicians would seem to be that of libel. *Dunbar v. Greenlaw, supra; Perkins v. Mitchell*, 31 Barb., N.Y. 461, 465; Cooley on Torts, 4th Ed., Ch. 7, Sec. 145, p. 494.

The rule in this jurisdiction is that a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity. *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248; *Godette v. Gaskill*, 151 N.C. 52, 65 S.E. 612; *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775. The great weight of American authority supports this rule. See cases cited in Annotations 12 A.L.R. 1247, 81 A.L.R. 1119, 54 A.L.R. 2d 1298; 22 L.R.A. 836 Note; Cooley on Torts, 4th Ed., Ch. 7, Sec. 153, p. 527; 53 C.J.S., Libel and Slander, pp. 180-181.

We held in *Jarman v. Offutt, supra*, that a proceeding to commit an alleged mentally disordered person to a State Hospital for the Mentally Disordered under the procedure set forth in G.S. 122-43 and G.S. 122-46 is a judicial proceeding within the rule of absolute privilege.

The contents of the affidavits of Drs. Kenneth H. McGill and Thomas H. Wright, Jr. are not set forth in the complaint. That the recitals in these affidavits were material and pertinent to the inquiry before the Clerk of the Superior Court of Cleveland County seem manifest.

In *Jarman v. Offutt* this Court said: "Ordinarily, statements made in an affidavit which are pertinent to matters involved in a judicial proceeding, or which the affiant has reasonable grounds to believe are pertinent, are privileged, and, although defamatory, are not actionable." See also, Cooley on Torts, 4th Ed., Ch. 7, Sec. 156; Restatement of the Law of Torts, p. 233, Sec. 588.

Physicians, who are witnesses, in judicial proceedings to commit an alleged mentally disordered person for confinement, have been accorded such absolute immunity from civil liability for

their material and pertinent affidavits, certificates and testimony. *Jarman v. Offutt, supra; Dunbar v. Greenlaw, supra; Dyer v. Dyer, supra; Corcoran v. Jerrel,* 185 Iowa 532, 170 N.W. 776, 2 A.L.R. 1579; *Fisher v. Payne, supra; Hager v. Major,* 353 Mo. 1166, 186 S.W. 2d 564, 158 A.L.R. 584; *Perkins v. Mitchell, supra; Linder v. Foster,* 209 Minn. 43, 295 N.W. 299 (physician regarded as a quasi judicial officer). See *Reycraft v. McDonald,* 194 Mich. 500, 160 N.W. 836.

There is contrary authority. *Williams v. LeBar,* 141 Pa. 149, 151, 21 A. 525 (a brief Per Curiam Opinion); *Ayers v. Russell,* 50 Hun. 282, 3 N.Y.S. 338; and *Miller v. West,* 165 Md. 245, 167 A. 696 (dictum);—the last two cases are cited and relied on in plaintiff's brief—were decided upon the issue of ordinary or reasonable care of the physician without cognizance of the witness privilege and immunity. In *Ayers v. Russell,* Ingalls, J., dissenting, said: "It would seem that the certificates made by the defendants should also be regarded as privileged communications." The correctness of the decision in *Ayers v. Russell* has been questioned in *Brady v. Collom,* 68 R.I. 299, 27 A. 2d 311. Also *Hall v. Semple,* 3 Foster and Finlayson 337, 176 English Reports, Full Reprint 151, and *Harnett v. Fisher,* 16 British Ruling Cases 238—both cases cited and relied on by plaintiff. *Hall v. Semple* was decided upon the issue of ordinary or reasonable care of a physician acting under a lunacy statute very diferent from the North Carolina Act. It would seem that the English Act did not provide for a hearing and order of commitment by a public officer like our Act. In that case the defendant and one Guy, a surgeon, signed certificates that plaintiff was of unsound mind. Plaintiff's wife took these certificates to an asylum, whose manager sent men at her instance, who, under the authority of the certificates, next night seized plaintiff, and forcibly carried him to the asylum. Lord Blanesburgh, one of the Judges delivering an opinion in *Harnett v. Fisher,* said: "The point under *Hall v. Semple* (1862) 3 Fost. & F. 337, 358, remains where it was left by this House in *Everett v. Griffiths* (1921) 1 A.C. 631-H.L. There the correctness of that decision was assumed but not decided. Now its correctness is no longer challenged."

Some authorities deny the pertinent witness privilege to a physician in a lunacy proceeding if the tribunal lacks jurisdiction. *Beckham v. Cline,* 151 Fla. 481, 10 So. 2d 419, 145 A.L.R. 705; *Hager v. Major, supra; Perkins v. Mitchell, supra;* 158 A.L.R. 592 Note. See also, 70 C.J.S., Physicians and Surgeons, p. 972.

Mezullo v. Maletz, supra, was an action against a physician for signing a pertinent certificate in a lunacy commitment proceeding heard upon a demurrer to plaintiff's declaration. Plaintiff alleged in the first count that the defendant negligently per-

formed a mental examination of her, and signed a certificate to the effect that she was insane or of unsound mind, and that as a result of such negligence "plaintiff . . . was committed" to a State Institution for the Insane. The second count alleged in substance that defendant "did maliciously and in bad faith execute and sign a certificate designed by law for the commitment of individuals to State Institutions for the Insane," when he "knew or should have known" that plaintiff was sane, and that plaintiff as a result was "caused to be confined in and committed to a State Institution for the Insane." The Court said: "But whatever the law may have been formerly on this subject it is now settled that words spoken by a witness in the course of judicial proceedings which are pertinent to the matter in hearing are absolutely privileged, even if uttered maliciously or in bad faith. Citing authority. And this is the prevailing view elsewhere. Citing authority. If a physician signing a certificate is entitled to the privilege of a witness—and the Niven Case so holds—then it would follow that he does not lose it on proof of malice or bad faith." The allegations of the third count are in substance that defendant "wilfully conspired with the plaintiff's husband to unlawfully and improperly have the . . . plaintiff committed as an insane person" when the defendant knew that the plaintiff was sane; that in furtherance of the conspiracy the defendant "did sign or execute a certificate of commitment" whereby plaintiff was seized and committed; and deprived of her liberty and suffered physical and mental harm. The Supreme Judicial Court of Massachusetts affirmed the order of the lower court sustaining the demurrer to the declaration.

Dunbar v. Greenlaw, supra, was a suit against a physician. Plaintiff accused him of having erroneously certified in ancillary, emergency, detention proceedings, under the Maine Act, without sufficient inquiry or examination, that plaintiff was insane. Plaintiff was confined in a State Hospital, and claimed resultant damage. The amended declaration contains the following recitation of the standard of care legally required by plaintiff from the defendant, and of defendant's failure to fulfill it:

> " 'It had then and there become the duty of the defendant *to exercise reasonable and ordinary care, skill and diligence* in an examination of the plaintiff to ascertain his true mental condition *to make a prudent and careful* inquiry and to obtain proof whether he was sane or insane and it also became the duty of the defendant *to exercise his best and reasonable and proper judgment* to the plaintiff's sanity . . . the said defendant . . . *made a false, pretended and grossly negligent examination* of the plaintiff as to his mental condition . . . the defendant failed and neglected *to use or to exercise reasonable and ordinary care, skill and diligence* in such examination . . . and the defendant failed *to make a prudent*

and careful inquiry and to obtain proof as to the sanity or insanity of the plaintiff, and failed *to exercise his best, reasonable and proper judgment* as to to the plaintiff's sanity but *with gross and culpable negligence* without adequate and proper examination of the plaintiff, the defendant made and delivered said certificate.' (Emphasis supplied.)"

Mr. Justice Sullivan delivered for the Supreme Judicial Court of Maine on 16 December 1956 a very scholarly and well reasoned opinion. In his opinion he said: "The plaintiff presents his case as a malpractice suit. The nature of the charge would seem to be that of libel, citing authorities; rather than of false imprisonment, citing authority; or malicious prosecution, citing authority." The Court held that a physician, whose certificate of insanity in insanity detention proceedings was allegedly product of gross negligence, was immune from tort liability to person thereafter committed to state institution, in view of absolute privilege of physician as witness in lunacy proceeding from civil liability for his pertinent certification, and sustained defendant's exceptions to the overruling of his demurrer to plaintiff's declaration by the lower court.

Plaintiff has not challenged the regularity of the judicial proceeding before the Clerk of the Superior Court of Cleveland County in which plaintiff was committed to a State Hospital for the Mentally Disordered, nor has he contended that the Clerk had no jurisdiction in the proceeding. The pertinent affidavits made in this proceeding by direction of the Clerk by Drs. Kenneth H. McGill and Thomas H. Wright, Jr. were absolutely privileged, even if made maliciously or in bad faith. Plaintiff's allegations against Drs. Kenneth H. McGill and Thomas H. Wright, Jr. do not state a cause of action against them, and the lower court properly sustained their demurrers *ore tenus*.

In this Court Drs. Kenneth H. McGill and Thomas H. Wright, Jr. demur *ore tenus* to the complaint, and move the Supreme Court to dismiss the action against them on the ground that the complaint does not state facts sufficient to constitute a cause of action against them. As the complaint constitutes a statement of a defective cause of action against the above named two physicians, the motion by them to dismiss is allowed. *Cotton Mills Co. v. Duplan Corp.*, 246 N.C. 88, 97 S.E. 2d 449; *Scott v. Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146.

We are next confronted with the question as to whether the allegations of the complaint state facts sufficient to constitute a cause of action against Dr. John C. McGill.

"The rule is that if the complaint is good in any respect, or to any extent, it may not be overthrown by demurrer for failure to state a cause of action." *Batchelor v. Mitchell*, 238 N.C. 351, 78 S.E. 2d 240.

These are the essential allegations against Dr. John C. McGill: The relationship of physician and patient existed between him and plaintiff. Before 15 October 1954 Dr. John C. McGill had various conversations and conferences with plaintiff's parents, and by virtue of his position as a physician, through these conversations and conferences, influenced, persuaded and caused plaintiff's parents to execute and file an affidavit with the Clerk of the Superior Court of Cleveland County, stating in substance that plaintiff was suffering from some mental disorder, and was in need of observation and admission to the State Hospital for the Insane. That plaintiff's parents in executing this affidavit acted in complete reliance on Dr. John C. McGill's representation to them that plaintiff was insane. *Dr. John C. McGill in advising and influencing plaintiff's parents to execute and file this affidavit acted solely through ill will and malice toward plaintiff growing out of his anxiety to rid himself of plaintiff as a patient, because he knew plaintiff was suffering from an incurable case of hemophilia, and did not respond to his treatment.* At the request, advice and recommendation of Dr. John C. McGill, the Clerk of the Superior Court of Cleveland County, pursuant to G.S. 122-43, directed Drs. Kenneth H. McGill and Thomas H. Wright, Jr. to make an examination of plaintiff. Dr. John C. McGill, acting through ill will and malice toward plaintiff, and using his influence as a brother physician, influenced and caused Drs. Kenneth H. McGill, his brother, and Thomas H. Wright, Jr., to make and execute the necessary affidavits required by statute for committing plaintiff to the State Hospital for the Insane, without making the examination required by G.S. 122-43. About 18 October 1954 plaintiff was carried to Morganton, and there admitted in the State Hospital for the Insane, where he was forced to stay for 30 days. Plaintiff was not insane, or in need of mental treatment, and had never been in such condition in his life. Then follows the allegations of damages.

Accepting the allegations of the complaint against Dr. John C. McGill as true, and construing them with the liberality we are required to do on a demurrer, it appears that Dr. John C. McGill maliciously perverted the proceeding to commit a mentally disordered person to a State Hospital for the Mentally Disordered for observation and treatment, to the purpose of having plaintiff, who was not mentally disordered, committed to such a hospital and there confined for 30 days, to the end of ridding himself of plaintiff as a patient, which was a purpose and result not warranted by the proceeding authorized by G.S. 122-43 and G.S. 122-46.

Plaintiff has alleged a cause of action against Dr. John C. McGill for abuse of process. *Davenport v. Lynch,* 51 N.C. 545;

Getsinger v. Corbell, 188 N.C. 553, 125 S.E. 180; *Coulter v. Coulter*, 73 Colo. 144, 214 P. 400 (this case cites our case of *Davenport v. Lynch*). See *Barnette v. Woody, supra*, p. 431 of our Reports, and p. 228 in 88 S.E. 2d.

Plaintiff's counsel stated in the lower court, and here, that they do not rely upon a cause of action for abuse of process. This Court said in *Bizzell v. Equipment Co.*, 182 N.C. 98, 108 S.E. 439: "It is also fully recognized that an attorney, by virtue of his office and ordinary employment in a case, has no implied power . . . to enter into stipulations or agreements which sensibly impair such client's substantial rights and interests presented and involved in the litigation."

In 7 C.J.S., Attorney and Client, p. 922, it is written: ". . . in the absence of express authority, an attorney generally has no power, by stipulation, agreement, or otherwise, to waive or surrender the substantial legal rights of his client . . . ." See *S. v. Barley*, 240 N.C. 253, 81 S.E. 2d 772.

There is nothing in the record to show that plaintiff expressly authorized his counsel to say that they did not rely upon a cause of action for abuse of process, and, therefore, such statement is not binding on him.

The judgment sustaining the demurrers of Drs. Kenneth H. McGill and Thomas H. Wright, Jr. is sustained, and the action against them is dismissed; the judgment sustaining the demurrer of Dr. John C. McGill is reversed.

As to Dr. Kenneth H. McGill and Dr. Thomas H. Wright Jr.
Affirmed and action dismissed.
As to Dr. John C. McGill
Reversed.

JOHNSON, J., concurs in result.

G. FETZ LITAKER, ADMINISTRATOR OF THE ESTATE OF BILLY RAY LITAKER, DECEASED, v. CHARLES FRANKLIN BOST, BY HIS GENERAL GUARDIAN, E. L. BOST, AND CALEB WATSON BOST, III.

(Filed 11 December, 1957)

1. **Automobiles § 52—**

Evidence that the owner of the automobile was a passenger therein, and that the driver negligently operated the vehicle under the direction and control of the owner, resulting in the death of another passenger in the vehicle, is sufficient to overrule nonsuit in an action for wrongful death against the owner-passenger.

2. Trial § 22b—

Conflicts in the testimony must be resolved in plaintiff's favor upon motion to nonsuit.

3. Automobiles § 49—Evidence held insufficient to show contributory negligence of passenger as a matter of law.

Where there is conflict in the evidence as to whether the car in which intestate was riding was engaged in racing during the afternoon before the fatal trip so as to give intestate notice of the driver's recklessness or incompetence, and there is evidence tending to show that intestate was helped into the car for the fatal trip and was too intoxicated to be aware that the automobile was being driven at excessive speed and in a reckless manner in participating in races on the highway, the evidence, although sufficient to support a finding that intestate was aware of what was happening and was contributorily negligent in continuing to ride in the car under the circumstances, is insufficient to establish contributory negligence in this respect as a matter of law.

4. Negligence § 18: Pleadings § 24a—

It is not required that plaintiff's evidence in refutation on the issue of contributory negligence be supported by allegation, since the burden of proof on this issue is on defendants.

5. Appeal and Error § 35—

Where the charge of the court is not included in the record, it will be presumed that the jury was correctly instructed on every principle of law applicable to the facts.

6. Trial § 36—

The verdict of the jury may be construed with regard to the pleadings, evidence, admissions of the parties and the charge of the court in ascertaining its meaning with the view of sustaining it if possible.

7. Appeal and Error § 39—

The presumption is in favor of the correctness of the judgment in the lower court, and the burden is on appellant to show a denial of some substantial right.

8. Automobiles § 54h: Negligence § 21—Verdict against defendant-owner held not inconsistent with finding that defendant-driver was not liable.

Plaintiff's allegations were to the effect that his intestate was a passenger in an automobile and was fatally injured as a result of the negligent operation of the automobile by one of defendants who was driving under the supervision and control of the other defendant, who was the owner and also a passenger in the car. The evidence was conflicting as to whether the defendant specified was driving or whether the vehicle was operated at the time by yet another passenger. The verdict of the jury established that intestate was not killed by the negligence of the defendant named as driver, but that his death did result from the negligence of defendant-owner. *Held:* The verdict must be interpreted as finding that defendant-owner was responsible for the negligence of the driver, but that the passenger named as driver in the complaint was not operating the vehicle at the time of the accident, and the verdict, as so construed, is not inconsistent.

9. Pleadings § 22b—Amendment to make allegations conform to proof held not to change substantially the claim against appealing defendant.

Plaintiffs allegations were to the effect that his intestate was a passenger in an automobile and was fatally injured as a result of the negligent operation of the automobile by one of defendants who was driving under the supervision and control of the other defendant, who was the owner and also a passenger in the car. The evidence was conflicting as to whether the defendant specified was driving or whether the vehicle was operated at the time by yet another passenger. The verdict of the jury established liability on the part of defendant-owner, but that the defendant named as driver was not liable. After verdict, the court permitted plaintiff to amend the complaint to make the allegations conform to the evidence by alleging that the car was being driven by either one of the passengers referred to in the evidence, and that in either event defendant-owner was responsible for the negligence of the driver. *Held:* Under the facts of this case the amendment did not change substantially the plaintiff's claim against defendant-owner, and the variance prior to amendment did not mislead defendant-owner to his prejudice in the trial on the merits, G.S. 1-163, G.S. 1-165, G.S. 1-168, since the crucial fact in respect to defendant's liability was not the identity of the driver, but that defendant permitted or directed the negligent operation of the car.

10. Automobiles § 52—

Where the owner is an occupant in the car at the time of its negligent operation by another, the owner's liability for such negligent operation is not dependent upon the relationship of principal and agent in the ordinary sense, but upon the fact that he knowingly permits or directs the negligent operation of his car by another.

APPEAL by defendant Charles Franklin Bost from *Gwyn, J.*, March Term, 1957, of CABARRUS.

Action by administrator to recover damages for the alleged wrongful death of Billy Ray Litaker, his intestate.

On Sunday, September 12, 1954, about 7:15 p.m., the 1954 Chrysler New Yorker of defendant Charles Franklin Bost, traveling west on Highway 73 at a speed of 80-95 miles per hour, left the hard-surfaced portion, went 999 feet along the dirt shoulder, hit and broke a telephone pole, and finally came to rest upside-down in a cotton field some 117 feet from the telephone pole and some 40-48 feet north of Highway 73.

The four occupants, defendant Charles Franklin Bost, the owner, defendant Caleb Watson Bost, III, hereinafter called Watson Bost, Donald P. Stewart, Jr., hereinafter called Stewart, and plaintiff's intestate, hereinafter called Litaker, were thrown therefrom. Litaker was killed. Charles Franklin Bost received a serious head injury. Thereafter, he was adjudged incompetent; and his father, E. L. Bost, was duly appointed general guardian and defends this action in that capacity. Watson Bost and Stewart testified at the trial.

On March 11, 1955, plaintiff instituted three separate wrongful death actions against Stewart, Watson Bost and Charles Franklin Bost, respectively; but, instead of filing complaints,

plaintiff applied in each case for an order permitting his adverse examination of the defendant therein named. In each case, by consent order, plaintiff was permitted to examine the defendant adversely on six specific subjects, including "(2) As to the driver of the said vehicle in which the decedent was riding."

Plaintiff did not conduct any of the three adverse examinations so authorized. Instead, a voluntary nonsuit was entered in the separate actions against Stewart and Watson Bost. This was contemplated by a consent order signed August 23, 1955, whereby Watson Bost was joined as an additional defendant herein, to wit, the action originally against Charles Franklin Bost alone.

In complaint filed August 23, 1955, plaintiff alleged that the driver, defendant Watson Bost, operated the Chrysler at an unlawful and dangerous speed and in a reckless and wanton manner in utter disregard of the rights and safety of the passengers therein, lost control thereof and wrecked the Chrysler in the manner indicated above; that defendant Watson Bost so operated the Chrysler under the direction and supervision, and with the authority, consent and knowledge, of defendant Charles Franklin Bost, the owner, who was seated on the passenger side of the front seat of the car.

The defendants, represented by the same counsel, filed separate answers. Defendant Watson Bost, in his further answer and defense, alleged that Stewart was driving the car when the wreck occurred. Defendant Charles Franklin Bost admitted his ownership of the Chrysler; but, in respect of plaintiff's allegation that Watson Bost was the driver, he averred that he had no sufficient knowledge or information to form a belief as to the truth thereof and therefore denied it.

Each defendant pleaded the contributory negligence of plaintiff's intestate. Defendant Charles Franklin Bost's plea is preceded by this conditional clause: "If the plaintiff's intestate came to his death by the negligence of defendant Charles Franklin Bost, which is expressly denied, . . ." Defendant Watson Bost's plea is preceded by this conditional clause: "That even if this defendant were operating the said automobile on the occasion of the alleged accident, which is expressly denied, or if the said automobile were being operated by any person other than the plaintiff's intestate, . . ."

The gist of each defendant's plea of contributory negligence is indicated by this excerpt from defendant Charles Franklin Bost's further answer and defense: ". . . the plaintiff's intestate was himself guilty of negligence which directly and proximately contributed to and caused his death, in that he rode in the automobile of Charles Franklin Bost at a time when he knew or, by the exercise of due care, should have known that *the driver*

thereof was not driving same in a proper manner, and this defendant is informed and believes and so alleges that the plaintiff's intestate encouraged *said driver* to drive at a fast, reckless and unlawful rate of speed, when plaintiff's intestate knew, or by the exercise of due care should have known, that the automobile *was being driven* at an unlawful rate of speed and in excess of the rate of speed allowed by law at the point of and immediately east of the point of upset; and that plaintiff's intestate failed to protest the reckless and unlawful manner in which *the driver* was operating said automobile, and instead of protesting, the plaintiff's intestate encouraged the *said driver* to drive at a fast and unlawful rate of speed under the conditions then existing, when the plaintiff's intestate knew or, by the exercise of due care, should have known that *the driver* could not control the operation of said automobile and that the speed thereof should be decreased, and the plaintiff's intestate failed to exercise that degree of care which an ordinarily prudent person would or could have exercised under the same or similar conditions, . . ." (Italics added.)

Upon these pleadings, the case came on for trial; and both plaintiff and defendants offered evidence. The following issues were submitted to and answered by the jury, viz.:

"1. Was the plaintiff's intestate, Billy Ray Litaker, injured and killed by the negligence of the defendant Caleb W. Bost, III, as alleged in the Complaint? Answer: NO.

"2. Was the plaintiff's intestate, Billy Ray Litaker, injured and killed by the negligence of the defendant Charles Franklin Bost, as alleged in the Complaint? Answer: YES.

"3. If so, did the plaintiff's intestate, Billy Ray Litaker, by his own negligence contribute to his injury and death? Answer: NO.

"4. What amount, if any, is the plaintiff entitled to recover? Answer: $20,000.00."

After verdict, upon plaintiff's motion, the court entered an order permitting plaintiff to amend his complaint "to conform to the facts proved." Plaintiff filed the amendment as authorized by said order, therein alleging in effect that the negligent driver was either Watson Bost or Stewart and that in either event Charles Franklin Bost was responsible for the negligent acts of the driver.

Judgment was entered in favor of Watson Bost, dismissing plaintiff's action as to him and providing that he recover his costs from plaintiff.

Defendant Charles Franklin Bost tendered judgment in his favor, based upon the verdict, which the court refused. Thereupon, the court signed judgment on the verdict in plaintiff's

favor providing for the recovery by plaintiff from defendant Charles Franklin Bost of $20,000.00 and costs.

Defendant Charles Franklin Bost excepted and appealed, assigning errors based on exceptions duly taken.

Webster S. Medlin for plaintiff, appellee.
Hartsell & Hartsell for defendant Charles Franklin Bost, appellant.

BOBBITT, J. As stated on oral argument, appellant seeks a reversal, not a new trial. His assignments of error relate (1) to the overruling of his motions for judgment of involuntary nonsuit, (2) to the refusal of the court to sign judgment on the verdict in his favor, (3) to the allowance after verdict of plaintiff's motion for leave to amend his complaint, and (4) to the entry of judgment on the verdict in plaintiff's favor.

There was plenary evidence to support a finding that Litaker's death was caused by the negligence of *the driver* of the Chrysler and that Charles Franklin Bost, the owner, seated therein, had control and direction of its operation. Indeed, although the jury found otherwise, plaintiff's evidence was sufficient to support a finding that, as originally alleged by plaintiff, Watson Bost was driving the Chrysler at the time of the wreck. For this reason, *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147, discussed below, has no bearing on the question of nonsuit.

Appellant's position as to nonsuit rests on his contention that the undisputed evidence, taken in the light most favorable to plaintiff, established the contributory negligence of Litaker so clearly that no other reasonable inference or conclusion could be drawn therefrom. *Dennis v. Albemarle,* 243 N.C. 221, 90 S.E. 2d 532.

Only the testimony of Stewart, plaintiff's witness, and that of defendant Watson Bost, relate to what happened prior to 5:00 p.m., at Chubirko's Restaurant, the occasion when Charles Franklin Bost and his Chrysler are first referred to in the evidence. Their testimony tends to show that they and Litaker were together from about 1:00 p.m. until they parked at Chubirko's place about 5:00 p.m.; that each had a car; that they rode around from place to place, first in one car and then in another; and that, during this period, they drank six cans of beer and at least one pint of whiskey.

There is no evidence that, during this period, any car was operated in a negligent or unusual manner or that Litaker was put on notice of the driver's incompetency, except the testimony referred to in the next paragraph.

Watson Bost testified that he met Stewart and Litaker at Buddy's Grill about 1:00 p.m.; that they left on Highway 29A, he driving his car, and Stewart, with Litaker beside him, driving Litaker's car; that Stewart drove up beside him and challenged him to a "drag race"; and that they raced for some distance on Highway 29A but did not get "over sixty an hour." On the other hand, Stewart testified positively that he and Litaker did not meet Watson Bost at Buddy's Grill about 1:00 p.m. and that there was no incident relating to a "drag race" on Highway 29A. Hence, as to such incident, the testimony was in direct conflict. On motion for nonsuit, the conflict must be resolved in favor of plaintiff. *Cozart v. Hudson*, 239 N.C. 279, 78 S.E. 2d 881.

There was no evidence that Litaker drove any car prior or subsequent to 5:00 p.m.

Conceding the evidence sufficient to support a finding that plaintiff's intestate was contributorily negligent in continuing to ride with Stewart and Watson Bost throughout the afternoon and up to 5:00 p.m., it is insufficient to establish contributory negligence in this respect as a matter of law.

There is evidence tending to show that Litaker, Stewart, Watson Bost and Charles Franklin Bost left Chubirko's place in the Chrysler on two occasions, first at 5:00 p.m. or shortly thereafter and again about 7:00 p.m.; that, on the first occasion, with Watson Bost driving, they went to Buddy's Grill where they drank "the rest of the whiskey which we had with us," and thereafter drove to a Mrs. Helton's where Stewart, Litaker and Watson Bost went in and bought another pint of whiskey; and that thereafter they returned to Chubirko's place and parked.

There is evidence tending to show that, after returning to Chubirko's place, Stewart and Litaker got in Stewart's Ford coupe; and that Stewart twice drove up and down the divided highway and after doing so drove back into Chubirko's place and parked his car. Concerning such incident, Watson Bost testified: "Don (Stewart) got out of his car and came around to Bill's side and as Bill started to get out, he caught his foot on the runningboard and he almost fell."

According to Watson Bost, the Chrysler's final departure from Chubirko's place was under these circumstances. One Paul Moose came along in a pickup truck. He was challenged by Stewart to race the Chrysler. They were to race south on Highway 29, then turn off onto Highway 73 and go west. Stewart insisted on driving and did drive the Chrysler. The Moose truck started down the highway. The Chrysler passed it before it had reached the turn-off into Highway 73. The Chrysler proceeded west on Highway 73. Moose abandoned the race and continued south on Highway 29; but another car, a Pontiac, otherwise unidentified,

traveling west on Highway 73, passed the Chrysler. The wreck of the Chrysler occurred shortly thereafter, that is, after the Chrysler had overtaken and passed the Pontiac. The testimony of Moose and Swaringen (who testified he was riding with Moose), witnesses for defendants, was to the effect that Stewart instigated the race and was driving the Chrysler when it left Chubirko's place. Also, their testimony further corroborates the testimony of Watson Bost as to what occurred until the Chrysler turned off into Highway 73.

Stewart testified that he had no recollection as to arranging for a race with Moose; that he did not drive the Chrysler when it left Chubirko's place; that Watson Bost was then driving the Chrysler; that he did not know who was driving the Chrysler after it entered Highway 73; that he could "only come to spots, what I remember and what I don't remember"; and that on Highway 73 "about the top of the hill at Miss Munday's house Watson was driving." Plaintiff's witness James testified that Watson Bost was driving the Chrysler on an occasion about 7:00 p.m. when he saw "a truck leave at about the same time the Chrysler left."

True, none of the evidence indicates that Litaker made any protest as to riding with Stewart or Watson Bost or as to the manner in which the Chrysler was operated. Conceding the evidence sufficient to support a jury finding that Litaker was aware of what was happening and hence was contributorily negligent in riding in the Chrysler when driven by Stewart or Watson Bost on the last and fatal trip, we cannot say that the undisputed evidence establishes this so clearly that no other reasonable inference or conclusion can be drawn therefrom. In this connection, attention is called to the testimony set out below.

Mrs. Brown, plaintiff's witness, testified that she knew Litaker; that she was in a car, parked at Chubirko's place, around 4:30 or 5:00 p.m., when a Ford car in which Litaker was riding drove up and parked; that the driver of this Ford car went over to a Chrysler car; that two men came from the Chrysler, "woke Billy Ray up," and helped him to the Chrysler where he (Litaker) "got on the back seat and laid down." As to Billy Ray's condition before he was aroused and helped to the Chrysler, she testified: "I just don't know whether Billy Ray was asleep or not but he was passed out." Again: ". . . they took him by the arm and woke him up and when he got up he had on khaki pants. I don't know whether he had been drinking or not but they were wet."

James, plaintiff's witness, testified that he was at Chubirko's place around 7:00 p.m. when the Chrysler, with the four said occupants, drove up and parked. He testified: "All of the boys

got out of the car but Billy Litaker. He was in the Chrysler and was in the right front seat, lying down. He did not move."

The testimony of Mrs. Brown and James was offered by plaintiff in relation to the contributory negligence issue. Since the burden of proof on this issue was on defendants, appellant's contention that plaintiff had made no allegation corresponding to this evidence is without merit.

Whether Litaker was contributorily negligent in riding in the Chrysler when driven by either Stewart or Watson Bost would depend in last analysis on whether he knew what was going on and so consciously committed himself to the assumption of the risk.

The charge of the trial court was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on this and every principle of law applicable to the facts. *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104.

The court was correct in overruling defendants' motion for judgment of involuntary nonsuit and in submitting the contributory negligence issue for determination by the jury.

Bogen v. Bogen, 220 N.C. 648, 18 S.E. 2d 162, cited by appellant, is readily distinguishable. There the testimony of *plaintiff,* the guest passenger, was to the effect that she knew the defendant driver habitually drove in a reckless manner and at a high rate of speed without keeping a proper lookout.

We come now to the interpretation of the verdict, the amendment of the complaint after verdict and the judgment entered in plaintiff's favor.

Here certain fundamentals must be kept in mind. "It is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible, and in ascertaining its meaning resort may be had to the pleadings, the evidence and the charge of the court." *Guy v. Gould,* 202 N.C. 727, 164 S.E. 120. Too, admissions of the parties, if any, may be considered. *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493. Moreover, the presumption is in favor of the correctness of the judgment of the lower court; and the burden is upon appellant to show error amounting to a denial of some substantial right. Strong, N.C. Index, Vol. 1, Appeal and Error Sec. 39, where many cases are cited.

Our task of interpreting the verdict is rendered more difficult on account of appellant's failure to include the charge in the record on appeal. However, we must presume that the charge instructed the jury correctly as to all phases of the case and that the jury followed his instructions. *Bank v. Wysong & Miles Co.,* 177 N.C. 284, 289, 98 S.E. 769.

Appellant's first position is that the verdict, properly interpreted, entitled him to a judgment that plaintiff recover nothing and dismissing the action. On this point, our inquiry is to determine what facts were established by the verdict, leaving for later consideration questions concerning the amendment to the complaint.

The jury, in answering the first issue, found that the death of Litaker was not caused by the negligence of defendant Watson Bost. The gist of appellant's contention is that this finding necessarily established that Litaker's death was not caused by the negligence of defendant Charles Franklin Bost; and that the jury's answer to the second issue should be disregarded. The asserted basis for this contention is that the jury should have been instructed that, if they answered the first issue, "No," they would not consider the second issue; or that, as a legal result of their said answer to the first issue, they would likewise answer the second issue, "No." Obviously, the trial judge did not so instruct the jury. It is equally apparent that the trial judge did not consider that the jury failed to follow his instructions or that the answers to the first and second issues were inconsistent.

There was no evidence or contention that Charles Franklin Bost, personally, was driving the Chrysler. Since all the evidence tended to show that either Watson Bost or Stewart was the driver, we think the only reasonable interpretation of the verdict is that the jury found that Stewart was the driver. Hence, the answer to the second issue, a finding that plaintiff's intestate was killed by the negligence of Charles Franklin Bost, must be considered as establishing appellant's legal liability for the negligence of the actual driver, to wit, Stewart.

When defendants' evidence was developed, so the record indicates, it appeared probable that Stewart rather than Watson Bost was in fact the driver of the Chrysler. The trial judge, alert to see that the cause was determined on the real issues, did not submit a single issue, *e.g.:* "Was plaintiff's intestate killed by the negligence of defendants as alleged in the complaint?" Instead, he submitted the first and second issues as set out above. It seems apparent that this was done in order that he might instruct the jury that, if they answered the first issue, "No," they would proceed to the second issue; and that, upon reaching the second issue under such circumstances, if they found that Stewart was the negligent driver and appellant was responsible for his acts, they would answer the second issue, "Yes." It is significant that the record does not show that appellant objected to the issues as submitted by the court.

This brings us to the amendment to the complaint, "to conform to the facts proved." Unquestionably, to the extent plaintiff had

alleged that Watson Bost was the driver, the complaint was at variance with the facts established by the verdict. In this respect the amendment was appropriate to conform to the facts so established.

G.S. 1-163, in pertinent part, provides: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading . . . to the fact proved."

G.S. 1-165 provides: "The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect."

G.S. 1-168 provides: "1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just. 2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

While the record shows that the motion for leave to amend the complaint was not made until after verdict, it seems clear that the trial was conducted *as if* the amendment had been made. If misled to his prejudice, it would seem that appellant should have objected then on the ground of variance. The record shows no objection by appellant to the conduct of the trial on the theory indicated and no exception to the charge. The impression prevails that in the trial below the real fight was on the contributory negligence issue.

Under the factual situation disclosed by the record, we are constrained to hold that the amendment did not change substantially the plaintiff's claim, that is, the essential nature of his cause of action against appellant, and that the variance prior to amendment did not mislead appellant to his prejudice in the trial on the merits.

In his answer, appellant admitted that Charles Franklin Bost was an occupant of *his* Chrysler on the occasion of the fatal wreck.

Defendants' evidence, although identifying Stewart rather than Watson Bost as the driver of the Chrysler, tended more

strongly than that offered by plaintiff to establish Charles Franklin Bost's responsibility for its operation. Watson Bost testified that "Charles Franklin Bost was present when this arrangement (the race with Moose) was made"; and that, after the Pontiac had passed the Chrysler, and when the Chrysler was in process of overtaking the Pontiac, Charles Franklin Bost said to Stewart, "If you are going to pass him, pass him."

True, to recover from defendant Watson Bost, plaintiff was required to establish his allegation that Watson Bost was in fact the driver. But *the crucial fact, in respect of appellant's liability, was not the identity of the driver but rather that appellant permitted or directed the negligent operation of the Chrysler.* The fact that the jury accepted defendants' evidence as to the identity of the actual driver under circumstances where defendants' evidence tended to establish both the negligence of the actual driver and the legal responsibility of Charles Franklin Bost therefor would seem an unsubstantial basis upon which to deny plaintiff's right to recover.

This distinction should be noticed. The liability of an owner-occupant does not depend upon whether the driver was his agent in the ordinary sense, that is, then engaged as authorized in furtherance of the owner's business. Rather, the liability of such owner-occupant arises from the fact that he knowingly permits or directs the negligent operation of his car by another. *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Bass v. Ingold,* 232 N.C. 295, 60 S.E. 2d 114; *Harris v. Draper,* 233 N.C. 221, 63 S.E. 2d 209; *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374. Also, see *Matheny v. Motor Lines,* 233 N.C. 681, 65 S.E. 2d 368.

In *Harper v. Harper, supra,* opinion by Barnhill, J. (later C. J.), it is stated: "The owner of an automobile has the right to control and direct its operation. So then when the owner is the occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner. (Citations omitted.)" The following excerpt from the same opinion is noted: "Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law of agency is applied." See Annotation, "Owner's presence in motor vehicle operated by another as affecting owner's rights or liability," 50 A.L.R. 2d 1281.

To establish the liability of *an absentee owner,* it must be shown that the driver was the owner's agent and then acting in furtherance of the owner's business. Ordinarily, in such case, the

identity of the driver would be a vital factor in the determination of the alleged agency.

The vital distinction is that the liability of *an absentee owner* depends on the application of the doctrine of *respondeat superior* while the liability of *an owner-occupant,* where the driver is not his agent, depends upon his own acts or omissions as related to his right to control and direct the operation of his car.

In *Whichard v. Lipe, supra,* defendant Lipe was the absentee owner of the truck. Plaintiff had alleged that the individual defendant, Lipe's agent, was the driver at the time of the fatal wreck. No evidence supported this allegation but *the plaintiff* offered evidence tending to show that two men, both agents of Lipe, were aboard the truck and took turns in operating it. The defendant offered no evidence. The court instructed the jury that if both men aboard the truck were his agents, Lipe would be liable under the doctrine of *respondeat superior* if the jury found either of them operated the truck in such manner as to cause the death of plaintiff's intestate. The plaintiff did not ask for leave to amend his allegations to conform to the proof at the trial, after the trial or in this Court. This Court held that there was a fatal variance between plaintiff's allegations and the evidence and that, *absent an amendment,* Lipe's motion for nonsuit should have been allowed.

It is noted that the fact that the trial judge allowed the amendment to the complaint "to conform to the facts proved" tends to confirm the view that the trial was conducted and the jury instructed as indicated above.

While the crucial issue, that of contributory negligence, might well have been decided in favor of appellant, this was resolved by the jury in plaintiff's favor. As to the variance between plaintiff's original pleading and the facts established by the verdict, appellant has failed to show prejudicial error.

No error.

SOLON LODGE No. 9 KNIGHTS OF PYTHIAS COMPANY, TWIN-CITY LODGE No. 5 KNIGHTS OF PYTHIAS COMPANY, AND MASEO KNIGHTS OF PYTHIAS LODGE No. 14 COMPANY v. IONIC LODGE FREE ANCIENT AND ACCEPTED MASONS No. 72 COMPANY.

(Filed 11 December, 1957)

1. **Trusts § 28—**

Where the *cestuis* make out a *prima facie* case establishing a trust, the trustee has the burden of establishing his defense that the trust

had been terminated by the distribution of the *corpus* for the benefit of the *cestuis*, and nonsuit on such affirmative defense is proper only when it is established as a matter of law by the *cestuis'* evidence.

2. Trial § 24a—

Nonsuit on an affirmative defense is proper only when plaintiff's own evidence establishes such defense.

3. Trusts § 28: Associations § 4—Property of association can be diverted to other uses only by unanimous consent of its members.

A benevolent association conveyed realty to a corporation formed for the purpose of holding the property for the benefit of the association. Defendant corporation contended that it terminated the trust under agreement by thereafter issuing its stock to the members of the association in good standing. *Held:* The association had no right to apply the property to any use other than the trust except by the unanimous consent of its members, and where the evidence discloses that a bare majority of the members of the association voted in favor of terminating the trust in such manner, the defense of termination is not established as a matter of law.

4. Limitation of Actions § 16—

Where the apposite statute of limitations is properly pleaded, the burden is ordinarily on the adverse party to show that his claim is not barred.

5. Limitation of Actions § 18—

Where the party against whom the apposite statute of limitations has been properly pleaded fails to show that his action is not barred, nonsuit is proper, but where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the issue is for the jury.

6. Limitation of Actions § 9—

Even the unequivocal repudiation of the trust by the trustee does not start the running of the statute of limitations in the trustee's favor until the *cestuis* have notice or knowledge of such repudiation in such manner that they are called upon to assert their rights.

7. Same—

Ordinarily, the statute of limitations does not run against an action by the *cestuis* to enforce a trust so long as the *cestuis* remain in possession of the trust property.

8. Same—

Ordinarily, where the *cestui* in possession of the trust property voluntarily pays rent to the trustee and thus establishes the relationship of landlord and tenant between them, such relationship suffices to set the statute of limitations to running against the *cestui*.

9. Same: Associations § 4—Knowledge of payment of rent by officers of association, acting against interest of association, is not imputed to members.

Members of a benevolent association conveyed realty to a corporation formed for the purpose of holding the property for the benefit of the association. Defendant corporation contended that it terminated the

trust under agreement by issuing its stock to the members of the association in good standing, and that thereafter the association paid rent to the corporation. The evidence disclosed that the association continued to use the premises, and there was evidence that when the corporation acquired the property it was understood that no rent would be charged but that later rent was charged by the corporation and paid by officers of the association who were then in control of its affairs, which officers were also agents of the corporation, and that not all members of the association had knowledge that the corporation was exacting and the officers of the association were paying rent. *Held:* The knowledge of the officers of the association acting in their own behalf and against the interest of the association will not be imputed to its members, and the mere payment of the rent under the circumstances of this case is not sufficient to start the running of the statute of limitations against the right of the *cestuis* to enforce the trust.

10. Principal and Agent § 8—

The rule that knowledge of the agent is imputed to the principal does not apply when the agent, nominally acting as such, is in reality acting in furtherance of his own personal business and adversely to the principal, or has a motive in concealing the facts from the principal.

11. Limitation of Actions § 9—

The three-year statute of limitations is applicable in an action to establish an express trust. G.S. 1-52.

12. Appeal and Error § 45—

Where the jury answers the issue as to the bar of the three-year statute of limitations in plaintiff's favor, the submission of the further issue of the ten-year statute cannot be harmful.

APPEAL by respondent from *Crissman, J.*, and a jury, at 22 April, 1957, Term of FORSYTH.

This case was here at the Fall Term, 1956. The decision, sending it back for retrial, is reported in 245 N.C. 281, 95 S.E. 2d 921. The background facts are there set out in pertinent detail. Only such of them will be restated here as seem necessary to present the questions for decision on the present appeal.

The case as originally instituted was a special proceeding for the partition sale of real estate. The property, originally a vacant lot, was purchased in 1901 by four fraternal benefit lodges for the purpose of erecting a building to provide meeting quarters for each of the lodges. A three-story building was erected and the four lodges used the second and third floors for their meetings. The first floor of the building, and at times some of the lodge rooms, were rented out.

It is alleged in the petition and admitted in the answer that the respondent owned a one-fourth undivided interest in the property. The controversy now at issue arose when a group of intervenors came in by petition in the cause and asserted title to the one-fourth interest claimed by the respondent. The inter-

venors are the officers and members of Ionic Lodge No. 72, Free, Ancient and Accepted Masons, an unincorporated fraternal association organized and existing under charter of the State Grand Lodge of the Masonic Order, hereinafter referred to at times as the Lodge. The respondent, Ionic Lodge Free Ancient and Accepted, Masons No. 72 Company, hereinafter referred to at times as the Corporation, by the terms of its original charter issued by the Secretary of State was a nonstock corporation. It was set up in 1901 at the instance of the intervenor Lodge for the purpose of taking and holding title to its one-fourth interest in the lodge property. This one-fourth interest when purchased by the Lodge was conveyed at its direction to the Corporation. It is alleged that the nonstock corporation was authorized "to hold and own real and personal property to the amount of Twelve Thousand and no/100 Dollars ($12,000) for charitable purposes only,"

The intervenors alleged that the Corporation took title and held it in trust for the Lodge and its members, present and future. The purpose of their intervention was to establish the trust. The respondent Corporation by answer denied the intervenors' claim of title, and by way of further defense alleged that pursuant to appropriate resolutions adopted by the Lodge in 1929 the charter of the Corporation was amended, in a manner that converted it from a nonstock corporation to an ordinary corporation with authorized capital stock of $5,325, divided into 106½ shares of the par value of $50 per share; that the stock was issued to the then members of the unincorporated Lodge who were in good standing; and that this conversion of the corporation into a stock company, together with the allocation of its capital stock to the members of the Lodge, effectively terminated any trust relation that may have previously existed between the Corporation and the unincorporated Lodge; and that thereafter the Corporation owned the one-fourth interest in the property, freed of any trust. The other defenses set up by the respondent are: (1) the statutes of limitations, (2) laches, and (3) estoppel.

The land was sold by a commissioner, and each of the petitioners has received its one-fourth of the proceeds. They have no further interest in the controversy. The remaining one-fourth of $2,902.06, claimed by the intervenors and by the respondent, is now being held by the clerk. Its disposition is the subject of the controversy.

The decision on former appeal discloses that the case was first heard by a referee, and then, on exceptions, by the presiding judge, and from the judgment entered, both sides appealed to this Court. The judgment was vacated and the cause was re-

manded, with direction that it be tried by a jury. *Solon Lodge v. Ionic Lodge, supra* (245 N.C. 281).

On retrial, the case was submitted to the jury on the evidence adduced before the referee. The following issues were submitted and answered as indicated:

"1. In 1901 was legal title to said undivided one-fourth interest in the real estate conveyed to Ionic Free, Ancient and Accepted Masons No. 72, Company, in trust for the use and benefit of Ionic Lodge No. 72, Free Ancient and Accepted Masons, a fraternal Lodge, and the then present and future members of such fraternal lodge so long as it should continue to operate? Answer: YES.

"2. If so, was the trust subsequently legally terminated? Answer: No.

"3. Are the intervenors estopped from recovering the proceeds of said sale? Answer: No.

"4. Are the intervenors barred by the three-year statute of limitations from recovering said one-fourth proceeds of sale? Answer: No.

"5. Are the intervenors barred by the ten-year statute of limitations from recovering said one-fourth proceeds of sale? Answer: No.

"6. Are the intervenors barred by laches from recovering said one-fourth proceeds of sale? Answer: No."

Judgment was entered on the verdict, adjudging that the unincorporated Lodge is the equitable owner of and entitled the $2,902.06 proceeds of sale in the hands of the clerk. The judgment directs that this fund be turned over to the Lodge for use towards providing a lodge hall for lodge purposes. From the judgment so entered, the respondent appeals.

Ingle, Rucker & Ingle for respondent appellant.
William S. Mitchell for intervenors appellees.

JOHNSON, J. The chief assignment of error urged by the respondent Corporation is that the court below erred in denying its motion for judgment as of nonsuit at the close of all the evidence. The respondent contends that the motion for nonsuit should have been allowed on either or both of these grounds: (1) that the transactions in 1929, by which the capital stock in the Corporation was allocated to its members, terminated the trust relation which previously existed between the Corporation and the unincorporated Lodge, by merging in the Corporation both the equitable and the legal title to the property, and (2) that in any event, the intervenors failed to offer evidence suffi-

cient to repel the bars of the statutes of limitations set up by the respondent. We discuss separately the grounds urged by the respondent for nonsuit.

1. *The question whether the intervenors should have been nonsuited on the ground that the trust was terminated by the issuance and allocation of the stock in 1929.* In determining this question, these things must be kept in mind: (1) that the intervenors, assuming the role of plaintiffs, alleged, and offered evidence sufficient to show, that the respondent Corporation held title to the property as trustee for the unincorporated Lodge; and (2) that the Corporation, answering, set up as an affirmative defense the plea that the trust was terminated in 1929 by the allocation of the corporation stock to the members of the Lodge. Thus the burden of proof was on the respondent to establish its affirmative defense. In a situation of this kind, where the relief demanded by the plaintiff stands *prima facie* proved, nonsuit is available to the defendant only where the plaintiff's evidence establishes the affirmative defense as a matter of law. *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248; *Butler v. Ins. Co.*, 213 N.C. 384, 196 S.E. 317; *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86.

In order to establish the respondent's affirmative defense that the trust was terminated by the allocation of stock to the members of the Lodge, it was necessary to show that such allocation was made by the unanimous action of all the members of the Lodge. 7 C.J.S., Associations, Section 14(b) (2). The rule is that where property is vested in a trustee for the use and benefit of an unincorporated association, like the instant fraternal benefit Lodge, the association, acting in conformity with the will of the majority of its members, ordinarily has a right to devote the property to the objects of the association, but it has no right to apply it to other uses, *except by the unanimous consent of the members. Lodge v. Benevolent Association*, 231 N.C. 522, 58 S.E. 2d 109; *Lodge v. Lodge, supra* (245 N.C. 281).

The evidence adduced below discloses that the action of the members of the Lodge in attempting to divide up the property by issuing the stock was never unanimous. It is noted that Thomas H. Martin, who was then Worshipful Master of the Lodge, testified in part: "At this time the Lodge wasn't making any progress, almost at a standstill; sometimes a few members would come, sometimes they wouldn't. . . . Some of the older men began to clamor for stocks. I didn't think too much of the idea. . . . But they kept forcing the issue and finally I appointed a committee. . . . They brought back recommendations for it. . . . I decided to put it to a vote. . . . The original motion was carried 13 to 12. . . . In fact, the feeling was so strong on both sides I

didn't want to even let it come up. I tried to keep it out. Through this period of 1928 and 1929 it was about equally divided. There wasn't too many for it and too many against it; about equal. . . . I don't think our membership was over 50 or 60." When the stock was issued, there were about 15 certificates that were never taken by the members to whom they were issued. These certificates remained in the stock book and were exhibited at the trial.

In view of the foregoing testimony, it is manifest that the intervenors' evidence does not establish as a matter of law that the trust was terminated in 1929 by allocation of stock in the Corporation to the members of the Lodge. Accordingly, the respondent was not entitled to nonsuit on that ground.

2. *The question of the statute of limitations.* Here the respondent makes a two-fold contention. First, the respondent points again to the events of 1929, when the corporation charter was amended and the capital stock was allocated to the members of the Lodge, and makes the contention that if the events surrounding the allocation of stock were not sufficient in law to work an immediate termination of the trust, because of lack of unanimous consent of all the members, nevertheless, it asserts that such action shows a disavowal or repudiation of the trust which set the statute of limitations to running against the unincorporated Lodge, and that the evidence here shows that the bar of the statute, whether it be the statute of three or ten years, became absolute as a matter of law long before the intervenors set up their instant claim in this action in November, 1952, and that therefore the case should have been nonsuited at the close of the evidence. Next, the respondent points to the phase of the evidence tending to show that some years after the stock was allocated among the members in 1929, the officers of the Corporation (who were also officers of the Lodge) started collecting rent from the Lodge and paying dividends on the stock. This evidence the respondent insists was sufficient to set the statute of limitations in motion and establish as a matter of law the bar of the statute against the Lodge.

In passing on these contentions of the respondent it is necessary that we keep in mind and apply certain basic principles relating to the burden of proof and nonsuit in cases where the statute of limitations is pleaded:

1. While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof (except in certain cases not applicable here) is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. *Lee v.*

Chamblee, 223 N.C. 146, 25 S.E. 2d 433; *Rankin v. Oates,* 183 N.C. 517, 112 S.E. 32.

2. "Ordinarily, the bar of the statute of limitations is a mixed question of law and fact." *Currin v. Currin,* 219 N.C. 815, 817, 15 S.E. 2d 279, 280. Nevertheless, where the party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. *Hooper v. Lumber Co.,* 215 N.C. 308, 1 S.E. 2d 818; *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498.

3. However, where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. *Garrett v. Stadiem,* 220 N.C. 654, 18 S.E. 2d 178; *Majette v. Hood, Com'r of Banks,* 208 N.C. 824, 179 S.E. 23; *Fort Worth R. R. v. Hegwood,* 198 N.C. 309, 151 S.E. 641.

In deciding the question of nonsuit based on the plea of the statute of limitations here raised, it would serve no useful purpose for us to restate the evidence favorable to the respondent. It may be conceded there was ample evidence to support a jury-finding in favor of the respondent on its plea of the statute of limitations of three years, G.S. 1-52. Decision here requires only that we determine whether the intervenors' evidence was sufficient to show *prima facie* that their cause of action was not barred. Hence, the scope of decision is narrowed to a treatment of the evidence favorable to the intervenors in the light of certain principles of law which may be stated in summary as follows:

1. The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations to running, unless and until such repudiation and claim are made known to the beneficiary of the trust. The trustee's "repudiation and adverse claim must be clear, open, and unequivocal, and must be so clearly made known to the *cestui que trust* as to require him to assert his rights." 54 C.J.S., Limitations of Actions, Sec. 182(b)(3), p. 171. In *Teachey v. Gurley,* 214 N.C. 288, 293, 199 S.E. 83, 87, the Court said: "As long as the relation of trustee and *cestui que trust* is admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, no refusal on demand to comply with the terms of the trust, and no repudiation or disavowal of the trust, no cause of action rests in the *cestui que trust.* The cause of action arises when and only when there has been some assertion of adverse claim or ownership, or a refusal to comply upon demand, or a disavowal or repudiation of the trust. (cita-

tion of authorities) . . . the statute begins to run when the trust is closed or when the trustee disavows the trust with the knowledge of the *cestui que trust,* or holds adversely to the claim of those he represents. If a trustee repudiates a trust by clear or unequivocal acts or words and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust* and he will be completely barred at the end of the statutory period."

2. However, in determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim. Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the statute of limitations to running against an owner in possession and occupancy. 54 C.J.S., Limitations of Actions, Sec. 118. The foregoing rule applies to an equitable owner in possession of land, and so long as he retains possession, nothing else appearing, the statute of limitations does not run against him. *Bowen v. Darden,* 241 N.C. 11, and cases cited at bottom of page 17, 84 S.E. 2d 289, 294.

3. Nevertheless, where it appears that the relation of landlord and tenant has been established between trustee and *cestui que trust,* evidenced by voluntary payment of rent by the *cestui que trust* to the trustee, such relation ordinarily suffices to set the statute of limitations to running against the *cestui que trust.* But where, as here, the object of the trust is to hold and preserve title for the benefit of an unincorporated association, whose personnel is constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, is not enough to start the statute to running. To set the statute in motion we think it necessary to show that all the members of the Lodge had knowledge, or in law were charged with knowledge, that the Corporation was exacting and the officers of the Lodge were paying rent. See *Lodge v. Benevolent Association, supra* (231 N.C. 522) ; *Lodge v. Lodge, supra* (245 N.C. 281).

4. The general rule is that the relation of principal and agent exists between the members of an unincorporated association and its officers, so that knowledge obtained by the officers concerning vital business dealings is ordinarily imputed to the members. However, there is a well recognized exception to the general rule that knowledge of the agent is imputed to the principal. The exception is stated this way in *Federal Reserve Bank v. Duffy,* 210 N.C. 598, 603, 188 S.E. 82, 84: "Where the conduct of

the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply. (citing authorities) Where the agent is dealing in his own behalf or has personal interest to serve, the knowledge of agent is not imputable to the principal."

Here the evidence favorable to the intervenors discloses: that the unincorporated Lodge remained in possession and continued to hold its meetings in the Lodge hall until it was sold—as one witness put it, "up to date"; that when those who advocated the allocation of stock gained control and issued the stock, by bare majority action, in 1929, it was their announced purpose that the Lodge should remain in possession of the property, rent free; that the stated purpose of this group was to prevent the property from passing to the State Grand Lodge and thereby save it for all the members in the event the local charter should be revoked or suspended; that in 1928 and 1929 the Lodge was finding it hard to keep current with obligations to the State Grand Lodge; that the State Masonic Code provided that in case of "suspension or demise" of a lodge, its property would "forthwith vest in the Grand Lodge"; that "In order to keep this from happening, the men felt like in issuing the stock they could hold theirs in fee simple"; that "It was a precaution against failure of our Lodge which would, under the Masonic Code, cause the title to go to the Grand Lodge"; that the building was under the management of twelve trustees, three elected from each of the four owner-lodges; that the trustees leased the stores on the first floor of the building and also some of the offices in other parts of the building, and collected the rents, paid for upkeep and repairs, and turned over the surplus to the owner-lodges; that the three trustees representing the intervenor Lodge were elected by the Lodge; that these trustees made financial reports from time to time to the Lodge in session and turned in to the Lodge treasurer its share of the surplus rentals from the building; that this plan of handling the surplus rents continued to be followed for a long time after the stock was allocated to the members; that the deed of trust on the Lodge property was not paid off until January, 1939; that after 1929 the membership increased considerably—from about 64 to approximately 100; that nevertheless, "the members of the fraternal Lodge who held certificates of stock were in control of the fraternal Lodge itself," with the elected officers of the Lodge serving also as officers of the Corporation; that, according to the testimony of the witness Martin, who was a member from prior to 1929 until he

left the city of Winston-Salem in 1940, at first all business was transacted in regular lodge meetings, but that later "Because of some other matters pertaining to bills owed, . . . we would call the Lodge off and then take care of those bills"; that, according to the further testimony of witness Martin, from the time he joined the Lodge in 1913 "up until pretty close to 1940" the Lodge paid no rent; that, according to the testimony of witness Potts, "We'd have our Lodge meeting, dismiss, and re-assemble for this other. We had it in the same place, and most of the same people were present."; that according to the testimony of the Rev. George W. Moir, who came into the Lodge in 1941 and served as Worshipful Master from 1944 until 1949: "When I came in the Lodge in 1941, the brethren who held certificates of stock in the stock company were in controlling power of the Lodge. I heard something about the stock when I went in in 1941, but I never could get any information concerning it until I became Master. When I became Master in 1944, we couldn't get any information concerning the certificates of stock and the Lodge was paying rent. We decided to go into the matter and see. So, we asked the Trustees for a report and I could not get one. . . . it took some time to find out the full facts concerning this real estate; it was approximately 1947 when me and my fellow officers found out what the various claims were concerning this real estate"; that after this investigation the fraternal Lodge continued to utilize the building and the real estate and at the meeting of July 27, 1947, "the Lodge voted to discontinue paying rent"; that after the Lodge stopped paying rent in 1947, a proceeding in ejectment was instituted at the instance of the trustees against the unincorporated Lodge, which resulted in a judgment in favor of the unincorporated Lodge.

The foregoing testimony and other evidence of like import relied on by the Lodge justifies these inferences: (1) that when the capital stock in the Corporation was allocated among the members of the Lodge in 1929, the allocation was made under circumstances not amounting to a clear, open, and unequivocal repudiation of the trust; (2) that when and after the stock was issued, a substantial number of the members of the Lodge were without notice that the members who accepted the stock intended to make and did make adverse claim to the property; (3) that later, after the officers began collecting rent from the Lodge for the benefit of the holders of stock in the Corporation, a substantial number of the members of the Lodge were without actual knowledge that rent was being so collected and paid; (4) that the officers of the Lodge, in withdrawing the rent money from the Lodge treasury and in distributing it among the holders of stock, were acting adversely to the interest of the Lodge and in

furtherance of their own personal interest, so that in law their knowledge of the rental arrangement was not imputed to their fellow members of the Lodge; and (5) that as soon as the rental arrangement was discovered by the aggregate group in 1947, prompt action was taken to terminate it.

With the evidence being susceptible of the foregoing inference, the court properly overruled the motion for nonsuit and submitted to the jury the issue on the statute of limitations of three years. The trust here was based on an agreement or transaction operating as an express trust. Hence the limitation applicable was the statute of three years. G.S. 1-52. *Teachey v. Gurley, supra* (214 N.C. 288). Manifestly, then, no harm came to the respondent from the submission of the further issue based on the statute of ten years, G.S. 1-56.

It necessarily follows from what we have said that the court correctly declined to direct a verdict in favor of the respondent on both issues of the statute of limitations.

The other exceptions brought forward have been examined. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

SOUTHERN RAILWAY COMPANY v. CITY OF GREENSBORO AND LAMBETH CONSTRUCTION COMPANY.

(Filed 11 December, 1957)

1. **Eminent Domain § 1—**

Land in use by a railroad company for railroad purposes cannot, in the absence of statutory authority, express or necessarily implied, be condemned for streets or highways in such manner as to impair or destroy its use for railroad purposes.

2. **Eminent Domain § 14—**

More is required in the proper exercise of the power of eminent domain than good faith and notice; before property is finally taken the owner must be given opportunity to question the right of the condemnor to take the property.

3. **Injunctions § 8—**

Where plaintiff alleges an unlawful entry and trespass upon its right of way by a municipality and the municipal contractor pursuant to a plan to construct numerous grade crossings at acute angles, without legislative authority and in such manner as to impede or prevent the railroad company from continuing its railroad operations and services required of it by law, the defendant upon appropriate terms should be restrained from proceeding further with its plans pending the hearing upon the merits of the issues raised by the pleadings.

4. Eminent Domain § 1: Municipal Corporations § 30—

While a municipality in the improvement of its streets may provide grade crossings over railroad tracks within its limits by right angle crossings in such manner as will not deprive the railroad company of the reasonable use of its tracks for railroad purposes, express legislative authority is required for improvement of streets under a plan calling for the construction of numerous crossings in a relatively short distance at acute angles in such manner as would substantially impede or prevent the railroad company from continuing its railroad operations.

PARKER, J., dissenting.

APPEAL by plaintiff from *Olive, J.*, September 23, 1957 Term, GUILFORD Superior Court.

The plaintiff instituted this civil action for trespass and for temporary and permanent restraining orders enjoining the defendants and their agents and servants from committing acts of trespass upon its railway right of way in a designated section in the City of Greensboro.

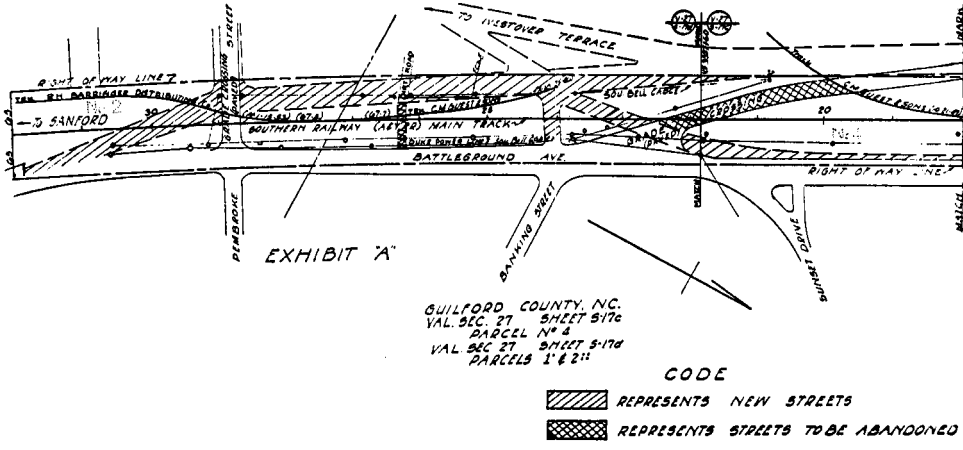
In substance the plaintiff alleges it owns a permanent easement 130 feet (amended to allege 200 feet) wide over certain lands along Battleground Avenue in the City of Greensboro, including that area beginning at a point 160 feet south of Pembroke Street to a point 180 feet north of Cornwallis Road; and that on this easement it operates its main line railroad between Greensboro and Mount Airy. In addition to its main line it now maintains three business sidings over which it moves freight to and from business establishments adjacent to its easement. In addition to its present facilities, the plaintiff finds it necessary immediately to lay and construct another track along the present one in the designated area and to construct additional sidings so that in the next 12 to 18 months its railroad facilities will be doubled. All its present facilities and those in contemplation will be necessary to enable the plaintiff to carry on its business and meet the requirements placed upon it by the Interstate Commerce Commission of the United States and the Utilities Commission of North Carolina.

The plaintiff sets out its chain of title and attaches to its complaint copies of the documents upon which its claim of title is based. It further alleges that the unhampered use of all its right of way is essential to the operation of its business as a common carrier and that its right of way is now so used. In particular, the plaintiff further alleged:

"7. That on or about the 16th day of September, 1957, the defendant City of Greensboro, acting without the consent or approval of the plaintiff, and without having ac-

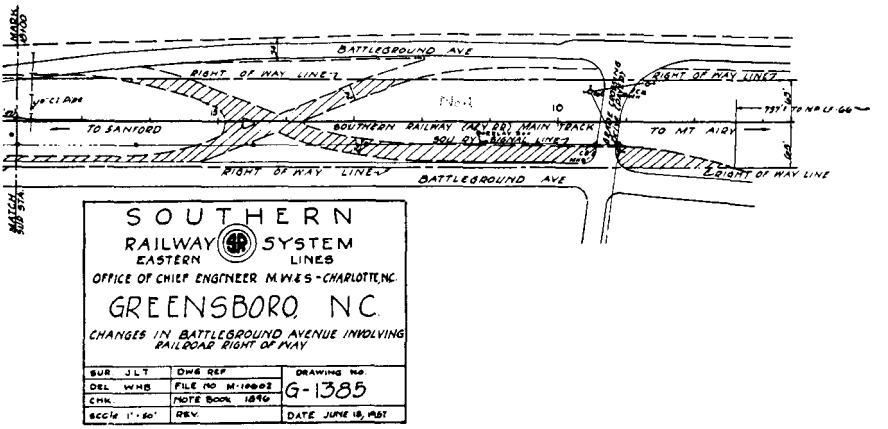
quired from the plaintiff any property rights in the plaintiff's right of way hereinbefore described, and without having attempted to acquire any such property rights, awarded a contract to the Lambeth Construction Company for the construction of streets and street crossings at grade in, along, and over the plaintiff's right of way and tracks. That on or about the 25th day of September, 1957, the defendant City of Greensboro and its agent, said Lambeth Construction Company, without notice to the plaintiff and without the plaintiff's permission or consent and without any legal rights so to do, entered upon the plaintiff's right of way located between Pembroke Street and Cornwallis Road, as aforesaid, in the City of Greensboro and commenced grading and other construction work with the intent and purpose to construct streets and grade crossings upon plaintiff's said right of way. That in the performance of such work the said Lambeth Construction Company caused dirt and other material to be placed on and about the plaintiff's railroad track and has caused the said track to be moved or misaligned so as to render the use of the same unfeasible and dangerous, and that the defendant and its agent Lambeth Construction Company are now engaged in the excavation of a ditch approximately 500 feet in length lying along the east side of the plaintiff's railroad track south of Pembroke Street within approximately six feet from the center of the plaintiff's track. That the location and depth of said ditch is such as to render the use of the plaintiff's railroad track at that point so dangerous that it renders it impossible for the plaintiff to operate its trains over said tracks with any reasonable degree of safety. The plaintiff is advised, informed and alleges that the defendant City of Greensboro and its agent Lambeth Construction Company intend to continue the performance of other construction work in and over the plaintiff's right of way which will interfere with the normal operation of the plaintiff's trains and the rendition of the railroad service to the public which is required of it by law.

"8. That the defendant City of Greensboro has adopted a plan for the construction of streets and street crossings along and over the plaintiff's right of way as indicated on the Map attached hereto marked 'Exhibit A.' Said plan contemplates the construction of six grade crossings over the plaintiff's right of way within a distance of 1,670 feet, within which distance there are now two paved crossings and one unpaved crossing; that said planned crossings are designed so that the streets approach the railroad tracks



at acute angles, thereby rendering such crossings excessively hazardous. That if the defendant City of Greensboro is permitted to carry into execution its aforesaid plan for the construction of streets and street crossings, it will occupy the plaintiff's main track for a distance of 320 feet in the space of 1,670 feet of railroad trackage and will occupy a substantial part of the plaintiff's right of way for a distance of approximately 2,400 feet, and will render two industrial sidings now in existence and in use practically worthless and useless and the use of a third industrial siding will be rendered unreasonably hazardous. That if the City is permitted to carry into execution its plan as aforesaid it will impose upon the plaintiff railroad greatly increased expense in the maintenance of said street crossings and maintenance of its track in said newly constructed streets, and the further development of railroad service by the plaintiff over its existing track and its right of way will be impaired to the extent that the plaintiff will not be able to render the public service now required of it or reasonably to be required in the foreseeable future.

"9. The plaintiff alleges that its railroad right of way within the City of Greensboro as hereinbefore described has been and is now being devoted to railroad use and that all of the said right of way is necessary and essential to the plaintiff railroad in the operation of its railroad business; and that the City of Greensboro and the defendant Lambeth Construction Company have acquired no legal right and have not attempted to acquire any legal right to enter upon the plaintiff's said right of way or any part thereof



for the purpose of constructing the streets and other facilities shown on the plan and map attached to this complaint and marked 'Exhibit A,' and that the entry upon said right of way by the defendant City of Greensboro and the defendant Lambeth Construction Company and their agents and servants constitutes an unlawful trespass upon the property of the plaintiff railroad and an unreasonable interference with the property of the plaintiff necessary and essential in the operation of its railroad.

"10. That unless the defendants and their agents and servants are enjoined and restrained from so doing, they will continue to trespass upon the right of way and property of the plaintiff and to interfere with the plaintiff's railroad operations. The plaintiff alleges that the entry upon its said right of way as aforesaid and the performance of construction work thereon constitute a continuing trespass and that the defendants have continued said trespass after being forbidden by the plaintiff so to do and the plaintiff is without any remedy at law to protect itself from such continued trespass, and unless the defendants and their agents and servants are permanently restrained and enjoined they will wrongfully interrupt, impede and prevent the plaintiff from continuing its railroad operations and the railroad services required of it by law."

Attached to the complaint is a map showing the proposed highway changes undertaken by the City of Greensboro. A reproduction of the map is made a part hereof.

Based on the complaint treated as an affidavit and other supporting evidence, the plaintiff asked for temporary and per-

manent orders restraining the defendants from proceeding further with their street construction plans.

The defendants have not filed answer to the complaint. However, for the purposes of the hearing on the motions for the restraining orders, they filed an affidavit of the Mayor of Greensboro and supporting evidence. In substance the Mayor's affidavit says that by its charter provisions the City of Greensboro, in the interest of safety, is charged with the duty of providing and keeping in repair those streets and highways within the city, including railway grade crossings; that the City Council, after careful study, approved the plan of improvement and in good faith and in the public interest the City entered into a contract with its co-defendant to carry out the planned improvements.

In particular, the affidavit of the Mayor states:

> "6. That in order to get the best results from the public money necessary to improve said highway adequately and provide a highway which will be of the greatest good to the greatest number of people, with the minimum of inconvenience and the least damage, the authorities of the City of Greensboro, and the State of North Carolina, after mature consideration, adopted the plan of this project for the improvement of U. S. Highway No. 220, as shown on the map attached to the complaint in this action."

Further, the affidavit states: "That the City of Greensboro denies that Southern Railway Company has any rights over said lands in conflict with the right to carry out said project. . . . That any right of way of Southern Railway Company over said lands, if it has any, is a right of easement . . . for railroad operations. . . . That the work of the City of Greensboro in completion of said project would in no way interrupt or interfere with the right of way which Southern Railway Company may have, and no irreparable injury can be sustained by Southern Railway Company." The defendant City of Greensboro furnished plans of the crossing changes proposed and the plaintiff refused to co-operate in making them. The Mayor's affidavit further says that the improvements are in co-operation with the State Highway & Public Works Commission. Attached to the Mayor's affidavit and made a part of it is a letter dated September 10, 1957, to the Division Engineer of the State Highway & Public Works Commission signed by the Director of Public Works of the City of Greensboro, stating: "The City of Greensboro has acquired all necessary right of way for the construction of this project and will furnish same without cost to the State Highway Commission."

Based upon the allegations of the complaint and the supporting proof, Judge Preyer issued a temporary order returnable

before Judge Olive on October 2, 1957, restraining the defendants from trespassing or otherwise entering upon the right of way of the plaintiff Railway Company between the specified points near Pembroke Street and Cornwallis Road pending further hearing.

At the further hearing, Judge Olive entered the following order:

> "IT IS CONSIDERED, ORDERED AND ADJUDGED that the temporary restraining order heretofore granted by this Court in this action be, and the same is dissolved as of the 3rd day of October, 1957, and the defendants as of said date are no longer restrained from the construction work restrained by said temporary restraining order."

To the entry of the foregoing order, the plaintiff excepted and appealed to the Supreme Court. Upon motion and upon the conditions fixed in its order, this Court granted supersedeas pending the appeal.

W. T. Joyner, Jr., Brooks, McLendon, Brim & Holderness, By: Hubert Humphrey for plaintiff, appellant.

H. J. Elam, III, Frazier & Frazier, for defendant City of Greensboro, appellee.

Jordan, Wright & Henson, for defendant Lambeth Construction Company, appellee.

HIGGINS, J. This appeal is from the order of Judge Olive dissolving the temporary restraining order issued by Judge Preyer. The order of Judge Olive contains the following: ". . . the Court finds that the work, the performance of which was restrained by said temporary restraining order, is pursuant to a plan and a contract duly adopted in good faith by the City Council of the City of Greensboro in the exercise of its judgment and discretion for the important public work of building and improving streets and storm sewer drains, and that to stop this work would greatly interfere with public improvements that are for the public good and that tend to develop the country and its resources."

It must be understood this Court is discussing only the issues involved. The merits must be left to the trial court. However, we think the pleadings raise questions more basic than whether the improvement was pursuant to plan and a contract entered into in good faith in the exercise of the Council's discretion, and that to stop the work would interfere with public improvements that tend to develop the country and its resources.

The findings may be sufficient (but of this we express no opinion) to enable the City to exercise its power of eminent domain to take private property for the uses indicated. *Yadkin County v. High Point,* 217 N.C. 462, 8 S.E. 2d 470; *Retreat Association v. Development Co.,* 183 N.C. 43, 110 S.E. 524; *Commissioners v. Bonner,* 153 N.C. 66, 68 S.E. 970. In this instance, however, the City attempts to take the property (easement) of another public service agency also possessing the power of eminent domain when the property is already in public use and alleged by the plaintiff to be necessary for that use. In this connection it is noted the City's brief emphasizes the plaintiff's contention by the following: "It is true, as counsel for plaintiff argue, that the whole area involved in this matter is one of the most promising industrial areas in the State."

The map reproduced herein shows the extent to which the City proposes to make use of the plaintiff's right of way as a thoroughfare over which 25,000 cars will pass daily and the number will be doubled within the next 12 years. Whether the labyrinth of crossings as shown by the map will carry the vehicular traffic, present and contemplated, and still permit the plaintiff to operate its railway facilities is a question for the trial court. To the extent of the interference with the railroad's operation over its right of way the City will be taking the plaintiff's property.

Quite understandable is the concern of the City and the public over the traffic bottleneck which has resulted from the suspension of work by court order after road facilities in existence had been partially destroyed by the City's contractor in the attempt to carry out the City's plans. However, it must be borne in mind the City had notice the Railway Company objected to the plan and instead of going to the courts to have the dispute determined, the City elected to execute its plans. It did so at its own risk. The record discloses the City had acquired rights of way for this project from all owners except the plaintiff. The plaintiff certainly has done nothing to waive or forfeit its rights to be heard on the issues of fact and questions of law raised by its complaint. Since the City did not resort to the courts to have the dispute resolved, the plaintiff has done so by this proceeding.

No doubt this progressive and rapidly growing city is anxious to discharge its duty to provide within its domain adequate street and highway facilities. But in this instance, if the plaintiff's contentions are correct, the City seeks to use the strong arm of government under its general powers to take property already

dedicated to a proper public use. "The power of eminent domain, as generally understood, extends only to the right to condemn private property for public uses." *Yadkin County v. High Point, supra; Wissler v. Power Co.*, 158 N.C. 465, 74 S.E. 460; *Jeffress v. Greenville*, 154 N.C. 490, 70 S.E. 919. "The authorities are to the effect that a general authorization to exercise the power of eminent domain will not suffice in a case where property already dedicated to a public use is sought to be condemned for another public use which is totally inconsistent with the first or former use. *Railroad v. Railroad*, 83 N.C. 489; 20 C.J. 602. In such a case a specific legislative grant or one of unmistakable intent is required." *Yadkin County v. High Point, supra*, (citing many cases). The City of Greensboro does not have specific legislative authority.

No doubt the Legislature may authorize a municipality to take (by condemnation) for public use property already devoted to another public use, but the authority must be expressly conferred by statute or must arise by necessary inference. 18 Am. Jur., Eminent Domain, p. 723. Land once appropriated by a railroad company for public use cannot, in the absence of statutory authority which is express or necessarily implied, be condemned for streets or highways if such purpose would be inconsistent with and impair or destroy its use for railroad purposes. 29 C.J.S. 869, Eminent Domain, Sec. 87; *Fayetteville Street Railway v. R. R.*, 142 N.C. 423, 55 S.E. 345. This same principle is fully recognized in the case of *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486, cited in the City's brief; "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. (citing authorities) 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." (Citing *Yadkin County v. High Point, supra*). In the Goldsboro case there was a finding to the effect "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."

Unquestionably the State, its subdivisions, and public agencies may acquire property by gift, by purchase, and, in proper cases, by condemnation under the power of eminent domain. In the latter class of cases the procedure is outlined.

Notwithstanding the fact that authorities who seek to take may act in the utmost good faith, something more is required than merely adopting a plan, transmitting it to the owner, and entering into a contract for the work to be done. Due process in-

volves more than notice. Before the plaintiff is finally deprived of its property it may question the right of the City to take as planned. Acquisition of property by confiscation is limited to forfeitures and to contraband.

We have examined the many cases cited by the defendants. These cases do not mitigate or weaken but tend to support the principles enunciated in the cases herein cited, and many others of like import. Courts generally are reluctant to approve governmental shortcuts when personal and property rights are involved.

In view of the importance and seriousness of the issues involved, the facts and the reasons for this opinion have been stated at considerable length. The plaintiff has alleged an unlawful entry and a trespass upon its right of way by the City and its contractor, and that the entry is unauthorized by legislative enactment. It alleges further that if the planned construction is permitted the railroad's ability to operate its lines will be destroyed or greatly impaired. If the plaintiff's charge of trespass is established at the hearing, conceivably the defendant may be faced with the problem of restoring, as near as may be, the property to its former condition. But these matters are for another court.

Nothing herein is intended as a modification of the general rule that a city may provide street facilities over a railroad track by right angle crossings in such manner and under such circumstances as will not deprive the railway company of its reasonable use of its track for railroad purposes. *Ft. Wayne v. Lake Shore and M. S. Railroad,* 132 Ind. 558, 32 N.E. 215.

The issues presented should be heard on the merits, and to that end the *status quo* should be maintained until the issues in dispute have been resolved. The order appealed from is set aside and the cause is remanded to the Superior Court of Guilford County for the entry of an order, upon appropriate terms, restraining the defendants from proceeding further with the execution of its plans pending hearing on the merits.

Reversed.

PARKER, J., dissenting. At the hearing on 3 October 1957 before Judge Olive, pursuant to his order of 27 September 1957, the city of Greensboro presented to the judge an affidavit of George H. Roach, Mayor of the city of Greensboro. This affidavit contains among many other statements, this: "That the spot at which the Southern Railway Company would have the work of this project restrained bears the heaviest and most congested traffic. That the latest traffic count discloses that more than 25,000 vehicles pass through the project area each day,

and the estimated use by 1970 is 50,000 vehicles per day." The Mayor further states in his affidavit: "That to continue the temporary restraining order and stoppage of the construction work under this project could contribute to many accidents to the general public who must operate their vehicles along said highway."

J. A. Rust, General Manager of plaintiff, in the hearing before Judge Olive, testified: "Two trains run daily between Greensboro and Mount Airy over the track involved, one each way, and there are three other switch engine movements, three in each direction, passing this section. This makes eight movements altogether each day over the track in question."

This Court said in *Griffin v. R. R.*, 150 N.C. 312, 64 S.E. 16:

> "It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, except in extreme cases, and this is not such an one. It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good, as well as for private gain. The court will not put the public to needless inconvenience. The court should have dissolved the restraining order."

The opinion cites numbers of our cases.

This Court also said in *Jones v. Lassiter*, 169 N.C. 750, 86 S.E. 710:

> "It is true that when the injunctive relief sought is not merely ancillary to the relief demanded, but is, itself, the principal relief sought, the courts will generally continue the injunction to the hearing upon the making out of a *prima facie* case. *Marshall v. Commissioners*, 89 N.C. 103.
>
> "But the rule does not hold good in cases where important public works and improvements are sought to be stopped. In such matters, in the interest of the public good, the courts will let the facts be found by a jury before interfering by injunction. The right of this plaintiff to recover damages for her alleged injuries is not now before us."

See also, *Scott v. Comrs.*, 170 N.C. 327, 87 S.E. 104; and *Staton v. R. R.*, 147 N.C. 428, 61 S.E. 455.

It is public policy not to interfere with the construction of works of great public benefit, where the defendant is amply able to respond in damages, and no irreparable injury will accrue to plaintiff, if the injunction is refused.

E. L. Faulconer, a former President and General Manager of the Atlantic and Yadkin Railway Company, and now an assistant Vice-President of the plaintiff, and since December 1919 an employee of both railway companies, testified before Judge Olive:

"The criss-cross plan was not, to my knowledge, a part of the Babcock Plan. Well, in a way, what the Southern Railway is objecting to in this is not the putting of the streets there, but the way these are being put there. The engineering is one objection."

The city of Greensboro is a municipal corporation, and able to respond in damages, if any should be awarded. If the plaintiff should prevail at the trial on the merits of the controversy, it has an adequate remedy at law to recover adequate compensation for any loss it may sustain by any acts of the city of Greensboro, and the court can enter such judgment as to justice appertains and the rights of the plaintiff may require in accordance with law.

Judge Olive found in an order 16 October 1957 that "plaintiff will not sustain any damage by the carrying on of the construction work originally restrained by the temporary restraining order."

I vote to affirm Judge Olive's order dissolving the temporary restraining order before issued by Judge Preyer.

JOSEPH EUGENE DAVIS v. SANFORD CONSTRUCTION COMPANY, INC., EMPLOYER, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER.

(Filed 11 December, 1957)

1. **Master and Servant § 53b(1)**

The additional compensation for serious bodily disfigurement under G.S. 97-31(w) may be awarded in the discretion of the Industrial Commission whether such disfigurement results from the loss or injury to any important organ of the body or not, provided such loss or injury to such organ is not specifically compensable under G.S. 97-31(a) through (t).

2. **Same—**

The award of compensation under G.S. 97-31(v) is mandatory upon the Commission upon a finding of serious facial or head disfigurement, although the amount of compensation therefor rests in the legal discretion of the Commission. Serious facial or head disfigurement may result from the loss or injury to any important organ of the face or head, so that compensation for the loss of two upper front teeth is compensable under section (v) rather than (w).

3. **Same—**

Whether the loss of two upper front teeth results in a serious facial or head disfigurement so as to make the award of compensation therefor mandatory under G.S. 97-31(v) is a question of fact for the Commission.

4. Appeal and Error § 49: Master and Servant § 55g—

Where it is apparent that the Industrial Commission made its findings of fact in regard to compensation for the loss of claimant's two upper front teeth under misapprehension that G.S. 97-31(w) rather than G.S. 97-31(v) was applicable, the cause must be remanded for consideration of the evidence in its true legal light.

5. Master and Servant § 53b(1)—

A facial disfigurement is serious in law only when there is a serious disfigurement in fact, which is one which adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power, even though no present loss of wages may be shown to have occurred.

6. Constitutional Law § 7: Master and Servant § 36—

The statutory provisions in regard to award for serious disfigurement are not invalid on the ground that the statute fails to provide an intelligible guide or standard for the Commission.

APPEAL by plaintiff from *Crissman, J.*, March 18, 1957, Term, of FORSYTH.

Compensation claim for the loss of two upper front teeth.

The jurisdictional facts were stipulated; also, it was stipulated that plaintiff, a regular employee, sustained an injury by accident arising out of and in the course of his employment.

The findings of fact and conclusions of law made by the hearing commissioner, approved and adopted by the full Commission, are as follows:

"FINDINGS OF FACT

"1. That plaintiff lost no time or wages by reason of his injury and the sole question for determination in this case is how much compensation, if any, plaintiff is entitled to receive by reason of serious facial disfigurement, or serious bodily disfigurement.

"2. That as a result of the accident giving rise hereto plaintiff has lost two upper front teeth, said loss being permanent; that these two front teeth have been replaced by a matching bridge, the cost of which has been borne by the defendants.

"3. That plaintiff has thus suffered the loss of or permanent injury to an important organ of the body for which no compensation is payable under the provisions of G.S. 97-31(a) through (v); that proper and equitable compensation therefore is $450.00."

"CONCLUSIONS OF LAW

"The sole question for determination in this case is whether or not loss of teeth is compensable as disfigurement under our Act, all other factors necessary for an award being stipulated."

After quoting G.S. 97-31(w), also from *Mabee v. Anthony*, an Oklahoma decision referred to in the opinion, this "Conclusion of Law" was stated:

"The Commission concludes as a matter of law that plaintiff has suffered the loss of an important organ of the body for which no compensation is payable under the provisions of G.S. 97-31(a) through (v) and that the proper and equitable compensation therefor is $450.00. G.S. 97-31(w)."

The award made required that defendants pay to plaintiff compensation "for his serious bodily disfigurement" the sum of $450.00.

Upon defendants' appeal to the superior court, Judge Crissman, "being of the opinion that the Conclusions of Law based upon the Findings of Fact are erroneous," entered judgment whereby the award was "in all respects set aside and vacated," compensation was denied and plaintiff was ordered to pay the costs. Plaintiff excepted and appealed.

Leake & Phillips for plaintiff appellant.
King, Adams, Kleemeier & Hagan for defendants appellees.

BOBBITT, J. Defendants state the question presented as follows: "May compensation be awarded plaintiff for serious facial or head disfigurement or for serious bodily disfigurement (where plaintiff lost two teeth which were replaced with a bridge at defendants' expense) in absence of any evidence or finding of fact that plaintiff sustained serious disfigurement so that it handicapped him in obtaining employment or reduced his earning power?"

G.S. 97-31 provides that, in addition to compensation paid for disability during the healing period, compensation is to be awarded for specified definite extended periods where the injury involves the loss of any part, member or organ of the body designated in subsections (a) through (t). This additional compensation "shall be in lieu of all other compensation, including disfigurement." The loss of a tooth or teeth is not one of the losses designated in subsections (a) through (t). Whether such loss should be so designated is a matter for the General Assembly, not for this Court.

Plaintiff bases his claim for compensation solely on alleged serious disfigurement. Prior to Ch. 1221, Session Laws of 1957, enacted subsequent to plaintiff's injury, the pertinent provisions of G.S. 97-31, applicable to plaintiff's claim, were as follows:

"(v) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed two thousand five hundred dollars. In case

of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

"(w) In case of serious bodily disfigurement, including the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the Industrial Commission may award proper and equitable compensation not to exceed two thousand five hundred dollars."

While *the amount* of the award (up to $2,500.00) is for determination by the Commission under (v) as well as under (w), "the statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. The statute provides that the Industrial Commission shall have the power and the authority to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this article, not to exceed $2,500.00." *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570. Thus, where "serious bodily disfigurement" is involved, award of compensation therefor is not required but may be allowed or disallowed in the exercise by the Commission of its legal discretion. *Branham v. Panel Co.*, 223 N.C. 233, 238, 25 S.E. 2d 865.

In express terms, the Commission based its award of $450.00 on G.S. 97-31(w). The factual basis therefor is that plaintiff "suffered the loss of or permanent injury to an important organ of the body for which no compensation is payable under the provisions of G.S. 97-31(a) through (v)."

With reference to (w), it would seem that "the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections" may be the basis for a separate award only if it results in "serious bodily disfigurement." Such loss or permanent injury to an important organ of the body is not something different from or in addition to "serious bodily disfigurement" but rather, as indicated by the word "including," an instance of what may constitute "serious bodily disfigurement." While (v) does not refer in express terms to the loss of or permanent injury to any important organ of the face or head, we think it clear that such loss, if in fact a "serious facial or head disfigurement," is compensable thereunder.

If plaintiff's loss of his two upper front teeth constitutes serious disfigurement within the meaning of G.S. 97-31, it would

seem inescapable that this would be a "serious facial or head disfigurement" compensable under (v) rather than a "serious bodily disfigurement" compensable under (w). In such case, plaintiff would be entitled under (v) to *an* award as a matter of right.

The crucial question is this: If plaintiff suffered the loss of *two* upper front teeth, a finding challenged by defendants on their appeal from the full Commission to the superior court, did plaintiff suffer thereby a "serious facial or head disfigurement"? The full Commission did not make such finding of fact. Rather, it appears clearly that the full Commission considered (w) rather than (v) the pertinent provision and that it interpreted (w) as authority for an award for loss or permanent injury to any important organ of the *body,* for which no specified compensation for a definite period was payable under the preceding subsections of G.S. 97-31, without regard to whether such loss constituted "serious bodily disfigurement." Hence, the full Commission's findings of fact were made under misapprehension as to the applicable law. It follows that the court below should have set aside the findings of fact and remanded the cause to the full Commission for consideration of the evidence in its true legal light. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and cases there cited.

It does not follow that the Commission cannot award compensation to plaintiff under (v) upon a supported finding of fact that he has suffered a "serious facial or head disfigurement." In that connection, we deem it proper to call attention to the matters stated below.

Under our decisions, there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, *no present loss of wages* need be established; but to be *serious,* the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. *Stanley v. Hyman-Michaels Co., supra; Branham v. Panel Co., supra;* Larson, Workmen's Compensation Law, Vol. 2, Sec. 58.32; also see (dictum) *Marshburn v. Patterson,* 241 N.C. 441, 448, 85 S.E. 2d 683.

In *Stanley v. Hyman-Michaels Co., supra,* where this Court affirmed the order of the superior court remanding the cause to the Commission for the taking of evidence and for findings of fact as to disfigurement, Denny, J., speaking for the court, said: "In awarding compensation for serious disfigurement, we think

the Commission, in arriving at the diminution of earning power from disfigurement and making its award, should take into consideration the natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. What is reasonable compensation for serious disfigurement is for the determination of the Commission in each case in the light of the facts established by competent evidence."

In *Muchnick v. Susquehanna Waist Co.*, 124 Pa. Super. 194, 188 A. 413, the Court said: "The loss of front teeth has always been regarded as a serious matter." Again: "We have no doubt that, if average persons were asked whether they would classify the loss of two front teeth as important or trifling, the vast majority would refuse to classify the loss or blemish as trifling. Certainly there is no such unanimity of opinion to the contrary as would justify the court in saying that the finding of fact by the board is inherently wrong." Again: "The degree of the injury depended upon other factors than the loss of the two teeth, such as the condition of the other teeth and the consequent effect on the facial appearance. The previous appearance of the teeth as a whole as part of the head and face is a matter that is proper for the fact-finding body to consider, and situations may arise where the loss of a front tooth might not be so serious as to create an unsightly appearance."

In *Mabee v. Anthony*, 155 Okla. 35, 8 P. 2d 22, 80 A.L.R. 968, the Court said: "In this particular case there was no loss of wages for the time being, but undoubtedly there was loss of power to masticate food, which is the foundation of practically all physical labor that is to last. As a specific injury, the loss of the tooth is not defined in the statute. However, to knock out two teeth would certainly be disfigurement to the head as nature made it, and as nature made the front, which we call the face. It is only a question of time when, by the shrinking of the gums and the wasting away of the bony process that the roots of the teeth are fastened in, there will be a disfigurement, not only of the head, but of the face also. The fact that a dentist made some new teeth for him would not prevent disfigurement, as we all know that the teeth will not come back and that artificial teeth never fill the place of that which is natural."

In this jurisdiction, whether an injured employee has suffered a "serious facial or head disfigurement" is a question of fact to be determined by the Commission, after taking into consideration the factors indicated above, in relation to whether it may be fairly presumed to cause a diminution of his future earning power.

Since loss of future earning power is not susceptible of precise present proof, this determination as to whether a diminution of future earning power may be reasonably presumed on the basis of the facts established must rest largely within the judgment of the Commission. Admittedly, there are exceptional instances where the most serious handicap, whether caused by disfigurement or otherwise, is entirely overcome in respect of future earning power by notable qualities of industry or of ingenuity. However, as stated by Cardozo, J., in opinion for the Court of Appeals of New York in *Sweeting v. American Knife Co.*, 226 N.Y. 199, 123 N.E. 82: "Lawmakers framing legislation must deal with general tendencies. The average and not an exceptional case determines the fitness of the remedy."

The fact that there exists a broad area in which the judgment of the Commission with reference to the particular factual situation is determinative does not invalidate the statutory provision on the ground of failure to provide an intelligible guide or standard for the award of compensation for serious disfigurement causing impairment of future earning power. *Baxter v. Arthur Co.*, 216 N.C. 276, 4 S.E. 2d 621; *New York Cent. R. R. Co. v. Bianc*, 250 U.S. 596, 40 S. Ct. 44, 63 L. ed. 1161. Justice Pitney, in the case last cited, said: "Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or customers."

Cases from other jurisdictions supporting awards on account of loss of teeth include the following: *Muchnick v. Susquehanna Waist Co., supra; Mabee v. Anthony, supra; Grinnell Co. v. Smith*, 203 Okla. 158, 218 P. 2d 1043; *Amalgamated Sugar Co. v. Industrial Commission*, 75 Utah 556, 286 P. 959; *Olson v. Union Pac. R. Co.*, 62 Idaho 423, 112 P. 2d 1005; *Betz v. Columbia Telephone Co.* (Kansas City Court of Appeals), 24 S.W. 2d 224; *Odom v. Atlantic Oil Producing Co.*, 162 La. 556, 110 So. 754. Fully aware of the differences in statutory provisions and of the diverse bases for decision, the rule in this jurisdiction as stated above is based upon our interpretation of our statute and the prior decisions of this Court.

In *Stephens v. A. L. Wright & Co.*, 194 Va. 404, 73 S.E. 2d 399, plaintiff's injury caused the loss of four front teeth and one back tooth. A denture had been substituted for the missing teeth. The *Commission* denied compensation. Its decision was

affirmed. Because of defendants' reliance upon this Virginia decision, it seems appropriate to consider the exact holding therein.

The Virginia Act, then under consideration, provided: "For marked disfigurement of the head or face resulting from an injury not above mentioned in this section which will impair the future usefulness or occupational opportunities of the injured employee sixty per centum of the average weekly wages not exceeding sixty weeks."

The *full Commission* said: "Taking into consideration claimant's present and past occupations, it is *our conclusion* that the evidence fails to show a marked disfigurement of the head or face which will impair the future usefulness or occupational opportunities of this claimant." (Italics added.)

The Supreme Court of Appeals of Virginia, per Buchanan, J., said: "Disfigurement alone is not made compensable by the act. Before it is compensable it must be, by the plain terms of the act, not only (1) a marked disfigurement, but also one which (2) impairs the future usefulness or occupational opportunities of the injured employee. *These are questions of fact,* and the burden rests upon the claimant to establish the existence of both factors." (Italics added.)

"There is no evidence in the record to show the existence of the second factor. The hearing commissioner found from observing the claimant and from the record that there was no facial disfigurement that would affect his future usefulness or occupational opportunities. The full Commission found that the evidence strongly indicated that it would not, and concluded that there was no such impairment. That conclusion, being upon a question of fact, supported in this instance by observation of the claimant and by the evidence bearing upon the point, is binding upon us on this appeal. (Citations omitted.)

"As stated by Commissioner Nichels in *Guy v. Perry,* 15 O.I.C. 484, 486-487, the hearing commissioner may readily make a reasonably safe deduction from observation at the hearing as to whether the claimant has suffered a marked disfigurement; but *the more difficult question of whether the marked disfigurement will impair future usefulness or occupational opportunities 'may only be solved in any case by the exercise of good judgment.'* The legislative history of subsection (19) indicates some hesitation about making disfigurement compensable. When it was finally brought within the coverage of the compensation law, and by amendments subsequently made, the solution of the basic questions, as well as the amount of compensation to be allowed, was confided to the Commission with broader lattitude of decision than had been given with respect to the specific injuries made

compensable by the preceding subsections of section 65-53." (Italics added.)

In closing his opinion, Buchanan, J., said: "Loss of teeth is not among the losses specifically made compensable by section 65-53, as it could have been if that had been the purpose. Instead, by the language of the statute, before such loss is compensable it must result not only in marked disfigurement but also in the impairment of the claimant's usefulness or his occupational opportunities. Neither of these conditions is *per se* a question of law. *They stand here as do other questions of fact on appeal from the Industrial Commission.* As stated, the finding of the Commission on the case in judgment is conclusive and its award must be affirmed." (Italics added.)

It would seem that the Virginia rule is in accord rather than in conflict with the rule in this jurisdiction as stated above.

In *Davis v. Waterbury's, Inc.*, (La.), 145 So. 569, the only other case that has come to our attention where compensation for the loss of a tooth or teeth was denied, one tooth "that was dislodged (had) been replaced with a false tooth." We pass without discussion the difference in statutory provisions. Suffice to say, it appears that decision was based on a finding that the plaintiff *in fact* had suffered no serious or permanent disfigurement.

As indicated above, the court below did not rule on defendants' exceptions to the Commission's findings of fact but held that, upon the facts found, the Commission's legal conclusion was erroneous.

For the error pointed out, the judgment of the court below is vacated; and the cause is remanded to the end that the court below remand it to the Commission for further consideration consistent with the applicable law as stated herein.

Error and remanded.

G. E. SIMMONS v. WILLIE BUCK ROGERS AND SHIRLEY JEAN ROGERS, A MINOR, AND WILLIE BUCK ROGERS, AS GUARDIAN AD LITEM FOR SHIRLEY JEAN ROGERS.

(Filed 11 December, 1957)

1. **Infants § 12—**

Where the guardian *ad litem* dies after filing answer, but the infant becomes of age prior to the trial, the appointment of a new guardian *ad litem* is not necessary.

2. **Appeal and Error § 5—**

Where it is made to appear that a party defendant has died, motion to substitute the personal representative of the deceased defendant will be allowed in the Supreme Court. Rule of Practice in the Supreme Court No. 37.

3. **Trial § 22b—**

Defendant's evidence which is favorable to plaintiff and not in conflict therewith, or which clarifies or explains plaintiff's evidence, may be considered on motion to nonsuit.

4. **Trial § 22a—**

Upon motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him.

5. **Automobiles § 8—**

The giving of the statutory signal for turning from a direct line does not constitute full compliance with G.S. 20-154(a), but the operator of a vehicle is required in addition first to ascertain that such movement can be made in safety and to exercise due care in other respects.

6. **Same—**

The violation of G.S. 20-153(a), requiring a motorist turning left on a multiple lane highway to travel on the lane nearest the center of the highway before making the turn, is negligence *per se* and is actionable if the proximate cause of injury.

7. **Automobiles § 41h—Evidence of negligence in swerving from the right-hand lane to the passing lane of highway held sufficient for jury.**

Plaintiff's evidence and defendant's evidence consonant therewith tended to show that plaintiff, driving in the second or passing lane of a four-lane highway, sounded his horn as he was overtaking defendant's vehicle traveling in the right-hand lane, that defendant driver, without giving the statutory signal, suddenly swerved into plaintiff's line of travel in order to make a U-turn on the highway at a place where there was no intersection of highways, and that the driver of defendant's car, though he had seen plaintiff's car in his rear-view mirror some distance back, made the turn without again looking for traffic. *Held:* The evidence is sufficient to be submitted to the jury on the issue of negligence. G.S. 20-153(a), G.S. 20-154(a).

8. **Negligence § 19c—**

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom.

9. **Automobiles § 6—**

The operator of a motor vehicle is not under duty to anticipate negligence on the part of others, but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume and act on the assumption that others will exercise due care for their own safety.

10. Automobiles § 14—

The driver of an automobile traveling in the second or passing lane of a four-lane highway is under no obligation to slow down in passing a slower moving vehicle traveling in the right lane in the absence of any indication or warning that the driver of the vehicle in the right lane is preparing to turn left or enter the second or passing lane of traffic.

11. Automobiles § 42e—

Evidence tending to show that the operator of a vehicle in the second or passing lane of a four-lane highway, overtaking and preparing to pass a slower moving vehicle traveling in the same direction in the right lane, sounded his horn but failed to reduce speed and struck the other vehicle when it, without warning or signal, suddenly turned left from the right lane across the second lane at a place where there was no intersecting highway, *is held* not to show contributory negligence as a matter of law, since plaintiff is not required to anticipate such negligent operation of the other car.

12. Automobiles § 19—

The operator of a motor vehicle confronted with a sudden emergency is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made.

13. Automobiles § 42a—

Evidence tending to show that the operator of a vehicle in the second or passing lane of a four-lane highway, overtaking and preparing to pass a slower moving vehicle traveling in the same direction in the right lane, sounded his horn but failed to reduce speed and struck the other vehicle when it, without warning or signal, suddenly turned left from the right lane across the second lane at a place where there was no intersecting highway, *is held* not to show contributory negligence on the part of plaintiff as a matter of law in failing in the sudden emergency to avail himself of the opportunity of passing the other car to its right.

APPEAL by defendants from *Rousseau, J.*, April Civil Term 1957 of GUILFORD (Greensboro Division).

This action was instituted by the plaintiff on 5 April 1956 to recover for personal injuries and property damages sustained in a collision between his automobile and an automobile owned by the minor defendant Shirley Jean Rogers and driven by the defendant Willie Buck Rogers on 17 March 1956 with the consent of the owner. The collision occurred on U. S. Highway 29-70 north of where Highway 311 runs under U. S. Highway 29-70. The plaintiff alleges in his complaint that his injuries and damages were the result of the negligence of the defendant Willie Buck Rogers.

The plaintiff's evidence tends to show that about 4:00 p.m. on the above date he was driving his 1956 Buick automobile, to which was attached an empty two-wheel trailer, along U. S.

Highway 29-70 outside of High Point. U. S. Highway 29-70 is a four-lane highway with two north-bound lanes and two south-bound lanes. The north-bound lanes are about 30 feet wide. There is a dotted or broken white line down the middle of the north-bound lane. An island in the center of the highway separates north- and south-bound traffic. The island terminates about one-quarter mile north of the intersection of U. S. Highway 311 with U. S. Highway 29-70. Plaintiff was in the left north-bound lane when he first saw the automobile driven by the defendant Willie Buck Rogers, traveling in the same direction about 500 feet ahead of the plaintiff in the right-hand lane. Plaintiff was traveling about 50 to 55 miles per hour at the time he saw the Rogers car which was being driven about 20 to 25 miles per hour. The highway at that point was suitable for passing and the speed limit was 55 miles per hour.

When the plaintiff got within about 200 feet of the Rogers car, he sounded his horn preparatory to passing the Rogers car. When the plaintiff was within 150 feet of the Rogers car the driver of the Rogers car, having just passed the end of the traffic island, suddenly swerved from the right-hand lane into and across the left-hand lane in front of plaintiff's oncoming automobile and stopped.

The Highway Patrolman who arrived at the scene of the wreck about 4:10 p.m., testified that the plaintiff pointed out to him the skid marks made by his car; that he measured the skid marks on the highway and they were 142 feet in length; that based on his experience and on the condition of the road at the time he examined it, an automobile traveling about 50 miles per hour would travel about 56 feet by the time the driver could get his foot on the brake and then for around 150 feet before he could bring it to a stop. The Patrolman further testified that he requested Mr. Rogers to show him the point just about where he started giving the hand signal and that he pointed out a place about 40 feet from the point where the collision occurred. The plaintiff testified that no signal for a left turn was given until after the Rogers car was in the act of turning.

The defendant Willie Buck Rogers was attempting to get over and across the left-hand north-bound lane of traffic into the south-bound lane so he could head back towards Thomasville. He denied that he had pointed out to the Patrolman any place where he started giving the hand signal for a left turn. The defendant Willie Buck Rogers testified that after he entered the superhighway from the cloverleaf leading from Highway 311, he looked in his rear view mirror and saw the plaintiff's car coming over a little hill (the evidence discloses that the little hill re-

ferred to was about 500 feet south of where the Rogers car entered U. S. Highway 29-70).

The witness further testified that he gave a hand signal for about 200 feet until he got near the end of the island, "Then I pulled my hand in and gave the glass a wheel or two and hit my brakes and then I heard the tires squalling. I was going to turn there at the end of the island and go back towards Thomasville. I had made just about a quarter of a turn at the time the two cars came together."

On cross-examination the defendant Willie Buck Rogers admitted that he first saw the plaintiff's car through his rear view mirror after entering Highway 29-70; that he never again looked in the rear view mirror or saw the plaintiff's car again until the moment of the crash. He also testified that just before he got to the end of the island where he was going to cross, "I rolled my glass up just before I got to the end of the island, while I was still headed straight down the highway."

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and awarded damages accordingly. The defendants appeal, assigning error.

Haworth & Haworth, and Jordan, Wright & Henson, for defendant appellants.

Smith, Moore, Smith, Schell & Hunter, and Richmond G. Bernhardt, Jr., for plaintiff appellee.

DENNY, J. It appears from a motion filed in this Court that the defendant Willie Buck Rogers died intestate on 12 June 1957. That on 15 August 1957, while this cause was pending in the Supreme Court, Lucille Rogers was duly appointed administratrix of the estate of Willie Buck Rogers. It further appears from the motion that when this action was instituted on 5 April 1956 the defendant Shirley Jean Rogers was a minor, which required the appointment of a guardian *ad litem*. But when this matter came on for trial at the April Civil Term 1957 of the Superior Court of Guilford County (Greensboro Division), Shirley Jean Rogers was then 21 years of age. Therefore, we hold that it is not necessary for a new guardian *ad litem* to be appointed for Shirley Jean Rogers. She will now be treated as a party defendant, defending this action in her own right. The motion to make Lucille Rogers, administratrix of the estate of Willie Buck Rogers, a party is granted and she is hereby made a party defendant as authorized by Rule 37, Rules of Practice in the Supreme Court, 221 N.C. 566.

The sole assignment of error is to the refusal of the court below to sustain the defendants' motion for judgment as of non-

suit interposed at the close of plaintiff's evidence and renewed at the close of all the evidence.

The defendants contend that the evidence adduced in the trial below was insufficient to show any actionable negligence on the part of the defendant Willie Buck Rogers and that it was error to submit the case to the jury. They further contend, however, that if the defendant Willie Buck Rogers was guilty of negligence, the facts clearly show that the plaintiff was guilty of contributory negligence as a matter of law.

We do not concur in these contentions. There was ample evidence to carry the case to the jury. In fact, the evidence of the defendant Willie Buck Rogers is sufficient to establish these facts. After he entered U. S. Highway 29-70, he observed the plaintiff's car approaching from the south, some 500 feet from where he entered the highway; that from that time until the moment of the crash he never looked for or saw the plaintiff's car. Likewise, while traveling in the right north-bound lane of the highway and just before he got to the end of the island where he was going to cross the left north-bound lane and turn back into a south-bound lane, according to his evidence he discontinued his signal for a left turn and rolled up the glass in the left front door while he was still driving straight down the highway in the right-hand north-bound lane. This evidence not only explains the evidence of the plaintiff but it supports the plaintiff's evidence to the effect that the driver of the Rogers car suddenly swerved from the right-hand lane into and across the left north-bound lane in front of plaintiff's oncoming automobile.

On a motion for judgment as of nonsuit, we will not only consider evidence offered by the plaintiff but that offered by the defendant which is favorable to the plaintiff or not in conflict therewith, or when it may be used to clarify or explain the plaintiff's evidence. *Godwin v. Cotton Co.*, 238 N.C. 627, 78 S.E. 2d 772; *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543; *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Hobbs v. Drewer*, 226 N.C. 146, 37 S.E. 2d 121; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598.

G.S. 20-153(a) provides that, "* * * the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of

the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. When a vehicle is being operated on a three-lane street or highway, the driver thereof intending to turn to the left at an intersection shall approach the intersection in the lane nearest to the center of the highway and designated for use by vehicles traveling in the same direction as the vehicle about to turn."

Furthermore, it is required by G.S. 20-154 (a) that, "The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, * * * and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. * * * All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn." The evidence of the defendant Willie Buck Rogers clearly shows that he made no effort whatever to ascertain whether or not a left turn of his motor vehicle could be made in safety.

The plaintiff testified that the driver of the Rogers car gave no signal before turning left across the highway. Upon a motion for nonsuit, plaintiff's evidence is to be taken as true and must be considered in the light most favorable to him. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Register v. Gibbs*, 233 N.C. 456, 64 S.E. 2d 280; *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E. 2d 904; *Whitley v. Jones*, 238 N.C. 332, 78 S.E. 2d 147.

As pointed out in *Ervin v. Mills Co., supra*, by Devin, J., later C. J., "We do not regard the requirement in G.S. 20-154, that a prescribed hand signal be given of intention to make a left turn in traffic, as constituting in all cases full compliance with the mandate also expressed in this statute that before turning from a direct line the driver shall first see that such movement can be made in safety, nor do we think the performance of this mechanical act alone relieves the driver of the common law duty to exercise due care in other respects."

A violation of G.S. 20-153(a) constitutes negligence *per se* and such negligence is actionable if it proximately causes injury to another. *Ervin v. Mills Co., supra; Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565.

If we consider all the evidence in this case, including that of the defendants, which is not in conflict with the plaintiff's evidence, it is sufficient to support the view that the driver of the Rogers car not only failed to give a signal for a left turn, as

required by G.S. 20-154, but that he failed to approach the area, at the end of the island where he intended to turn left, in the proper lane, as required by G.S. 20-153(a).

Now, as to the contention of the defendants that the evidence of the plaintiff clearly shows that he was guilty of contributory negligence as a matter of law.

A nonsuit on the ground of contributory negligence should not be granted unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891; *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676; *Mikeal v. Pendleton*, 237 N.C. 690, 75 S.E. 2d 756; *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239; *Levy v. Aluminum Co.*, 232 N.C. 158, 59 S.E. 2d 632; *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921; *Bundy v. Powell, supra; Atkins v. Transportation Co., supra; Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227.

The defendants are relying on the case of *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396, where the facts in some respects are similar to those in the instant case, but there is a substantial difference between the entire factual situation in that case and the one now before us. In the Sheldon case the plaintiff attempted to pass on a highway having only one lane for traffic in each direction. Plaintiff sounded a warning 400 feet to the rear of defendant's tractor-trailer, which we held not to be in apt time for defendant's driver to have heard it. In the instant case, the plaintiff blew his horn when he was about 200 feet behind the Rogers car and was traveling in the proper lane for passing. Neither is there any evidence on this record to show that the plaintiff was driving at an excessive rate of speed under the conditions and circumstances prevailing immediately preceding the collision. Moreover, in the Sheldon case, the defendant's truck was approaching an intersecting paved highway to the left, which the driver of the defendant's truck attempted to enter at the time the plaintiff attempted to pass the truck. The intersecting highway was visible from the direction in which the plaintiff and the defendant's driver were traveling for a distance of 400 or 500 feet from the intersection. In the instant case, there was no intersecting highway. The plaintiff, under the factual situation revealed by the evidence in this case, was under no legal obligation to anticipate that the driver of the Rogers car might undertake to make a left turn across the left lane of traffic from the right lane of traffic in violation of G.S. 20-153 (a).

While the operator of a motor vehicle is under duty to exercise that care which an ordinarily prudent person would exercise

under the same or similar circumstances for his own safety and the safety of others, he is under no duty to anticipate negligence on the part of others, in the absence of anything which gives or should give notice to the contrary. He is entitled to assume, and act on the assumption, that others will exercise ordinary care for their safety. *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

In *Cox v. Lee, supra,* Barnhill, J., later C. J., said: "The driver of an automobile is not required to anticipate negligence on the part of others, and his failure to do so does not constitute an act of negligence."

In the absence of some indication or warning that a motor vehicle traveling in the right lane of a two-lane highway for traffic in the same direction, is preparing to enter the left lane of traffic, the driver of a motor vehicle in the left lane, where the speed limit is 55 miles per hour, is under no obligation to slow down in passing a slow moving vehicle traveling in the right lane.

Even though there was no intersection into or across U. S. Highway 29-70 at the point where the driver of the Rogers car attempted to make a U-turn, in any event, before doing so, he was required by statute to do five things: (1) Before leaving the right lane of traffic, to give the signal required by G.S. 20-154; (2) to see that such movement could be made in safety; (3) to get into the left lane of traffic before he reached the place on the highway where he intended to turn left into a south-bound lane of traffic, as required by G.S. 20-153 (a); (4) to give the signal for the second left turn as required by G.S. 20-154, and (5) to see that such movement from the left lane could be made in safety.

The defendants further contend that the plaintiff was contributorily negligent because he did not drive his car to the right of the Rogers car where there was ample space to pass either on the paved portion of the highway or on the ten-foot shoulder.

We think the evidence on this record supports the view that the plaintiff was confronted with a sudden emergency. The rule of conduct in an emergency was succinctly stated by Stacy, C. J., in *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562, in which he said: "One who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have done." *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664; *Morgan v. Saunders,* 236

N.C. 162, 72 S.E. 2d 411; *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383.

In our opinion, the questions of negligence and contributory negligence were properly submitted to the jury. In *Infantino v. Maher,* 366 Pa. 633, 79 A 2d 247; *Baggett v. Markel, Inc.* (1953, La. Appeal), 65 So. 2d 367; *Ball v. Home Oil Co.* (1941, La. Appeal), 4 So. 2d 579; Anno: Motorist—Signal for Left Turn, 39 A.L.R. 2d, page 54.

The action of the court below in overruling the defendants' motion for judgment as of nonsuit will be upheld.

Affirmed.

HARVEY LEE SMITH AND WIFE, MARGARET H. SMITH v. CITY OF WINSTON-SALEM

and

N. G. THOMAS AND WIFE, RUBY THOMAS v. CITY OF WINSTON-SALEM.

(Filed 11 December, 1957)

1. **Municipal Corporations § 1—**

A municipal corporation is an agency created by the State to assist in the civil government of a designated territory and the people embraced within its limits.

2. **Municipal Corporations § 5—**

A municipal corporation has only those powers expressly granted in its charter or necessarily implied therefrom or essential to the declared objects and purposes of its creation, and it can have no extra-territorial powers unless expressly authorized by legislative grant.

3. **Same—**

Provision in the charter of a municipality authorizing it to acquire property for necessary sewer lines outside its limits and to compel citizens living along such line to connect therewith, is a grant of power and is not self-executing, and therefore in the absence of allegation or proof that the city undertook to exercise such power in his case, a person residing outside the city limits may not contend that he was compelled to connect the sanitary facilities of his house to the municipal sewer line. G.S. 160-240.

4. **Municipal Corporations § 6—**

A municipality in furnishing sanitary facilities to persons residing outside the corporate limits for a fee acts in a proprietary capacity.

5. **Contracts § 10—**

Ordinarily, as a matter of public policy, corporations may not exempt themselves from liability for negligence in the performance of public services.

6. **Same: Municipal Corporations § 14b—**

Defendant municipality contracted to maintain and keep in repair sewer lines from territory outside its limits, which lines were connected with the municipal sewer system, but by ordinance in force at the time of the connections in question expressly exempted itself from liability for any damage or injury from maintenance and repair. *Held:* The exemption from liability was authorized by legislative act, G.S. 160-249, and a resident outside the city cannot recover for damages resulting from the failure of the municipality to perform its contractual obligation to repair and maintain such lines.

7. **Pleadings § 24a—**

Plaintiff must recover, if at all, upon the cause of action alleged in the complaint and cannot recover on a different legal right.

8. **Municipal Corporations § 14b—**

Where plaintiffs base their right of action upon the failure of defendant municipality to perform its contractual obligation to maintain and repair a sewer line to which the sanitary facilities of plaintiffs' residences were connected, plaintiffs may not recover damages resulting from the flowing of sewerage directly from the city's mains on plaintiffs' property on the ground of trespass, since plaintiffs may not recover in tort unrelated to the contractual obligations alleged.

APPEAL by defendant from *Crissman, J.*, January 21, 1957 Term of FORSYTH.

Plaintiffs Smith owned a house on Cornell Avenue, and plaintiffs Thomas a house on Yale Boulevard in a suburban development adjacent to Winston-Salem. Except for the allegations with respect to the location of their homes, the facts alleged in each complaint as the basis for recovery are substantially the same. The cases were consolidated for trial.

As determinative of the rights of the parties, the court submitted two issues in each case. The jury, by its answer to the first issue, found that plaintiffs' property had been damaged by a nuisance created by the negligence of defendant; and by their answer to the second issue, fixed the damage resulting therefrom. Judgments were entered on the verdicts. Defendants appealed.

Hoyle C. Ripple and Wesley Bailey for plaintiff appellees.
Womble, Carlyle, Sandridge & Rice for defendant appellant.

RODMAN, J. These in brief are the allegations of the complaints: In 1947 Weston Corporation, then the owner of land adjacent to Winston-Salem, began the development of the area for residential purposes. As a part of its planned development, the corporation laid out and installed a sewerage system to which the houses to be erected could be connected. This sewerage system was connected at defendant's corporate limits with

the city's system and terminated in a pump house of defendant some distance beyond its corporate boundaries. The sewage was there pumped and transferred to defendant's disposal plant. The city, as a condition to the connection with its sewerage system, required Weston to construct its system in accordance with plans and specifications provided by defendant. The system was so constructed. It was also made a condition to the connection that if the corporate limits of the defendant should be enlarged, the portion of the system included within the enlarged corporate limits should become the property of the city. In 1949 the city limits were enlarged and a portion of the development not including the residences of plaintiffs was taken in the city. Thereupon, the part of the system constructed by Weston and included within the corporate limits became the property of defendant. To service this portion of the system constructed by Weston and maintained for the benefit of the residents of defendant city, it was necessary to use the remainder of the system constructed by Weston and particularly the mains passing the homes of plaintiffs. In the summer of 1950 Weston sold and conveyed to defendant all of its water and sewer lines and easements for the maintenance thereof lying beyond the city limits. The consideration for this conveyance was the agreement of the city to operate, repair, and maintain the system. Subsequent thereto the city sold numerous rights to tap into this sewerage system. Plaintiffs, subsequent to the summer of 1950, purchased homes in the area developed by Weston Corporation. These homes were erected by Weston Corporation prior to 1949 and each, when constructed, was provided with bath and toilet facilities which were connected with the sewerage system constructed by Weston Corporation. The connections were in accordance with specifications of the city and were approved by it. Beginning in 1950 or 1951 defendant failed to adequately maintain the sewerage system which Weston Corporation had constructed for the benefit of the home owners in its development. The main sewerage line in the streets serving as outlets for plaintiffs' sewerage system separated and sagged because of broken joints and other defects in the city's mains. The mains were negligently permitted to fill up and sewage from the mains was forced back into the line connecting plaintiffs' homes with the street mains. The back pressure on the service connection was so great that the commode and bath tub in plaintiffs' homes repeatedly overflowed. Under the provisions of the city's charter, plaintiffs were required to connect their homes to the system so maintained and operated by the city, and the services so furnished were in conformity with the conditions and rates provided in the city ordinances.

Defendant admitted the construction of the sewer system by Weston Corporation under plans prepared or approved by it; the connection of the two systems, the inclusion of a portion of the Weston system in the corporate limits, a conveyance of the system by Weston to the city on the condition that the city would maintain and operate pursuant to the terms of its ordinances. It denied plaintiffs were injured by any default on its part. As a further defense it pleaded the provision of its ordinances duly enacted pursuant to statutory authority. The ordinances pleaded as a defense provided: (1) property owners were, under conditions in which plaintiffs were situate, required to install backwater or backpressure valves, and (2) the terms under which the city would provide sewerage service to property owners beyond the corporate limits. The portion of that ordinance material to this case follows: "Connections to the city sewer system outside the corporate limits shall be made in its entirety by the owner, his contractor or agent, under permit from the Public Works Department upon the payment of the required fee . . . All risks shall be assumed by the applicants and the owners of the property supplied with the sewer, and the city shall not be responsible for any damage or injury to person or property by reason of said system, its construction, maintenance or repair; the city shall not be liable to anyone for the proper operation or maintenance of the sewer system, or any part thereof . . ."

Plaintiffs offered evidence which was sufficient for a jury to find that defendant negligently failed to maintain or operate its sewer system; that it permitted the mains in the street in front of plaintiffs' home to break and stop up, thereby preventing the sewage from flowing to the pumping plant, creating a pressure in the mains sufficient to back the sewage up in the line connecting plaintiffs' homes with the mains, overflowing the fixtures and flooding the homes; that the connection between the mains in the street and the fixtures in the plaintiffs' homes was made by or under the supervision of the city and without the installation of the back-pressure valves called for in the ordinance pleaded by defendant.

In addition to the negligence alleged as the basis of plaintiffs' causes of action, they offered evidence sufficient for a jury to find that the negligent failure of defendant to maintain and operate this system caused the sewage to overflow from the manholes in the streets, flooding the streets, and from the flooded streets onto the properties of plaintiffs, that this sewerage passing from the mains out of the manholes and onto the lands of plaintiffs caused serious damage to their property, left it in a foul condition and created a hazard to the health of plaintiffs and members of their families.

Defendant, at the conclusion of the evidence, moved for nonsuits. Its motions were denied. It tendered issues based on the pleadings. The court declined to submit the issues so tendered, but as determinative of defendant's liability submitted an issue in each case reading: "Was the plaintiffs' property, located on . . . damaged by a nuisance created by the negligence of the defendant, as alleged in the Complaint?"

The court charged the jury in accord with the defendant's contention, that plaintiffs, nonresidents of the city, connected with the sewer system of their own volition and because of the contractual relationship, under the ordinance exculpating defendant from liability for negligence, no damage could be recovered which resulted from the flooding of the homes by backing sewage into and overflowing the fixtures in the homes. He further charged that the failure to maintain the system and the resulting flooding of the streets from the manholes and the drainage of this sewage onto the lots of plaintiffs was a nuisance or trespass for which damages could be awarded.

Defendant excepted to the issues submitted and to the charge permitting plaintiffs to recover on the basis of damage resulting from a nuisance created by defendant's negligence. The exceptions assigned as error present two questions:

(1) Validity of a contract (city ordinance) which relieves a city from liability for damages resulting from a negligent failure to furnish services contracted for.

Plaintiffs maintain the invalidity of the ordinance. They assert that they were, by the provisions of the city's charter, compelled to connect with the sewer system, and as they acted under compulsion, they were entitled to compensation for the damages proximately resulting from compliance. They also assert that the ordinance denying liability for the negligent breach of the contractual obligation is contrary to public policy and void. The provisions of the city's charter form the basis of the assertion that plaintiffs had no freedom to contract but were compelled to connect with the city's sewerage system.

The charter authorizes the city to construct and operate a sewerage system, granting to the city the power of eminent domain for that purpose. Following this general grant of the power of eminent domain, the charter provides: ". . . and if it shall be necessary, in obtaining a proper outlet to said system, to extend the same beyond the corporate limits, to condemn a right of way to and from such outlet, it shall be done as herein provided for opening new streets and other public purposes; and in addition thereto said Board of Aldermen shall have power and authority to compel *citizens* living along the line of sewerage or in the vicinity thereof to connect their premises, drain or other

pipes with said sewerage, so as to drain all of the premises along the line of said sewerage, and on default of the owner to make such connection the City can have such connection made and the costs thereof charged against the owner of the property . . ." (Italics added.)

The fallacy of the position taken by plaintiffs that they were compelled to act and deprived of any freedom to contract is apparent from a casual reading of the charter provision on which they depend. First, it is a mere grant of power. It is not self-executing. There is neither proof nor allegation that the city has undertaken to exercise the power granted. Second, the power of compulsion granted to the city applies to *citizens*, that is citizens of Winston-Salem. Plaintiffs are not citizens of Winston-Salem.

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits. *Lee v. Poston*, 233 N.C. 546, 64 S.E. 2d 835. Its charter is the legislative description of the power to be exercised and the boundaries within which these powers may be exercised. Neither city charter nor ordinance enacted pursuant thereto have extraterritorial effect unless authorized by legislative grant. *Holmes v. Fayetteville*, 197 N.C. 740, 150 S.E. 624; *S. v. Eason*, 114 N.C. 787; *Dean Milk Co. v. Aurora*, 14 A.L.R. 2d 98; *Hyre v. Brown*, 49 A.L.R. 1230 and annotations; *Donable v. Harrisonburg*, 104 Va. 533, 7 Ann. Cas. 519; 37 Am. Jur. 736.

In *S. v. Gulledge*, 208 N.C. 204, 179 S.E. 883, Schenck, J., quoted from Dillon on Municipal Corporations as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

Interpreting the language of the city's charter in the light of uniform decisions, it is apparent that the quoted provision was not a grant of power to the city of Winston-Salem to compel people residing outside of but "living along the line of sewerage or in the vicinity thereof" to use the city's sewerage system.

The specific authority granted to Winston-Salem by its charter provision is substantially in accord with the authority given all municipalities. G.S. 160-240. The authority granted by that section was interpreted in *Construction Co. v. Raleigh*, 230 N.C. 365, 53 S.E. 2d 165. It was there said: "Obviously the municipal-

ity is not authorized by the statute, to compel owners of improved property located outside the city, but which may be located upon or near one of its sewer lines or a line which empties into the City's sewerage system, to connect with the sewer line but since it is optional with a city as to whether or not it will furnish water to residents outside its corporate limits and permit such residents to connect their sewer facilities with the sewerage system of the city, or with any other sewerage system which connects with the city system, it may fix the terms upon which the service may be rendered and its facilities used."

It is not suggested that the statute, G.S. 160-234, giving municipalities the power to remove and abate conditions inimical to health suffices to authorize the City of Winston-Salem to compel people outside of its corporate limits to connect to its sewerage system.

When plaintiffs, with the assent of defendant, connected their sanitary facilities with defendant's main, defendant impliedly contracted to furnish services reasonably suitable to plaintiffs' need and not to injure plaintiffs by a breach of their contractual obligation. Defendant, in furnishing these services, was acting in a proprietary capacity. *Asbury v. Albemarle,* 162 N.C. 247, 78 S.E. 146.

Courts have prohibited corporations performing public services from exempting themselves for liability for their negligence when to do so was contrary to public policy. *Hall v. Refining Co.,* 242 N.C. 707, 89 S.E. 2d 396; *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236; *Kennerly v. Dallas,* 215 N.C. 532, 2 S.E. 2d 538; *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333.

Here the Legislature has spoken. It has said with respect to services furnished nonresidents the rates may be based on nonliability for breach of contractual obligations. G.S. 160-249.

Hence the ordinance constituting the contract between the parties made voluntarily and with legislative sanction is valid and binding. Plaintiffs cannot recover for damages done by backing sewage in their homes through the connection between their homes and the city's mains.

(2) Right of plaintiffs in this action to recover damages resulting from the flowing of sewage directly from the city's mains on plaintiffs' property.

The answer is found by examining the pleadings to ascertain the wrong assertedly done plaintiffs. It may be conceded that the evidence offered by plaintiffs is sufficient to base an action in tort totally unrelated to defendant's contractual obligation to provide services. *Johnson v. Winston-Salem,* 239 N.C. 697, 81 S.E. 2d 153; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Gore v. Wilmington,* 194 N.C. 450, 140 S.E. 71; *Moser v. Burling-*

ton, 162 N.C. 141, 78 S.E. 74. But this evidence cannot avail plaintiffs unless they have asserted this tortious conduct as a wrong which the court should redress. "Recovery must be based on the cause of action alleged. It cannot rest on a different legal right." *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422, and cases cited.

Plaintiffs' pleadings, construed liberally to encompass all wrongs asserted, are in our opinion confined to damages resulting from the contractual relationship and do not encompass damages resulting from a potential right of action distinct from defendant's contractual obligation.

It follows that defendant's motion to nonsuit, made upon the conclusion of the evidence, should have been allowed. This conclusion renders unnecessary any discussion of the measure of damages on a cause of action not alleged.

Reversed.

BRUCE RANDALL ARNETT, BY HIS NEXT FRIEND, MRS. ARTHUR ARNETT, JR., v. JOE YEAGO AND LORRAINE YEAGO.

(Filed 11 December, 1957)

1. **Automobiles § 42l: Negligence § 12—**

   A three-year old child is incapable of negligence, primary or contributory.

2. **Automobiles § 9—**

   The leaving of a motor vehicle on a highway unattended without first setting the hand brake and turning the front wheels toward the curb or side of the highway is negligence *per se,* and is actionable if the proximate cause of injury.

3. **Automobiles § 6—**

   Unless the statute itself provides to the contrary, the violation of a motor vehicle traffic regulation is negligence *per se,* and the statute itself prescribes the standard so that the common law rule of ordinary care does not apply.

4. **Automobiles § 34—**

   A person must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, and that children near a highway are entitled to a care in proportion to their incapacity to foresee and avoid peril.

5. **Automobiles § 41q—Evidence that defendant left car unattended without setting brakes so that it was put in motion by a young child held to take issue of negligence to jury.**

   Plaintiff's evidence tending to show that defendant left her automobile unattended headed downhill upon a street in a thickly populated

neighborhood with knowledge that a number of young children were about, that defendant left the left front door of the car open, failed to set the hand brake or turn the front wheels toward the curb, and left the gear shift in reverse but that the gear shift could be moved out of reverse by touching it, and that a three-year old child climbed in the car, and thereafter the car started moving downhill, struck several trees, resulting in injury to the child, *is held* sufficient to be submitted to the jury on the issue of defendant driver's negligence, since the parking of the vehicle in such manner is negligence *per se*, and a reasonably prudent person in the exercise of ordinary care could or should have reasonably foreseen that a child might get into the car, put it in motion, and that consequences of a generally injurious nature might be expected.

6. Negligence § 9—

It is not necessary that injury in the precise form that occurred should have been foreseen.

7. Negligence § 5—

The determination of the issue of proximate cause requires the drawing of inferences sometimes from disputed and sometimes from uncontroverted facts, and is peculiarly the province of the jury.

JOHNSON, J., dissents.

APPEAL by defendants from *Nimocks, J.*, June Civil Term 1957, of CUMBERLAND.

Civil action to recover damages for injuries to a three-year-old boy.

Upon issues submitted to them, the jury found that this boy was injured by the actionable negligence of the defendants, and awarded damages in the amount of $5,000.00.

From judgment on the verdict, the defendants appeal.

James R. Nance for Defendants, Appellants.
N. H. McGeachy, Jr., for Plaintiff, Appellee.

PARKER, J. The defendants have two assignments of error. The first is to the denial of their motion for judgment of nonsuit made at the close of plaintiff's evidence. The defendants offered no evidence. The second is formal: failure to set aside the verdict as being contrary to the law and the evidence, and the entry of the judgment.

The defendants are husband and wife. At the time in question the husband owned a 1951 Pontiac four-door sedan. Prior to the introduction of evidence, the defendants stipulated "into the record judicially" that on 22 June 1955 Mrs. Lorraine Yeago, as a member of Joe Yeago's household, operated this automobile "under what is known in North Carolina as the family car doctrine, and that as to the responsibility of her husband for its

operation at the time in question, if she is liable, then he, the owner thereof, is likewise responsible under this doctrine."

Mrs. Arthur Arnett, Jr. is the mother of Bruce Randall Arnett, who, on 22 June 1955, was living with his mother, and was three years old. On this date she lived at 1918 Cherokee Drive in the city of Fayetteville. Her home was situate on the north side of the street. Cherokee Drive is a wide paved street running east and west, and goes downhill east from the Arnett home to Mohawk Avenue, with a decline of about five feet for every one hundred feet of distance. Mrs. Arnett testified that Cherokee Drive goes "downhill, with a drop of about 15 feet from the west side of my yard to where the car was stopped." Cherokee Drive has curbing on the north and south sides. Mrs. Arnett thus described the curbing: "It is a little concrete dip. Instead of going up from the black part of the pavement, it goes down a little more, and then slopes up." Another witness, Mrs. Horace L. Whitley, gave this description: "It is not such a curb as we have in front of the Courthouse; it is rounded up to it. . . . Automobiles roll and drive right across that, but it bumps because we go across one in our driveway. It is not such a curb as needed to be cut away to make the driveway, it is just a little decline and an incline up to the yard and the incline up to the yard is only a matter of inches."

On this date there were seven houses on the north side of Cherokee Drive, and six on the south side. About fifteen young children lived in the neighborhood. Mrs. Lorraine Yeago and Mrs. Arthur Arnett, Jr., were friends, and Mrs. Yeago visited Mrs. Arnett in her home about twice a week. The defendants admitted in their answer that this was a thickly settled residential area, and that on this day, when Mrs. Yeago parked her automobile in front of the Arnett home, she saw Bruce Randall Arnett about his yard.

About 4:00 p.m. on 22 June 1955 Mrs. Lorraine Yeago drove this 1951 Pontiac automobile to the Arnett home, and parked it next to this home on the north side of Cherokee Drive, headed east and downhill. When Mrs. Yeago drove up, Mrs. Arnett with Bruce and a younger son, Barry, and her eight-year-old niece, Shelia Susan Lott, were in a back yard across the street from her home. Mrs. Yeago and her daughter, Cathy, went to where Mrs. Arnett and the children were. In about twenty or thirty minutes all five of them went across the street to the Arnett premises. Cathy was crying to go home. Mrs. Arnett, Mrs. Yeago and Cathy went into the house, so that Mrs. Arnett could give Cathy a piece of cake she had baked. Bruce, Barry and Shelia Susan Lott were left outdoors.

This is the substance of Shelia Susan Lott's testimony: The car was headed downhill, and the left front door was open. She saw the car door was open as she came across the street from the back yard. Neither Bruce, nor Cathy, opened the door. Bruce couldn't reach the door and open it. He was little at that time, but he could climb up in an automobile, and he could climb up on a seat. The left front door was open, and Bruce was on the left side in the front seat. She saw Bruce playing with the gear shift. He had a hand on the gears. She saw him messing with the gear shift, and the car started rolling. The car did not start rolling until Bruce started fooling with it. She did not see Bruce get in the car. The car rolled three or four car lengths straight down the road, and then turned to the left, went across a yard, and a tree slapped the door on Bruce's hand. He started screaming, and then the car hit another tree, and stopped. At the time Shelia Susan Lott was eight years old.

When Mrs. Arnett had been in her house a minute or two, she went to the front door to look for the children outside. She saw the Yeago car moving straight down the hill. The left front door was open. Bruce was sitting under the steering wheel, with his feet hanging out the door. She started running after the car. It went straight down the street three or four car lengths and then turned into Mrs. Horace L. Whitley's yard, which is on the same side of Cherokee Drive as the Arnett home. The left front door hit a tree in the Whitley yard, which closed it on Bruce's hand. Bruce started screaming and crying. The car went on until the bumper hit another tree, which stopped it. Mrs. Arnett reached the car, and opened the door. Blood was pouring from Bruce's hand, and he was screaming and crying. He was immediately carried to a doctor, and then to Highsmith Hospital.

Mrs. Arnett testified as follows: "Mrs. Yeago told me that she left the brake off the car; that she wished she had pulled it up but she put the gear shift in reverse; that the brake was hard to pull up and that was easier to do. She was referring to the emergency brake, and Mrs. Yeago has told me that on two or three occasions."

The brakes on this 1951 Pontiac car are not locked in any gear except reverse. It will move in any other gear. The gear shift in reverse can be moved out of reverse by touching it with a finger. This car had an emergency brake, which can be pulled up, and let down.

Bruce had two operations on his left hand. Over half of his index finger had to be amputated. He has some permanent disability to digit No. 3. Bruce is left-handed. His left hand is his dominant hand, and Dr. John W. Balus, who was Bruce's doctor, testified his left hand will probably stay that way, and the in-

juries to his left hand will permanently effect the left hand and its use. Bruce was in the hospital from 22 June 1955 until 2 July 1955. He suffered pain from his injury. His hospital, medical and drug expenses amounted to $504.00.

Bruce Randall Arnett, a three-year-old child, was incapable of negligence, primary or contributory. *Campbell v. Laundry,* 190 N.C. 649, 130 S.E. 638; *Bevan v. Carter,* 210 N.C. 291, 186 S.E. 321; *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664; *Reid v. Coach Co.,* 215 N.C. 469, 2 S.E. 2d 578.

G.S. 20-163 provides: "No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor of said vehicle, and, when standing upon any grade, without turning the front wheels of such vehicle to the curb or side of the highway."

G.S. 20-124(b) reads: "No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the hand brake thereon, stopping the motor and turning the front wheels into the curb or side of the highway."

A violation of the above two statutes is negligence *per se,* but such violation must be a proximate cause of the injury to be actionable. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

This Court said in *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331: ". . . when the plaintiff relies on the violation of a motor vehicle traffic regulation as the basis of his action that, unless otherwise provided in the statute, the common law rule of ordinary care does not apply. The statute prescribes the standard, and the standard fixed by the Legislature is absolute. 38 A.J. 831, Sec. 160. Proof of the breach of the statute is proof of negligence."

Mrs. Yeago allowed this 1951 Pontiac four-door sedan to stand on Cherokee Drive in front of the Arnett home unattended without first effectively setting the brakes thereon, and without first effectively setting the hand brake thereon, which was a violation of G.S. 20-163 and G.S. 20-124(b), and negligence *per se* on her part.

When Mrs. Yeago parked this automobile in front of the Arnett home, and left it unattended, the automobile was headed east and downhill. When this automobile started downhill with Bruce Randall Arnett in the front seat sitting under the steering wheel with his feet hanging out of the open left-hand front door, it went straight down Cherokee Drive three or four car lengths before it turned to the left into Mrs. Horace L. Whitley's yard. These facts permit the reasonable inference that Mrs.

Yeago, when she parked this automobile, did not turn its front wheels to the curb or side of Cherokee Drive, or did not turn its front wheels into the curb or side of Cherokee Drive, in violation of G.S. 20-163 and G.S. 20-124(b), which is negligence *per se*. *Hatch v. Globe Laundry Co.*, 132 Me. 379, 171 A. 387. See *Campbell v. Laundry, supra*, pp. 650-651 in our Reports, and p. 638 in the S.E. Reporter.

In *Campbell v. Laundry, supra*, this Court said: "A child of this tender age (4 years old) merely indulges the natural instincts of a child and amuses himself with an empty cart, a deserted horse, an automobile or an electric truck, or whatever may be in his sight." And further on in the opinion it is said: "Authorities might be extended, but we deduce the rule to be that one is held responsible for all the consequences of his acts which are natural and probable and ought to have been foreseen by a reasonably prudent man, and if one wrongfully leaves upon a public street, in a populous city, a large electric delivery truck, with the 'plug' in its place, and the brakes loose and not set, which he, as a reasonable man, ought to have foreseen, in the exercise of ordinary care, would likely be disturbed by heedless children, then he is liable for an injury resulting from such negligence. *Lane v. Atlantic Works*, 111 Mass., 136; *Union Pac. v. McDonald*, 152 U.S. 262; *Stark v. Holtzclaw*, 105 Sou., 330 (Florida)."

A person must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, and that children near a highway are entitled to a care in proportion to their incapacity to foresee and avoid peril. *Pavone v. Merion*, 242 N.C. 594, 89 S.E. 2d 108; *Greene v. Board of Education*, 237 N.C. 336, 75 S.E. 2d 129; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488.

In *Hatch v. Globe Laundry Co., supra*, the Supreme Judicial Court of Maine held that whether the negligence of driver of electric truck in parking it on left side of street headed downhill, without turning front wheels toward curb, or removing key to prevent power from passing to motor, was proximate cause of injury to one attempting to stop truck after small boys started it, was an issue of fact to be decided.

In *Block v. Pascucci*, 111 Conn. 58, 149 A. 210, the evidence showed the following: The defendant Luigi Pascucci left an automobile of his wife standing on Barbour Street, in Hartford, at a point nearly opposite the plaintiff's store, and went into the apartment of a Mrs. Trembley. While he was absent, a child of Mrs. Trembley, about three years old, was observed in a bending position in front of the car, and soon thereafter the car backed across the street and crashed through a plate-glass window into plaintiff's store, with disastrous consequences to his merchan-

dise therein. The child was seen to leave the automobile an instant before it struck the window. Barbour Street is practically level at the point in question. The Court said: "The trial court found that Pascucci, being in a hurry, left the car unattended and unoccupied, with the engine running, and without setting any brakes so as to prevent the car from moving or being moved, or locking it in any way, and that the child could not have manipulated the brakes, but may have interfered with some of the mechanism. . . . Upon this finding, the conclusion of negligence was warranted. The appellant claims, further, that, even if the defendants be held negligent, such negligence was not the proximate cause of the plaintiff's damage. It is too clear to require discussion that negligence of the defendant driver in leaving the automobile unattended, with motor running, unbraked and unlocked, on a business street, was 'a substantial factor in producing the damage complained of,' notwithstanding possible intervention of an innocent act of the small child, which would have been prevented by reasonable care and precautions by the defendant driver. Such negligence, therefore, might reasonably be held a proximate cause of the incursion of the automobile into the plaintiff's store and of the resulting damages."

The jury could reasonably and legitimately draw these inferences from the evidence: (1) Mrs. Yeago was guilty of negligence *per se* in allowing the Pontiac four-door sedan automobile to stand unattended upon a grade on Cherokee Drive in front of the Arnett home, and headed downhill, without first effectively setting the hand brake on the automobile, and without turning its front wheels to the curb or side of the highway; (2) that she put the gear shift in reverse to brake the automobile, because that was easier to do, but the gear shift in reverse can be moved out of reverse by touching it with a finger; (3) that she left the left front door of the automobile next to the steering wheel open; (4) that she frequently visited Mrs. Arnett, and knew that it was a thickly settled residential area with a number of young children living in the neighborhood; (5) that when she went in the Arnett home with Mrs. Arnett and her daughter Cathy, she knew Bruce Randall Arnett, his younger brother Barry, and the eight-year-old girl Shelia Susan Lott were outside in the Arnett yard; (6) that she could, and should, have reasonably foreseen as a reasonably prudent person in the exercise of ordinary care that a young and heedless child would likely get into the automoble with its left front door open next to the steering wheel, and under the circumstances in which she left the automobile unattended, would put this automobile in motion, and, as it was headed downhill, it would roll down the grade of Cherokee Drive, and that from such movement of the automobile downhill conse-

quences of a generally injurious nature might be expected; and (7) that such negligence on Mrs. Yeago's part might reasonably be held a proximate cause of Bruce Randall Arnett's injuries. It is not necessary that injury in the precise form that it occurred should have been foreseen. The determination of the issue of proximate cause requires the drawing of inferences sometimes from disputed, and sometimes from uncontroverted, facts, and is peculiarly the province of the jury. The trial judge properly left to the decision of the jury the question of the actionable negligence of the defendants. *Campbell v. Laundry, supra,* and cases there cited; *Block v. Pascucci, supra; Hatch v. Globe Laundry Co., supra.* See *Tierney v. New York Dugan Bros.*, 288 N.Y. 16, 41 N.E. 2d 161, 140 A.L.R. 534; and Anno. 51 A.L.R. 2d, pp. 659-662.

The defendants during the trial stipulated that if Mrs. Yeago is liable in damages to Bruce Randall Arnett, then Mr. Yeago, her husband, as the owner of the automobile was also liable under the family purpose car doctrine, which is well settled law in North Carolina. *Elliott v. Killian,* 242 N.C. 471, 87 S.E. 2d 903.

In the trial below we find
No error.

JOHNSON, J., dissents.

CITY OF RALEIGH v. W. H. MORAND AND WIFE, MARGARET OLIBENE MORAND.

(Filed 11 December, 1957)

1. **Appeal and Error § 22—**

Where there are no exceptions to the admission of evidence or to the findings of fact, the findings are presumed to be supported by competent evidence and are binding upon appeal.

2. **Appeal and Error § 21a—**

Where the court hears the cause by agreement of the parties, an exception to the refusal of motion for nonsuit presents no question for review when there is no exception to the findings of fact or conclusions of law.

3. **Appeal and Error § 21—**

An exception to the signing of judgment presents the questions whether the facts found support the conclusions of law and the judgment entered thereon and whether any error appears on the face of the record.

4. **Municipal Corporations § 40: Injunctions § 4g—**

A municipality may enjoin the violation of its zoning ordinance. G.S. 160-179.

5. **Appeal and Error § 49—**

Where in one instance the findings of fact refer to an inapposite statute, but in all other places the applicable statute is referred to, the erroneous reference will be treated as a typographical error and not fatal.

6. **Municipal Corporations § 36—**

The Legislature has authority to confer upon municipalities jurisdiction for sanitary and police purposes beyond the city limits.

7. **Municipal Corporations § 37—**

Where a municipality is given the power to enact zoning ordinances within its limits and within one mile thereof, Chapter 540, Session Laws of 1949, the municipality may enjoin the use of land within one mile from its limits for a trailer park when at the time such use was begun the area was zoned for residential purposes only, and such restriction cannot be held arbitrary or discriminatory when the ordinance applies alike to all property within the territory affected.

8. **Municipal Corporations § 40—**

Where it is shown that a zoning ordinance has been duly adopted by the governing board of a municipality, there is a presumption that it was enacted in the proper exercise of the police power, with the burden of showing the contrary upon those attacking the validity of the ordinance.

APPEAL by defendants from *Phillips, J.*, June Civil Term 1957 of WAKE.

This is a civil action instituted by the City of Raleigh on 9 January 1957 against the defendants for the purpose of obtaining a permanent injunction restraining the defendants from the continued construction and maintenance of a house trailer park on the premises of the defendants, alleged to be within one mile of the corporate limits of the City of Raleigh.

When this cause came on to be heard, the parties agreed that his Honor might hear the evidence, find the facts, without the intervention of a jury, and render judgment upon the facts found. His Honor found the facts and entered judgment as follows:

"1. That the plaintiff, a municipal corporation, extended the zoning jurisdiction conferred upon it by Article 14 of Chapter 160 of the General Statutes of North Carolina and its Charter (Chapter 1184, Session Laws of North Carolina, 1949) to the area outside of its City limits and within one mile in all directions therefrom, pursuant to authority conferred upon it by Chapter 541 (540), Session Laws of North Carolina, 1949, by

Ordinance No. 293 adopted January 23, 1952 and effective February 15, 1952.

"2. That the property of the defendants described in the complaint lies within one mile of the City limits of the City of Raleigh and within an area zoned for use as a residential area.

"3. That the defendant W. H. Morand admitted that he had devoted his said land to use as a trailer camp or park and that at the time of the hearing he was renting house trailer space to sixteen house trailers at a charge of $16.00 per month for each house trailer.

"4. That the use of the defendants' said land for a trailer park or camp and for profit constitutes a violation of a valid and subsisting zoning ordinance of the City of Raleigh and that such use was commenced by defendants after the adoption and effective date of the ordinance prohibiting such use;

"IT IS NOW, THEREFORE, ORDERED AND ADJUDGED that the defendants and each of them be and they are restrained and enjoined from continuing the operation of said trailer camp or park on their said property for any use not permitted by the zoning ordinance of the City of Raleigh."

The defendants appeal to the Supreme Court, assigning error.

Paul F. Smith, attorney for plaintiff appellee.
Alfonso Lloyd, Charles O'H. Grimes, for defendants appellant.

DENNY, J. The appellants took no exceptions to the findings of fact or the conclusions of law entered pursuant thereto in the court below. Hence, no exceptions having 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. *Goldsboro v. R. R.* 246 N.C. 101, 97 S.E. 2d 486; *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. Likewise, since no exceptions were taken to the findings of fact or conclusions of law, the exception to the refusal of the court to grant the appellants' motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. *Goldsboro v. R. R., supra.* The exception to the signing of the judgment, however, does present these questions: (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) does any error appear upon the face of the record? *Goldsboro v. R. R., supra,* and cited cases.

It is clear that the City of Raleigh extended the zoning jurisdiction conferred upon it pursuant to the statutes and its charter, as set forth in the court's finding of fact No. 1 hereinabove set out, by Ordinance No. 293, adopted 23 January 1952 and which became effective 15 February 1952, as amended by Ordinance No. 542 which is set out in the record and which became effective 16 December 1955. It likewise appears from the findings of fact that the use of the defendants' land for a trailer park or camp was commenced by the defendants after the adoption and effective date of the ordinance prohibiting such use.

The appellants assign as error the refusal of the court below to grant their motion to dismiss this action on the ground that the plaintiff is not entitled to have the defendants enjoined from violating the provisions of its zoning ordinance. We have held otherwise. *Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 897; *Fayetteville v. Spur Distributing Co.*, 216 N.C. 596, 5 S.E. 2d 838. In fact, G.S. 160-179 expressly authorizes the use of the injunctive power of the court to enjoin violations of zoning ordinances. This assignment of error is overruled.

The defendants contend that since the complaint and the findings of fact erroneously refer to Chapter 540, Session Laws of North Carolina, 1949, as Chapter 541, it appears on the face of the record that the zoning ordinance of the City of Raleigh, as amended, is without legal validity. The contention is without merit. It clearly appears from other parts of the record that the ordinance prohibiting trailer camps in residential areas of the City and within one mile thereof in all directions was passed pursuant to the provisions of Chapter 540, Session Laws of North Carolina, 1949. Consequently, the erroneous references will be treated as typographical errors only.

The appellants further contend that their property lies in an area outside the City of Raleigh, not subject to city taxes, peopled by nonresidents of the City of Raleigh, and receiving no benefits from said city. Therefore, they contend that on the face of the plaintiff's complaint the ordinance sought to be enforced is unreasonable and arbitrary and cannot in any way be said to further the general welfare of the City of Raleigh.

In *Harrington v. Renner*, 236 N.C. 321, 72 S.E. 2d 838, this Court, speaking through Devin, C. J., said: "Statutes which have been passed authorizing the governing bodies of municipal corporations to enact zoning ordinances prescribing that in certain areas only designated types of buildings may be erected and used have been generally upheld by the courts as an exercise of the police power of the State. *Kinney v. Sutton*, 230 N.C. 404, 53 S.E. 2d 306; *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706;

Ahoskie v. Moye, 200 N.C. 11, 156 S.E. 130; *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (71 L. ed. 303).

"By Chapter 250, Laws of 1923, now codified as G.S. 160-172, *et seq.*, the General Assembly 'for the purpose of promoting health, safety, morals or the general welfare of the community' granted to the legislative bodies of cities and towns power to regulate the use of real property in respect to the character and purpose of buildings to be erected therein, to divide the municipality into zones in accord with a comprehensive plan, and to provide the manner in which such regulations should be established and enforced."

In the case of *S. v. Rice,* 158 N.C. 635, 74 S.E. 582, 39 L.R.A. (N.S.) 266, this Court said: "The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits." *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624.

It is likewise stated in 37 Am. Jur., Municipal Corporations, Sections 284, page 918, "The legislature has power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified short distance of the corporate limits."

Also, in 58 Am. Jur., Zoning, Section 18, page 950, it is stated: "Zoning laws are enacted in the exercise of the police power, and, where upheld, are upheld as a proper exercise thereof."

In the last cited authority in section 63, page 981, it is declared: "The validity of a zoning statute and ordinance relating to the division of a municipality into zones and the prohibition in particular zones of camping grounds conducted for private gain has been upheld as against the contention that they were arbitrary, unreasonable, and discriminatory." In Yokley's Zoning Laws and Practice, 2nd Ed., Trailers, section 253, page 149, it is said: "The right of a municipality to regulate trailers and trailer camps by placing them in certain zones and by excluding them from other zones is well settled."

The contention that the provisions of the zoning ordinance prohibiting the use of the defendants' property, which lies within an area zoned for residential purposes, for use as a trailer camp, constitute arbitrary, unreasonable, and discriminatory restrictions upon the property of the defendants, is untenable. The ordinance applies alike to all property within the territory affected. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29.

Furthermore, when it is shown that an ordinance in question has been adopted by the governing board of a municipality and that fact is shown, as it has been in this case, there is a presumption in favor of the validity of the ordinance. *S. v. Baynes,* 222

N.C. 425, 23 S.E. 2d 344; *Durham v. R. R.*, 185 N.C. 240, 117 S.E. 17. Consequently, there is a presumption that the zoning ordinance of the City of Raleigh constitutes a proper exercise of the police power, and the burden was upon the appellants in the court below to show otherwise. *Kinney v. Sutton, supra; Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650. The defendants have failed to carry the burden in this respect. Moreover, no error appears upon the face of the record. *Cf. S. v. Owen,* 242 N.C. 525, 88 S.E. 2d 832.

We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief.

The judgment of the court below is

Affirmed.

STATE v. WISTER JAMES MOORE

(Filed 11 December, 1957)

1. **Criminal Law § 18: Indictment and Warrant § 15—**

Upon appeal to the superior court from conviction in a municipal court upon a warrant charging operation of a motor vehicle by defendant after his operator's permit had been permanently revoked, an amendment adding the allegation that the revocation was by the Department of Motor Vehicles by reason of a prior conviction of defendant in the municipal court, *held,* not to change the nature of the offense charged in the original warrant, G.S. 7-149, Rule 12, and defendant's exception to the allowance of the amendment and his motion in arrest of judgment are overruled.

2. **Criminal Law § 72—**

Testimony of an admission by defendant is competent, and where a witness has detailed a conversation had by him with defendant containing a virtual admission that defendant was operating the vehicle at the time in question, the State may ask the witness to state whether defendant admitted he was operating the vehicle at the time, and objection that it was a leading question is untenable.

3. **Automobiles § 3—**

In a prosecution for driving after permanent revocation of license, certified copy of the record of the Department of Motor Vehicles, signed by a proper official and bearing the seal of the Department, and disclosing such revocation, is competent. G.S. 20-42(b). However, the use of figures separated by dashes to indicate dates, such as "11–10–49," is disapproved.

4. **Automobiles § 3—**

Where defendant admits he was driving his automobile on a highway of the State at the time in question, which time was subsequent to the date his license had been permanently revoked as disclosed by certified record of the Department of Motor Vehicles introduced in evidence, the evidence is sufficient to make out a *prima facie* case and overrule nonsuit in a prosecution for driving after revocation of license, it not being incumbent on the State to show that a new license had not been granted, this being a matter of defense.

5. **Automobiles § 65—**

Evidence that defendant drove his automobile around a curve with his left wheels in the ditch on his left side of the highway, and struck a truck, traveling in the opposite direction on its right side of the road, resulting in damages and injuries, is sufficient to take the case to the jury and support a conviction of reckless driving.

6. **Criminal Law § 156—**

Ordinarily, any misstatement in reciting the contentions of the parties must be brought to the court's attention in time to afford opportunity for correction, or an exception thereto is deemed waived.

APPEAL by defendant from *Olive, J.*, at April 15, 1957, Regular Criminal Term, Greensboro Division, of GUILFORD.

Criminal prosecution upon two warrants, issued out of The Municipal County Court, Criminal Division, of Guilford: No. 11208, charging "that Wister James Moore, on or about the 6th day of December, 1956, with force and arms, at and in Guilford County * * * did unlawfully and willfully operate a motor vehicle upon a public highway, a rural road approximately 9 miles north of Greensboro, North Carolina, after his operator's permit having been permanently revoked, against the statute" etc., and

No. 11209, charging "that Wister James Moore, on or about the 6th day of December, 1956, with force and arms, at and in Guilford County * * * did unlawfully operate a motor vehicle upon a public highway, 9 miles north of Greensboro, North Carolina, on a rural road in a careless and reckless manner so as to endanger life, limb and property, against the statute" etc.

In the Municipal County Court defendant pleaded not guilty as to the charge in each warrant.

The cases were consolidated for the purpose of trial, and the court heard evidence in each case, and found defendant guilty in each case, and from judgments pronounced defendant appealed to Superior Court for trial *de novo*.

In Superior Court, defendant again entered a plea of not guilty. And by consent the two cases were consolidated for the purpose of trial.

The State then moved to amend the warrant No. 11208 by adding thereto the following: "Said license having been per-

manently revoked by the Department of Motor Vehicles by reason of the defendant having been convicted in the Municipal Court of the City of Greensboro on the 24th day of March, 1950." Objection by defendant was overruled, and defendant excepted. Exception No. 1.

Verdicts in Superior Court: Guilty as charged.

Judgments: In No. 11208: "That the defendant be confined to the common jail of Guilford County for a period of six (6) months to be assigned to work under the supervision of the State Highway and Public Works Commission." And in No. 11209: "That the defendant be confined to the common jail of Guilford County for a period of six (6) months to be assigned to work under the supervision of the State Highway Commission."

Defendant excepted to each judgment, and appeals therefrom to Supreme Court, assigning error.

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

Robert S. Cahoon for defendant appellant.

WINBORNE, C. J. In record on this appeal defendant appellant sets forth twenty-five assignments of error based upon thirty-four exceptions. And in brief filed in this Court the matters brought up are treated under nine headings.

FIRST: Assignment of error No. 1, relates to exception No. 1 to the court allowing the State to amend the warrant No. 11208 as above indicated. In this connection, "under our practice, our courts have the authority to amend warrants defective in form and even in substance: Provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant." G.S. 7-149, Rule 12. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d, 609. See also to same effect *S. v. Cauble,* 70 N.C. 62; *S. v. Crook,* 91 N.C. 536; *S. v. Vaughan,* 91 N.C. 532; *S. v. Yellowday,* 152 N.C. 793, 67 S.E. 480; *S. v. Johnson,* 188 N.C. 591, 125 S.E. 183; *S. v. Wilson,* 221 N.C. 365, 20 S.E. 2d, 273; *S. v. Carpenter,* 231 N.C. 229, 56 S.E. 2d, 713; *S. v. Wilson,* 237 N.C. 746, 75 S.E. 2d 924; *S. v. McHone,* 243 N.C. 231, 90 S.E. 2d, 536. The case is distinguishable from *S. v. Cooke,* 246 N.C. 518, 98 S.E. 2d, 885. Hence the exception is not well founded.

Moreover, in respect to the ninth subdivision of defendant's brief, pertaining to defendant's motion in arrest of judgment made in this Court for defect in warrant as amended in No. 11208, the action of the Court in this respect is accordant with holding above as to the amendment.

SECOND: That the court erred in allowing, over objection, "evidence prejudicial to defendant, and which was incompetent and lawfully not admissible in evidence": (a) assignment of error No. 2 based on exception No. 2, and (b) assignments of error Nos. 3, 4, 5 and 6 based on exception of like numbers are as follows:

(a) Exception No. 2 is taken to action of trial court overruling objection to the leading question asked the highway patrolman—"Now, state whether or not the defendant admitted he was operating the station wagon there at the time?" Answer: "Yes, sir." In this connection reference to the case on appeal discloses that the patrolman detailed conversation had by him with defendant about 7:30 p.m., on 6 December, at the hospital, as follows: "First of all, I asked Mr. Moore if anyone was with him in his car. He stated that there was not. I asked him if he owned the car, and he stated that he did. When I say 'car' I mean the '55 Ford four-door station wagon * * * I asked him for his driver's license and he stated that they were in the car which had been pulled in by a wrecker, and then I asked him what happened, in his opinion, what happened. At that time he stated that he was going west on the dirt road on his side of the road and somebody ran into him * * *." This language is virtual admission that he was driving the station wagon, which is admissible in evidence. *S. v. Roberts,* 12 N.C. 259; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Gray,* 192 N.C. 594, 135 S.E. 535. Hence the question and answer to which objection relates is proper. Moreover, the objection that it is a leading question is untenable.

(b) Exceptions 3, 4, 5 and 6 are taken to the ruling of the trial court in permitting the State to show by the highway patrolman that he obtained from Department of Motor Vehicles of the State of North Carolina certified copy of the driver's license record of Wister James Moore, identified as State's Exhibit 1, and to offering same in evidence, and reading in evidence the record relating to driver's license revocation of Moore as follows:

"STATE'S EXHIBIT 1

Form 727
Revised 1-53

N. C. DEPARTMENT OF MOTOR VEHICLES
HIGHWAY PATROL
OPERATOR LICENSE CHECK

Date December 7, 1956

TO:
State Highway Patrol
Department of Motor Vehicles
Raleigh, N. C.

Please advise if the following subject holds a value operator's license, or if cancelled, suspended or revoked.

Name (Full Name) Wister James Moore Race White
Sex Male Age 9-30-20
(Street Address) 115 Erwin Street
(Post Office) Greensboro, N. C.
(Patrolman) William F. Clay, PFC
(Call No.) 369 (Station) Greensboro, N. C.
This is to certify the above named subject
Operator's
Holds Chauffeur's License No. None
Expired
Issued Expires
1—License Revoked From 11-10-49 to 11-10-50
1—Revocation Notice served (Date) 11-22-49
(By) Mailed Direct
1—Court Municipal County Court, Greensboro
Offense Driving Drunk G. S. 20-17-(2)
1—Dept. Action Revoked One year
2—License Revoked From 2-22-50 To 2-22-53
2—Revocation Notice Served (Date) 3-2-50
(By) Mailed Direct
2—Court Municipal County Court, Greensboro
Offense Driving Drunk (2nd Offense) and
Driving After License Revoked
2—Dept. Action Revoked Three Years
3—License Revoked From 3-24-50 To Permanent
3—Revocation Notice served (Date) 6-26-50
(By) Mailed Direct
3—Court Municipal Court, Greensboro
Offense Driving Drunk (3rd Offense) and
Driving After License Revoked
3—Dept. Action Revoked Permanently
Date: December 10, 1956

Signed Elton R. Peele
State Highway Patrol Chief,
Driver License Division.

NOTE: Patrolmen make note of all essential facts concerning status of license at time it is checked, and after receiving report of status of license from Drivers License Division either discard report or obtain warrant and bring indictment if indicated.

(DEPARTMENT SEAL AFFIXED)."

In this connection it is noted that the statute G.S. 20-42 (b) provides: "(b) The Commissioner and such officers of the Department as he may designate are hereby authorized to prepare under the seal of the Department and deliver upon request a certified copy of any record of the Department, charging a fee of fifty cents (50¢) for each document so certified, and every

such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification. (1937, c. 407, s. 7; 1955, c. 480)."

The language of the Exhibit is susceptible of the inference that it is a certified copy of the record of the North Carolina Department of Motor Vehicles Highway Patrol, signed by a proper official and bearing the seal of the Department, which is "admissible in any proceeding in any court in like manner as the original thereof, without further certification."

(Nevertheless, note is taken of the figures in the record, for instance figures 1, 2 and 3 each appearing 4 times on the left margin presumably relating to first, second and third revocations, and other figures separated by dashes, such as "11–10–49" presumably indicating date of "November 10, 1949." This practice in judicial records ought not to be followed, and it is not approved. A form sufficiently clear to dispense with necessity of interpretation should be adopted by the Department.) *Edwards v. Edwards*, 235 N.C. 93, 68 S.E. 2d, 822.

THIRD: "That the trial court erred in overruling the defendant's motions for judgment as of nonsuit on the charge of driving *after* his license was revoked." The evidence offered tends to show "that at the time and place charged (1) defendant was operating a motor vehicle; (2) that he was operating it upon a public highway or road as defined in G.S. 20-6; (3) that his license to operate was at that time lawfully revoked." Reference to the certified record, Exhibit 1, shows that defendant's license was revoked for a period of one year on 10 November, 1949; that it was again revoked for a period of three years on 22 February, 1950, and was permanently revoked on 24 March, 1950. Indeed, it is provided in G.S. 20-19 (e) that "When a license is revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug, the revocation shall be permanent: Provided, that the Department may, after the expiration of five years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past five years, and that his conduct and attitude is such as to entitle him to favorable consideration." Hence the alleged violation on 6 March, 1950, was necessarily after and while his license was revoked,—and is sufficient to make out *prima facie* case. Whether or not a new license had been granted to defendant was a matter of defense. And no such defense was made.

FOURTH: That the trial court erred in overruling defendant's motion for judgment as of nonsuit on the charge of careless and reckless driving. As to it, the evidence tended to show that defendant operating a Ford station wagon came around the curve

on his left-hand side of the road with his left wheels in the ditch on that side of the road, and struck the Chevrolet truck operated by the witness Green on his right side of the road, damaging it and injuring Green. This evidence taken in the light most favorable to the State is sufficient to take the case to the jury, and to support a conviction of reckless driving.

FIFTH: That the court erred in its charge to the jury. Assignments of Error No. 9 through No. 18, relating to exceptions Numbers 11 through 27. As to these matters defendant acknowledges in his brief filed in this Court that "the condemnatory language to which exception is reserved, is identified as contentions of the State." Such being the status of these exceptions, suffice it to say, ordinarily, as here, any misstatement of the evidence or of contentions by the trial judge in reciting contentions of the State, or of a defendant, must be brought to his attention at the time in order to afford him an opportunity for correction, or else it will be deemed to be waived. *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d, 825; *S. v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633, and many other cases. Such is the case here.

SIXTH: That the trial court erred in failing to instruct the jury as to the law pertinent to the offenses charged. It is enough to say that a reading of the charge of the court, as a whole, leads to the conclusion that the challenge is not tenable.

SEVENTH AND EIGHTH: That the court erred in overruling motions to set aside the verdict and for new trial in the respective cases. The exceptions here pertain to formal matters, and need no elaboration. The charges are supported by sufficient evidence to justify the verdict rendered by the jury.

Error in the trial below is not made to appear. Hence in the judgments from which appeal is taken there is

No error.

JERRY LYNN BUMGARNER, MINOR, BY HIS NEXT FRIEND, MRS. EMMA BUMGARNER v. SOUTHERN RAILWAY COMPANY AND MRS. J. W. YATES

and

C. M. BUMGARNER v. SOUTHERN RAILWAY COMPANY AND MRS. J. W. YATES.

(Filed 11 December, 1957)

1. Railroads § 4—

In an action against a railroad company to recover for a crossing accident, allegations of the lack of warning signs at the crossing are immaterial when the evidence discloses that the driver of the car knew

the crossing and stopped for it, and allegations of excessive speed of the train are ineffective when there is no evidence in support thereof.

2. **Same—Evidence held insufficient to be submitted to jury on issue of negligence of railroad in causing crossing accident.**

Evidence that the driver of the car heard the whistle of a train before it came into view, that he slammed on his brakes, stalling the car on or near the tracks, that all the occupants of the car but one escaped, and that plaintiff passenger, upon realizing that one occupant was still in the car, went back and removed her to a place of safety, but that before plaintiff could reach a place of safety the engine struck the car and knocked it against him to his injury, together with defendant's evidence not in conflict with that of plaintiff that the engineer applied his brakes as soon as he saw the car and stopped the train within some 1600 feet after the impact, *is held* insufficient to be submitted to the jury on the question of actionable negligence of the railroad company in failing to give timely warning by bell or whistle.

3. **Automobiles § 55—**

Testimony of a minor that his mother owned the car and that he was driving it on the occasion in question with her consent and that it was understood he could drive the car whenever he came home, is sufficient to be submitted to the jury on the issue of liability under the family car doctrine.

4. **Automobiles § 47—**

Evidence that the driver of a car drove it upon a railroad track, became excited when he heard the whistle of an approaching train and slammed on the brakes, stalling the car, when time remained to have continued to a place of safety, is sufficient to be submitted to the jury on the question of the driver's negligence in an action by a passenger in the car to recover for injuries received in the accident.

5. **Automobiles § 42j—**

After a car had stalled on railroad tracks at a grade crossing and plaintiff, another passenger and defendant driver alighted, plaintiff realized that the fourth passenger was still in the car, frozen with fright, went back and got her out of the car and pushed her to a place of safety, but was himself hurt when the engine struck the car and knocked it against him. *Held:* Plaintiff will not be held guilty of contributory negligence as a matter of law in leaving a place of safety and going to a place of known danger in rescuing the passenger.

APPEAL by defendants from *Gwyn, J.*, March Term, 1957, CABARRUS Superior Court.

The two civil actions as above entitled were consolidated for trial. The first was for personal injury to Jerry Lynn Bumgarner (minor) alleged to have been proximately caused by the negligence of the defendants; and the second by the father for medical expenses and loss of services by reason of the minor's injuries.

Briefly summarized, the evidence disclosed the following: Jerry Lynn Bumgarner is a minor son of C. M. Bumgarner. The defendant Southern Railway Company's double track main line

(Washington to Atlanta) runs north and south through the town of Landis, North Carolina. East Brown Street in Landis crosses the defendant's tracks from the west at right angles and dead ends in South Railroad Avenue which parallels the tracks on the east. John Yates is the son of Mrs. J. W. Yates.

On the night of December 26, 1953, the plaintiff, Jerry Lynn Bumgarner, was a passenger in a 1946 Ford coach as it approached the railroad crossing on East Brown Street. He was sitting in the back seat on the right, and Phyllis Metcalf, now Mrs. McCardy, was in the back seat on the left. John Yates was the driver of the car. Betty Bumgarner, plaintiff's sister, was in the front seat to the right of the driver. At the time of the accident there were neither signs nor signals on East Brown Street to indicate the crossing.

The accident occurred at about 8:20 at night. The weather was clear and cold. East Brown Street is paved to the width of about 20 feet. From a point in the street about 30 feet west of the crossing, an approaching south-bound train can be seen for about 1,100 feet. From a point in the crossing it can be seen for about 600 feet. At the time the Ford approached the crossing from the west, the defendant's freight train approached from the north at a speed estimated by the plaintiff's witnesses at 50-55 miles per hour, and by the engineer at 30-35 miles per hour. The train consisted of four diesel engines and 95 freight cars.

The following is the story of the accident as told by the plaintiff's witness, John T. Yates: "I was driving a 1946 Ford sedan. The automobile was my mother's. I was familiar with East Brown Street . . . to the extent I had been over it maybe a couple of times. I understand where East Brown Street crosses over the Southern Railway tracks that is within the corporate limits of Landis. On the evening of December 26, 1953, at 8:20 p.m., I was in a Ford on East Brown Street, traveling east. When I came to the crossing I stopped a distance of . . . I don't know how close it was; I thought I could see both ways, which I looked both ways and didn't see anything, then I started across the track and about the time the front wheels got to the track, I heard a whistle, and natural impulse I hit the brakes. When I hit the brakes, it killed my engine and I looked up and the headlights of the train blinded me and I didn't know how close the train was. Trying to take time to remove the car, I didn't know whether I had time or not, I thought probably the best thing to do would be to get out. I told the others in the car to get out. I went out the left door of the car, and Betty went out the right. We went behind the car . . . When approximately the front wheel got to the track I heard a whistle. Then I slapped on my

brakes . . . I got maybe two yards behind the car before the crash . . . the train struck the front fender of my car. . . . When the train stopped it still had the crossing blocked."

Jerry Lynn Bumgarner testified: "The car had come to a complete stop. . . . John got out on the left side and my sister was getting out on the right side. It was a two-door automobile . . . I had to wait until the passengers in the front seat got out before I could get out . . . I pushed the front seat forward and got out and was clear of the car before I noticed that Phyllis was not behind me and I turned around and seen Phyllis was in the back seat and I got her out and started back towards the back of the automobile and she was clear of it, but the automobile caught my leg. The train struck the car and the car struck my leg. . . . The train was six or seven hundred feet up the track when I first saw it."

There was evidence that Phyllis Metcalf (now Mrs. McCardy) was so overcome with fright that she was unable to move until the plaintiff, Jerry Lynn Bumgarner, pulled her out from the stalled car. He pushed her clear of the automobile and the train. However, the train struck the left front fender of the automobile and hurled it against the plaintiff's leg, injuring him so badly that the leg had to be amputated. Medical and hospital bills amounted to about $2,500.

There was evidence the car involved in the wreck was purchased while John Yates was under age and the title taken in the name of Mrs. J. W. Yates, his mother. John, then in the service, furnished a part of the purchase price, and the mother the remainder. At the time of the accident John had passed his 21st birthday. He still made his home with his mother, who kept the car while he was away. He testified: "On the evening in question I had my mother's permission . . . to drive the automobile."

The individual defendant did not introduce evidence. Her motion for nonsuit at the close of the plaintiff's evidence was overruled. The Railway Company introduced evidence after its motion for nonsuit was overruled, and the motion was renewed at the close of all the evidence. The jury answered issues of negligence and contributory negligence in favor of the plaintiffs. From the judgments on the verdicts, both defendants appealed, assigning as error the failure of the court to enter judgment of nonsuit.

Webster S. Medlin for plaintiffs, appellees.

Hartsell & Hartsell, By: L. T. Hartsell, W. T. Joyner for defendant Southern Railway Co., appellant.

Carpenter & Webb, By: L. B. Carpenter, John G. Golding for defendant Mrs. J. W. Yates, appellant.

HIGGINS, J. In considering the appeal of the Southern Railway Company we may dismiss as without significance the allegation that neither warning signs nor signals were placed at the crossing where the accident occurred. The driver of the automobile knew the crossing and stopped for it. Therefore, he had all the notice warning devices could have given him. Evidence is lacking to support the plaintiff's allegation that the speed of the train was in violation of law—either State statute or city ordinance, or that after seeing the car on the track the train crew could have stopped the train in time to avoid the injury. All the evidence is to the effect that the headlights on the engine were properly functioning.

Left for consideration is the allegation that the defendant's train appeared "suddenly without any warning on the part of the defendant Railroad Company, its agents, or servants, either by blowing of a whistle or the ringing of a bell, or in any manner making known its approach, . . . and negligently approached the crossing . . . at a great rate of speed, . . . or without slowing down . . ." The evidence is plenary that the driver heard the whistle before the train came into view. At the time he heard the whistle, and while he was about to enter upon the southbound track, he became excited, slammed on his brakes, choked down and stalled his engine while the automobile was on the track, or so close to it that the train struck it. After the car stopped, three of the occupants, including the plaintiff, reached a place of safety. The plaintiff, however, saw Phyllis Metcalf still in the car, "frozen with fright." Immediately he went to her rescue, succeeded in taking her from the car and pushing her to a place of safety. The plaintiff, having escaped from the car and from the moving train, however, received his injury as the train hurled the car against him.

The evidence did not disclose how far the train moved after striking the car. The defendant's evidence (not in conflict with plaintiff's) indicated the engineer applied his brakes as soon as he saw the car stopped on or near the tracks, and that the train moved about 35 car lengths, approximately 1,600 feet, before it stopped. The evidence is insufficient to show negligence on the part of the Railway Company, *Faircloth v. R. R., ante,* 190, and cases cited; and likewise to raise the question of the railway's last clear chance to avoid the accident after ascertaining the occupants of the car were in a place of danger. *Freight Lines v. Burlington Mills,* 246 N.C. 143, 97 S.E. 2d 850; *Redmon v. R. R.,* 195 N.C. 764, 143 S.E. 829.

This case is governed by the doctrine approved by this Court in the following cases: *Faircloth v. R. R., supra; Jones v. R. R.,* 235 N. C. 640, 70 S.E. 2d 669; *Jeffries v. Powell, Receiver,* 221

N.C. 415, 20 S.E. 2d 561; and cases cited. The evidence was insufficient to take the case to the jury against the corporate defendant. Its motion for judgment of nonsuit should have been allowed.

As to the individual defendant, the jury found that John T. Yates was her agent, and acting in the scope of his agency at the time of the accident. John Yates testified: "My mother actually owned the automobile . . . I had been away approximately a year and a half . . . During that time I considered my permanent address with my mother. . . . It was understood I would drive the car when I came home or any time I came in contact with it . . . On the evening in question I had my mother's permission and consent to drive the automobile." The evidence of ownership and agency, and that the car was maintained for a family purpose was sufficient to require the court to submit the issue to the jury and to warrant the jury in answering it in favor of the plaintiff. *Elliott v. Killian*, 242 N.C. 471, 87 S.E. 2d 903; *Goode v. Barton*, 238 N.C. 492, 78 S.E. 2d 398; *Ewing v. Thompson*, 233 N.C. 564, 65 S.E. 2d 17; *Matthews v. Cheatham*, 210 N.C. 592, 188 S.E. 87.

The evidence disclosed that John T. Yates was familiar with the crossing where the accident occurred. He stopped an undisclosed distance from the crossing and looked both to the north and to the south. Seeing nothing, he thereafter looked only straight ahead until his vehicle was on or near the track. The whistle sounded, he became excited, and, instead of continuing or speeding up, he applied his brakes and stalled his car in the path of the train. Even so, all except Phyllis Metcalf reached a place of safety.

The defendant's agent drove the automobile into a zone of danger, became excited when the danger materialized, and stopped when time remained to have continued to a place of safety. The evidence was sufficient to go to the jury. *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349; *Beaman v. R. R.*, 238 N.C. 418, 78 S.E. 2d 182; *Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251.

Remaining to be disposed of is the individual defendant's allegation that the plaintiff was guilty of contributory negligence. By leaving a place of safety, and by entering a place of known danger for the purpose of rescuing Phyllis Metcalf, was the plaintiff guilty of contributory negligence as a matter of law, or does the evidence present the question as one for the jury?

The impulse to give assistance to his companion who was helpless in a place of great danger necessarily was strong in the plaintiff. Her rescue was complete. He missed escape by a very narrow margin. In all probability her life was saved at the cost

of his leg. Would it be fair to say that his injury resulted from his negligence and that no other reasonable inference can be drawn from the evidence in the case? ". . . it is well established that when the life of a human being is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions . . ." *Norris v. R. R.*, 152 N.C. 505, 67 S.E. 1017; *Pegram v. R. R.*, 139 N.C. 303, 51 S.E. 975. ". . . the rule is well settled that one who sees a person in imminent and serious peril through the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life, or serious injury, in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788. Evidence the driver's negligence exposed Phyllis Metcalf to the danger from which the plaintiff rescued her to his own injury was sufficient to go to the jury and to sustain the verdict. Contributory negligence on the part of the plaintiff does not appear as a matter of law. The jury resolved the question in his favor as an issue of fact.

On the appeal of the corporate defendant, the judgment is Reversed.

On the appeal of the individual defendant, there is No error.

THOMAS O. PRUITT AND WIFE, ESTELLE K. PRUITT v. BAXTER H. TAYLOR, T/A TAYLOR CONSTRUCTION COMPANY.

(Filed 11 December, 1957)

1. **Judgments § 27d—**

An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside by motion in the cause.

2. **Constitutional Law § 24—**

Fundamental to an adjudication of liability is notice of a demand and an opportunity to contest.

3. **Judgments § 11—**

Judgments upon inquiry after default cannot exceed the amount demanded in the complaint, G.S. 1-226, and while upon the inquiry the court may allow plaintiff to amend to allege damages in a larger amount to make the allegations conform to the proof, G.S. 1-163, the entry of judgment for the greater amount without notice and opportunity to defendant to controvert the amount is irregular, and the verdict and judgment must be set aside on motion so that each party may offer evidence in support of their contentions as to the amount of damage.

4. Appeal and Error § 49—

In the absence of findings, it will be presumed that the lower court found the predicate facts upon supporting evidence.

APPEAL by plaintiffs from *Carr, J.*, September 1957 Civil Term of LEE.

On 29 December 1956 plaintiffs filed in the Superior Court of Lee County their verified complaint in which they alleged their home near Sanford had been damaged as a result of negligent blasting operations by defendant. They alleged damages in the sum of $2000 and prayed that they recover that sum and costs. Thereupon summons issued for defendant. The summons and complaint were served on defendant on 7 January 1957. Defendant made no appearance. On 9 February 1957 judgment by default was rendered with a provision that inquiry as to damages should be had at the next civil term.

At the May Term 1957, which was the next civil term, a jury was empaneled to determine the amount of plaintiffs' damage. Plaintiffs offered evidence to the effect that their damage in fact amounted to $2200 instead of $2000 as alleged in the complaint. They then asked leave to amend the complaint to allege damage to accord with their evidence. Their motion was allowed and the sum of $2200 was inserted in the complaint. The issue was then submitted to the jury and answered by them $2200. Judgment was entered on the verdict for $2200 and costs.

At the September Term 1957 defendant moved to set aside the judgments rendered in February and at the May Term. The motion was based on excusable neglect and also on irregularity in the judgment assessing damages. Defendant's motion was allowed as to the judgment rendered at the May Term and otherwise denied. Plaintiff excepted and appealed.

Pittman & Staton and Lowry M. Betts for plaintiff appellants.

Gavin, Jackson & Gavin and Ward & Bennett for defendant appellee.

RODMAN, J. Our statute, G.S. 1-226, provides: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint . . ."

A default judgment rendered contrary to this statutory provision for an amount in excess of the damages alleged and the sum prayed for in the complaint is irregular. *Simms v. Sampson*, 221 N.C. 379, 20 S.E. 2d 554; *Land Bank v. Davis*, 215 N.C. 100, 1 S.E. 2d 350; *Burrowes v. Burrowes*, 210 N.C. 788, 188 S.E. 648; *Smith v. Travelers Protective Assoc.*, 200 N.C. 740, 158 S.E. 402; *White v. Snow*, 71 N.C. 232.

An irregular judgment is one rendered contrary to the course and practice of the courts. A motion in the cause is the proper course to pursue to obtain relief from a judgment so improperly entered. *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709; *Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362; *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315; *Carter v. Rountree*, 109 N.C. 29; *Fowler v. Poor*, 93 N.C. 466.

The judgment rendered at the May Term was an irregular judgment if the statute refers to the amount demanded in the complaint served on defendant. Plaintiffs argue that it should not be given this restricted meaning, that it properly means the amount alleged and demanded at the time plaintiffs' damages are assessed. If their position is correct, the judgment is not irregular, but at most erroneous, as they assert.

The amendment to the complaint was made while plaintiffs were offering evidence with respect to the amount of damage to which plaintiffs were entitled. The amendment was allowed to make the complaint "conform to the proof." This amendment increased the damages claimed substantially. Defendant had no notice of this amendment until after the verdict was rendered, judgment entered, and execution had issued. The record does not disclose whether the plaintiffs or some other witness testified to a greater damage to plaintiffs' property than plaintiffs had asserted in their sworn complaint, or when plaintiffs, subsequent to the filing of their complaint, conceived the damage done was greater than they had originally claimed.

The position taken by plaintiffs, appellants, does not in our opinion properly interpret the express language of the quoted section of the Code of Civil Procedure nor conform to the policy declared in that chapter of our statute law.

Fundamental to an adjudication of liability is notice of a demand with an opportunity to contest. Default judgments on an obligation specific in amount or to be ascertained by inquiry can only be rendered when the complaint has been duly verified. G.S. 1-211. The complaint must contain "A demand for the relief to which plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated." G.S. 1-122. The complaint must be served on defendant. G.S. 1-121. When these requirements of the statute have been complied with the defendant is called upon to make some response. If he remains silent and files no answer, it is by law a confession of liability on the cause of action asserted in the complaint, G.S. 1-159, and an assent to the ascertainment of the extent of that liability in the manner prescribed by law.

It would do violence to one's sense of justice to say that defendant, having consented to the assessment of damages not in

excess of a stipulated amount, had, by that consent, agreed that larger damages might be assessed.

The right to amend the complaint is conferred by statute. In one instance the plaintiff can exercise that right without seeking permission of the court. G.S. 1-161. He must do so before the time for answering has expired. Certainly it would not be suggested that a plaintiff could file a verified complaint alleging defendant's indebtedness in the sum of $500, serve such complaint on the defendant, and thereafter and before the time for answering had expired, amend his complaint, changing his allegation and prayer from $500 to $5000, and upon default of an answer have judgment on the amended complaint for the amount then claimed.

If plaintiff does not amend before the time to answer expires, he may amend upon application to and permission of the court. G.S. 1-163.

Amendments made either in the discretion of the court or as a right are of equal dignity. Neither are confessed by a defendant who has no knowledge thereof and, when made for the purpose of obtaining relief in excess of the amount demanded in the complaint served on defendant, come within the prohibition of G.S. 1-226 until he has notice thereof. *Simms v. Sampson, supra; Smith v. Travelers Protective Assoc., supra.*

The Supreme Court of Oklahoma was called upon, in *Davenport v. Jamison,* 177 P. 550, to deal with a similar situation. It said: "The question presented here is whether or not a suit may be filed and a definite sum asked in said petition, and, after the summons has been served and no defense offered by the defendant, the court has jurisdiction to permit an amendment so as to include a much larger sum than was originally sought to be recovered from the defendant." The court reached the conclusion that a judgment rendered based on the amendment was invalid.

Freeman, in his work on Judgments (5th Ed. Sec. 1292), says: ". . . a default operates as an admission of all the material traversable allegations of the plaintiff, so that it is only necessary for him to establish by proof the damages claimed. This places a corresponding limitation on the scope of the inquiry. In the first place, the plaintiff is limited strictly to the case made by his pleadings. Upon the question of damages he has no greater latitude than had a denial been interposed." And speaking with respect to amendments as affecting the default, he says, in Sec. 1278: "If the amount of damages claimed is increased by amendment without notice to the defendant, judgment cannot exceed the amount claimed in the original petition."

"Where the complaint is amended in a matter of substance, after default, a valid default judgment cannot be entered on the amended pleading unless the defendant is duly notified of the amendment and given opportunity to plead." 49 C.J.S. p. 340; 31 Am. Jur. pp. 130, 131; Black on Judgments, 2nd Ed. p. 556.

The adjudication of defendant's liability to plaintiffs for a sum in excess of the amount demanded in the complaint served on defendant was contrary to the course and practice of the courts. The judgment was irregular; but a judgment merely follows the verdict. *Jernigan v. Neighbors*, 195 N.C. 231, 141 S.E. 586; *Sitterson v. Sitterson*, 191 N.C. 319, 131 S.E. 641. To vacate the judgment without vacating the verdict would in fact afford no relief. Plaintiffs would be entitled to again have judgment entered on the verdict. It was proper to set aside both verdict and judgment.

The court did not find that defendant had a meritorious defense. He made no findings. No request for findings was made. Defendant's affidavit on which he moved to set aside the judgments for excusable neglect as well as for irregularity was insufficient, as the court found, to justify setting the judgments aside on the ground of excusable neglect, but the facts there stated sufficed to show that defendant does have a meritorious defense on the question of the extent of damage, and in the absence of findings of fact or request for findings it is presumed that on the evidence in the record the court found facts which support his judgment. *Morris v. Wilkins*, 241 N.C. 507, 85 S.E. 2d 892.

The power of the court at the May Term 1957 to allow the amendment is not challenged. Defendant is now entitled to file an answer controverting the amount which plaintiffs claim he owes. Each party is entitled to offer evidence in support of their contentions. If the jury, having heard the evidence, finds the damages as now claimed by plaintiffs, they are entitled to a judgment for the amount so ascertained.

The judgment is

Affirmed.

STATE v. EUGENE CLARENCE TINGEN

(Filed 11 December, 1957)

1. Automobiles § 72—

Evidence of defendant's guilt of driving a motor vehicle on the public highways of this State while under the influence of intoxicating liquor *held* sufficient to overrule nonsuit.

2. **Criminal Law § 135—**
Order activating a suspended sentence, when supported by proof that the terms of suspension had been violated, is proper.

3. **Negligence § 23—**
Culpable negligence in the law of crimes imports something more than actionable negligence in the law of torts, and is such recklessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others.

4. **Same—**
The violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, wilful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated.

5. **Automobiles § 59—Evidence held insufficient to show causal connection between driver's drunkenness and fatal accident.**
Evidence tending to show that as two elderly ladies were attempting to cross a street at a place where there was no crosswalk they saw defendant's car approaching and, instead of stopping in the middle of the street, began to run toward the far curb, that defendant's car hit one of them with sufficient force to knock her down and cause fatal injuries, without damaging the car, that defendant, although intoxicated, was traveling on his right side of the street, with no evidence that his speed was excessive or that he was driving recklessly, with further testimony of defendant, not in conflict with the evidence for the State, that he did not see the ladies on account of the lights of a parked car until the ladies were near the middle of the street and that they ran into his car before he was able to stop, *is held* insufficient to be submitted to the jury on a charge of manslaughter.

6. **Same: Automobiles § 40—**
When all the physical facts at the scene tend to show that defendant was driving at a lawful speed, his statement after the accident, "I reckon that I was going a little too fast," considered in the light of the attendant circumstances, can mean nothing more than that defendant did not have enough time and distance after apprehending the danger to avoid the accident.

APPEAL by defendant from *Williams, J.*, May, 1957 Criminal Term, DURHAM Superior Court.

Two criminal prosecutions were consolidated and tried together. Superior Court Case No. 6848 originated in the Recorder's Court of Durham County upon a warrant which charged the defendant with the second offense of operating a motor vehicle upon the public highway while he was under the influence of intoxicating liquor, he having been previously convicted of driving drunk on July 24, 1956. From a conviction and judgment, he appealed to the Superior Court of Durham County. In Superior Court Case No. 6849, the defendant was charged with

the offense of manslaughter in the slaying of Elizabeth R. Strickler. Both offenses are alleged to have occurred on April 15, 1957. They grew out of the same transaction.

The following is the substance of the evidence: At approximately ten o'clock on the night of April 15, 1957, Miss Clara Crawford parked her car on the south side of Morehead Avenue in the City of Durham. The car was stopped inside the block, facing east, and the lights were on. Mrs. Elizabeth Strickler, age 74, Mrs. Cobb, age 76, and Mrs. Everett Land were in Miss Crawford's car at the time it stopped. Mrs. Strickler and Mrs. Cobb lived across the street on the north side of Morehead Avenue. When the car stopped, Mrs. Land got out, helped Mrs. Strickler and Mrs. Cobb out of the car, and offered to assist them across the street. The offer was declined and the two elderly ladies went to the rear of the car and started across Morehead Avenue to their home.

Mrs. Land testified: "I watched them until they had gotten over half way across (the street) . . . I heard one of them say, 'I've got to run' and then I saw headlights and heard brakes . . . the car whose lights I had seen and whose brakes I had heard was stopped there. Mrs. Strickler was in front of the car. Mrs. Cobb . . . was lying about three feet from the north curb. The defendant was driving the car. . . . He was out of the car going toward Mrs. Strickler." The witness was unable to give an opinion of the car's speed.

Mr. E. R. Cobb, son of Mrs. Cobb, came to the scene of the accident immediately. The defendant said to him, "I reckon that I was going a little too fast." The defendant talked with a thick tongue and, in the opinion of the witness, was highly intoxicated. Mrs. Strickler died as a result of the injuries received.

Lt. Bowles, of the police department, investigated the accident and arrived on the scene shortly after it happened. "I asked him how fast he was going. He said he was driving 25 miles per hour and he slowed down to 10 miles per hour." Two tire marks started 6½ feet out in the street and came in approximately four feet from the curb. The skid marks were on the north side of Morehead Avenue. They were on the proper side of the street for a person driving west. The avenue is 32 feet, four inches wide. In the opinion of the officer the defendant was drunk. Without objection, the officer further testified with reference to the skid marks: "That would be about 35 feet of skid marks. These skid marks are no indication of speed to me. . . . I conducted the examination and investigation in this matter and I found no one or no information leading to or showing any reckless driving or speeding on the part of the defendant Tingen

on the occasion of this accident. I examined the front of his automobile and there was no damage to it."

Patrolman Whitfield testified: "In my opinion he was under the influence of alcohol. There is no crosswalk at the point where the accident occurred. There is no stopsign or stoplight. The accident occurred one-third of the way towards the middle of the block."

The State introduced other evidence of the defendant's intoxication and also evidence of the defendant's prior conviction "for driving under the influence." At the close of the State's evidence the defendant moved for judgment as of nonsuit on both charges and excepted to the court's refusal to grant them.

The defendant testified, admitted he had had two beers, but stated he was not under the influence of intoxicants. "As I approached the car on the south side of Morehead (evidently Miss Crawford's) I was momentarily blinded and I slowed up. I was running at a speed of 25 miles per hour. I don't know what I slowed down to. . . . As I approached the parked car . . . I was partially blinded by the lights and I slowed down. . . . and then I saw two people to the left . . . These people were almost in the middle of the street. I was driving in my right-hand lane. In a split second I turned to the right as I thought they were going to stay in the middle of the street . . . I applied all the brakes I had and skidded on up. I angled my car partially towards the curb . . . as I applied my brakes . . . It was clear enough to see two ladies crossing the street. I saw they were excited and they turned and ran towards me. I heard a small thump and I am satisfied that the one inside struck my car. One of the ladies had gotten between my car and the curb. I . . . got out as soon as I could and went around to the front side of the car where this lady was lying. She was lying in the front of the car. I lifted her . . . as some lady came over. I waited until the ambulance arrived."

The defendant offered the evidence of a number of witnesses whom he had just left at a filling station who testified that he was not under the influence of liquor. To the court's refusal to grant the renewal of his motions at the close of the evidence, the defendant excepted. The jury returned a verdict of guilty on both charges. From judgment (1) that he serve two years on the roads in case No. 6848, and (2) that he serve 10 to 15 years in the State's prison in No. 6849, the defendant excepted and appealed.

George B. Patton, Attorney General, Harry W. McGalliard, Assistant Attorney General for the State.

Arthur Vann for defendant, appellant.

HIGGINS, J. The evidence in the case, although in conflict, is amply sufficient to sustain the verdict on the charge of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor. The judgment, therefore, in Superior Court Case No. 6848 is free from error. The order activating the suspended sentence on the prior conviction is supported by proof the terms of suspension were violated, and the judgment of imprisonment is affirmed.

The defendant's assignment of error No. 4, based on exception No. 20, presents for review the question of the sufficiency of all the evidence to go to the jury on the charge of manslaughter. In the leading case of *State v. Cope,* 204 N.C. 28, 167 S.E. 456, Chief Justice Stacy has stated the rules by which criminal responsibility in automobile accident cases shall be determined:

"4. Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts.

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

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

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

In the light of the foregoing rules, is there substantial evidence of manslaughter? The evidence of the defendant's intoxication at the time of the accident is conflicting. However, under the rules of evidence governing such cases the conflict must be resolved against the defendant and we must assume he was operating the car at the time of the accident while he was under the influence of liquor. However, in order to fix criminal responsibility, something more than intoxication must be shown. *State v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638; *State v. Cope, supra; State v. Satterfield,* 198 N.C. 682, 153 S.E. 155. Causal relationship must be shown. The negligent act must be the proximate cause of the casualty. In this case, except as to intoxication, the evidence is not in conflict. The State's witness said Mrs. Strickler and Mrs. Cobb started to cross the street from behind Miss Crawford's car and at the time they were more than half way across the avenue one of them said, "I've got to run." The witness saw lights and heard brakes. The car evidently hit Mrs. Strickler, though it stopped before running over her. No dam-

age was done to the car. Mrs. Cobb was lying near the curb and there is no evidence the car hit her. The defendant's evidence is not in conflict, but in amplification of the State's evidence. The defendant said he didn't see the ladies on account of the lights of the parked car until they were near the middle of the street; that he applied his brakes and that they ran into his car before he was able to stop.

The officer who investigated the case was permitted to say, "I conducted the examination and investigation in this matter and I found no one or no information leading to or showing any reckless driving or speeding on the part of the defendant Tingen on the occasion of this accident. . . . The skid marks are on the north side of Morehead Avenue; they were on the proper side of the street for a person driving west on Morehead Avenue."

Eliminated, therefore, is all question of speeding or reckless driving. There remains to be considered only the defendant's statement to Mr. Cobb, "I reckon that I was going a little too fast." The statement must be interpreted in the light of the attendant circumstances. When so considered it does not necessarily mean the defendant was violating the law. In the light of attendant circumstances the statement could mean little, if anything, except that not enough time and distance remained in which the defendant could stop after he saw the danger in which the ladies had placed themselves by attempting to run across the street in front of him.

We conclude the evidence is insufficient to sustain a conviction on the charge of manslaughter. The defendant's assignment of error No. 4 is sustained. The motion for judgment as of nonsuit should have been allowed.

In the trial and judgment on the charge of operating an automobile while intoxicated, there is

No error.

The judgment on the charge of manslaughter is

Reversed.

LYDIA KELLY HIGHFILL v. OLLIE F. PARRISH, EXECUTOR OF ESTATE OF HATTIE LEE KELLY, DECEASED.

(Filed 11 December, 1957)

Executors and Administrators § 15d: Evidence §§ 26½, 32—

In an action to recover upon *quantum meruit* for personal services rendered deceased, testimony by the executor to the effect that he performed practically all the personal services which plaintiff claimed she had performed, as testified to by other witnesses, "opens the door" and renders competent, for the purpose of rebuttal, testimony by plaintiff as to the personal services rendered by her. G.S. 8-51.

APPEAL by defendant from *Fountain, S. J.*, and a jury, at 27 May, 1957, Civil Term of GUILFORD (Greensboro Division).

Wm. E. Comer for appellant.
Frazier & Frazier for appellee.

JOHNSON, J. This is a civil action brought by the plaintiff to recover upon a *quantum meruit for* personal services rendered Mrs. Hattie Lee Kelly during the last nine or ten months of her life. The plaintiff was a step-daughter of Mrs. Kelly. Their homes were on adjoining lots. The plaintiff's evidence discloses that she spent much time over at the home of the deceased performing various personal services of a menial nature for the deceased. There was a verdict and judgment in favor of the plaintiff for $750.

The defendant's chief assignment of error is based on an exception to the testimony of the plaintiff, in which she was permitted to relate in detail the things she did for the deceased. The defendant contends that this testimony was violative of the dead-man statute, G.S. 8-51. However, the challenged testimony was not received in evidence until after the defendant executor went upon the stand and testified that he performed for the deceased practically all the services which the plaintiff claimed she had performed. As to this, the executor testified in part: "I would go to the grocery store for her once a week—mostly on Friday night. *I did everything for her;* I even washed dishes, swept floors, made up beds, *and everything else down there.* . . . I never saw Mrs. Highfill take in any food to Mrs. Kelly. I have seen her over there, but she would always leave before I come in." (Italics added.)

Previous to the admission of this testimony, the plaintiff in making out her case had relied chiefly on the testimony of other witnesses. However, after the executor testified as above indicated, the court, being of the opinion that the defendant had "opened the door" in respect to the personal services the plaintiff claimed she had performed, permitted her to testify in rebuttal concerning these matters. As to them, it would seem that the door had been swung wide by the testimony of the defendant, and that the trial court correctly so held. The ruling was free of error. It is supported by authoritative decisions of this Court. See *Burnett v. Savage,* 92 N.C. 10. See also *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; *Walston v. Coppersmith,* 197 N.C. 407, 149 S.E. 381. The cases cited and relied on by the defendant, including *Batten v. Aycock,* 224 N.C. 225, 29 S.E. 2d 739, do not sustain his position.

The defendant's remaining assignments of error are without merit. They raise no new question requiring discussion. Prejudicial error has not been made to appear. The judgment and verdict will be upheld.

No error.

MAY FRENCH EDENS v. CAROLINA FREIGHT CARRIERS CORPORATION AND STERLING EUGENE SMITH.

(Filed 11 December, 1957)

Automobiles §§ 42g, 45—Evidence held to show contributory negligence as matter of law in failing to yield right of way at intersection.

Plaintiff's evidence disclosing that she was traveling on the servient highway and entered the intersection when the vehicle traveling on the dominant highway, approaching from her right, was not more than 28 feet from her line of travel, shows as a matter of law contributory negligence constituting a proximate cause of the collision, and fails to show that the operator of the other vehicle, after he saw or by the exercise of due care should have seen that plaintiff was not going to stop and yield the right of way, then had sufficient time, in the exercise of due care, to stop and avoid the collision, and therefore the doctrine of last clear chance is not applicable.

APPEAL by plaintiff from *Rousseau, J.*, May 13, 1957, Civil Term, High Point Division, of GUILFORD.

Personal injury action growing out of an intersection collision on February 14, 1953, about noon, between a Chrysler sedan, operated by plaintiff, and a tractor-trailer unit, owned by the corporate defendant and operated by defendant Smith, its agent.

It was stipulated that, at the intersection involved, Highway 68, the dominant highway, ran north-south, and Highway 534, the servient highway, ran east-west. Approaching the intersection, plaintiff was going west on Highway 534 and Smith was going south on Highway 68. Hence, the tractor-trailer was approaching from plaintiff's right. Too, a "Stop" sign on plaintiff's approach, was located 24 feet east of the east edge of the hard-surfaced portion (20 feet) of Highway 68.

As stated in appellant's brief: "Plaintiff, traveling in a westerly direction on Highway 534, approached its intersection with Highway 68 at approximately 30 to 35 miles per hour, slowed down but did not come to a dead stop as she approached the stop sign, and proceeded into the intersection, coming into collision with defendants' truck, approaching from a northerly direction on Highway 68."

In her complaint, plaintiff alleged that she proceeded to cross Highway 68 at a speed of approximately 20 miles per hour and "had driven across said intersection to a point beyond the center thereof" when the collision occurred.

The left front of the tractor-trailer, traveling in its right lane of Highway 68, a two-lane highway, collided with the right front side of the Chrysler, traveling in its right lane of Highway 534, a two-lane highway. Both vehicles were greatly damaged and plaintiff suffered serious personal injuries.

Upon defendants' motion, at the close of all the evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Schoch & Schoch, T. J. Gold, Sr., and W. B. Byerly, Jr., for plaintiff, appellant.

Smith, Moore, Smith, Schell & Hunter for defendants, appellees.

PER CURIAM. Plaintiff, whose testimony related primarily to her injuries and damages, testified that she had no recollection of what occurred from 7 a.m., the morning of February 14, 1953, until she regained consciousness (after the collision) in the hospital that afternoon. The evidence offered by plaintiff as to what occurred on the occasion of the collision was the testimony of the investigating Highway Patrolman, portions of the adverse examination of defendant Smith and the testimony of an engineer as to conditions at the intersection, particularly the distances each driver could have observed a vehicle on the intersecting highway at several stated points in their respective lines of travel.

There was no evidence to support plaintiff's allegation that, prior to crossing Highway 68, she exercised due care to observe and did observe that there was "no vehicle within a distance which might reasonably be expected to menace her safety in crossing Highway 68." Indeed, the evidence tends to show that when plaintiff *entered* the intersection the tractor-trailer was then not more than 27 feet and 6 inches from her line of travel.

When considered in relation to the fact that Highway 68 was the dominant highway, G.S. 20-158, and the fact that the tractor-trailer was approaching from her right, the only conclusion that may be reasonably drawn from the evidence is that plaintiff failed to exercise due care to yield the right of way but instead negligently drove directly across the path of the tractor-trailer. Indeed, plaintiff, in her brief, makes no contention that she was not guilty of contributory negligence.

Irrespective of Smith's negligence, if any, unquestionably plaintiff's negligence was a proximate cause of collision. This suffices to bar recovery herein.

The doctrine of last clear chance, pleaded by plaintiff in her reply, has no application to the factual situation disclosed by the evidence. The evidence is insufficient to support a jury finding that Smith, after he saw or by the exercise of due care should have seen that plaintiff was not going to stop and yield the right of way, then had sufficient time to enable him by the exercise of due care to have stopped the tractor-trailer or otherwise to have acted so as to avoid the collision.

We have reached these conclusions after consideration of the evidence in the light most favorable to plaintiff. Hence, assignments of error directed to the admission over plaintiff's objection of certain evidence offered by defendants have no bearing on the question of nonsuit.

The applicable principles of law are well established and have been frequently stated. There is no need for reiteration. Nor do we deem it appropriate to analyze the evidence in greater detail.

The judgment of involuntary nonsuit is

Affirmed.

WILLIAM IRA WILSON v. J. L. WEBSTER AND WIFE, BESSIE WEBSTER.

(Filed 11 December, 1957)

Automobiles § 42d—

Evidence tending to show that plaintiff was blinded by the lights of a vehicle traveling in the opposite direction, that just after he passed this vehicle he hit defendant's car, which had been parked without lights and left unattended with the two left-hand wheels about two feet on the hard surface, *held* not to warrant nonsuit. G.S. 20-141(e).

APPEAL by defendants from *Johnston, J.*, March Civil Term 1957 of CASWELL.

This action was instituted by the plaintiff to recover for damages to his automobile resulting from the alleged negligence of the defendants.

According to the plaintiff's evidence, he was driving his automobile westwardly on the Union Ridge Road in Caswell County "close to 7 o'clock, good dark," on 23 March 1956, headed towards Highway No. 62; that when he was about 100 to 150 yards of Highway No. 62 he saw a car crossing the highway

coming towards him; "it had awful bright lights and blinded me;" that the driver of the car meeting him failed to dim his lights; that he had to look down right close in front of his car to keep from running across the line into the man he was approaching; that just as he passed this car, he hit a Buick car owned by the defendant Jack Webster, which had been parked by his wife, Mrs. Bessie Webster. That the Webster car had been parked and left unattended with the two left-hand wheels about two feet on the hard surface part of the road; that there were no lights on the Buick car. The plaintiff's car was traveling about 20 miles per hour at the time of the collision.

According to the defendants' evidence, the paved portion of the highway was 18 feet wide with approximately 7 feet of shoulder, 3½ feet on each side. That Mrs. Webster had parked the Buick car on the road headed in a westerly direction approximately two feet over on the paved surface. That the plaintiff stated at the time of the accident he was traveling 30 to 35 miles an hour.

The issues of negligence and contributory negligence were submitted to the jury. These issues were answered in favor of the plaintiff and his damages assessed at $310.00.

The defendants set up a cross-action and the jury answered the pertinent issue submitted on the cross-action against the defendants.

Defendants appeal, assigning error.

D. Emerson Scarborough, for defendant appellants.
No counsel contra.

PER CURIAM.The only assignment of error on this appeal is to the failure of the court below to sustain the defendants' motion for judgment as of nonsuit.

It would seem that under the provisions of G.S. 20-141 (e) and our decisions, the evidence adduced in the trial below was sufficient to carry the case to the jury. *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232; *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276; *Boles v. Hegler*, 232 N.C. 327, 59 S.E. 2d 796; *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11.

The ruling of the court below is

Affirmed.

STATE v. JAMES DAVID HAIRSTON

(Filed 11 December, 1957)

Criminal Law § 143—

Where defendant evidences his consent to a suspended judgment by making payments into court in accordance with the terms of suspension, he waives his right of appeal.

APPEAL by defendant from a judgment of *Sharp, S. J.*, at Chambers, 22 June 1957, CASWELL.

In April 1956 a warrant issued from the Recorder's Court of Caswell County charging defendant with a wilful failure to support his illegitimate child, in violation of G.S. 49-2. Upon defendant's demand a jury trial was held 28 May 1956. Defendant was represented by counsel. The jury returned a verdict of guilty. Thereupon judgment was entered imposing a prison sentence which was suspended on these conditions: "1. That he pay into the office of the Clerk of the Court the sum of Twenty Dollars ($20.00) each month for the support of his child, this amount to be paid on or before the 1st day of each month with the first payment due at this time. 2. Defendant pay the cost of this action. 3. That he pay the sum of Ten Dollars ($10.00) in addition to the Twenty Dollars ($20.00) to be applied to the Doctor's bill and this amount to be paid until the Doctor bills are paid."

The Recorder's Court of Caswell County adjourned 28 May 1956 to meet again 4 June 1956. On 31 May 1956 defendant paid into the office of the Caswell County Recorder's Court the amount then due under the suspended sentence entered on 28 May 1956. On 4 June 1956 defendant, through counsel, appeared in the Recorder's Court and for the first time gave notice of appeal. The Recorder's Court held that defendant, having consented to the judgment and partially complied with its terms by the payment of all sums then accrued and owing had waived his right of appeal. It declined to permit the appeal or to transfer the record to the Superior Court. Thereupon defendant applied to the Superior Court for *writ of certiorari*. The writ issued. The Recorder's Court of Caswell County certified the record. The Superior Court, upon the record so certified, adjudged that plaintiff was not entitled to appeal to that court and trial *de novo*. It remanded the record to Caswell County Recorder's Court. Defendant appealed.

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

Brown, Scurry, McMichael & Griffin and Pemberton & Blackwell for defendant appellant.

PER CURIAM. Defendant is concluded by beginning compliance with the terms of the judgment rendered in May 1956. *S. v. Canady,* 246 N.C. 613. G.S. 15-177.1 has no application to the facts of this case.

Appeal dismissed.

WALKER B. McGUIRE v. EULA SAMMONDS

(Filed 11 December, 1957)

Judgments § 10—

Judgment by default final may be rendered in an action to recover for personal services rendered upon an express contract to pay sums of money fixed by the terms of the contract and thus capable of being ascertained by computation.

APPEAL by defendant from *Moore (Dan K.), J.,* 3 June, 1957, Term, Schedule "A", Civil Court of MECKLENBURG.

Wm. H. Abernathy for appellant.
Alvin A. London for appellee.

PER CURIAM. This is a civil action to recover for personal services rendered upon an express contract. The case was heard below upon motion of the defendant to set aside the judgment by default final rendered by the clerk on failure of the defendant to answer or appear or otherwise plead to the complaint within the time allowed by law after service of summons. The ground of the motion is that the judgment is erroneous, for that upon the face of the complaint the plaintiff is not entitled to judgment by default final. The court below found and concluded that the complaint states a cause of action for breach of an express contract to pay sums of money fixed by the terms of the contract and capable of being ascertained by computation.

The ruling below was correct. It will be upheld without elaboration or discussion on authority of the principles explained and applied in *Miller v. Smith,* 169 N.C. 210, 85 S.E. 379; *Thompson v. Dillingham,* 183 N.C. 566, 112 S.E. 321.

Affirmed.

STATE v. MELVIN DEAN PICKARD

(Filed 11 December, 1957)

APPEAL by defendant from *Sink, E., J.*, at March 18, 1957, Criminal Term of DURHAM.

Criminal prosecution upon warrant issued out of Recorder's Court in city of Durham charging that Melvin Dean Pickard on or about 13th day of January, 1957, within Durham County, did willfully, maliciously and unlawfully drive a motorcycle on the public streets of the city or on the public highways of the county, at a greater rate of speed than allowed by law "100 MPH Duke Homestead Rd." etc.

In the Recorder's Court defendant was adjudged guilty, and fined, from which he appealed to Superior Court, wherein the jury returned a verdict of guilty. Whereupon the court ordered (1) that defendant be confined in the common jail of Durham County for a period of sixty days to be assigned to work the public roads under the direction of the State Highway and Public Works Commission, and (2) that he pay a fine of $100.00 plus cost of the court.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney General Patton, Assistant Attorney General Kenneth Wooten, Jr. for the State.

Arthur Vann for defendant appellant.

PER CURIAM. Careful consideration of the record and case on appeal in the light of each and all of the twenty-four assignments of error presented on the appeal fails to reveal error prejudicial to defendant. The evidence is brief, and the charge clear and explicit.

Hence in the judgment from which appeal is taken there is

No error.

COKE CANDLER, HARRY P. MITCHELL AND JOHN C. VANCE, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF BUNCOMBE COUNTY AND EX OFFICIO TRUSTEES OF SOUTH BUNCOMBE WATER AND WATERSHED DISTRICT, OF SWANNANOA SANITARY SEWER DISTRICT, OF BEAVERDAM WATER AND SEWER DISTRICT, OF CANEY VALLEY SANITARY SEWER DISTRICT, OF HAZEL WARD WATER AND WATERSHED DISTRICT, OF VENABLE SANITARY DISTRICT, IN BEHALF OF ALL WATER CONSUMERS OF BUNCOMBE COUNTY WHOSE PROPERTY IS CONNECTED TO ANY OF THE WATER MAINS OF ANY OF SAID DISTRICTS; P. MORTON KEARY, TOM COLE, FRANK LOWE, MRS. NELL BUSCH, HOYT SPIVEY AND W. E. CREASMAN, WATER CONSUMERS IN THE ABOVE-NAMED DISTRICTS WHOSE PROPERTIES ARE CONNECTED TO WATER MAINS OF SAID DISTRICTS, IN THEIR OWN BEHALF AND IN BEHALF OF ALL RESIDENTS OF BUNCOMBE COUNTY WHOSE PROPERTIES ARE CONNECTED TO ANY OF THE WATER MAINS OF THE AFOREMENTIONED DISTRICTS v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 10 January, 1958)

1. **Municipal Corporations § 1—**

A municipal corporation has a dual capacity: one, governmental or political, the other proprietary or *quasi*-private.

2. **Municipal Corporations § 6—**

While public utilities, such as water and lights, are necessary municipal expenses, nevertheless a municipality in furnishing water and lights to private consumers acts in a proprietary capacity.

3. **Municipal Corporations § 5—**

A municipal corporation is under the absolute control of the Legislature in regard to purely governmental matters, but as to proprietary municipal functions the Legislature is under the same constitutional restraints that are placed upon it in regard to private corporations.

4. **Constitutional Law § 11: Utilities Commission § 2—**

The State, in the exercise of a governmental function pursuant to the police power, has authority to regulate and establish rates to be charged by instrastate utilities, which power it may exercise directly or by delegation to administrative agencies under prescribed rules and standards. The General Assembly has not given the Utilities Commission authority to establish rates for municipally owned utilities.

5. **Municipal Corporations § 8b—**

The General Assembly has prescribed adequate standards for the fixing of rates by municipalities owning their own water works system and has authorized such municipalities to furnish water to private consumers outside their corporate limits and to charge for such services a different rate from that charged consumers within their limits. G.S. 160-255, G.S. 160-256.

6. **Municipal Corporations § 5: Statutes § 2—**

There is no contract between the State and the public that a municipal charter shall not at all times be subject to amendment by the Gen-

eral Assembly, and Section 4, Article VIII, of the State Constitution does not forbid the Legislature from doing so by special act.

7. Municipal Corporations § 8b—

Since a municipality has no legal right either in its governmental or proprietary capacity to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made; provided, such terms permit the establishment of a rate or rates which will be fair and just to the consumer and will produce a proper return to the municipality.

8. Same: Statute prescribing that residents of sanitary districts should not be charged for water at higher rate by municipality held constitutional.

Residents within sanitary districts adjacent to a municipality constructed and maintained with funds derived from a tax levied therein their respective water and sewer systems. The municipality sold water to such districts at bulk sale rates by metering same through master meters. Later, the municipality sold water directly to the individual consumers in the districts and billed such consumers at a higher rate than that charged residents of the city. *Held:* A statute thereafter enacted (Chapter 399, Public-Local Laws of 1933) prohibiting the municipality from charging residents in such districts at a higher rate, but not prescribing the rates to be charged by the municipality or commanding it to furnish water to consumers outside its limits, renders void an ordinance subsequently enacted in conflict therewith, since the statute is valid and does not violate Section 17, Article I, of the State Constitution or the Fourteenth Amendment to the Federal Constitution, the rates fixed by the city for its residents being presumed just and reasonable and the city having no expense in regard to the construction, maintenance or repair of the systems within the respective districts.

9. Municipal Corporations § 8b—

In prohibiting a municipality from charging residents in sanitary districts outside the municipality rates for water service in excess of rates charged residents of the municipality, the General Assembly may prescribe that it should be unlawful for the city to charge non-residents within the sanitary districts a higher rate, notwithstanding that ordinarily the violation of a rate regulation merely subjects the violator to a penalty.

10. Estoppel § 10—

A municipality cannot be estopped from enforcing a valid ordinance or from contesting the validity of an act it deems unconstitutional.

APPEAL by plaintiffs from *Campbell, J.*, May Term 1957 of BUNCOMBE.

This is an action to restrain the City of Asheville from putting into effect an ordinance which provides a higher rate for consumers of water living outside the City than that charged to consumers residing in the City.

The facts essential to an understanding of the questions involved on this appeal are stated below.

1. Between 1923 and 1927, pursuant to various Acts of the Legislature, there were formed in Buncombe County six water and sewer districts. These districts were duly incorporated by the Legislature as municipal corporations for the purpose of furnishing to the residents of the respective districts water and sewer service. By the provisions of the various Acts of the Legislature, the districts were given geographical boundaries and were authorized to acquire rights of way for water and sewer lines, to construct such lines, and to hold elections authorizing the issuance of bonds in payment therefor.

2. The six districts issued bonds as follows: South Buncombe Water and Watershed District—$400,000.00 5½% Water and Sewer Bonds, dated 1 May 1927. Swannanoa Sanitary Water District—$1,723,000.00 5½% Water and Sewer Bonds, dated 1 July 1927, and $150,000.00 6% Water and Sewer Bonds, dated 15 May 1929. Beaverdam Water and Sewer District—$500,000.00 5% Water and Sewer Bonds, dated 1 September 1927. Caney Valley Sanitary Sewer District—$66,000.00 6% Water and Sewer Bonds, dated 1 May 1927. Hazel Ward Water and Watershed District—$48,000.00 6% Water and Watershed Bonds, dated 1 November 1926. Venable Sanitary District—$45,000.00 6% Water Bonds, dated 1 January 1928.

3. Each respective district was created and organized and the Board of Commissioners of Buncombe County made trustees thereof, pursuant to the following Acts of the General Assembly: (a) South Buncombe Water and Watershed District—Chapter 501 of the 1925 Public-Local Laws of North Carolina, and Chapter 246 of the 1927 Public-Local Laws of North Carolina. (b) Swannanoa Sanitary Water District—Chapter 249 of the 1927 Public-Local Laws of North Carolina, and Chapter 139 of the 1931 Public-Local Laws of North Carolina. (c) Beaverdam Water and Sewer District—Chapter 135 of the 1927 Private Laws of North Carolina. (d) Caney Valley Sanitary Sewer District—Chapter 341 of the 1923 Public-Local Laws of North Carolina, and Chapter 243 of the 1927 Public-Local Laws of North Carolina. (e) Hazel Ward Water and Watershed District—Chapter 501 of the 1925 Public-Local Laws of North Carolina, and Chapter 235 of the 1927 Public-Local Laws of North Carolina. (f) Venable Sanitary District—Chapter 237 of the 1927 Public-Local Laws of North Carolina.

Each plaintiff listed below is a citizen of Buncombe County and resides in the district hereinafter indicated and is a consumer of water, whose property is connected to one of the water

mains of the district in which he resides, to wit: P. Morton Keary, South Buncombe Water and Watershed District; Tom Cole, Swannanoa Sanitary Water District; Frank Lowe, Beaverdam Water and Sewer District; Mrs. Nell Busch, Caney Valley Sanitary Sewer District; Hoyt Spivey, Hazel Ward Water and Watershed District; and W. E. Creasman, Venable Sanitary District.

4. The Board of Commissioners of Buncombe County as ex officio trustees of such municipal corporations or districts enumerated herein, are charged with the management, operation and control of each of such corporations, and have the power, as such trustees, to do all things necessary for the successful operation of water and sewer systems, including purchasing of land, rights of way, laying of pipes, and such other things as may be necessary for the successful operation of sewer and water systems in said districts, including the maintenance thereof. The Board of Commissioners, as such, and not as trustees, is authorized and directed by the Special Acts to levy annually a special tax in the respective districts for the maintenance of the water and sewer systems located therein, and to levy annually in each district a tax sufficient to pay the principal and interest due on the bonds issued by such district.

5. That for the year 1954-1955, the following were the debt service levies for said districts: South Buncombe Water and Watershed District—$8,189.00—15.40¢ per $100 valuation. Swannanoa Sanitary Water District—$45,280.00—20.70¢ per $100 valuation. Beaverdam Water and Sewer District—$2,268.00—13.10¢ per $100 valuation. Caney Valley Sanitary Sewer District—$1,850.00—29.00¢ per $100 valuation. Hazel Ward Water and Watershed District—$2,300.00—12.30¢ per $100 valuation. Venable Sanitary District—$1,300.00—16.00¢ per $100 valuation. That for prior years said County Commissioners have levied varying amounts for said debt service but generally comparable to the figures above stated.

6. That for the year 1954-1955, the levy for maintenance and upkeep of said lines and systems for each of the districts was as follows: South Buncombe Water and Watershed District—$12,500.00—18.60¢ per $100 valuation. Swannanoa Sanitary Water District—$44,500.00—19.50¢ per $100 valuation. Beaverdam Water and Sewer District—$3,800.00—19.90¢ per $100 valuation. Caney Valley Sanitary Sewer District—$1,400.00—16.00¢ per $100 valuation. Hazel Ward Water and Watershed District—$2,100.00—9.70¢ per $100 valuation. Venable Sanitary District—$2,200.00—15¢ per $100 valuation.

7. Pursuant to the provisions of Chapter 205 of the 1929 Private Laws of North Carolina, the corporate limits of the City of Asheville were enlarged and extended so as to include within the extended corporate limits of the City portions of the territory embraced within the boundaries of the Beaverdam Water and Sewer District, the South Buncombe Water and Watershed District, and the Swannanoa Sanitary Water District. The City of Asheville, as required by Section 8 of the above Act, assumed the payment of a portion of the bonded indebtedness of said districts in proportion to the percentage the assessed valuation of the territory annexed to the City of Asheville bore to the assessed valuation of the entire territory of said districts. As of 1 July 1936, the date of the refunding of the bonded indebtedness of said districts, the City of Asheville had assumed the following percentages and amounts of the bonded indebtedness incurred by said districts: The percentage of the indebtedness in the Beaverdam Water Sewer District was 86.043, and the amount was $430,215.00; the percentage in the South Buncombe Water and Watershed District was 39.6765, and the amount was $158,706.00; the percentage in the Swannanoa Sanitary Water District was 27.7688, and the amount was $538,839.00. As of 1 July 1949, the City of Asheville assumed the proportionate percentage and amount of the outstanding indebtedness of the Caney Valley Sanitary Sewer District, which had been included within the territorial limits of the City of Asheville, as follows: 25.68253, and the amount of $12,841.27. As of 1 July 1955, the outstanding indebtedness of the four districts referred to in this paragraph was $1,742,000.00, of which the City of Asheville had assumed $713,304.89.

8. That since the assumption by the City of Asheville of the indebtedness hereinabove set out, the City of Asheville has levied anually an ad valorem tax on all the taxable property in the City of Asheville of a sufficient rate to pay the principal and interest of that part of said indebtedness of said districts so assumed, as required by Section 8 of Chapter 205 of the 1929 Private Laws of North Carolina.

9. It is stipulated by the parties to this action that, for the fiscal year ending 30 June 1956, 5,983 water meters were in operation in the said water districts outside the City of Asheville; that the individual consumers residing in the districts purchased and installed these meters at an average initial cost of $40.00 per meter; that the City of Asheville served on the above date, in and outside its corporate limits, a total of 20,977 water meters; that the revenue during the year indicated from the meters located outside the City was $285,483.00, and all

revenue from the sale of water through all the above meters was $1,056,703.00, and the total cost of billing and meter reading was $85,365.00.

10. It is also stipulated that the City of Asheville has, over a long period of years, beginning over fifty years ago, invested in a waterworks system a sum in excess of ten million dollars, which system consists of watersheds comprising approximately thirty square miles in area, located on the North Fork of the Swannanoa River and on Bee Tree Creek in Buncombe County, at a distance of approximately fifteen miles from the City of Asheville, impounding dams, chlorinating plants, pumping installations, transmission lines from said watersheds to the City of Asheville, reservoirs and a network of distribution lines operated and maintained by large maintenance crews and personnel employed by the City of Asheville, which waterworks system was originally for the primary purpose of providing the citizens of Asheville with an adequate supply of wholesome water for domestic and industrial purposes and for fire protection. It is further stipulated that, including the water bonds issued by the City of Asheville on 1 December 1951, in the sum of $2,750,000.00, the combined unpaid indebtedness of the City for the waterworks system as of 30 June 1955 was $6,404,593.44.

11. Prior to the year 1928, the City of Asheville sold water in bulk under its ordinances to certain of said water districts, by means of metering the same through one or more master meters located in one or more districts, and such districts paid the City therefor at rates provided for bulk sales of water, and the districts sold the water at retail prices to the individual consumers and did its own billing and collecting. In 1928, this method was abandoned and the City of Asheville thereafter sold water directly to the individual consumers in the districts and billed the individual consumers on the basis of rates then in effect under its ordinances.

12. On 29 February 1928, the City of Asheville adopted an ordinance which reduced the rates to customers outside its corporate limits but still charged a rate to outside customers double that charged customers inside its corporate limits. Effective as of 25 August 1930, the City of Asheville increased its water rates to both its inside and outside customers, still leaving the cost to outside customers double that charged to customers living within its corporate limits.

13. That the General Assembly of North Carolina, at its 1933 session, enacted Chapter 399 of the 1933 Public-Local Laws, reading as follows: "Section 1. That from and after the passage of this Act, it shall be unlawful for the City of Asheville, or any

of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said City.

"Section 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off, and his right to further use of water from the city system to be discontinued until payment of any water rent in arrearages.

"Section 3. That it is the purpose and intent of this Act to declare that persons residing outside the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency, or at any time the governing body of the City of Asheville may deem that the city has use for all of its water supply.

"Section 4. That it shall be the duty of the County Commissioners of Buncombe County and/or trustees of the different water districts operating outside of the corporate limits of the City of Asheville, in Buncombe County, to maintain the water lines in proper repair, in order that there may not be a waste of water by leakage."

14. That after the passage of the above Act, the City of Asheville billed consumers of water in the various districts at the same rate as that charged consumers of water living inside the City of Asheville, until 1 September 1955. That on 11 August 1955, the City Council of the City of Asheville enacted Ordinance No. 383, to be effective as of 1 September 1955, establishing rates for outside consumers substantially higher than those charged its consumers within its City limits.

Upon the foregoing finding of facts by the court below, it was concluded as a matter of law that (a) Chapter 399 of the 1933 Public-Local Laws of North Carolina is unconstitutional and void and is contrary to the Constitution of the State of North Carolina and the Constitution of the United States of America, and particularly is in violation of Section 17 of Article I of the Constitution of North Carolina and the Fourteenth

Amendment to the Constitution of the United States of America, and other applicable provisions of said Constitutions; (b) that the defendant, City of Asheville, is not estopped to assert the invalidity of Chapter 399 of the 1933 Public-Local Laws of North Carolina; and (c) that Ordinance No. 383 enacted by the City Council of the City of Asheville, on 11 August 1955, and every section thereof, is in all respects lawful and valid.

Judgment was entered accordingly, the temporary restraining order theretofore entered was dissolved, the action was dismissed and the plaintiffs directed to pay the costs of the action to be taxed by the Clerk.

Plaintiffs appeal, assigning error.

Ward & Bennett, Roy A. Taylor, William M. Styles, for plaintiff appellants.

Robert W. Wells, Charles N. Malone, Frank M. Parker, for defendant appellee.

DENNY, J. The numerous exceptions and assignments of error preserved and brought forward on this appeal, in our opinion, present only three questions which require our consideration and determination. (1) Did the trial court err in holding that Chapter 399 of the 1933 Public-Local Laws of North Carolina is unconstitutional and contrary to Section 17, Article I, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States? (2) Did the trial court err in holding that the defendant City of Asheville is not estopped to assert the invalidity or unconstitutionality of the above Act? (3) Did the trial court err in holding that Ordinance No. 383, enacted by the City Council of the City of Asheville, on 11 August 1955, is lawful and valid and in full force and effect?

The correctness of the ruling of the court below on the first question posed, turns on whether or not the General Assembly has the power to prohibit a municipality from selling water to consumers residing outside its corporate limits at a higher rate than the rate fixed for consumers of water who reside within its corporate limits, where such outside consumers reside in a water or water and sewer district in which the taxpayers of the district have constructed the water or water and sewer facilities and are maintaining them out of ad valorem taxes levied on the real and personal property in the district.

A municipal corporation in this State has a dual capacity. One is governmental or political, and the other is proprietary or *quasi*-private. *Asbury v. Albemarle,* 162 N.C. 247, 78 S.E. 146;

Holmes v. Fayetteville, 197 N.C. 740, 150 S.E. 624; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209; *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371.

A municipality acting in its governmental capacity is an agency of the State for the better government of those residing within its corporate limits, and while public utilities, like water and lights, are now held to be a necessary municipal expense, *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029, even so, they are not provided by a municipality in its political or governmental capacity, except insofar as they may furnish water for extinguishing fires and for other municipal purposes, *Harrington v. Greenville,* 159 N.C. 632, 75 S.E. 849; *Howland v. Asheville,* 174 N.C. 749, 94 S.E. 524; *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411; and provide electric energy for lighting streets, *Baker v. Lumberton,* 239 N.C. 401, 79 S.E. 2d 886; or for the operation of traffic light signals, *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770, or other municipal purposes, but, in its proprietary capacity it acts exclusively in a private or *quasi*-private capacity for its own benefit.

"In matters purely governmental in character it is conceded that the municipality is under the absolute control of the legislative power, but as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." *Asbury v. Albemarle, supra.* No one challenges the power of the State to fix rates for private utilities or for utilities operated in a proprietary capacity by a municipality.

In this State, the power to regulate and to establish the rates to be charged by intrastate railroads, motor vehicle carriers of passengers and freight, power companies, etc., has been delegated to the North Carolina Utilties Commission. However, the right to establish rates for municipally owned electric light plants, water, or water and sewer systems, has never been given to the Utilities Commission.

In *Utilities Commission v. State,* 239 N.C. 333, 80 S.E. 2d 133, this Court, speaking through *Barnhill, J.,* later *C.J.,* said: "This right to grant franchises to public service corporations and to fix or approve the rates to be charged by them for the services rendered the public rests in the Legislature. The General Assembly may act directly or it may delegate its authority to an administrative agency or commission of its own creation. However, no Act undertaking to delegate the rate-making function of the Legislature is valid unless the General Assembly prescribes rules and standards to guide the legislative agency in

exercising the delegated authority. *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *Hospital v. Joint Committee,* 234 N.C. 673 (concurring opinion at p. 684), 68 S.E. 2d 862; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310."

In 43 Am. Jur., Public Utilities and Services, section 83, page 624, *et seq.*, it is said: "In accordance with its right to regulate and control public utilities, a state may, under its police power and within constitutional limitations, regulate and prescribe reasonable rates at which charges may be made by public utilities for their services to the public. The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by the enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated, or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

In the last cited authority, section 94, page 636, we find this statement: "The well recognized general rule is that when a governmental body has the power to regulate the rates for charges for services by public utilities to consumers, that power includes the power to fix any maximum rate which is fair and just to the consumer if it will also produce a proper return to the public utility."

It is clear that the power to establish rates is a governmental function and not a proprietary one. It is likewise clearly established in this jurisdiction that municipalities "are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers may be changed, modified, diminished, or enlarged, and, subject to the constitutional limitations, conferred at the legislative will. There is no contract between the State and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted." *Holmes v. Fayetteville, supra.*

In the case of *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 80 L.Ed. 1033, in speaking for the Court, *Chief Justice Hughes* said: "The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or

through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. * * * When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are especially applicable to such an agency are met, as in according a fair hearing, and acting upon evidence and not arbitrarily."

Likewise, in *City of Seymour v. Texas Electric Service Co.*, 66 F. 2d 814 (C.C.A. 5), *(certiorari* denied 290 U.S. 685, 78 L.Ed. 590), it is said: "* * * In owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity, (but) when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the State, as regulator. It exerts not the contractural power of the city, but the sovereign power of the state." See also *Shirk v. Lancaster,* 313 Pa. 158, 169 A 557, 90 A.L.R. 688.

The Legislature has authorized a municipal corporation that owns a waterworks system to furnish water to any person, firm, or corporation outside its corporate limits, where the service is available. G.S. 160-255. Likewise, the Legislature has seen fit to adopt G.S. 160-256, which in pertinent part provides: "The governing body, or such board or body which has the management and control of the waterworks system in charge, may fix such uniform rents or rates for water or water service as will provide for the payment of the annual interest on existing bonded debt for such waterworks system, for the payment of the annual installment necessary to be raised for the amortization of the debt, and the necessary allowance for repairs, maintenance, and operation, and when the city shall own and maintain both waterworks and sewerage systems, including sewerage disposal plants, if any, the governing body shall have the right to operate such system as a combined and consolidated system, and when so operated to include in the rates adopted for the waterworks a sufficient amount to provide for the payment of the annual interest on the existing bonded debt for such sewerage system or systems, for the payment of the annual installment necessary to be raised for the amortization of such debt, and the necessary allowance for repairs, maintenance and operation. * * * Provided, however, that for service supplied outside the corporate limits of the city, the governing body, board or

body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits * * *"

Unquestionably, the above statute contains ample standards to guide a municipality in exercising the delegation of authority to fix fair and just water rates. Moreover, Chapter 399 of the 1933 Public-Local Laws of North Carolina merely established separate classifications as between services supplied outside the corporate limits of the City of Asheville, "where the service is available," to persons, firms, and corporations not located within a water or water and sewer district, and to persons, firms, and corporations outside the corporate limits of the City of Asheville, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of constructing such water or water and sewer system.

The Legislature by adopting the above Act did not establish the rates to be charged to consumers in the water or water and sewer districts involved, although it had the right to do so; but it did direct the City of Asheville not to charge rates to the persons, firms, and corporations in these districts in excess of the rate or rates fixed from time to time by the governing body of the City of Asheville to be paid by persons, firms, and corporations within the corporate limits of the City. The governing body of the City of Asheville is free to raise or lower its present rates if in its judgment the rates are too high or too low.

This Court has heretofore held that Section 4, Article VIII, of our Constitution does not forbid the Legislature from passing special acts, amending charter of cities, towns, and incorporated villages, or conferring upon municipal corporations additional powers, or restricting the powers theretofore vested in them. *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187; *Holton v. Mocksville,* 189 N.C. 144, 126 S.E. 326; *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377; *Deese v. Lumberton,* 211 N.C. 31, 188 S.E. 857.

In *Kornegay v. Goldsboro, supra,* it is said: "The defendant is a public corporation and section 1 of Article VIII 'would seem clearly to have reference to private or business corporations, and does not refer to public or *quasi*-public corporations acting as governmental agencies.' " *Mills v. Commissioners,* 175 N.C. 215, 95 S.E. 481.

The Court, in this same case, in discussing the validity of the special act under consideration, said: "* * * Is it not clear that the true intent of the last section (section 4 of Article VIII) is to impose the duty of passing general laws relating to cities

and towns, leaving it to the discretion of the legislature to enact special acts as the needs of the municipalities may require?" The Court then continues: "The reason for making this distinction is that the needs of the different communities are so diverse that no legislature could foresee the emergencies that would arise in different localities or the necessity for additional powers dependent on changing conditions, and could not provide for them by general legislation, and the present case is an apt illustration of the wisdom of this course."

In the case of *Holton v. Mocksville, supra, Conner J.*, speaking for the Court, said: "Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, town and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. *Kornegay v. Goldsboro,* 180 N.C. 441."

In our opinion, since a municipality has no legal right either in its governmental or proprietary capacity to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made; provided, such terms permit the establishment of a rate or rates which will be fair and just to the consumer and will produce a proper return to the municipality.

In the instant case, it will be presumed that the City Council of the City of Asheville acted in good faith in establishing water rates for its own consumers residing within its corporate limits and that it based the rates on the provisions contained in G.S. 160-256. There is nothing on this record which tends to show that the rate or rates to be charged the consumers in these water or water and sewer districts are unjust and confiscatory.

It is clear, under the facts disclosed on this record, that every purchaser of water in these water or water and sewer districts, from the City of Asheville, at the rates fixed for consumers of water within the city limits of Asheville, are paying as much of the debt service and interest, as well as the cost of operating, repairing, and maintaining the water and sewer systems of the City of Asheville, as any resident of the City who purchases a like amount of water. Moreover, in addition thereto, the persons, firms, and corporations in these water or water and sewer dis-

tricts are being taxed to pay the debt service, including interest on bonds issued to construct the water or water and sewer system in these respective districts, as well as taxing themselves for the repair and maintenance of such water or water and sewer system. Asheville contributed nothing to the construction of these systems, neither does it contribute anything to the cost of repairing and maintaining them. Asheville renders no service except to pump the water into the water systems, read the meters, which it did not furnish and does not service, and to bill the consumers.

It further appears from the record that a little over twenty-eight per cent of the meters through which the City of Asheville furnishes water are outside its corporate limits and the City derives a little over twenty-seven per cent of its total income from its water system from these outside consumers.

In our opinion, in light of all the facts and circumstances revealed on this record, the Legislature had the power to enact Chapter 399 of the Public-Local Laws of 1933, and that such Act is constitutional and valid and is binding on the City of Asheville insofar as it pertains to the right to sell water to persons, firms, and corporations who obtain water through mains constructed and maintained at the expense of the taxpayers in these water or water and sewer districts. We further hold that such Act does not violate Section 17, Article I, of the Constitution of North Carolina, or the Fourteenth Amendment to the Constitution of the United States.

The City of Asheville, however, still has the right to establish a different rate for service outside its corporate limits to persons, firms, and corporations not located or residing in a district that has constructed and maintained at its own expense its water or water and sewer system. *Construction Co. v. Raleigh,* 230 N.C. 365, 53 S.E. 2d 165; *Fulghum v. Selma,* 238 N.C. 100, 76 S.E. 2d 368. In *Construction Co. v. Raleigh, supra,* we held that in the absence of any constitutional or statutory restriction the rates and fees that may be charged to residents outside the corporate limits of a city or town are matters to be determined by its governing body in its sound discretion. It is optional with the City of Asheville as to whether or not it will continue to furnish these districts with water, but if it does do so, it must do so on the prescribed terms. Furthermore, the City is not authorized to contract for the sale of water to outside consumers except with respect to its surplus water.

The appellee contends the statute is unconstitutional because it provides that it shall be unlawful for the City to sell its water to outside consumers above the rate established for consumers in-

side the corporate limits of the City. This contention is without merit. While ordinarily the violation of a regulation established by a rate-making body subjects the violator to a penalty, in many instances such violation is declared to be a misdemeanor. G.S. 60-6; G.S. 62-121.72 (3); G.S. 62-128.

We do not consider the case of *Missouri P. R. Co. v. Tucker*, 230 U.S. 340, 57 L.Ed. 1507, and similar cases cited by the appellee, as controlling on the facts in the present case. In those cases, the complaining party or parties had no voice in the establishment of the rates; nor were they given the right to be heard. Here, the complaining party was left free to fix the rate which the General Assembly directed should be the maximum rate to be charged where certain factors or conditions exist. Moreover, the complaining parties in the cases cited by the appellee were compelled by law to operate under the rate or rates promulgated. Such is not the case here. As we have heretofore pointed out, the City of Asheville is under no duty to sell water to consumers residing outside its corporate limits. *Fulghum v. Selma, supra.* However, under the facts revealed by the record, it would seem that the City, in view of its control of the sources of water in the area, does have a moral duty to furnish water to these districts.

On the second question posed, we hold that a municipality cannot be estopped from enforcing its legal ordinances or from contesting the validity of an act it deems unconstitutional. *Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 897 and cited cases.

In light of the conclusions we have reached, we hold that Ordinance No. 383, enacted by the City Council of the City of Asheville, on 11 August 1955, is invalid insofar as it established a different rate or rates for persons, firms, and corporations within these water or water and sewer districts and the rate or rates established for persons, firms, and corporations within the City limits of Asheville. The Ordinance is valid insofar as it applies to persons, firms, and corporations outside the City of Asheville, but not within a district that has established and maintains, at its own expense, the water or water and sewer system.

The judgment of the court below is

Reversed.

IN RE APPLICATIONS FOR REASSIGNMENT: JOSEPHINE OPHELIA BOYD FROM DUDLEY HIGH SCHOOL TO SENIOR HIGH SCHOOL; HAROLD MCDUFFIE DAVIS, ELIJAH J. HERRING, JR., AND RUSSELL HERRING FROM LINCOLN JR. HIGH SCHOOL TO GILLESPIE JR. HIGH SCHOOL; BRENDA KAY FLORENCE AND JIMMIE B. FLORENCE FROM BLUFORD SCHOOL TO GILLESPIE ELEMENTARY SCHOOL.

(Filed 10 January, 1958)

1. **Injunctions § 8: Notice § 3—**

Upon the preliminary hearing of petitions for mandatory injunctions, held at the request of petitioners, motion of respondents, who seek no affirmative relief, to dismiss the petitions may be heard even though petitioners are not given ten days notice of the motion, G.S. 1-581 having no application.

2. **Schools § 3d—**

Where a municipal board of education grants the applications for reassignment of certain pupils, appeal from its decision may be taken as to each child only by the child's parent, guardian, or person standing *in loco parentis*, and the parents of other children attending the schools to which the reassignments are made are not the parties aggrieved by such reassignments within the purview of G.S. 115-179, and have no standing in court to contest the assignments. Moreover, each reassignment must be challenged separately and cannot be challenged *en masse*.

3. **Statutes § 5b—**

The interpretation given to proposed legislation by the department proposing it, as well as the interpretation by the department responsible for its administration, are aids in the construction of the statute.

4. **Injunctions § 8—**

Where, upon the hearing of petitions for mandatory injunctions, petitioners allege no invasion of any legal right, injunctive relief is correctly denied.

PARKER, J., concurs in result.

APPEAL by J. E. Turner, Jr. and others from *Preyer, J.*, at Chambers, August 1957, GUILFORD.

Greensboro City Board of Education (hereinafter designated as Board) in May 1957 promulgated rules and regulations for the enrollment and assignment of pupils as provided by Art. 21, c. 115 of the General Statutes of North Carolina. The Board is an administrative unit charged with the responsibility of operating the public schools within its boundaries. Prior to the 1957-1958 school year the Board operated separate schools for members of the white and Negro races.

During June 1957 and within the time prescribed by the regulations, applications were made by parents of Negro children for reassignment from schools they had previously attended to schools theretofore restricted to white children. The applica-

tions, made for individual children, designated the school the applicant desired his child to attend and gave the reason for the requested reassignment. Separate requests were filed for the reassignment of: (1) Josephine Ophelia Boyd to Senior High School; (2) Harold McDuffie Davis to Gillespie Junior High School; (3) Elijah H. Herring, Jr. to Gillespie Junior High School; (4) Russell Herring to Gillespie Junior High School; (5) Brenda Kay Florence to Gillespie Elementary School; (6) Jimmie B. Florence to Gillespie Elementary School. The Board held a public hearing on each application on 18 June 1957. It did not at that time reach a decision on any of the applications and postponed further consideration of the applications to its regular meeting in July. At its regular meeting on 23 July 1957 the Board again considered each of these applications and directed the enrollment of each of these six children in the school specified in the application filed by his or her parent.

On 2 August 1957 James E. Turner, Jr., James A. Strunks, and James W. Cudworth filed in the Superior Court of Guilford County papers reading as follows:

"IN RE: APPLICATIONS FOR REASSIGNMENT:

Josephine Ophelia Boyd from DUDLEY HIGH SCHOOL TO SENIOR HIGH SCHOOL; Harold McDuffie Davis, Elijah J. Herring, Jr., and Russell Herring from LINCOLN JR. HIGH SCHOOL TO GILLESPIE JR. HIGH SCHOOL; Brenda Kay Florence and Jimmie B. Florence from BLUFORD SCHOOL TO GILLESPIE ELEMENTARY SCHOOL."

"NOTICE OF APPEAL
TO THE GREENSBORO CITY BOARD OF EDUCATION:

You are hereby notified that an appeal has been taken from the order or orders of said Greensboro City Board of Education, reassigning the above named Negro children to the designated white schools. A copy of said appeal is hereto attached."

"APPEAL ENTRY

BEFORE THE GREENSBORO CITY BOARD OF EDUCATION

J. E. TURNER, JR., JAMES A. STRUNKS and JAMES W. CUDWORTH, being citizens and taxpayers of Greensboro and Guilford County, N. C., and being parents of white children assigned to Senior High School and Gillespie Park Elementary and Junior High Schools, and being aggrieved by the order or orders of The Greensboro City Board of Education, on their own behalf and on the behalf of all other parents and taxpayers similarly situated do hereby, acting through their attorney, except to the order or orders of The Greensboro City Board of Education

entered on July 23, 1957, reassigning the above named Negro children to Senior High School and Gillespie Park Elementary and Junior High Schools. Appeal is hereby taken to the Superior Court of Guilford County under provisions of General Statutes of North Carolina, Section 115-179."

Copies of the "Notice of Appeal" and "Appeal Entry" were, on 2 August 1957, served on the Secretary of the Board.

On 22 August 1957, a petition entitled "IN RE: APPLICATION FOR REASSIGNMENT: Josephine Ophelia Boyd from Dudley High School to Senior High School", in which J. E. Turner, Jr., Mrs. A. M. Pickard, H. G. Stubblefield, Mrs. H. G. Stubblefield, Alton R. Braswell, J. H. Cockman, and Mrs. J. H. Cockman are designated petitioners, was filed with the Clerk of the Superior Court of Guilford County. Petitioners allege in brief that they are citizens and taxpayers of Greensboro and Guilford County and are the parents of white children assigned to Senior High School, that heretofore such school has been attended by white pupils only, that the applicant (Josephine Ophelia Boyd) reassigned is a Negro child and has heretofore attended a school operated exclusively for Negroes, that an application had been filed with the school board for the reassignment of the applicant, that the application had been favorably acted on and the child reassigned to the school theretofore operated exclusively for white children, that the order of the board directing such reassignment "will disrupt the orderly and efficient administration of said public school and will greatly impair the proper and effective instruction of the pupils there enrolled and will gravely endanger the health, safety, and welfare of the children there enrolled."

Petitioners aver they are parties aggrieved within the meaning of the statute, c. 366, S.L. 1955, G.S. 115-179. They pray for an order enjoining the Board from enrolling and permitting the applicant to attend the designated school.

Similar petitions seeking the same relief were filed by J. E. Turner, Jr. and others with respect to each of the other five children who had been reassigned by the Board.

Upon the filing of the petitions, Judge Preyer gave notice to petitioners and the Board that a hearing would be held on 29 August 1957.

The Board filed: (1) a motion to dismiss the appeal for that (a) the parties named were not "persons aggrieved," and hence were not permitted to appeal, and (b) appeals could only be taken from orders made on specific applications; (2) answers to each of the petitions seeking to enjoin the Board from enrolling the named children. The answers allege the Board acted in good faith in complying with the assignment statute.

At the time fixed for the hearing, counsel for appellants and for the Board announced that they were ready to proceed. Counsel for appellants requested the court not to consider at that time the motion of the Board to dismiss or the demurrer *ore tenus* then made.

The court proceeded with the hearing, found as a fact that the Board acted in good faith in the performance of the duties imposed on it by law. It concluded that the assignment statute was constitutional, that Turner, Strunks, and Cudworth were not parties aggrieved under the statute, and that appeals could only be taken by an aggrieved party from a ruling on a specific application, and for that reason the attempted appeal was ineffective. He declined to issue an order restraining the Board from assigning the named children and declined to enjoin pending the hearing of this appeal.

Appellants-petitioners excepted and appealed.

J. J. Shields for petitioner appellants.
Robert F. Moseley and Welch Jordan for respondent appellee.

RODMAN, J. Four errors are assigned: (1) Hearing the motion to dismiss; (2) granting the motion to dismiss the appeal; (3) refusal to issue the restraining order prayed for; and (4) refusal to issue a restraining order pending the hearing of this appeal.

The date for the hearing was fixed at the request of appellants. This date was seven days after the petitions were filed seeking mandatory injunctions. At the time fixed for the hearing appellants announced their readiness to proceed, with knowledge of the motion to dismiss, filed two days prior to the hearing and five days after the filing of the petitions for mandatory injunctions. The motion to dismiss sought no affirmative relief. It was a mere statement of the reasons why the parties seeking orders from the court were not entitled to call on the court to act. G.S. 1-581 has no application to the factual situation here presented. *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709; *Harris v. Board of Education*, 217 N.C. 281, 7 S.E. 2d 538.

Is the motion to dismiss the appeal soundly based? The history of the assignment statute, the reasons given by its sponsors for its enactment, the interpretation given to it by the Advisory Committee on Education appointed pursuant to legislative direction, the language of the statute, and judicial interpretation are all in accord. Each suggests an affirmative answer.

History of the statute: North Carolina, since the beginning of the present century, has consistently pursued a policy of

providing better educational facilities for all of its children. Illustrative: c. 1046, S.L. 1953, authorizing the issuance of $50,000,000 in bonds to provide funds to assist in construction of school buildings; c. 1156, S.L. 1953, appropriating in excess of $120,000,000 per year for public education. These appropriations were materially supplemented by local funds. Our law at that time was mandatory that the different races should be educated in separate schools but without discrimination in favor of either race. Art. IX, s. 2, Constitution of 1875. This policy of separation for educational purposes had been accepted as constitutional since the decision in *Plessy v. Ferguson,* 163 U.S. 537, 41 L.Ed. 256.

The decision in the Segregation Cases *(Brown v. Topeka)* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180, announced on 17 May 1954, immediately created problems for North Carolina. How could our declared purpose of providing an education for our children be effectively pursued? To help in finding an answer to this question, Governor Umstead, a staunch advocate of public education, on 10 August 1954, appointed a committee "to study the effects of the decision of the Supreme Court of the United States of May 17, 1954, dealing with racial segregation in the public schools and make recommendations as to how the problems arising therefrom might be met." This committee was composed of seventeen distinguished citizens of North Carolina. Both races were represented. The recognition given to public schools, higher education, industry, agriculture, the legal profession, and communications and public information is apparent from a casual examination of committee membership.

Governor Umstead died in the fall of 1954. The committee made its report to Governor Hodges. The report was unanimous. It was filed 30 December 1954. It was promptly made available to the Legislature which convened in January 1955. The committee, having declared its belief in the desire of the people of the State to provide for the public education of their children in a legal manner, said: "The Committee is of the opinion that the enrollment and assignment of children in the schools is by its very nature a local matter and that complete authority over these matters should be vested in the county and city board of education. With such authority local school boards could adopt such plans, rules and procedures as their local conditions might require. The Committee finds that public school problems differ widely throughout North Carolina and that there is even a wide variation of problems and conditions within counties themselves. As these problems unfold and develop from month to month and from year to year local school administrative units could move

to meet each problem as it arises if such units are given complete authority over the matters referred to above. We, therefore, recommend that the General Assembly of North Carolina enact the necessary legislation to transfer complete authority over enrollment and assignment of children in public schools and on school buses to the county and city boards of education throughout the state."

The committee recommended that the Legislature authorize a continuing study of the problem.

The 1955 Legislature gave its approval to the report by enacting the assignment statute and providing for a committee of seven to continue the study. Acting pursuant to legislative direction, Governor Hodges appointed a committee of seven, known as the North Carolina Advisory Committee on Education.

That Committee made a report 5 April 1956. It recommended that all school units "1. Recognize that there is no law compelling the mixing of the races. 2. Recognize that since the Supreme Court decision there can be no valid law compelling the separation of the races in public schools. 3. Declare that initial assignments to schools will be made in accordance with what the assigning unit (or officer) considers to be for the best interest of the child assigned, including in its consideration, residence, school attended during the preceding year, availability of facilities, and all other local conditions bearing upon the welfare of the child and the prospective effectiveness of his school."

Further touching on the assignment statute, the Committee said: "It may well be that before the people of North Carolina will give the necessary support to an honest trial of the assignment plan they will need to be assured of escape possibilities from intolerable situations—assured that no child will be forced to attend a school with the children of another race in order to get an education and assured, second, that if a public school situation becomes intolerable to a community, the school or schools in that community may be closed. To achieve these objectives there must be some changes in the North Carolina Constitution and some legislative enactments based thereon."

It recommended the calling of a special session of the General Assembly in the summer of 1956. On 23 July 1956 the Advisory Committee on Education filed its second report. The report was addressed to Governor Hodges, Lt. Governor Barnhardt, and Mr. Larry I. Moore, speaker of the House of Representatives. It contained proposed bills to be submitted to a special session of the General Assembly to accomplish the general purpose declared in its report of April 1956.

Among the bills proposed was a bill amending the assignment statute of 1955 which had then been incorporated in the 1955

supplement to our Consolidated Statutes as Art. 21, G.S. 115-176, 115-179. A comparison of the original with the amended statute demonstrates the purpose to make the statute conform to practical application in the operation of the schools. The 1955 act used the words "enroll" and "enrollment." These words were changed to conform to the school practice to "assign" and "assignment." The 1955 act required the enrollment or assignment of each child in an administrative unit to a school within that administrative unit. This was modified to permit assignment to a school outside of the administrative unit, a need in part suggested by *In re Assignment of School Children,* 242 N.C. 500, 87 S.E. 2d 911. Provision was made for the original mass assignment of children without the formality of a hearing and with notice given personally or by publication where children would attend during the coming year but with the right reserved to apply for a reassignment to another school.

The report of the Committee became known as "The Pearsall Plan." The Committee issued a bulletin entitled "The Pearsall Plan to Save our Schools." It lists legislative recommendations made by it and says with respect to the Assignment Act: "This bill would make certain clarifications in the present Assignment Act which was enacted by the 1955 Session of the General Assembly."

The same document contains a series of questions and answers designed to pin point the Committee's recommendations and the reasons underlying its recommendations. We quote pertinent questions and answers: "1. What is the purpose of this Program? A. It is an effort to preserve North Carolina's Public School system . . . 5. If the people approve this program will my child be forced to attend school with a member of another race? A. Emphatically No. 6. Is this whole thing an effort to defy the U. S. Supreme Court? A. It is not defiance. It is an attempt to stay within that decision, even though a great majority of our citizens disapprove the Supreme Court's ruling . . . 8. Did the U. S. Supreme Court say that my child has to go to school with a member of another race? A. No. 9. What did it say, in effect? A. Only that we cannot deny admission of a child to a public school solely on the basis of race. 10. If conditions in my child's public school become intolerable, what happens? A. Your school board can order an election; or 15% of the people in your school unit can ask for an election on suspending it. If the school is closed, it can later be reopened by vote of the people in the same manner. 11. Suppose children of another race are assigned to the school attended by my child and I object? What remedy will I have? A. Your child can be reassigned to another public school provided one is reasonably

available, or, if one is not available, you can withdraw your child from school. Then you may send your child to private school."

The interpretation here given is clear: If a parent is dissatisfied with the operation of the school because of the assignment of another pupil to that school, his remedy is to request reassignment of his child, not to appeal the assignment of the other pupil.

The Circuit Court of Appeals for the Fourth Circuit, in *Carson v. Board of Education of McDowell County*, 227 F. 2d 789, reiterated the conclusion that a child could not, solely because of color be denied the right to attend a public school. It also took note of the assignment statute, c. 366, S.L. 1955, and held that an adequate administrative remedy for each child to assert his rights as declared in the Segregation Cases, *supra*. This decision was noted with approval in the April 1956 report of the Advisory Committee.

The history of the statute, we think, shows that the "person aggrieved" permitted to appeal from a decision of a school board assigning a child is the child assigned or some one acting in behalf of that child.

The interpretation given to proposed legislation by the department proposing it, as well as the interpretation by the department responsible for its administration, is helpful to a court when it is called upon to interpret legislative language. *Cannon v. Maxwell*, 205 N.C. 420, 171 S.E. 624; *Corp. Com. v. R. R.*, 185 N.C. 435, 117 S.E. 563; *Comrs. v. Davis*, 182 N.C. 140, 108 S.E. 506; 50 Am. Jur. 274; Southern Statutory Construction, 3rd Ed., Secs. 5003-4.

To give the statute the interpretation claimed by appellants would be contrary to the declared intent of the committee which recommended its passage and would raise grave question as to its constitutionality. *Gibson v. Board of Public Instruction of Dade County*, 246 F. 2d 913; *School Board of City of Newport News, Va. v. Atkins*, 246 F. 2d 325; *School Board of Charlottesville, Va. v. Allen*, 240 F. 2d 59; *Orleans Parish School Board v. Bush*, 242 F. 2d 156.

The language of the statute is clear with respect to the right to apply for a reassignment. That right is limited to the parent, guardian, or person standing *in loco parentis* to the child seeking reassignment. G.S. 115-178. Notice of the Board's decision must be given applicant or his parent. No notice is required to be given to the parents of other children; they are not parties to the hearing; they are not entitled to notice of the Board's decision.

The statute, G.S. 115-179, grants "any person aggrieved by the final order" the right to appeal within ten days of the date of the order. Appellants insist that they are "persons aggrieved" and therefore entitled to appeal. We do not agree.

The words "party aggrieved" with respect to the right to appeal have been in our statute since 1868, G.S. 1-271. The phrase has been defined on a number of occasions and has been applied in a multitude of cases. "An aggrieved party is one who has been injuriously affected by the act complained of, one who has thereby suffered an injury to person or property. 3 C.J.S. 350, 1 C.J. 973. Websters' International Dictionary defines an aggrieved party as one 'adversely affected in respect of legal rights.'" *James v. Denny,* 214 N.C. 470, 199 S.E. 617; "The party aggrieved, in statutes of this character, is the one whose legal right is denied," *Summers v. R. R.,* 138 N.C. 295; "And a 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court." *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; "A person is . . . aggrieved, in the legal sense, when a legal right is invaded by the act complained of . . ." *American Surety Co. v. Jones,* 51 N.E. 2d 122 (Ill.); ". . . 'aggrieved' refers to a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation." *In re Appeal of Town of Greenfield,* 73 N.W. 2d 580 (Wisc.); *Gregg v. Williamson,* 246 N.C. 356, 98 S.E. 2d 481; *Queen City Coach Co. v. Carolina Coach Co.,* 237 N.C. 697, 76 S.E. 2d 47; *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566; *Gill v. McLean,* 227 N.C. 201, 41 S.E. 2d 514; *In re Estate of Suskin,* 214 N.C. 219, 198 S.E. 661; *Summerlin v. Morrisey,* 168 N.C. 409, 84 S.E. 689; *Faison v. Hardy,* 118 N.C. 142; *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219; *Recreation Com. v. Barringer,* 242 N.C. 311, 88 S.E. 2d 114.

Applicants who were reassigned were entitled to attend one of the schools provided by the State for the education of its youth. Children of appellants were likewise entitled to attend one of the schools provided by the State. Neither had a right to prescribe the manner in which the other should be educated. To say that the parent of every child has a right to challenge the assignment of another child because the assignment is not in the best interest of his child or to challenge the right for any of the other reasons provided by statute would, for all practical purposes, make the administration of the public school system an utter impossibility. We think the Legislature did not intend to give a broader connotation to the words "person aggrieved" as used in this statute than has heretofore been given to similar words. We conclude that "person aggrieved" as used in this

statute means the person who makes application for the particular child for reassignment.

What is the character of the proceeding authorized by statute for the reassignment of a pupil? We think the question is answered by this quotation from *Joyner v. Board of Education*, 244 N.C. 164, 92 S.E. 2d 795: "The question is settled by the statutes governing the enrollment of pupils in the public schools of North Carolina and, in the opinion of the Court, they do not authorize the institution of class suits upon denial of an application for enrollment in a particular school. . . . Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing *in loco parentis* to any child or children for the admission of such child or children to a particular school, must be prosecuted in behalf of the child or children by the interested parent, guardian or person standing *in loco parentis* to such child or children respectively and not collectively." That case clearly and definitely interprets the statute to the effect that consideration of applications for reassignment must be made individually and not *en masse* and appeals heard *de novo*. If the appeal is to be heard *de novo* as the statute provides, every reason given for individual hearings in the first instance applies with equal force to the hearing on appeal. Appeals are not intended to settle generalities. They deal with rights of individual students.

It will be noted that the students whose assignments are here challenged by appellants have been assigned to different schools. Some are in elementary school; some, in high school; some, in junior high school. Patently the same questions are not involved in each instance. Even if appellants were parties aggrieved, it is manifest that the appeal here attempted does violence to the principles enunciated in the *Joyner* case. We adhere to the interpretation then given to the statute.

In effect that was the interpretation placed on the statute in *Carson v. Board of Education of McDowell County, supra*, referred to approvingly by the Advisory Committee on Education.

For each of the reasons given we conclude that Judge Preyer was correct in dismissing appellants' attempted appeal from the Board.

Since there was nothing pending before the court and the petitioners alleged no invasion of any rights of theirs, it follows that the court was correct in denying injunctive relief sought. The judgment is

Affirmed.

PARKER, J., concurs in result.

C. J. MOORE, JR. v. DAVE HUMPHREY

(Filed 10 January, 1958)

1. **Judgments § 27b—**

A void judgment is one lacking some essential element, such as jurisdiction, and may be ignored or treated as a nullity at any time.

2. **Judgments § 27d—**

An irregular judgment is one entered contrary to the procedure and practice allowed by law in some material respect, and may ordinarily be set aside on motion in the cause.

3. **Judgments § 27c—**

An erroneous judgment may be corrected solely by appeal.

4. **Claim and Delivery § 5—**

The sureties on plaintiff's undertaking in claim and delivery are parties of record, and a defendant who recovers judgment against the plaintiff is entitled to summary judgment against plaintiff's sureties in accordance with the statute and the terms of the bond.

5. **Same—**

While ordinarily judgment for defendant in claim and delivery should provide first for the return of the property with damages for its deterioration and detention, where the parties stipulate that the property cannot be returned, such provision is neither necessary nor appropriate.

6. **Trial § 5½—**

A stipulation of the parties is a judicial admission and binding on them.

7. **Same: Claim and Delivery § 5—**

The sureties in plaintiff's undertaking in claim and delivery are bound by stipulations entered into between plaintiff and defendant and by admissions in the pleadings in that action, there being no contention that plaintiff's attorneys were not authorized to make the stipulations and admissions.

8. **Pleadings § 25½—**

An admission in a pleading is as effectual as if the fact admitted were found by a jury, and is binding upon the pleader even though the admission is not introduced in evidence.

9. **Trial § 39—**

The verdict of the jury may be given significance and interpreted by reference to the pleadings, the facts in evidence, the admissions of the parties and the charge of the court.

10. **Appeal and Error § 35—**

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts.

11. Claim and Delivery § 5—When property cannot be returned, plaintiff's sureties are liable for its value at time of wrongful seizure.

Where in claim and delivery proceedings the pleadings, stipulations, and verdict establish that plaintiff's seizure of the property under his conditional sales contract was wrongful, that plaintiff could not return the property, and that the value of the property at the time of its seizure was in a designated sum, judgment against the sureties on plaintiff's undertaking for the stipulated value of the property at the time of seizure is not irregular, damages sustained by defendant as the result of the wrongful seizure and detention of the property being in excess of this amount.

APPEAL by J. B. Hunt, Jr., and Patty Penn Hunt, movants, from order of *Bickett, Resident Judge,* entered October 5, 1957, in Chambers. From WAKE.

Judge Bickett's order denied the motion made September 13, 1957, by the Hunts, sureties on plaintiff's $12,000 undertaking in claim and delivery proceedings, to vacate and set aside, insofar as it related to and affected them, the judgment signed by Judge Carr at June Civil Term, 1957, after a contested jury trial.

These events preceded the entry of said judgment:

On October 4, 1955, when plaintiff commenced this action, he obtained (1) an order extending the time for filing complaint, and (2) an order, in claim and delivery proceedings, for the seizure of property then in possession of defendant. In his affidavit, plaintiff set forth, *inter alia,* that he was the owner and entitled to the immediate possession of the property by virtue of a contract between plaintiff and defendant; that defendant wrongfully detained possession thereof; and that the value of the property was $6,000.

To obtain said order for the seizure of the property, plaintiff was required to give and did give a $12,000 undertaking, with J. B. Hunt, Jr., and Patty Penn Hunt as sureties, which, after recitals, contained these provisions, viz.:

"Now, therefore, and in consideration of the taking of said property, or any part thereof, by the Sheriff or other lawful officer of said county, by virtue of the said affidavit and the requisition thereon endorsed, we, the undersigned, hereby undertake and become bound to the defendant in the sum of TWELVE THOUSAND (12,000) DOLLARS, for the prosecution of this action by the said plaintiff, for the return of the property to the defendant, with damages for its deterioration and detention, if such return is adjudged and can be had, and, if for any cause return cannot be had, for the payment to the defendant of such sum as may be recovered against the plaintiff for the value of

the property at the time of the seizure, with interest thereon as damages for such seizure and detention."

The property was seized and taken from defendant on or about October 11, 1955; and, upon defendant's failure to file an undertaking for the return thereof to him, the sheriff delivered the property so seized to plaintiff.

The complaint was filed October 24, 1955; and the answer, which alleged a counterclaim, was filed December 16, 1955. The respective pleadings, in substance, contained these allegations, viz.:

Plaintiff alleged: "3. That on or about September 9, 1953 the plaintiff and defendant entered into a contract under the terms of which the plaintiff agreed: to give the defendant possession of a certain moveable building described as 'A Little Moore,' which was located at 2116 Hillsboro Street, Raleigh, North Carolina, and certain apparatus and equipment *described in said instrument* that was then located in said building: to give and convey to the defendant absolute title to said building and apparatus, whenever, *within five years and six and two-thirds months from date of said instrument,* the defendant should have paid, pursuant to the terms of said instrument the sum of $10,000, with payments due each month after date thereon in the sum $150.00 each and every month. And the defendant agreed under the terms of said instrument, that, in consideration of having possession as therein provided and the plaintiff's premises therein contained, he would pay the said money as aforesaid; that should he default and not make payments under the terms of said instrument, he would return the building, equipment and apparatus to the plaintiff *in the same condition as* the building, equipment and apparatus was in *when he took possession of them,* that is to say as of September 9th 1953." Except as to the words italicized, defendant admitted the said allegations of plaintiff's said paragraph 3.

Plaintiff alleged and defendant admitted: "4. That, pursuant to the terms of the written contract, the defendant took possession of said building and apparatus described, and continued to hold and enjoy possession of same from about the 9th day of September 1953 until on or about the 11th day of October 1955." (Note: The written contract is not in the record.)

Thereupon, plaintiff alleged that defendant was in default in respect of stipulated payments and that, "under the terms of said contract the property, fixtures and moveable building as enumerated in the contract reverts to the plaintiff." Plaintiff's prayer for relief was that he be adjudged the owner of said property and entitled to possession thereof; also, that he recover damages (1) on account of defendant's loss or removal

of certain equipment, and (2) on account of alleged deterioration of the building, fixtures and equipment while in defendant's possession.

Answering, defendant denied that he was in default or otherwise had breached the contract, averring that he had made all payments due under an amended schedule agreed upon and adopted by the parties.

As a counterclaim, defendant alleged that by reason of plaintiff's wrongful seizure and detention of said property, he had suffered substantial damages consisting of three items, (1) $5,000 damages, the reasonable cost and value of the improvements, repairs and additions defendant had made to said property, (2) $19,200 damages, "lost profits which could have been reasonably expected during the balance of the contract," and (3) $2,100 damages, the amount he had paid on account of the total agreed purchase price of $10,000.

Defendant's prayer for relief was that plaintiff recover nothing by his action; and "that the defendant have and recover of the plaintiff and his bondsmen" the said sums of $5,000, $19,200, and $2,100, respectively, to compensate him on account of his said alleged damages.

Plaintiff filed no reply to defendant's counterclaim.

At the trial by Judge Carr and a jury at June Civil Term, 1957, it was stipulated and agreed by counsel for plaintiff and defendant as follows:

"(1) That the property seized by the plaintiff cannot be returned to the defendant; (2) that the value of the property at the time of the seizure was $5422.89."

The issues submitted to and answered by the jury are set forth in Judge Carr's judgment, which judgment is as follows:

"This cause coming on to be heard before his Honor, Leo Carr, Judge presiding, and a jury, and the issues submitted to the jury having been answered as follows:

"1. Did the defendant breach the contract and lease, as alleged in the complaint? Answer: No.

"2. What damage, if any, has plaintiff sustained for equipment lost or mislaid by defendant? Answer:—

"3. Did the plaintiff breach the contract and lease, as alleged in the answer and counterclaim? Answer: Yes.

"4. What damage, if any, has defendant sustained by reason of plaintiff's taking and withholding the building and property? Answer: As to improvements on property—$3300.00; for refund for money paid $800.00; for loss of profits—$2890.00—this answer reduced by agreement of defendant to $1400.00.

"It is ORDERED, ADJUDGED AND DECREED that the plaintiff was not at the time of the commencement of this action, or at

any time since, entitled to possession of the personal property claimed by the plaintiff and seized by him in claim and delivery proceedings in this action; and that the taking possession of said property and every part thereof by the plaintiff was wrongful and unlawful;

"The parties plaintiff and defendant having stipulated that the plaintiff cannot return the property seized to the defendant and that the value of the property at the time of the seizure was $5422.89;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant have and recover, jointly and severally, from the plaintiff, C. J. Moore, Jr., and his bondsmen, J. B. Hunt, Jr., and Patty Penn Hunt, the sum of $5422.89.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant have and recover of the plaintiff, C. J. Moore, Jr., the sum of $77.11;

"IT IS FURTHER ORDERED that the plaintiff pay the costs of this action to be taxed by the Clerk."

Plaintiff excepted to said judgment, gave notice of appeal, was allowed fifty days to serve case on appeal, and appeal bond was fixed at $100. However, the appeal was not perfected.

On August 22, 1957, defendant caused execution to be issued against plaintiff and his sureties. Thereafter (date undisclosed), the Sheriff of Wake County served said execution on the sureties. On September 13, 1957, the said sureties, represented by counsel who had not appeared at said trial, filed their said motion, asserting therein that said judgment "was void, or irregular, or both void and irregular," as against the movants, to wit, the said sureties. Defendant in apt time replied to said motion. By agreement, the motion was heard by Judge Bickett, Resident Judge, in Chambers, on October 5, 1957.

Judge Bickett's order denied said motion. He made no findings of fact. There was no request that he do so.

Movants excepted to Judge Bickett's order and appealed. "The only exception is to the Order signed by *Bickett, J.*"

Smith, Leach, Anderson & Dorsett for J. B. Hunt, Jr., and Patty Penn Hunt, movants, appellants.

Harris, Poe & Cheshire for defendant, appellee.

BOBBITT, J. The judgment attacked by appellants was entered by Judge Carr at June Civil Term, 1957, at the conclusion of a contested jury trial. It was based on the verdict, on the stipulations and on plaintiff's $12,000 undertaking, admittedly signed by the Hunts as sureties.

Plaintiff's appeal was not perfected. If the judgment was *erroneous*, that is, based upon an erroneous application of legal principles to the established facts, it could be corrected only by this Court on appeal or on *certiorari*. *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409, and authorities cited.

This appeal presents this question: Is the judgment, on the face of the record, void or irregular, insofar as it relates to and affects the sureties on plaintiff's $12,000 undertaking, as asserted by appellants? Judge Bickett's answer was "No." We agree.

The distinction between void, irregular and erroneous judgments was stated by *Merrimon, C.J.*, in *Carter v. Rountree*, 109 N.C. 29, 13 S.E. 716, as follows: "A void judgment is one that has merely semblance, without some essential element or elements, as when the Court purporting to render it has not jurisdiction. An irregular judgment is one entered contrary to the course of the Court—contrary to the method of procedure and practice under it allowed by law in some material respect; as if the Court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same. *Vass v. Building Association*, 91 N.C. 55; *McKee v. Angel*, 90 N.C. 60. *An erroneous judgment is one rendered contrary to law. The latter cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a Court of Errors it shall be reversed or modified.* An irregular judgment may ordinarily and generally be set aside by a motion for the purpose in the action. This is so because in such case the judgment was entered contrary to the course of the Court by inadvertence, mistake or the like. A void judgment is without life or force, and the Court will quash it on motion, or *ex mero motu*. Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity." (Our Italics.) *Stafford v. Gallops*, 123 N.C. 19, 31 S.E. 265; *Moore v. Packer*, 174 N.C. 665, 94 S.E. 449; *Duffer v. Brunson*, 188 N.C. 789, 125 S.E. 619; *Dail v. Hawkins*, 211 N.C. 283, 189 S.E. 774; *Simms v. Sampson*, 221 N.C. 379, 20 S.E. 2d 554; *Mills v. Richardson, supra*. See McIntosh, N.C.P.&P., Secs. 651, 652 and 653.

The judgment was not void, for the court had jurisdiction of the subject matter and of the parties. As to the subject matter, there is no question or contention. As to the parties, it is well settled that sureties on the defendant's undertaking in claim and delivery proceedings, within the limits of their obligation, are parties of record. *Panel Co. v. Ipock*, 217 N.C. 375, 8 S.E. 2d 243; *Long v. Meares*, 196 N.C. 211, 145 S.E. 7; *Wallace v. Robinson*, 185 N.C. 530, 532, 117 S.E. 508, and cases

cited. Moreover, it is stated by *Hoke, J.* (later C. J.), and supported by the authorities he cited, "that their principal, the defendant in the case, is their duly constituted agent having power to bind them by compromise or adjustment of the matter, in any manner within the ordinary and reasonable purview and limitations of the action, and to have the same evidenced, secured, and enforced by judgment and final process in the cause." *Wallace v. Robinson, supra.*

The rule so established and declared as to sureties on defendant's undertaking applies equally to sureties on plaintiff's undertaking. *Council v. Averett,* 90 N.C. 168; *Insurance Co. v. Davis,* 74 N.C. 78.

Too, it is well settled that, upon determination of the action as between the principals, the prevailing party is entitled to a summary judgment against the sureties in accordance with the statute and the terms of the bond. *Trust Co. v. Hayes,* 191 N.C. 542, 132 S.E. 466; *Council v. Averett, supra; Harker v. Arendell,* 74 N.C. 85; *Insurance Co. v. Davis, supra.*

We consider now the several contentions advanced by appellants to support their position that the judgment is irregular, bearing in mind the definition of an irregular judgment quoted above.

Ordinarily a judgment drafted in accordance with the statute and the terms of the bond would provide, first, for the return of the property, with damages for its deterioration and detention. In *Trust Co. v. Hayes, supra,* and *McCormick v. Crotts,* 198 N.C. 664, 153 S.E. 152, cited by appellants, the judgment, on appeal, was held erroneous because it did not so provide. Here, the judgment was not erroneous in this respect; for, in view of the stipulation that the property could not be returned, such provision in the judgment was neither necessary nor appropriate. *Council v. Averett, supra.* The distinction is drawn in *Hall v. Tillman,* 103 N.C. 276, 9 S.E. 194. Also, see *Randolph v. McGowans,* 174 N.C. 203, 93 S.E. 730.

Where the property is returned, as in *Hall v. Tillman, supra,* the limit of the liability of the sureties on the bond is the amount of damages for the deterioration and detention of the property, and until the amount of such damages is determined by verdict or by agreement there is no basis for judgment against the sureties. See also, *Trust Co. v. Hayes, supra.* In *Hall v. Tillman, supra,* the sureties contended, as here, that the judgment rendered against them was irregular and void. However, it seems that the sureties appealed from the first judgment rendered *against them;* and whether the judgment was void, irregular or erroneous was not discussed in the opinion. It is

further noted that in *Trust Co. v. Hayes, supra,* the error was corrected on appeal from the first and only judgment.

Too, where the property cannot be returned, as in *Griffith v. Richmond,* 126 N.C. 377, 35 S.E. 620, the limit of the liability of the sureties on the undertaking is the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention; and, until the amount thereof is determined by verdict or by agreement, there is no basis for judgment against the sureties. In *Griffith v. Richmond, supra,* the error was corrected on appeal.

Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury. *Church Conference v. Locklear,* 246 N.C. 349, 355, 98 S.E. 2d 453, and cases cited; *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273, and cases cited. A stipulation is a judicial admission. As such, "It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact." Stansbury, North Carolina Evidence, Sec. 166.

Appellants contend: "The judgment, insofar as it purports to be based on the stipulation of counsel for plaintiff and counsel for defendant is void as to the makers of this motion for the reason that they did not expressly or by implication authorize plaintiff or plaintiff's counsel to sign said stipulation in their behalf and have not in any way ratified or approved his act." The cases cited in support of this statement are simply to the effect that "an attorney-at-law has no authority to compromise his client's case, or to consent to a judgment which will be binding on his client, founded upon such compromise, unless . . . specially authorized so to do by his client." *Morgan v. Hood, Comr. of Banks,* 211 N.C. 91, 189 S.E. 115; *Bath v. Norman,* 226 N.C. 502, 39 S.E. 2d 363. It is unnecessary to consider to what extent a stipulation relating to specified facts may be distinguished from a consent judgment fixing the ultimate rights and liabilities of the parties. Here there is no contention or suggestion that the counsel who represented plaintiff at the trial were not fully authorized by plaintiff to make and enter into the stipulations.

It is well settled that sureties in claim and delivery proceedings are bound by a consent judgment based on the principal's agreement. The rule is stated by *Smith, C. J.,* in *Council v. Averett, supra,* as follows: "The plaintiff prosecutes his own action, and the sureties assume responsibility for whatever may be legitimately and *bona fide* adjudged against their principal, who alone is the manager of his action, and by whose

conduct of it they must abide. His right to compromise in preference to hazarding the results of an inquiry into the value of the goods before a jury cannot be questioned, nor is a judgment thus rendered any less binding on the sureties. This the sureties agree to pay, and the summary judgment against them also was entirely correct and proper." *Robbins v. Killebrew*, 95 N.C. 19, 24; *McDonald v. McBryde*, 117 N.C. 125, 23 S.E. 103; *Nimocks v. Pope*, 117 N.C. 315, 23 S.E. 269; *Wallace v. Robinson, supra; Long v. Meares, supra. A fortiori*, the sureties are bound by stipulations of fact, made and entered into by plaintiff at the trial, relating to a particular phase of the case.

Even so, appellants assert that the facts established by the verdict and by the stipulations are insufficient to support the judgment. The contention is that "the vital and determinative issue of whether plaintiff was the owner and entitled to the possession of the property seized in the claim and delivery proceeding was not submitted to the jury or otherwise determined."

"A fact essential to the plaintiff's cause of action need not be proved if it is alleged in the complaint and admitted in the answer. (Citations) The admission is as effectual as if the fact admitted were found by a jury, and such fact is to be taken as true for all purposes connected with the trial. (Citations) This is so even though the admission is not introduced in evidence. (Citations)" *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16.

The essential nature of the contract between plaintiff and defendant was that of conditional sale. Admittedly, the property was sold and delivered by plaintiff to defendant; and, unless defendant had defaulted on his payments on account of the purchase price, or otherwise had violated the terms of the contract, defendant was entitled to possession of the property under the terms of the contract alleged by plaintiff. The jury's answers to the first and third issues, findings that defendant had not breached the contract, as alleged by plaintiff, but that plaintiff had breached the contract, as alleged by defendant, established that defendant, in accordance with the terms of the contract, was legally entitled to possession of the property at the time of the seizure and that the seizure was wrongful.

We advert now to appellants' contention that the judgment does not follow the theory of the pleadings and of the verdict. "It is the rule with us . . . that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court." *Stacy, C. J.*, in *Jernigan v. Jernigan*, 226 N.C. 204, 37 S.E. 2d 493; *Hutchins v. Davis*, 230 N.C. 67, 52 S.E. 2d

210; *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422, and cases cited. Since Judge Carr's charge was not included in the record, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104. Moreover, the evidence adduced at the trial was not included in the record. Hence, the record does not disclose the status of the property on October 24, 1955, when the complaint was filed, or on December 16, 1955, when defendant's pleading was filed.

It appears that the building, "A Little Moore," was constructed and equipped for use solely as a restaurant. It appears further that the seizure thereof destroyed defendant's ability to continue the operation of his restaurant therein. The damages he alleged, by way of counterclaim, did not arise out of any independent relationship between plaintiff and defendant; but the alleged damages were directly and proximately caused by plaintiff's wrongful seizure of the building.

Interesting questions, but no answers, are suggested by the record. Had plaintiff disposed of the property before the complaint or before the answer and counterclaim were filed? If so, had plaintiff sold it or leased it to a *bona fide* purchaser or lessee, for value, whose rights had priority over the rights of defendant under the contract? If so, any assertion by defendant of his right to recover actual possession would have been futile It is quite plain that Judge Carr had "a little more" information than the record before us discloses.

We cannot accept appellants' contention that the judgment does not follow the theory of the pleadings and of the verdict. Indeed, the damages assessed were those found to have been proximately caused by plaintiff's wrongful seizure and detention of the property; and, while less in amount, were the items of damages alleged by defendant.

There remains for consideration appellants' contention that defendant was not entitled to recover against the sureties because he did not seek to recover the property itself or in lieu thereof its value but alleged damages on account of plaintiff's breach of contract. In this connection, it must be kept in mind that the breach alleged by defendant consisted solely of plaintiff's wrongful seizure and detention of the property.

The property having been seized under claim and delivery and delivered to plaintiff, the plaintiff, together with his sureties, were required to account to defendant for its value at the time of seizure. *Credit Corp. v. Saunders,* 235 N.C. 369, 70 S.E. 2d 176, and cases cited. Here the judgment against the sureties was for such amount.

The property was taken from defendant and delivered to plaintiff on or about October 11, 1955. Plaintiff was enabled to obtain such immediate possession solely because the appellants signed his $12,000 undertaking as sureties. Hence, the sureties enabled plaintiff wrongfully to seize the property and to dispose of it in some undisclosed manner. Under the explicit terms of the bond, if the property had been returned, the sureties were liable for damages for its deterioration and *detention.* It would seem anomalous if the sureties were allowed to escape liability for damages for its *detention* because plaintiff, in breach of his contract with defendant, disposed of the property for his own purposes and so could not return it.

It is noted that plaintiff's undertaking, signed by appellants, was drawn in the language of G.S. 1-475. Prior to the Act of 1885 (Laws of 1885, Ch. 50, Sec. 1), the statute required that the condition of plaintiff's undertaking be "for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, *for any cause,* be recovered against the plaintiff. . . ." (Our italics.) Code of 1883, Sec. 324. The said Act of 1885, by amendment of the prior statute, adopted the phraseology now embodied in G.S. 1-475. Apparently, the purpose of the Act of 1885 was to limit the liability of the sureties to the value of the property at the time of seizure. It is also noted that G.S. 1-230, which antedates the Act of 1885, provides in pertinent part: "If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, *and damages for taking and withholding the same.*" (Our italics.) The foregoing would seem to support the view that, if the property is wrongfully seized and detained by plaintiff and cannot be returned, the liability of the sureties is for such damages as defendant may recover from plaintiff on account of such wrongful conduct, *not exceeding the value of the property.*

However, we need not resolve the questions of law suggested in the two preceding paragraphs. If Judge Carr erred in his application of the law to the facts as established by the verdict and by the stipulations, his judgment was erroneous. In such case, it could be corrected only by this Court on appeal from the judgment and not by motion in the cause interposed subsequent to adjournment of the trial term. *Mills v. Richardson, supra; Burrell v. Transfer Co.,* 244 N.C. 662, 94 S.E. 2d 829.

In their motion, appellants assert that they were advised by plaintiff that he had given notice of appeal from the judgment and was taking steps to perfect the appeal. Suffice to say, the

appeal was not perfected. Appellants saw fit to rely upon plaintiff, their principal, by becoming sureties for him and thereafter by committing to him the management of the trial and all subsequent proceedings. We are not concerned on this appeal with the status of affairs as between the sureties and the plaintiff. See *McDonald v. McBryde, supra.*

It is noteworthy that the cases cited by appellants deal largely with the correction of erroneous judgments on appeal therefrom. The facts in *Simms v. Sampson, supra,* a case involving an irregular judgment, readily distinguish that decision from the present case.

Since we hold the judgment is not irregular, it is unnecessary to consider whether appellants acted with reasonable promptness and have a meritorious defense, prerequisites to setting aside an irregular judgment. *Simms v. Sampson, supra; Duffer v. Brunson, supra.*

The order of Judge Bickett is affirmed.

Affirmed.

MRS. ELIZABETH PEARSON, WIDOW OF CARL A. PEARSON, DECEASED, (EMPLOYEE) v. PEERLESS FLOORING COMPANY (EMPLOYER), TEXTILE INSURANCE COMPANY (CARRIER); MOORE DRY KILN COMPANY (EMPLOYER), AND STANDARD ACCIDENT INSURANCE COMPANY (CARRIER).

(Filed 10 January, 1958)

1. **Master and Servant § 55d—**

Where it appears by the record that the court, after a full review of the evidence, adopted the findings of fact made by the Industrial Commission as its own as fully as if set out in the judgment, and found that such findings were supported by evidence and that they were correct, objection that the court failed to review the evidence and make its own findings in regard to jurisdictional facts is not supported by the record.

2. **Same—**

What was the contract between the parties and the facts in regard to their relationship and the dealings between them are questions of fact upon which the Commission's findings are conclusive when supported by evidence; whether upon such facts the relationship between the parties was that of master and servant or employer and independent contractor is a question of law reviewable by the courts.

3. **Master and Servant § 39b—Facts held to support conclusion that mechanic supervising installation of kiln was employee and not independent contractor.**

Findings to the effect that the seller of materials for the construction of dry kilns recommended upon the purchaser's request an expert

mechanic to supervise their installation under contractual agreement that such mechanic should be considered an employee of the purchaser, that the purchaser paid such mechanic compensation at a stipulated sum per hour, plus board and transporation, that the purchaser furnished all materials and labor to assist the mechanic, that the mechanic could perform his work only during the hours the labor so furnished was available, with facts supporting the inference that the purchaser could discharge the mechanic at any time for any reason, and that the mechanic was merely supervising the installation of the kilns because the purchaser had no foreman with sufficient experience and skill to supervise the installation in accordance with the plans and specifications furnished by the seller, *are held* to support the legal conclusion that the mechanic was an employee of the purchaser rather than an independent contractor.

4. Master and Servant § 4a—

A person contracting to do certain work who reserves the right to control the manner or method of performance and who is responsible to the employer solely as to the result is an independent contractor; while if the employer retains the right of control with respect to the manner or method of doing the work, the relationship of employer and employee obtains regardless of whether such control is exercised or not.

APPEAL by defendants Peerless Flooring Company and Textile Insurance Company, its compensation insurance carrier, from *Rousseau, J.*, March 11, 1957, Civil Term, GUILFORD, Greensboro Division.

Compensation claim by the widow of Carl A. Pearson. Pearson was fatally injured by accident while supervising the installation of two dry kilns for and on the premises of Peerless in High Point, N. C.

The hearing commissioner, based on his findings of fact, made these conclusions of law: (1) Moore was not subject to the Act, having less than five employees regularly employed in the same business or establishment in North Carolina, G.S. 97-2(a); (2) Peerless was subject to the Act, but Pearson was an independent contractor, not an employee of Peerless. The hearing commissioner's award dismissed plaintiff's claim "for lack of jurisdiction."

On plaintiff's appeal, the full Commission vacated and set aside the findings of fact, conclusions of law and award of the hearing commissioner. In lieu thereof, the Commission made its own findings of fact, conclusions of law and award, to wit:

"FINDINGS OF FACT"

"1. That in October 1954 the Peerless Flooring Company of High Point, hereinafter called 'Peerless,' and the Moore Dry Kiln Company of Jacksonville, Florida, hereinafter called 'Moore,' entered into written agreements for the purchase of equipment for the installation of two dry kilns; that the equipment was purchased by Peerless from Moore; that such agree-

ments provided, among other things, 'Experienced mechanics are available at $2.25 per hour ($18.00 per day), plus board and transportation from and to Jacksonville, Florida. If you (Peerless) desire and request, we (Moore) will recommend such mechanic to superintend the installation of equipment. It is understood and agreed, however, that this mechanic is to be your (Peerless') employee and that we (Moore) have no liability or responsibility in connection with his employment'; *that this contract* between Peerless and Moore *is* by this reference *made a part of this finding* the same as if herein fully rewritten; that shortly after the execution of this contract, Mr. J. A. Johnson, Secretary and Treasurer and General Manager of Peerless Flooring Company, who executed said contract on behalf of Peerless, requested Moore to contact an experienced mechanic to supervise the installation of the kilns; that thereupon Moore communicated Johnson's request to Carl A. Pearson, who was an experienced mechanic in the installation of dry kiln equipment, and sent Pearson a copy of the plans and specifications of the installation. (Our italics)

"2. That Pearson reported at High Point at the Peerless Company on or about November 7, 1954 and advised Mr. Johnson that he was ready to begin the installation of the kilns; that Johnson advised the deceased that Peerless would furnish the deceased with men or anything else that he needed in the installation and advised the deceased to call upon Peerless for any of his needs concerning the installation; that Peerless did not place the deceased upon its payroll, make social security or income tax deductions, or otherwise treat him as an employee on its records.

"3. That Mr. Johnson, acting for Peerless, employed an independent contractor, E. E. Younts, a corporation, to secure men to assist the deceased in the installation of the kilns; that the work of E. E. Younts was to be paid for by Peerless on the basis of cost plus ten percent; that the deceased did not start upon the installation of the kiln equipment for approximately two days after his arrival in High Point, because the necessary material had not arrived from Moore; that after the necessary material arrived, the deceased undertook the supervision of the installation of the kilns, said installation being done by employees of E. E. Younts and also on occasion by employees of Peerless, when the deceased advised that additional workers were needed in the installation; that such employees would only work for a few minutes or for the day or as they were requested by the deceased; that the deceased supervised the work of all such employees engaged in the installation, including the employees of E. E. Younts.

"4. That on the first Monday following the beginning of the installation of the kiln equipment, the deceased submitted to Mr. Johnson a bill or statement for $171.50, which was for board and room, travel, and compensation; that Johnson advised the deceased that Peerless could not pay him the requested amount, inasmuch as part of this time was spent in waiting for the equipment during which time the deceased performed no labor for Peerless; that there followed a communication between Mr. Johnson and Moore, or its representative, which resulted in a compromise settlement, under the terms of which Peerless paid the deceased $105.75 for travel, room and board, and compensation for services, and Moore paid the deceased, or his estate $65.00 for room and board and compensation for the time that the deceased had been in High Point before the material arrived at Peerless and the installation of the kilns was commenced.

"5. That during the course of the installation of the kilns, Mr. Johnson observed the progression of the work several times each day as he made his regular and customary rounds of the Peerless plant; that on one occasion, Johnson made a suggestion to the deceased concerning the work of installing the kilns, such suggestion concerning the routing of a pipe line being changed from the location called for in the plans and specifications provided by Moore; that Johnson suggested to the deceased that it might be possible to change the line to another location and the deceased stated that the only way that he would make any change would be to draw out a drawing and send it to Moore at Jacksonville for its approval; that the deceased then made such a drawing, which was submitted by Mr. Johnson and the deceased to Moore, and Moore advised that it was satisfactory to proceed per the deceased's drawing.

"6. That while supervising the installation of the kilns, the deceased worked full work days during the time that Peerless was open and the employees of Peerless and E. E. Younts were present; that the deceased reported to no one at Peerless when he started and stopped work and kept his own time and records.

"7. That the deceased, at the time of his death, was an employee of Peerless Flooring Company, having been employed to supervise the installation of two dry kilns; that he was paid for his time on an hourly basis plus a lump sum for room and board, such pay being paid by the Peerless Flooring Company, except the two days which were paid for by Moore by reason of the fact that it had not furnished the equipment on schedule; that the deceased was subject to discharge by Peerless; that he worked the regular hours of other Peerless employees assisting him, which employees were selected by the Peerless Flooring Company; that there was no special skill required in the installation

of the dry kilns, approximately fifty percent of all dry kiln equipment sold by Moore being installed by its customers without the assistance of a trained mechanic such as deceased; that there was no written contract between Peerless and the deceased, although there was a written contract between Peerless and Moore, as set out in Finding of Fact No. 1.

"8. That on November 19, 1954 the deceased sustained an injury by accident arising out of and in the course of his employment by the Peerless Flooring Company, resulting in his immediate death.

"9. (Re: Facts relevant solely to the liability of Moore.)

"10. (Re: Plaintiff's status as sole dependent, entitled to full amount of compensation payable.)"

In its conclusions of law, the Commission held that Moore was subject to the Act under the provisions of G.S. 97-13(b) but that Pearson was the employee of Peerless, not of Moore. The Commission awarded compensation to plaintiff, based upon its factual findings and legal conclusions to the effect that Pearson's death arose out of and in the course of his employment by Peerless.

Peerless and its carrier appealed to the superior court upon exceptions to designated findings of fact, conclusions of law and the award. Their basic position was and is that the Industrial Commission had no jurisdiction because of plaintiff's failure to establish the existence of an employer-employee relationship between Peerless and Pearson.

Moore and its carrier also appealed to the superior court; but their exceptions to the findings of fact and conclusions of law of the Commission are not relevant to this appeal.

Judge Rousseau, "having reviewed and considered the transcript of testimony and other evidence and matters contained in the record in this cause, and having reviewed and considered the Findings of Fact and Conclusions of Law of the Full North Carolina Industrial Commission, and the Court being of the opinion that the Findings of Fact made by the Full North Carolina Industrial Commission are supported by competent evidence and are correct, (with exception noted below) . . . and that the Conclusions of Law of the Full North Carolina Industrial Commission based upon said Findings of Fact are correct, (with the exception noted below) . . . and that the said award of the Full North Carolina Industrial Commission should be affirmed," entered judgment: (1) that "each and every one of the exceptions and assignments of error" of Peerless and its carrier "be and hereby are denied and overruled"; that "each and every one of the Findings of Fact and Conclusions of Law of the Full North Carolina Industrial Commission be and hereby is in all

respects approved and expressly adopted by the Court as fully as if set forth *verbatim* in this judgment" (with the exception noted below), and that "the award of the Full North Carolina Industrial Commission filed on November 8, 1956, allowing the plaintiff compensation as ordered in said award (against Peerless and its carrier) be and hereby is in all respects affirmed."

The exceptions indicated by parentheses above related to Moore's appeal. While no award was ever made against Moore and its carrier, Judge Rousseau's judgment set aside the full Commission's findings of fact and conclusions of law to the effect that Moore was subject to the Act and dismissed plaintiff's claim as to Moore and its carrier "for that the North Carolina Industrial Commission has no jurisdiction over claim against said defendants."

Peerless and its carrier excepted to said judgment and appealed.

King, Adams, Kleemeier & Hagan for plaintiff, appellee.

Sapp & Sapp for defendants Peerless Flooring Company and Textile Insurance Company, appellants.

Smith, Moore, Smith, Schell & Hunter for defendants Moore Dry Kiln Company and Standard Accident Insurance Company, appellees.

BOBBITT, J. The judgment as to Moore and its carrier is final. Plaintiff did not appeal. Cf. *Willingham v. Rock & Sand Co.*, 240 N.C. 281, 82 S.E. 2d 68. Moreover, plaintiff, in his brief, says: "There is no evidence which could possibly support the conclusion that Pearson was an employee of Moore."

This appeal relates solely to plaintiff's claim as against Peerless and its carrier. If Pearson was the employee of Peerless, as plaintiff contends, the death was compensable. If Pearson was not the employee of Peerless, but an independent contractor, as appellants contend, the Industrial Commission had no jurisdiction and the proceeding should be dismissed. Admittedly, Peerless and its employees were subject to the Act. The crucial question is whether the employer-employee relationship existed as between Peerless and Pearson.

Appellants insist that Judge Rousseau should have, but did not, make independent findings of fact relevant to the controverted jurisdictional question, citing *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673, and *Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269, which cite, *inter alia*, *Aycock v. Cooper*, 202 N.C. 500, 163 S.E. 569, and *Francis v. Wood Turning Co.*, 204 N.C. 701, 169 S.E. 654. These cases support the view that when a defendant-employer challenges the jurisdiction of the Industrial Com-

mission, "the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and . . . said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission." *Aycock v. Cooper, supra.* It is noted that *Hart v. Motors, supra,* and *Francis v. Wood Turning Co., supra,* relate to whether the injured party was an employee; that *Aylor v. Barnes, supra,* relates to whether the injured employee, within the meaning of G.S. 97-36, was a resident of this State and entitled to compensation on account of an accident in Virginia; and that *Aycock v. Cooper, supra,* relates to whether the employer had less than five employees regularly employed in his business within this State.

Yet, in a series of cases where the controverted jurisdictional question was whether the injured party was an employee or an independent contractor, this Court appears to have based decision on the rule applicable to non-jurisdictional questions, which, as stated in *Lassiter v. Telephone Co.,* 215 N.C. 227, 230, 1 S.E. 2d 542, is as follows: "It is established in this jurisdiction that the findings of fact made by the Industrial Commission, if supported by competent evidence, are conclusive on appeal and not subject to review by the Superior Court or this Court, although this Court may have reached a different conclusion if it had been the fact finding body." See *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425; *Cooper v. Ice Co.,* 230 N.C. 43, 51 S.E. 2d 889; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 691; *Cloninger v. Bakery Co.,* 218 N.C. 26, 9 S.E. 2d 615.

Whether the facts found by the Commission are supported by competent evidence, *McCraw v. Mills, Inc.,* 233 N.C. 524, 64 S.E. 2d 658, and whether the facts found by the Commission support the legal conclusion that the injured party was an employee, *Smith v. Paper Co.,* 226 N.C. 47, 36 S.E. 2d 730, and *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137, and *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515, are reviewable by the court as questions of law.

In *Beach v. McLean, supra, Barnhill, J. (later C. J.),* in an analysis of the extent to which the courts were bound by the Commission's finding and conclusion that the injured party was an employee of the corporate defendant, says: "(1) what were the terms of the agreement—that is, what was the contract between the parties; and, (2) what relationship between the parties was created by the contract—was it that of master and servant or that of employer and independent contractor? The

first involves a question of fact and the second is a question of law." Again: "The Commission having found the facts in respect to the terms and conditions upon which McLean undertook the work of dismantling and salvaging the machinery purchased by defendant from Superior Yarn Mills, it settled the question of fact involved in the 'finding' or conclusion as to the nature and extent of the contract. Hence, the element of fact involved in the conclusion is settled. Both the court below and this Court are bound thereby. The only question presented is the legal status of McLean under the contract. The Commission's conclusion in this respect is reviewable." (Here the injured party was employed by McLean; and the crucial question was whether McLean was an independent contractor or an agent of the corporate defendant.

The cases cited above (except *Lassiter v. Telephone Co.*) turn on whether plaintiff was an employee; but none prior to *Aylor v. Barnes, supra,* cites either *Aycock v. Cooper, supra,* or *Francis v. Wood Turning Co., supra.* While the rule announced in those cases was not applied in the intermediate cases, apparently there was no express reconsideration or discussion of its soundness. Even so, in the case before us, we need not undertake to reconcile or to resolve the apparent conflict in the cited decisions.

The record, fairly interpreted, does not show that Judge Rousseau failed to consider the evidence and make his own findings of fact therefrom. Indeed, the stronger inference is that he did so. Certainly, if he considered the findings of fact of the Commission correct, and his judgment so states, the rule contended for by appellants would not require a mere rephrasing of essentially the same factual findings in order to demonstrate that the findings made by him were his own rather than an approval of the Commission's findings because supported by *some* competent evidence.

The record shows that Judge Rousseau, after *a full review* of the evidence, found not only that the findings of fact of the Commission were supported by competent evidence but that they were *correct.* He adopted the findings of fact made by the Commission as his own "as fully as if set forth *verbatim* in this judgment." The phraseology of the judgment, quoted above, takes on special significance when considered in the light of the fact that Peerless and its carrier, in their "proposed findings of fact, conclusions of law, and judgment" had specifically brought to Judge Rousseau's attention that it was "the duty of this Court to find the facts from the evidence herein" and to base the court's legal conclusions on such findings.

Unquestionably, the record discloses that the findings of fact, made by the Commission and also by Judge Rousseau, are sup-

ported by ample competent evidence. The only remaining question is whether the facts so established support the legal conclusion that Pearson was an employee rather than an independent contractor. *Smith v. Paper Co., supra.*

In *Hayes v. Elon College, supra, Barnhill, J. (later C. J.),* citing many cases, discusses the distinction between an "employee" and an "independent contractor." Too, he sets forth a number of elements which ordinarily tend to identify either the employee relationship or the independent contractor relationship. He adds: "The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee."

In subsequent cases, including *Smith v. Paper Co., supra, Scott v. Lumber Co., supra,* and *Cooper v. Ice Co., supra,* both the general principles relating to the respective relationships and the incidents of each are set forth and need not be repeated.

These *indicia* established by the findings of fact, tend to support the view that Pearson was an employee, viz.:

1. According to their written contract, the equipment and materials were sold by Moore to Peerless, f.o.b., Jacksonville, Florida. While Moore agreed to furnish and did furnish "complete plans and specifications recommended for the construction of kiln buildings and installation of equipment," the installation was to be made by Peerless.

2. If desired and requested by Peerless, Moore agreed to recommend an experienced mechanic "to superintend the installation of equipment." But, it was agreed, if Peerless engaged the services of a mechanic recommended by Moore upon request by Peerless, "this mechanic is to be your (Peerless') employee."

3. At the request of Peerless, Moore recommended Pearson; Pearson's compensation was $2.25 per hour plus board and transportation from and to Jacksonville. As pointed out in *Hayes v. Elon College, supra,* "doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis," ordinarily is incident to the relationship of independent contractor; but, as stated by Larson, Workmen's Compensation Law, Vol. 1, Sec. 44.33, "Payment on a time basis is a strong indication of the status of employment."

4. Pearson was not free to employ assistants or to purchase materials. All materials were provided by Peerless; and all labor, that of the employees of Younts, an independent contractor, and that of its regular employees, was provided by Peerless. Freedom to select such assistants as he may think proper ordinarily

is incident to the relationship of independent contractor. *Hayes v. Elon College, supra.*

5. Ordinarily, the selection of one's own time for the performance of his work is incident to the relationship of independent contractor. *Hayes v. Elon College, supra.* But Pearson could perform his work only during the hours when the employees of Peerless or of Younts were available.

6. Peerless had the right to discharge Pearson. Appellants contend: "The test is whether or not Pearson was subject to discharge solely because he adopted one plan over the other for the installation of the dry kilns." It may be fairly inferred that Pearson, employed on an hourly wage plus board and transportation basis, had no legal right to remain at this job until the installation was completed; and it would appear that Peerless had the right to discharge him for any reason or no reason, without obligation other than payment of his agreed wages for the number of hours he worked plus board and transportation expense.

7. If Peerless had had in its regular employment a mechanic or construction foreman with sufficient experience and skill to supervise the installation in accordance with the plans and specifications therefor furnished by Moore, unquestionably his status as employee would not have been altered by the fact that Peerless reposed in him the responsibility of directing and supervising the installation. Under the circumstances here disclosed, there would seem little, if any, difference between the status of such employee and the status of one specially employed (Pearson) to perform such services.

"An independent contractor is one who exercises an independent employment, and contracts to do specified work for another by his own methods without subjection to the control of his employer, except as to the result of his work. His one indispensable characteristic is that he contracts to do certain work, and has the right to control the manner or method of doing it. The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it. (Citations omitted)" *Ervin, J.*, in *Scott v. Lumber Co., supra.* ". . . and it is not material as determinative of the relationship whether the employer actually exercises the right of control. (Citations omit-

ted)" *Devin, C. J.*, in *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220.

We attach no particular significance to the fact that Johnson was often present as the work progressed. Naturally, as the secretary-treasurer and general manager of Peerless, he was interested. Nor do we attach much weight to the fact that Johnson suggested a change in plans, which, on the basis of a drawing prepared by Pearson, was approved by Moore.

True, the objectives of Peerless and of Pearson were identical, that is, to make the installation in accordance with the Moore plans and specifications. Indeed, it appears that Pearson was employed because of his experience and skill in this type of work; but the mere fact that Pearson was experienced and skilled in the type of work for which he was employed does not imply that Peerless had lost *its right to control* Pearson's conduct during the progress of the work and to intervene if perchance (1) Peerless objected to any instructions given by Pearson to the employees of Peerless or of Younts, or (2) Peerless considered the installation as directed by Pearson to be in violation of the Moore plans and specifications, or (3) the installation as directed by Pearson was objectionable to or interfering with the other operations of Peerless. The mere fact that no occasion actually arose, except the incident mentioned, when Peerless did intervene to exercise its right of control, does not negative the existence of its right to do so.

For the reasons stated, there is no error in the court's conclusion that Pearson was fatally injured by accident arising out of and in the course of his employment by Peerless. Indeed, this case is strikingly similar to *Smith v. Paper Co., supra,* where the same conclusion was reached.

We have examined each of appellants' assignments of error. Suffice to say, none discloses error deemed sufficient to affect the result or to require particular consideration.

Affirmed.

STANDARD AMUSEMENT COMPANY, INC. v. R. O. TARKINGTON AND WIFE, MARY MARSH TARKINGTON (ORIGINAL DEFENDANTS); AND WAYNE THEATRES, INC.; MAX ZAGER AND MAX ZAGER ENTERPRISES (ADDITIONAL DEFENDANTS).

(Filed 10 January, 1958)

1. Courts § 7—

Where a defendant in a civil action in a municipal-county court files a cross-action in which a sum in excess of the jurisdiction of that court is demanded, which, under the applicable statute entitles defendant to

have the cause transferred to the Superior Court, Ch. 971, Session Laws of 1955, Sec. 4, Rule 25, (c), (4), the cause is properly transferred upon motion, and what is a proper counterclaim under this section is to be determined by the provisions of G.S. 1-137.

2. **Same—**

Upon proper transfer of a cause from a municipal-county court, the municipal-county court is divested of jurisdiction and the Superior Court acquires jurisdiction to hear and determine motions in the case originally made in the municipal-county court.

3. **Same—**

The General Assembly has the power to prescribe by statute the procedure and grounds for the removal of causes to the Superior Court from courts inferior to the Superior Court. Constitution of North Carolina, Art. IV, Sec. 12.

4. **Assignment § 4—**

The assignee of non-negotiable chose in action takes same subject to any set-off or counterclaim existing at the time of, or before notice of, the assignment, though such counterclaim may be used only to the extent of defeating the assignee's claim and not for affirmative relief.

5. **Pleadings § 10—Original defendant may set up cross-action against additional defendants when it arises out of plaintiff's claim and is necessary to a final determination of the controversy.**

The assignee of a lease sued lessees for rent due thereunder. Lessees had the original lessor and intervening assignees joined as additional parties defendant and filed a counterclaim alleging that lessees were induced to enter into the lease agreement by misrepresentation and fraud, resulting in damage to lessees in a large amount, which lessees pleaded against plaintiff in bar of recovery and against additional defendants for the recovery of the damage alleged, reduced by an amount to be applied to their unpaid rent. *Held:* While wholly irrelevant and independent causes of action between defendants may not be engrafted on plaintiff's cause, in the instant case lessees' cross-action arises out of the lease contract sued on by plaintiffs and is so interwoven therewith that a complete story as to one cannot be told without telling the essential facts of the other, and therefore the cross-action is authorized by G.S. 1-137(1).

6. **Same—**

G.S. 1-137(1) is broad in its scope and should be liberally construed in furtherance of its purpose to permit the trial in one action of all causes of action arising out of any one contract or transaction.

7. **Election of Remedies § 2—**

A party must either rescind what has been done as a result of fraud, or affirm what has been done and sue for damages caused by the fraud.

8. **Appeal and Error § 21—**

An exception to the signing and entry of judgment presents for review whether the pleadings and admitted facts on which the court ruled support the judgment.

APPEAL by R. O. Tarkington and wife, Mary Marsh Tarkington, original defendants, from *Rousseau, J.*, 18 February 1957 Term of GUILFORD, Greensboro Division.

Civil action instituted by Standard Amusement Company, Inc., plaintiff, in the Greensboro, Guilford County, Municipal-County Court, against R. O. Tarkington and wife, Mary Marsh Tarkington, to recover unpaid rents due under a lease agreement.

Plaintiff, in its complaint, alleges in substance: Plaintiff is a North Carolina corporation with its principal place of business in Greensboro, Guilford County, North Carolina. The defendants are residents of Edgecombe County, North Carolina. On or about 22 October 1953 Wayne Theatres, Inc., a North Carolina corporation, as lessor, and R. O. Tarkington and wife, Mary Marsh Tarkington, as lessees, entered into a written lease agreement by which the lessor demised to the lessees premises known as Gay Theatre, with certain personal property therein described in the lease, situated in the Town of Gibsonville, Guilford County, for a term from 1 November 1953 until 31 October 1957 at a rental of $150.00 per week payable weekly. The lessees immediately entered into possession of the demised premises under their lease, and since then until now have been in continuous possession by virtue of their lease. On or about 1 December 1954 Wayne Theatres, Inc., assigned the lease to Max Zager, and on or about 1 March 1956 Max Zager assigned the lease to plaintiff, which is now the owner of the lease, and all rights therein. From time to time defendants paid rent to plaintiff's predecessors in interest, and on 6 March 1956, and from time to time thereafter, defendants have made payments of rent under the lease to plaintiff, the assignee of the lease. The defendants have failed to pay any rent due to plaintiff under the lease since the week of 2 July 1956, up to and including the week of 19 November 1956 (this action was instituted 7 December 1956), and they are now in arrears in the payment of rent to plaintiff in the sum of $3,000.00. Wherefore, plaintiff prays that it recover from them, jointly and severally the sum of $3,000.00.

R. O. Tarkington and wife, Mary Marsh Tarkington, filed a joint answer in which they admitted their execution of the lease agreement, and its terms, as alleged in plaintiff's complaint, their entry into possession of the demised premises under the lease, and their continuous possession since, and that there is now due and owing by them under the lease to plaintiff the sum of $3,000.00. In their answer they allege they have no knowledge of any assignment of the lease by Wayne Theatres, Inc., to Max Zager, and of any assignment of the lease by Max Zager to plaintiff, and therefore deny the complaint's allegations as to such assignments. Defendants further allege in their answer they have paid rent from time to time to Wayne Theatres, Inc., to Max Zager Enterprises, and to plaintiff, but assert they have

no knowledge of plaintiff's predecessors in interest, except as above stated, and therefore deny payment of rent by them to plaintiff's predecessors in interest.

The defendants in their answer then alleged a cross-action against Wayne Theatres, Inc., Max Zager and Max Zager Enterprises, in which in substance they alleged: On or about 1 October 1953 the defendants, and their son, Erwin O. Tarkington, met Max Zager in the Town of Burlington for the purpose of discussing a lease of Gay Theatre in the Town of Gibsonville. At that time Gay Theatre was owned by the Gibsonville Development Company, Inc., which had leased it to Wayne Theatres, Inc. The defendants, their son, and Max Zager drove to the office of a Mr. Owen of the Gibsonville Development Company, Inc., where a conference was held with Mr. Owen on the subject of reducing the monthly rent of Wayne Theatres, Inc. After a brief discussion of the rent Mr. Owen and Max Zager left the office. They returned in 10 or 15 minutes, and told the Tarkingtons an agreement had been reached in respect to the rent payable by Wayne Theatres, Inc. Thereafter the Tarkingtons and Max Zager left Mr. Owen's office, and drove to a parking space, and parked, to continue discussions of the lease of Gay Theatre. Mary Marsh Tarkington asked Max Zager if their property would be subject to liability for rent in the event the proposed operation of Gay Theatre by them should not be profitable. Max Zager assured them that he would reduce the rental payments to an amount that the operation could afford to pay, and that their other property would not be subject to liability for payment of rent. While discussing the proposed lease R. O. Tarkington asked Max Zager if there was a drive-in theatre nearby, or words to that effect, and he replied No, and that was to their advantage, or words to that effect, though he well knew a drive-in theatre, known as Bon Air Theatre, was in operation 2½ to 3 miles from Gay Theatre, that such representation was false, and was made for the purpose of inducing defendants to enter into a lease agreement of Gay Theatre. During the discussions as to the lease Max Zager told the defendants Gay Theatre was doing twice the business they were doing in the Town of Aulander, and presented for their inspection certain figures purporting to show operating receipts by Gay Theatre of $500.00 to $600.00 a week, or more, though he knew such representations were false, and he made them for the purpose of inducing defendants to enter into a lease agreement of Gay Theatre. Acting in reliance on such false representations the defendants entered into the lease agreement of Gay Theatre, and in its operation have incurred heavy losses. Max Zager was acting as the duly authorized agent, or principal, for Wayne Theatres, Inc., in respect to the lease

negotiations, and it is believed he is the principal stockholder and real party in interest in Wayne Theatres, Inc., and in Standard Amusement Company, Inc., the plaintiff, and owns a controlling interest in Max Zager Enterprises. That defendants by such false representations have been damaged in the sum of $25,000.00. Wherefore, the defendants pray that the plaintiff recover nothing from them, and that they recover $25,000.00 from Wayne Theatres, Inc., and Max Zager reduced by an amount to be applied to their unpaid rent.

Upon motion of the defendants, Wayne Theatres, Inc., Max Zager and Max Zager Enterprises were made parties defendant by the judge of the Greensboro, Guilford County, Municipal-County Court, who ordered copies of the summons, defendants' cross-action, and his order to be served upon them.

Standard Amusement Company, Inc., the plaintiff, filed a motion to strike the entire cross-action of the defendants Tarkington, on the grounds that the cross-action is irrelevant, immaterial and will prejudice the interest of the plaintiff in the trial. that it is sham and frivolous, and is not pleaded in good faith, and that it fails to allege facts sufficient to constitute a defense to plaintiff's cause of action.

Max Zager, individually, and trading as Max Zager Enterprises, made a special appearance and moved the court to dismiss the cross-action of the defendants Tarkington against him and to quash the service of summons upon him, on two grounds: One, the court has no jurisdiction over him, or the alleged cause of action against him in the cross-action; two, the cross-action exceeds the jurisdiction of the Greensboro, Guilford County, Municipal-County Court, and is not pleaded in good faith.

Wayne Theatres, Inc., made a special appearance, and filed a motion identical with that of Max Zager.

Whereupon, the Tarkington defendants made a motion to remove the case to the Superior Court of Guilford County, Greensboro Division, for the reason that the damages they are seeking in their cross-action exceed the jurisdiction of the Greensboro, Guilford County, Municipal-County Court. This motion coming on to be heard in that court, the judge thereof entered an order removing the case to the Superior Court of Guilford County, Greensboro Division, for the reason that it appeared from an examination of the answer and cross-action filed by the defendants Tarkington that the amount in controversy exceeded the jurisdiction of the Greensboro, Guilford County, Municipal-County Court. To the order of removal plaintiff, Wayne Theatres, Inc., and Max Zager objected and excepted.

The Greensboro, Guilford County, Municipal-County Court declined to rule upon the motion of plaintiff to strike the entire cross-action in the answer of the defendants Tarkington, and plaintiff objected and excepted.

The Greensboro, Guilford County, Municipal-County Court declined to rule upon the motion of Wayne Theatres, Inc., and Max Zager to dismiss the cross-action against them and to quash the service of summons upon them, and Wayne Theatres, Inc., and Max Zager objected and excepted.

The motion of plaintiff to strike from the answer of the defendants Tarkington the entire cross-action, the separate motions of Wayne Theatres, Inc., and of Max Zager, to dismiss the cross-action of the defendants Tarkington against them, and to quash the service of summons upon them, and the objection and exception of the plaintiff and the additional defendants to the order removing the case to the Superior Court of Guilford County, Greensboro Division, was heard by Rousseau, J., who entered an order as follows: One, the cross-action of the defendants Tarkington is not a proper counterclaim, and is not pleadable in this action. Two, the cross-action is not a proper counterclaim within the requirements and meaning of Section 4, Rule 25 (c), (4), of the Municipal-County Court Act of 13 May 1955, so as to come within the terms and scope of Rule 25, (c), (4). Three, the cross-action seeks recovery from the additional defendants of a sum in excess of the jurisdiction of the Greensboro, Guilford County, Municipal-County Court. Four, the cross-action constitutes a misjoinder of parties and causes of action, and fails to allege a defense to plaintiff's claim. Five, plaintiff's motion to strike, and the motions of the additional defendants to dismiss should have been granted. Whereupon, Judge Rousseau ordered and adjudged that the cross-action in the answer of the defendants Tarkington be stricken, that the cross-action of the defendants Tarkington against Wayne Theatres, Inc., Max Zager and Max Zager Enterprises be dismissed, and the service of summons upon them be quashed, and that the case be remanded to the Greensboro, Guilford County, Municipal-County Court for trial. To the signing and entry of this order the defendants Tarkington excepted and appealed to the Supreme Court.

Within thirty days from the date of the entry of this order, the defendants Tarkington petitioned this Court for a writ of *certiorari* under Rule 4(a), (2), Amendments to Rules of Practice in the Supreme Court, 242 N.C. 766, to review the ruling of Judge Rousseau striking the entire cross-action in their answer. This Court in conference on 28 August 1957 entered the

following order: "Petition allowed to extent necessary to permit appellants to perfect their appeal at this term."

Block, Meyland & Lloyd for Plaintiff, Appellee, and for Additional Defendant Max Zager, Appellee.

McDougle, Erwin, Horack & Snepp for Additional Defendant Wayne Theatres, Inc., Appellee.

Daniel R. Dixon for Original Defendants R. O. Tarkington and wife Mary Marsh Tarkington, Appellants.

PARKER, J. Ch. 971 of the 1955 Session Laws of North Carolina, which is an act amending Ch. 651 of the Public Laws of 1909, as amended, relating to the establishing of a municipal-county court in Guilford County, provides in Sec. 3, (c), (2), that the municipal-county court shall have concurrent jurisdiction with the superior court of civil actions, excepting equity, divorce and those wherein title to real property is in controversy, wherein the sum demanded, exclusive of interest, does not exceed $3,000.00. Sec. 4, Rule 25, (c), (4), of this act provides that if the defendant files in any suit a counterclaim in which a money judgment is in good faith sought to be recovered, or in which the stated value of property sought to be recovered is beyond the jurisdiction of this court, such counterclaim shall, nevertheless, be a valid and subsisting counterclaim for the amount or property alleged, but the action shall be at once transferred by order of either judge to the regular civil issue docket of the Superior Court of Guilford County, Greensboro Division, and stand for trial by jury in the usual course, unless the parties file a stipulation that the case shall be placed upon the non-jury docket. Sec. 4, Rule 25, (c), (3), of this act provides that upon the entry of an order of transfer, the clerk shall deliver all process, pleadings, orders, or other instruments and matters constituting the case papers to the Clerk of the Superior Court of Guilford County.

Upon motion of the Tarkington defendants, the Greensboro, Guilford County, Municipal-County Court, acting under Sec. 4, Rule 25, (c), (4), Ch. 971, of the 1955 Session Laws of North Carolina, transferred the case to the regular civil issue docket of Guilford County Superior Court, Greensboro Division, on the ground that the defendants Tarkington had filed a cross-action in which a money judgment is sought to be recovered which is beyond the jurisdiction of that court.

"As a general rule, it is within the constitutional powers conferred upon the legislature of a state to provide by statute for the removal of causes from one court to another. . . ." 21 C.J.S., Courts, p. 769.

Art. IV, Sec. 12, of the Constitution of North Carolina, vests the General Assembly of the State with the power to allot and distribute that portion of the power and jurisdiction of the Judicial Department, "which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best. . . ." See *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576.

In 21 C.J.S., p. 783, it is said: "Where an order of removal of a cause from one court to another is properly made, the former court is thereby divested of jurisdiction and the jurisdiction of the latter court attaches and the cause proceeds as if originally instituted there."

The case having been properly transferred to the civil issue docket of the Guilford County Superior Court, Greensboro Division, Judge Rousseau presiding had jurisdiction to hear and determine the motions in the case originally made in the municipal-county court.

A study of the answer of the defendants Tarkington shows these admissions: One, the execution of the written lease between Wayne Theatres, Inc., as lessor, and themselves, as lessees, and the terms of the lease, as alleged in the complaint. Two, their entry into possession of the demised premises about 1 November 1953, and their continuous possession since. Three, their payment of rent under the lease from time to time to Wayne Theatres, Inc., to Max Zager Enterprises and to plaintiff. Four, they are now in arrears of payment of rent to plaintiff in the sum of $3,000.00.

Plaintiff alleges Wayne Theatres, Inc., assigned the lease to Max Zager about 1 December 1954, and about 1 March 1956 Max Zager assigned the lease to plaintiff, who is now the owner of the lease. Although the defendants Tarkington in their answer say they have no knowledge as to these assignments of the lease and as to plaintiff's ownership of the lease, and therefore deny the same, they assert in their brief "the plaintiff in the instant proceeding is the sub-assignee of the original lessor, and is not an original party to the lease," and their argument in their brief is based on the allegation in the complaint that plaintiff is the assignee of the lease.

It is well settled law in this jurisdiction that when plaintiff, according to the allegations of its complaint, became the assignee of this lease, a non-negotiable chose in action, it took it subject to any set-off or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. G.S. 1-57; *Iselin & Co. v. Saunders,*

231 N.C. 642, 58 S.E. 2d 614, and the numerous cases there cited. This Court said in *Harris v. Burwell,* 65 N.C. 584, speaking of the language of Sec. 55, C.C.P., now set forth in G.S. 1-57, which subjects the assignee to any set-off or other defense existing at the time of, or before notice of, the assignment: "This language is as broad as it can well be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or *other defense* that the maker had against any one or all of the assignees at the date of the assignment, or *before notice thereof.*" The assignor of a non-negotiable chose in action cannot confer upon an assignee a greater right than he has. *Ricaud v. Alderman,* 132 N.C. 62, 43 S.E. 543.

"It is well settled that in an action by an assignee, a claim in favor of defendant against the assignor can be allowed as a set-off, counterclaim, or reconvention only to the extent of the claim sued on, and judgment cannot be rendered against the assignee for the excess. Defendant is entitled to use his claim defensively, and not offensively. . . ." 80 C.J.S., Set-Off and Counterclaim, p. 121. To the same effect 47 Am. Jur., Setoff and Counterclaim, p. 756. See McIntosh, N.C. Practice & Procedure, 2nd Ed., Vol. I, p. 693.

Plaintiff alleges that it is the owner as assignee of Max Zager, who was an assignee of Wayne Theatres, Inc., of a written lease entered into between the defendants Tarkington, as lessees, and Wayne Theatres, Inc., as lessor, and sues the lessees for unpaid rent. The defendants Tarkington admit in their answer they owe plaintiff the exact amount of rent it sues for, and file a cross-action or counterclaim against Wayne Theatres, Inc., Max Zager, and Max Zager Enterprises to recover damages from them, to be reduced by an amount to be applied to the rent they owe plaintiff, upon the alleged ground that they were induced by the actionable fraud of Wayne Theatres, Inc., acting by its duly authorized agent Max Zager, to execute the lease upon which plaintiff sues. It appears from Max Zager's special appearance and motion to dismiss that Max Zager Enterprises is merely a trade name he uses. The defendants Tarkington seek no affirmative relief against plaintiff.

The purpose and intent of G.S. 1-137(1) "is to permit the trial in one action of all causes of action arising out of any one contract or transaction." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

The cross-action by a defendant against a codefendant or a third party permitted by the statute must arise out of the subject of the action as set out in the complaint, and have such relation to plaintiff's claim as that their adjustment is necessary to a full and complete determination of the cause. *Schnepp v.*

Richardson, 222 N.C. 228, 22 S.E. 2d 555; *Beam v. Wright,* 222 N.C. 174, 22 S.E. 2d 270; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247; *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397; *Wrenn v. Morgan,* 148 N.C. 101, 61 S.E. 641; *Branch v. Chappell,* 119 N.C. 81, 25 S.E. 783; *Hulbert v. Douglas,* 94 N.C. 128; *Bitting v. Thaxton,* 72 N.C. 541; McIntosh, N. C. Practice & Procedure, 2nd Ed., Vol I, Secs. 1238, 1239 and 1240. See *Etheridge v. Wescott,* 244 N.C. 637, 94 S.E. 2d 846.

This Court said in *Hancammon v. Carr, supra:*

> "As the purpose of the two sections (G.S. 1-123 (1), G.S. 1-137 (1)) is to authorize the litigation of all questions arising out of any one transaction, or series of transactions concerning the same subject matter, in one and the same action, and not to permit multifariousness, it must appear that there is but one subject of controversy. McIntosh, P. & P., 491; *Street v. Andrews,* 115 N.C., 417; *McKinnon v. Morrison,* 104 N.C., 354; *Bitting v. Thaxton,* 72 N.C., 541; *Walsh v. Hall,* 66 N.C., 233; *Wilson v. Hughes,* 94 N.C., 182; *Smith v. Building & Loan Assn.,* 119 N.C., 257; *Branch v. Chappell,* 119 N.C., 81; *Bazemore v. Bridgers,* 105 N.C., 191; *Smith v. French,* 141 N.C., 1; *Smith v. Smith,* 225 N.C., 189, 34 S.E. (2d), 148; *Pressley v. Tea Co.,* 226 N.C., 518, 39 S.E. (2d), 382."

Independent and irrelevant causes of action between two defendants, which do not come in question in settling the controversy involved in plaintiff's cause of action, cannot be litigated by cross-action. *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734; *Schnepp v. Richardson, supra; Beam v. Wright, supra; Wingler v. Miller, supra; Montgomery v. Blades, supra; Rose v. Warehouse Co.,* 182 N.C. 107, 108 S.E. 389; *Coulter v. Wilson,* 171 N.C. 537, 88 S.E. 857; *Hulbert v. Douglas, supra.* Such controversies are wholly foreign to plaintiff's cause, and must be settled in another suit between the defendants. *Gibson v. Barbour,* 100 N.C. 192, 6 S.E. 766. Such defendants cannot engraft their independent and irrelevant causes upon plaintiff's cause, and compel him to stand by while they litigate their differences in his suit. *Schnepp v. Richardson, supra; Montgomery v. Blades, supra.*

A party has the right either to rescind what has been done as a result of fraud, or affirm what has been done, and sue for damages caused by the fraud, but he must choose which course he will pursue for the remedies are inconsistent. He cannot choose both. *Surratt v. Ins. Agency,* 244 N.C. 121, 93 S.E. 2d 72.

If Wayne Theatres, Inc., had not assigned the lease, and had sued the defendants Tarkington for unpaid rent, they could set

up as a counterclaim against it the cross-action they have filed in the instant case. *Threadgill v. Faust,* 213 N.C. 226, 195 S.E. 798. See *Wilson v. Hughes,* 94 N.C. 182; *Walsh v. Hall,* 66 N.C. 233.

The written lease entered into between Wayne Theatres, Inc., as lessor, and the defendants Tarkington, as lessees, is the sole ground set forth in the complaint as the base of plaintiff's action. All the claims asserted in the cross-action against the assignors of this lease arise out of the lease set forth in the complaint as the foundation of plaintiff's claim. It is not a remote, uncertain or partial connection, and the parties must have assumed to have had this connection and its consequences in view when they dealt with each other. The defendants Tarkington, to prove a defense against the plaintiff, assignee of the lease, for alleged fraud on the part of Wayne Theatres, Inc., and Max Zager, assignors of the lease, in inducing them to execute the lease, must show actionable fraud on the part of Wayne Theatres, Inc., or Max Zager, or both. The defendants' cross-action is so interwoven in plaintiff's cause of action that a complete story as to one cannot be told without telling the essential facts as to the other, and has such relation to plaintiff's claim that the adjustment of both is necessary to a full and final determination of the controversy. The cross-action of the defendants Tarkington is authorized by G.S. 1-137(1), which is a statute very broad in its scope and terms, and which should be liberally construed by the court in furtherance of its desirable and beneficial purpose. *Smith v. French,* 141 N.C. 1, 53 S.E. 435. What is a proper counterclaim as the word is used in Sec. 4, Rule 25, (c), (4), of Ch. 971 of the 1955 Session Laws of North Carolina, is to be determined by the provisions of G.S. 1-137.

Judge Rousseau erred in holding that the cross-action is not a proper cross-action or counterclaim, and is not pleadable in this action, and that it is not a proper cross-action or counterclaim within the requirements and meaning of Sec. 4, Rule 25, (c), (4), of Ch. 971, of the 1955 Session Laws of North Carolina, and that the cross-action or counterclaim constitutes a misjoinder of parties and causes, and is irrelevant, immaterial and fails to allege a proper defense to plaintiff's claim, and that the plaintiff's motion to strike, and the motions of the additional defendants to dismiss should have been granted. Sec. 4, Rule 25, (c), (4), of Ch. 971 of the 1955 Session Laws of North Carolina, authorizes the filing of a counterclaim in which a money judgment is in good faith sought to be recovered beyond the jurisdiction of the court, and states such counterclaim shall be a valid and subsisting claim for the amount alleged,

but the action shall be at once transferred by that court to the regular civil issue docket of the Superior Court of Guilford County, Greensboro Division. The contention of the additional defendants as set forth in their special appearance and motion to dismiss on the ground that the court had no jurisdiction over them or the cause of action alleged against them is without merit.

Judge Rousseau erred in entering judgment striking out the cross-action, in dismissing the cross-action against the additional defendants, in quashing the service of summons upon them, and in remanding the case to the Greensboro, Guilford County, Municipal-County Court for trial.

This Court said in *Surratt v. Ins. Agency, supra:* "The exception to the signing and entry of judgment, the sole exception on this appeal, presents for decision the question as to whether the pleadings and admitted facts, on which the trial judge ruled, support the judgment."

The defendants Tarkington have excepted to the signing and entry of Judge Rousseau's judgment. The pleadings and admitted facts on which the learned judge ruled do not support his judgment.

Reversed.

STATE v. MARY ELIZABETH CLYBURN, CLAUD EDWARD GLENN, JESSE WILLARD GRAY, VIVIAN ELAINE JONES, DOUGLAS ELAINE MOORE, MELVIN HAYWOOD WILLIS, VIRGINIA LEE WILLIAMS.

(Filed 10 January, 1958.)

1. **Indictment and Warrant § 12—**

A motion made after conviction to quash the warrant is addressed to the discretion of the court, and the denial of the motion is reviewable solely for abuse of discretion.

2. **Trespass § 10—**

In a prosecution for criminal trespass, nonsuit is proper if defendants were merely exercising their constitutional rights.

3. **Trespass § 9—**

The person in lawful possession of a private enterprise may accept or reject patrons for whatsoever whim suits his fancy; G.S. 14-126 and G.S. 14-134 place no limitation on the right of the possessor to discriminate between patrons on the ground of race.

4. **Constitutional Law § 20—**

The Fourteenth Amendment to the Constitution of the United States creates no new privileges, but merely prohibits the abridgment of existing privileges by state action and does not proscribe the right of an operator of a private enterprise to select the clientele he will serve and base such selection on race if he so desires.

5. Same—

The fact that the proprietor of a private enterprise pays a license or privilege tax, and that persons he has refused to serve and whom he has requested to leave are charged with trespass in a warrant signed by an officer, does not render the proprietor's discrimination on account of race action on the part of the State.

6. Criminal Law §§ 31, 151—

The courts will not take judicial notice of municipal ordinances, but such ordinances must be proved as prescribed by G.S. 160-272, G.S. 8-5, and where the record does not indicate that a municipal ordinance was offered in evidence or called to the attention of the court, if such ordinance was then in effect, reference to such ordinance in the brief will be disregarded.

7. Trespass § 1c—

If a person enters on land without permission or invitation, express or implied, and without legal right or *bona fide* claim of right, and refuses to comply with an order to leave after his presence is discovered, such person is a trespasser from the beginning.

8. Trespass § 9—

Persons of the Negro Race who enter that part of the premises of a private enterprise reserved for white clientele, and who refuse to leave upon order of the proprietor, are guilty of a wrongful entry within the meaning of G.S. 14-126, even though their original entrance was peaceful. G.S. 14-134 is applicable where the entry is with force.

APPEALS by defendants from *Moore (Clifton L.), J.*, July 8, 1957 Criminal Term of DURHAM.

On 23 June 1957 a warrant issued from Durham Recorder's Court for defendant Clyburn, charging that she unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor . . ."

Similar warrants issued for each of the other defendants. Defendants challenged the warrants by pleas of not guilty. The court found defendants guilty and imposed a fine. Defendants thereupon appealed to the Superior Court. There the cases were consolidated for trial. The jury returned verdicts of guilty. Judgments were entered imposing a fine in each case. Defendants assigned errors and appealed.

Attorney General Patton and Assistant Attorney General Moody for the State.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, and F. B. McKissick for defendant appellants.

RODMAN, J. The questions propounded by appellants as arising on the assignments of error may be stated as follows: (1) Must a property owner engaged in a private enterprise submit to the use of his property by others simply because they are members of a different race? (2) Was there error in the charge as to what sufficed to constitute a violation of G.S. 14-134?

The questions are stated in the order of priority selected by appellants and are accordingly so treated.

There is no substantial dispute with respect to the facts. L. A. Coletta, with his partner, owned a building at the corner of Roxboro and Dowd Streets in Durham. There they did business under the name of Royal Ice Cream Company, retailing ice cream and sandwiches. The building is separated by partition into two parts. One part has a door opening on Dowd Street; the other portion has a door opening on Roxboro Street. Each portion is equipped with booths, a counter, and stools. Over the Roxboro Street door is a large sign marked "White," and over the Dowd Street door is a similar sign marked "Colored." Sales are made to members of the different races only in the portions of the building as marked.

Defendant Moore is pastor of Asbury Temple, a Methodist Church located on Braswell Street, a mile or mile and a half from the business conducted by Royal Ice Cream Company. Defendants gathered at the church to discuss the "plight of employment of qualified Negro young people."

Led by defendant Moore, they went from the church to the Royal Ice Cream Company, parked their car to the rear of the establishment and proceeded through the back door to the portion of the store set apart for white patrons. Defendant Moore gave orders to the clerk for each of the defendants. The clerk refused to serve defendants and called the manager.

Moore testified: "Then Mr. Coletta talked to me and said he did not want to cause any trouble but he wanted us to leave, but I said, as a Christian, I cannot possibly leave, that we wanted to be served as American citizens and, above all, as persons who believe in the Lord Jesus Christ. . . . We spoke in voices so that other people could hear, that is, other people in the room. Mr. Barnhill (a police officer) told me that I was under arrest. However, he said if we would leave he would not arrest us, but I told him, as a Christian, and believing that the power of the Church is above the State, and that's where the State gets its ultimate power, and that as American citizens, that we could not leave without doing damage to the Constitution. I could not leave. Mr. Coletta told us that he would serve us on the colored side but not on the white side."

The evidence shows the partitioning of the building and provision for serving members of the different races in differing portions of the building was the act of the owners of the building, operators of the establishment. Defendants claim that this, separation by color for service, is a violation of their rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Defendants, by motion first made in the Superior Court, sought to quash the warrant. This motion, made after conviction and while the cases were pending on appeal, was addressed to the discretion of the court. The court did not abuse its discretion in overruling the motion. *S. v. St. Clair*, 246 N.C. 183, 97 S.E. 2d 840; *S. v. Gales*, 240 N.C. 319, 82 S.E. 2d 80; *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513 (cert. den. 345 U.S. 930, 97 L.Ed. 1360); *S. v. Suddreth*, 223 N.C. 610, 27 S.E. 2d 623; *S. v. Beard*, 207 N.C. 673, 178 S.E. 242.

While defendants did not properly preserve their right to assert constitutional protection by the motion to quash, nevertheless, if the evidence, as defendants claim, establishes that defendants were merely exercising their constitutional rights, punishment for so acting should not be inflicted and defendants' motion to nonsuit should have been allowed

Our statutes, G.S. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.

Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the *Civil Rights Cases*, 109 U.S. 3, 27 L.Ed. 835, after quoting the first section of the Fourteenth Amendment, said: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every

kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will thus declared, may not be a mere *brutum fulmen,* the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

In *U. S. v. Harris,* 106 U.S. 629, 27 L.Ed. 290, the Court, quoting from *U. S. v. Cruikshank,* said: "The 14th Amendment prohibits a State from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guaranties and no more. The power of the National Government is limited to this guaranty."

More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R. 2d 441: "Since

the decision of this Court in the *Civil Rights Cases,* 109, U.S. 3, 27 L.Ed. 835, 3 S.Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins v. Hardyman,* 341 U.S. 651, 95 L.Ed. 1253; *District of Columbia v. Thompson Co.,* 346 U.S. 100, 97 L.Ed. 1480, 73 S.Ct. 1007; *Williams v. Yellow Cab Co.,* 200 F. 2d 302 (cert. den. 98 L.Ed. 361).

Dorsey v. Stuyvesant Town Corp., 87 N.E. 2d 541, 14 A.L.R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied *certiorari,* 339 U.S. 981, 94 L.Ed. 1385.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. *Madden v. Queens County Jockey Club,* 72 N.E. 2d 697 (N. Y.); *Terrell Wells Swimming Pool v. Rodriguez,* 182 S.W. 2d 824 (Tex.); *Booker v. Grand Rapids Medical College,* 120 N.W. 589 (Mich.); *Younger v. Judah,* 19 S.W. 1109 (Mo.); *Goff v. Savage,* 210 P. 374 (Wash.); *De La Ysla v. Publix Theatres Corporation,* 26 P. 2d 818 (Utah); *Brown v. Meyer Sanitary Milk Co.,* 96 P. 2d 651 (Kan.); *Horn v. Illinois Cent. R. Co.,* 64 N.E. 2d 574 (Ill.); *Coleman v. Middlestaff,* 305 P. 2d 1020 (Cal.); *Fletcher v. Coney Island,* 136 N.E. 2d 344 (Ohio); *Alpaugh v. Wolverton,* 36 S.E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G.S. 15-41.

Screws v. U. S., 325 U.S. 91, 89 L.Ed. 1495; *U. S. v. Classic*, 313 U.S. 299, 85 L.Ed. 1368; and *S. v. Scoggin*, 236 N.C. 19, 72 S.E. 2d 97, cited and relied upon by defendants, appellants, to support their position, have no factual analogy to this case. Nothing said in those cases in any way supports the position taken by defendants in this case.

Defendants insert in their brief what they say is a provision of the code of the City of Durham, enacted in 1940. It is noted, however, that no such ordinance was offered in evidence. The record as brought to us, prepared by appellants and accepted by the State as correct, does not indicate that any such ordinance was offered in evidence or called to the attention of the court, if then in effect. "We cannot take judicial notice of municipal ordinances. 31 C.J.S., Evidence, Section 27." *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368; *Toler v. Savage*, 226 N.C. 208, 37 S.E. 2d 485; *S. v. Razook*, 179 N.C. 708, 103 S.E. 67. The manner of proving municipal ordinances is prescribed by statute, G.S. 160-272; G.S. 8-5.

Defendants assign as error the following portion of the charge: "If a person without permission or invitation, express or implied, without legal right or *bona fide* claim of right intentionally enters upon the land of another, and after entering thereon his presence is discovered and he is unconditionally ordered to leave and get off of the property by one in the legal possession thereof, and if he refuses to leave and remains on the land, he is a trespasser from the beginning, and the statute read to you by the Court applies and he is deemed to have been forbidden to enter the property."

The court correctly described a trespasser. *S. v. Cooke*, 246 N.C. 518, 98 S.E. 2d 885; *S. v. Goodson*, 235 N.C. 177, 69 S.E. 2d 242; *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.

Does the statute, G.S. 14-134, apply to such a trespasser? Defendants maintain it has no application since it only makes criminal an *entry* after being forbidden. The merit, if any, in the position taken is determined by ascertaining the wrong condemned. The denomination of the criminal act and the historic interpretation given to the words used to define the act provide the answer to the question. The statute, first enacted in 1866, is entitled "AN ACT TO PREVENT WILFUL TRESPASSES ON LAND, AND STEALING ANY KIND OF PROPERTY THEREFROM." It is now grouped with other statutes relating to wrongs done to the owners of real estate in a subchapter of our criminal laws entitled "TRESPASSES TO LAND AND FIXTURES." Looking at the titles, it is apparent the Legislature intended to prevent

the unwanted invasion of the property rights of another. *S. v. Cooke, supra; S. v. Baker,* 231 N.C. 136, 56 S.E. 2d 424. It is not the act of entering or going on the property which is condemned; it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under G.S. 14-126. An entry under a *bona fide* claim of right avoids criminal responsibility under G.S. 14-134 even though civil liability may remain. *S. v. Faggart,* 170 N.C. 737, 87 S.E. 197; *S. v. Wells,* 142 N.C. 590; *S. v. Fisher,* 109 N.C. 817; *S. v. Crosset,* 81 N.C. 579.

What is the meaning of the word "enter" as used in the statute defining criminal trespass? The word is used in G.S. 14-126 as well as G.S. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G.S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. *S. v. Goodson, supra; S. v. Fleming,* 194 N.C. 42, 138 S.E. 342; *S. v. Robbins,* 123 N.C. 730; *S. v. Webster,* 121 N.C. 586; *S. v. Gray,* 109 N.C. 790; *S. v. Talbot,* 97 N.C. 494. The word "entry" as used in each of these statutes is synonymous with the word "trespass." It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent. The charge as given is the correct interpretation of the statute. There is

No Error.

STATE v. AMOS MAYNARD AND MAMIE LUSTER

(Filed 10 January, 1958.)

1. **Criminal Law § 83—**

The trial court may properly exclude testimony on cross-examination which is merely repetitious, and on this record it *is held* the trial court did not unduly restrict the examination or cross-examination of witnesses by defendants.

2. **Same—**

Where a witness testifies on cross-examination as to the versions given by defendant on four separate occasions, whether such versions are contradictory or repugnant is for the jury to determine, and the court properly sustains objections to questions on cross-examination as to whether the defendant had told the witness four different versions of the occurrences.

3. Same—

Where a witness testifies as to statements made by one defendant, cross-examination as to what another defendant told the witness is properly excluded as tending to draw out a self-serving declaration.

4. Criminal Law § 162—

Where the record does not show what the witness would have testified if he had been permitted to answer questions objected to, the exclusion of the testimony is not shown to be prejudicial. This rule applies also to questions asked on cross-examination.

5. Criminal Law § 83—

The exclusion of cross-examination of a witness as to his religious beliefs *held* not prejudicial.

6. Criminal Law § 108—

Where the court gives equal stress to the contentions of the defendant and the State, the fact that the court necessarily consumes more time in stating the State's contentions is not ground for objection.

7. Criminal Law §§ 90, 163—

Where the court properly instructs the jury that testimony competent against one defendant alone was admitted solely against such defendant and should not be considered against the others, a further statement of the court that the testimony could be considered as bearing upon the innocence of the other defendants, while technically incorrect, is not prejudicial.

8. Homicide § 3—

A murder committed in the perpetration of or attempt to perpetrate a robbery from the person is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. G.S. 14-17.

9. Homicide § 2—

If one defendant kills a human being in the attempted perpetration of a robbery committed in the execution of a conspiracy participated in by all the defendants, each defendant is guilty of murder in the first degree.

10. Conspiracy § 5: Criminal Law § 74—

Where parties enter into a conspiracy to commit a felony, each is deemed a party to the acts and declarations of each conspirator done or uttered in furtherance of the common, illegal design.

11. Homicide § 27g—

In this prosecution for a homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery, and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, *is held* without error and not to contain an expression of opinion on the evidence in violation of G.S. 1-180.

APPEAL by defendants Amos Maynard and Mamie Luster from *Johnston, J.*, April-May 1957 Term of SURRY.

Criminal prosecution upon a bill of indictment charging that Monroe Willard, Johnny Liss Luster, Amos Maynard, Mamie Luster and Irene Luster on 7 February 1957 feloniously, wilfully, and of their malice aforethought, did kill and murder John Allen Branch.

The court appointed separate counsel to represent each defendant. After their arraignment Monroe Willard and Johnny Liss Luster, pursuant to G.S. 15-162.1, tendered pleas of guilty of murder in the first degree as charged against them in the indictment, which the State, with the approval of the court, accepted. During the jury's deliberations after the charge of the court, Irene Luster tendered a plea of guilty of murder in the second degree as charged against her in the indictment, which plea the State accepted.

Amos Maynard and Mamie Luster entered pleas of not guilty. As to each of these two defendants the jury returned a verdict of guilty of murder in the first degree, and recommended for each of them imprisonment for life in the State's prison.

From judgments imprisoning each of these two defendants in the State's prison for life, they appeal.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Norman and Reid for Defendants, Appellants.

PARKER, J. The State's evidence presents these facts:

Johnny Liss Luster and Irene Luster are husband and wife. Mamie Luster is the stepmother of Johnny Liss Luster, and her husband, Sherman Luster, was serving a road sentence on 7 February 1957. Amos Maynard married Mamie Luster's sister. Monroe Willard was 16 years old, cannot read and write, and had been living at Mamie Luster's home about three weeks prior to 7 February 1957. He had been convicted twice for breaking and entering. Mamie Luster lived on the Pilot Mountain-Westfield Road about four miles from the home of John Allen Branch.

On the morning of 7 February 1957 all five defendants went to Mt. Airy in Amos Maynard's automobile. Upon their arrival in Mt. Airy, Amos Maynard and Johnny Liss Luster went to a bank there, and tried, without success, to borrow some money on Amos Maynard's automobile. They then went to one or two used car lots, and attempted to sell Maynard's automobile, but failed to do so. Around noon they went to Pilot Mountain, where an effort was made, that failed, to sell Maynard's automobile to the Pontiac place. About three o'clock in the afternoon all five defendants left Pilot Mountain in Maynard's automobile to

return to Mamie Luster's home. While on their way Amos Maynard said he wanted a drink of liquor, and asked Mamie Luster if she did. She said she didn't have but $20.00, which she gave to Johnny Liss Luster. They drove to John Allen Branch's home. Johnny Liss Luster got out, went in the house, and returned with a quart of liquor in a half-gallon can and $17.00 in change, which money he gave to Mamie Luster. They drove on to Mamie Luster's home.

They drank some of the liquor. All five of them were sitting in the heater room, and Mamie Luster, Johnny Liss Luster and Amos Maynard were talking about leaving, and going to Kentucky, and wanting some money. Monroe Willard said he knew a man, Sam Shinault, who had some money, that they had no money to go to Kentucky, rob him. Irene Luster said, "better leave him alone, he will shoot you." Mamie Luster said she knew a man, who carried a roll of money, John Allen Branch, the man who got her $20.00 bill. Irene Luster said that would be better, because there are not so many houses around. Prior to this time, Amos Maynard and Mamie Luster told Monroe Willard they would give him a rifle if he would rob old man Branch. Monroe Willard said he didn't have a gun. Mamie Luster said he could use the rifle. Amos Maynard told him he could use his pistol, but it wasn't there. Johnny Liss Luster told Monroe Willard not to use the pistol, he might miss: it would be better to use the shotgun. Johnny Liss Luster, Amos Maynard and Mamie Luster told Monroe Willard if he was going to shoot like they said, not to let him get the first shot. Amos Maynard, Johnny Liss Luster and Mamie Luster told Monroe Willard to shoot. Mamie Luster told Willard to kill Branch. Amos Maynard and Mamie Luster told Monroe Willard to wear something other than what he had on. Amos Maynard told him to pull his shirt off, so he would have a clean shirt to put on, after he got the money. He pulled off his shirt. Mamie Luster gave him a shirt which he put on, after his face was blacked. Irene Luster had some blacking on the fireboard. Monroe Willard's face was blacked in the heater room.

Monroe Willard with a shotgun and Johnny Liss Luster went out, and got in Johnny Liss Luster's car. Amos Maynard came out, got in his car, and pushed Johnny Liss Luster's car off to get it started. He drove his car to Hunter's Service Station. Amos Maynard followed to put gas in Johnny Liss Luster's car. It was then about 6:00 o'clock p. m. At the Service Station Johnny Liss Luster had Monroe Willard to look off, because his face was blacked.

Johnny Liss Luster and Monroe Willard left the Service Station in Luster's car with Luster driving, and went to a road,

which goes from the highway to the home of John Allen Branch. The Branch home is about three miles from Hunter's Service Station. When they reached the road, Monroe Willard got out of the car, and went to the Branch home. As Willard got out of the car, Johnny Liss Luster gave him five shells, he told him to use a shell like that, #6. A dog began barking, and John Allen Branch came out on his porch. Monroe Willard raised his shotgun, and shot him. Willard went back to the highway, and got in Johnny Liss Luster's car. He told Luster he had shot Mr. Branch. Luster asked him if he got the money, and he replied no.

Mrs. John Allen Branch testified that on this night about 7:00 p. m. she, her husband, and two grandchildren were sitting in their home looking at television, that the dogs barked, and her husband got up, turned on the porch light, and went out, and a gun fired. John Allen Branch did not speak, he came back into the room, and fell dead on the floor. Mrs. Branch and her grandchildren remained alone in the home all night.

After Willard shot and killed John Allen Branch, he and Johnny Liss Luster returned to Mamie Luster's home. Mamie Luster, Irene Luster and Amos Maynard were there. Willard told them he had shot and killed John Allen Branch. Mamie Luster asked Willard, if he got any money. He replied he did not. Mamie Luster tried to get Willard and Johnny Liss Luster to go back, and kill Mrs. Branch, and get the money. They refused. Mamie Luster said if Mrs. Branch was killed, there would be nobody to talk. They had Willard to pull off his shoes, and put them in the heater. Later an officer took the shoes out of the stove at Mamie Luster's home. Mamie Luster told Johnny Liss Luster to take the shotgun to the woods, and hide it under a log.

The defendants have filed a joint brief, in which they contend four questions are presented for decision on their appeal.

First, they group twenty-nine assignments of error, which they contend show that the trial court overly restricted the defendants' examination of witnesses, particularly in the light of the latitude afforded the State.

A study of the Record shows that the trial court did not overly restrict the examination or cross-examination of witnesses by the defendants, but on the contrary extended great latitude to the defendants in such examinations. Many of the questions referred to in these assignments of error, the answers to which the court excluded upon the State's objections, were repetitious or incompetent. Exceptions to the exclusion of testimony which is mere repetition cannot be sustained. *S. v. Wall*, 218 N.C. 566, 11 S.E. 2d 880.

M. G. Crawford, a State agent for the State Bureau of Investigation, testified for the State on direct examination as to what Monroe Willard told him in the presence of Amos Maynard, Mamie Luster, Irene Luster and Johnny Liss Luster as to the plan to rob and kill John Allen Branch, and as to his killing him. On cross-examination counsel for Amos Maynard asked M. G. Crawford several questions as follows: (1) "How many different statements has Monroe Willard made to you, how many different versions of this fantasy?"; (2) "And he told you and gave you different versions of it every time, did he not?"; (3) "He told different or made different statements about it from time to time, did he not?"; (4) "How many different statements did you hear him make?" The court sustained the State's objections to these questions, and the defendants assign this as error. However, the trial court told the cross-examining counsel that he could ask M. G. Crawford what Monroe Willard told him, and that it was for the jury to decide as to whether his statements were different. Whereupon, M. G. Crawford in response to counsel's questions stated what Monroe Willard told him on four different occasions about the commission of the crime. After this counsel then asked Crawford, "so that is four different versions?" The court sustained the State's objection to this question. These assignments of error are without merit.

On direct examination by the State Crawford was asked no question as to what, if anything, Mamie Luster said to him; nor did he testify as to anything she told him. She assigns as error the refusal of the court over the State's objection to permit Crawford to testify as to what, if anything, she told him. Such question was incompetent as tending to draw out a self-serving declaration. If it became so later in corroboration of Mamie Luster's testimony, it was not again offered. *S. v. McCanless*, 182 N.C. 843, 109 S.E. 62.

Amos Maynard assigns as error the refusal of the trial court over the State's objection to permit Crawford to answer a question to this effect: Did Monroe Willard tell you that Amos Maynard said to the defendants, you fellows ought not to go around and bother that old man? The Record fails to show what Crawford would have testified to if permitted to answer. Therefore, it is impossible for us to know whether the ruling was prejudicial or not. *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. The court sustained the State's objections to several other questions asked by defendants' counsel, but what the answer would have been is not in the Record.

The court, upon the State's objections, refused to require Monroe Willard to answer on cross-examination some questions as to his religious beliefs. According to what this Court said in

S. v. Beal, 199 N.C. 278, 154 S.E. 604, prejudicial error is not made to appear.

To discuss all of these assignments of error grouped under the first question separately would unduly lengthen this opinion, and serve no useful purpose. All of them have been considered, and none is sufficient to show prejudicial error that would justify a new trial. The defendants were allowed by the court to fully and adequately examine and cross-examine the witnesses.

The second question that the defendants present is, that the trial court did not give equal stress to the contentions of the State and the defendants, as required by G.S. 1-180.

The evidence for the State consumes about 38 pages of the Record: the evidence for the defendants, including the testimony of Irene Luster, takes up about 22 pages. The trial court necessarily took more time in stating the evidence and contentions of the State than in stating the evidence and contentions of the defendants. A careful study of the evidence and the charge shows that the trial judge sufficiently and fairly reviewed the evidence and contentions of the defendants, and gave equal stress to the contentions of the defendants and the State. Defendants' assignments of error grouped under this question are overruled. *S. v. Adams,* 245 N.C. 344, 95 S.E. 2d 902; *S. v. Sparrow,* 244 N.C. 81, 92 S.E. 2d 448.

The third question that the defendants present for decision is that the court failed to declare and explain the law arising on the evidence given in the case, as required by G.S. 1-180. Under this question they have and discuss two assignments of error, Nos. 80 and 82. After Amos Maynard, Mamie Luster and Irene Luster had testified in their own behalf, Agent Crawford was called as a witness in rebuttal by the State, and testified as to statements made to him by these three defendants, and he also testified as to what Mamie Luster testified to as a witness at the preliminary hearing. Whereupon, the trial judge, while Crawford was on the stand, carefully instructed the jury that what Amos Maynard told Crawford was admitted against him alone, and was not admitted and not to be considered against Mamie Luster and Irene Luster. The court gave similar instructions as to what Mamie Luster and Irene Luster said. The court went further and said the statement of any one of these witnesses could not be considered upon the guilt of the others, but could be considered as bearing upon their innocence. This statement of the court, while technically incorrect, was not prejudicial to the defendants. These assignments of error are overruled.

The fourth question presented by the defendants is that the court expressed an opinion, as prohibited by G.S. 1-180. Under this question they group and discuss five assignments of error.

Defendants state in their brief that their assignment of error No. 99, as to the charge set forth under this question, is the most severe and acute error committed by the judge in the course of the trial, and that "in reference to this assignment of error, the court, in effect, instructed the jury to disregard certain evidence and to find the defendant Amos Maynard guilty of murder in the first degree."

Assignment of error No. 99 is to the following part of the charge in parenthesis:

> "The Court instructs you that if the State has satisfied you beyond a reasonable doubt, the burden being upon the State to so satisfy you, that Amos Maynard planned, conspired and agreed with Monroe Willard, Johnny Luster, Mamie Luster and Irene Luster to rob or attempt to rob Allen Branch with the use or threatened use of the shotgun, or other firearms, that he planned, advised and counseled with Monroe Willard to procure a gun and advised and counseled to rob Branch, that he assisted in blacking Monroe Willard's face in concealing himself at Branch's house, (if he took the car and pushed off Johnny Luster and Monroe Willard or agreed to share in the proceeds of the robbery and in furtherance of such plan and agreement and while attempting to rob the said Branch, Monroe Willard shot and killed Branch, and if the State has so satisfied you beyond a reasonable doubt it will be your duty to return a verdict of Guilty of Murder in the First Degree)."

G.S. 14-17 provides that "a murder . . . , which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . or other felony, shall be deemed to be murder in the first degree." *S. v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352; *S. v. Alston*, 215 N.C. 713, 3 S.E. 2d 11; *S. v. Donnell*, 202 N.C. 782, 164 S.E. 352.

Where a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *S. v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533; *S. v. Alston, supra; S. v. Donnell, supra.*

"It is evident that under this statute (G.S. 14-17) a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not." *S. v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649.

The case was tried upon the theory that if a conspiracy were formed to rob John Allen Branch, and if Monroe Willard were

one of the conspirators, and murdered John Allen Branch in the attempted perpetration of the robbery in the execution of such conspiracy, each and all of the conspirators would be guilty of murder in the first degree. This is a correct principle of law. *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708; *S. v. Kelly, supra; S. v. Green,* 207 N.C. 369, 177 S.E. 120; *S. v. Stefanoff,* 206 N.C. 443, 174 S.E. 411; *S. v. Bell,* 205 N.C. 225, 171 S.E. 50. In the Bell Case, the Court said: "He (Bell) only furnished the conveyance, and remained a distance from the scene of the crime, nevertheless, he was one of the conspirators."

This Court said in *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508:

> "Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy. *S. v. Williams,* 216 N.C. 446, 5 S.E. 2d 314. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733. 'Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any one of the others, in furtherance of such common design.' *S. v. Jackson,* 82 N.C. 565; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Summerlin—'Hole-in-the-Wall' Case,*—232 N.C. 333, 60 S.E. 2d 322; *S. v. Anderson,* 208 N.C. 771, *loc. cit.* 786, 182 S.E. 643; *S. v. Herndon,* 211 N.C. 123, 189 S.E. 173."

S. v. Donnell, supra, was a prosecution upon an indictment charging Donnell and Lee with the murder of one R. B. Andrews. There was an adverse verdict and sentence of death. In finding no error in the trial, the Court said that the following part of the charge, which was assigned as error, was free from reversible error:

> " 'Now there is no conspiracy expressly set out in the bill, and it is not necessary that it should have been alleged in the bill, but if the State has satisfied you beyond a reasonable doubt from the evidence that the two defendants Donnell and Lee, prior to the time of the alleged killing of R. B. Andrew, entered into a conspiracy to rob him, and pursuant to that conspiracy so entered into, and while in an attempt to carry out the unlawful purpose, to wit, the robbery of

> Mr. Andrew, one of them shot and killed him, the court instructs you, gentlemen of the jury, that both defendants would under those circumstances be guilty of murder in the first degree.' "

The court stated that the defendants are charged in the indictment with the murder of one R. B. Andrews, while the judgment recites they were convicted of murdering one R. B. Andrew as charged in the bill of indictment. The Court said: "The names are patently *idem sonans*, and the slight difference, evidently a typographical error either in the one or the other, is not regarded as material."

The trial court apparently had the *Donnell* case before it, when it charged the jury in this case. The part of the charge assigned as error in this case by defendants' assignment of error No. 99 is free from reversible error, and in it the judge expressed no opinion.

In respect to the other four assignments of error grouped under the fourth question presented by defendants, nothing is shown to indicate that the trial judge offended by expressing an opinion.

The State offered plenary evidence of a conspiracy entered into by the two defendants here, and the other three defendants who pleaded guilty, to rob John Allen Branch, and that in the attempted perpetration of the robbery in execution of the conspiracy, Monroe Willard, one of the conspirators, murdered John Allen Branch. Each of the defendants' assignments of error has been carefully considered, and none shows prejudicial error sufficient to upset the judgments of imprisonment, and to require a new trial.

No Error.

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, A CORPORATION, V. MODERN GAS COMPANY, INC., LUMBERTON, NORTH CAROLINA, A CORPORATION.

(Filed 10 January, 1958.)

1. Insurance § 25b: Parties § 1—

An insurance company which has paid the entire claim for damages to insured's home by fire and explosion is subrogated to the rights of insured and properly brings suit in its own name against the tort-feasor whose alleged negligence caused the damage.

2. Gas § 1—

Liquefied petroleum gas is a highly dangerous substance and the distributor of such gas is required to use that degree of care to prevent the escape of such gas from its tanks, pipes and containers which is

commensurate to the dangers to be reasonably anticipated by a prudent man, and is liable for the damages resulting from the negligent breach of this duty when the person suffering the injury is free from contributory negligence.

3. Negligence § 9—

While foreseeability is a requisite of proximate cause, it is not required that the injury in the precise form in which it occurred be foreseeable, but only that consequences of a generally injurious nature might have been reasonably foreseen.

4. Gas § 2—

Gas companies may be held liable for their negligence in filling the tanks of their customers in a manner so as to allow an escape of the dangerous substance, which proximately results in a fire or explosion causing damage to their customers, provided their customers are free from contributory negligence.

5. Same—

Evidence tending to show that while defendant's tank truck was delivering liquefied gas to a customer's storage tank, liquefied gas escaped from the hose connected to the tank right up against the house, where it vaporized and created an extremely hazardous situation, and that fire from a spark or from the pilot lights burning in the house or fire coming from the tank truck, ignited the gas causing an explosion and fire damaging the customer's property, *is held* sufficient to overrule nonsuit in an action against defendant for negligence.

6. Same: Trial § 23f—

In this action against a liquefied petroleum gas company to recover damages sustained when it permitted gas to escape while filling a customer's storage tank, resulting in explosion and fire, the fact that the allegations as to the source of the fire that ignited the gas fail to conform strictly to the proof *held* not to warrant nonsuit on the ground of variance upon consideration of all the facts and the further fact that there was neither allegation nor proof of any contributory negligence on the part of the customer.

APPEAL by plaintiff from a judgment of nonsuit entered at the close of its evidence by *Mallard, J.*, at March Term 1957 of ROBESON.

Ellis E. Page for Plaintiff, Appellant.

Varser, McIntyre, Henry & Hedgpeth and Everett L. Henry for Defendant, Appellee.

PARKER, J. Plaintiff's evidence tends to show the following facts:

On 2 May 1955, and prior thereto, Julius Bullard owned a one-story frame dwelling house, in which he and his wife lived, on Fairmont Road. In this home were household and kitchen furniture and other personal property.

The defendant is a North Carolina corporation, with its principal office in Lumberton, and is engaged in the sale, installation, and service of bottled gas and appliances.

On 5 October 1954 the defendant sold Julius Bullard a gas automatic water heater, and on the same day installed it, and a gas storage tank at his home. The gas storage tank was owned by Julius Bullard, but not acquired by him from defendant. In 1952 defendant sold, and installed in his home a gas space heater. The gas storage tank was a round, upright, above-ground tank, with a capacity of 125 gallons, and was situate at the rear of the house near an enclosed back porch at a place designated by Julius Bullard.

On the afternoon of 2 May 1955 defendant sent its tank truck to Julius Bullard's home for the purpose of putting liquefied petroleum gas in his storage tank. When the driver of defendant's tank truck arrived at Bullard's home, there was gas in his gas storage tank. The pilot lights were burning. No gas was escaping about Bullard's premises. Bullard's gas equipment had operated satisfactorily from the time it was installed, up until the time the driver of defendant's tank truck connected the hose from his gas tank wagon to Bullard's gas storage tank. Nothing was wrong with Bullard's gas equipment. Defendant's driver checked the gas storage tank, and found several gallons of gas in the storage tank. He also checked the tank, and saw the amount of pressure in it. Defendant's driver hitched the hose from the gas tank truck, screwed it to the gas storage tank, and started to put gas in the storage tank. The pump to pump gas from the truck into the storage tank is located in the foot of the truck. The pump is operated with a gear shift. The pump is put in gear, the truck motor does the pumping, and the gas comes out of the truck into the storage tank.

The defendant's driver began pumping gas into the storage tank, and after it had run a little while, the end of the tank started shooting a fog that went right up to the house. Julius Bullard's wife yelled, "shut that thing off." She went, and shut the back door. The pump was still pumping. It pumped a minute or so, and the driver had something in his hand, and hit the valve ten or twelve times.

Julius Bullard testified as follows:

> "48 gallons of gas were pumped into my tank when the ticket was burned out of the machine. The computator was going pretty fast like counting 1, 2, 3, and on. You could tell by the way the computator was running. When the valve started releasing a vapor the driver of defendant's truck ran back around the truck and cut it off. The hose

caught on fire while the driver of the truck was helping me to learn to read the gauge. When the valve started releasing gas, he started beating the valve. He then went to the back there and cut it off after everything had went up. There was gas escaping from the hose connected to the tank and the fog and fire was blowing out of the end of that thing hot enough to melt the screen wire. I couldn't say there was any gas escaping around the connections. It was burning.

"The noise was like a big peal of thunder and then a great ball of fire shot out from the house. The fire was coming from the corner of the house when he was hitting the valve. There was no fire around where he was hitting that valve. The hose leading to the wagon caught on fire. After he went back and cut the pump off, I told him to back the truck out. I then put a ladder on top of the house, and the driver crawled up there and helped me fight the fire. . . . I know that the stuff that was coming out of the tank like fog was gas."

All the house was damaged. Every window sill "was busted." The doors didn't open as they did before, "but came out the opposite way." The walls on the inside of the house were torn all to pieces in every room. The fair market value of the house immediately prior to the explosion and fire was $8,500.00; immediately thereafter $1,000.00.

On cross-examination Julius Bullard testified:

"That explosion must have occurred inside the house. It blowed the doors open. There wasn't any explosion out there where I was, except that ball of fire that came out. I don't know if that came from the inside the house. The gas coming out of the valve made a bigger sound than a hissing sound. The gas was escaping from that tank. It came out of my safety valve. It was gas that had come out of the tank of Modern Gas Company, but the place the gas was escaping was from this safety valve that I brought here. I didn't strike any match out there and I didn't see any fire out there where me and the driver of the gas truck were. The fire that I was talking about that burned my house was inside and out. It happened on the inside of the house first and then came out. I don't know what caused the explosion inside of my house except the pilot lights went up. I was not in the house. I don't know what happened on the inside of my own knowledge."

On redirect examination he testified:

> "The first fire I saw was on the outside. The first fire was out there at the tank at the far end where the gas was coming out at the storage tank (my tank). That was the first fire I saw was outside. There was a ball of fire blowing out the other end."

The parties stipulated that plaintiff is a foreign corporation doing an insurance business in North Carolina, and that it had issued to Julius Bullard its Policy No. 31993, covering his dwelling house and furniture. The evidence shows that plaintiff paid Julius Bullard all his damages to his house and furniture resulting from this explosion and fire. Upon receiving this payment from plaintiff, Julius Bullard executed and delivered to plaintiff a Loan Receipt transferring and assigning to it any claim he has against the defendant for any negligence or other fault in causing the damage to his house and furniture, and authorizing plaintiff to prosecute suit against the defendant in his, or its name, for such loss or damage.

An agent of plaintiff testified the policy covered fire, lightning, or any event of that nature, and in accordance with the policy plaintiff paid Julius Bullard all the damage he claimed in the amount of $3,236.98, and that it is the holder of the Loan Receipt Julius Bullard assigned to it.

R. L. Spivey runs a furniture store. The next morning following the explosion and fire, he went to Julius Bullard's home, and examined the furniture and contents therein. They were burned and damaged, and had at that time a fair market value of $75.00. He bought the gas storage tank, and saw on it the pressure valve. His son is using this tank.

The insurance paid Julius Bullard by plaintiff under its policy covered his loss in full. He testified: "The plaintiff in this action paid me for all my damage." Therefore, the claim of plaintiff, the insurer, represents the entire unsettled claim, and it, being subrogated to the rights of the insured, properly brought suit in its own name. *Insurance Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686; *Insurance Co. v. Lumber Co.,* 186 N.C. 269, 119 S.E. 362; *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426; *Cunningham v. R. R.,* 139 N.C. 427, 51 S.E. 1029; *Insurance Co. v. R. R.,* 132 N.C. 75, 43 S.E. 548. See *Burgess v. Trevathan,* 236 N.C. 157, 160, 72 S.E. 2d 231, 233; *Smith v. Pate,* 246 N.C. 63, 67, 97 S.E. 2d 457, 460.

"Although liquid gas was discovered by chemists in about 1910, it remained a waste product at the oil wells until the middle 1920's, when, apparently because a more economical and con-

venient method had been devised for the capture of the gas and its compression, the oil companies commenced to ship the new product in small containers to individual customers. Today, its use has expanded tremendously, and it is now widely employed in homes and business places where the location forbids the use of piped gas." Anno. 17 A.L.R. 2d 888-889. For a brief discussion of the history of liquid gases, see *Tennessee Gas Co. v. McCanless,* 184 Tenn. 387, 199 S.W. 2d 108.

Graham v. Gas Co., 231 N.C. 680, 58 S.E. 2d 757, 17 A.L.R. 2d 881, quotes the following language from *Holmberg v. Jacobs,* 77 Or. 246, 150 P. 284, Ann. Cas. 1917 D, 496: It is a scientific fact "that gas ordinarily used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an instant explosion, if it is present in any considerable volume." Our opinion then states: "This being true, such gas is a dangerous substance when it is not under control."

The rule is well established that in view of the highly dangerous character of liquid gas and its tendency to escape, a gas company must use a degree of care to prevent the escape of such gas from its tanks, pipes and containers commensurate to the dangers to be reasonably anticipated by a prudent man, which it is its duty to avoid, and that if it fails to exercise this degree of care, and injury proximately results therefrom, the company is liable, provided the person suffering injury is free from contributory negligence. *Graham v. Gas Co., supra; Barbeau v. Buzzards Bay Gas Co.,* 308 Mass. 245, 31 N.E. 2d 522; *Skelly Oil Co. v. Holloway,* 171 F. 2d 670; *Clay v. Butane Gas Corp.,* 151 Neb. 876, 39 N.W. 2d 813; *March v. Carbide & Carbon Chemicals Corp.,* 265 App. Div. 1064, 39 N. Y. S. 2d 493; *Franklin v. Skelly Oil Co.,* 141 F. 2d 568, 153 A.L.R. 156; *Moran Junior College v. Standard Oil Co. of Cal.,* 184 Wash. 543, 52 P. 2d 342; *Barrickman v. Marion Oil Co.,* 45 W. Va. 634, 32 S.E. 327, 44 L.R.A. 92; 24 Am. Jur., Gas Companies, Sections 20, 21, 22 and 24; 38 C.J.S., Gas, Sections 41, 42 and 43.

In *Barbeau v. Buzzards Bay Gas Co., supra,* it is said: "The defendant in the conduct of its business (gasoline) was bound to use reasonable care to prevent the escape of gas upon the premises of the plaintiff; and that degree of care, in view of the dangerous character of gas and its tendency to escape, means care commensurate with the danger that would probably result if such care were lacking."

In *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385, there is an illuminating discussion of the degree of care required of a person dealing in or handling dangerous substances by *Stacy, C.J.,* and in summing up the many quotations from the cases, he says: "The standard is always the rule of the prudent man, or

the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions. *Fitzgerald v. R. R.*, 141 N.C. 530, 54 S.E. 391. The standard is due care, and due care means commensurate care under the circumstances."

In this jurisdiction foreseeable injury is a requisite of proximate cause. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796; *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331. But the rule does not require that the negligent person should have been able to foresee, or anticipate, the injury in the precise form in which it occurred. *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894. It is sufficient to satisfy the test of foreseeable consequences of negligence that in the exercise of reasonable care, the negligent person might have foreseen that consequences of a generally injurious nature might have been expected. *Hart v. Curry*, 238 N.C. 448, 78 S.E. 2d 170.

In accordance with the rule requiring distributors and sellers of bottled gas, or liquefied petroleum gas, to use care commensurate with the dangers to be reasonably anticipated by a prudent person, they have been held liable for their negligence in filling the tanks of their customers in a manner so as to allow an escape of the dangerous substance, which proximately results in a fire or explosion causing damage to their customers, provided their customers are free from contributory negligence. *Graham v. Gas Co., supra; Davidson v. American Liquid Gas Corp.*, 32 Cal. App. 2d 382, 89 P. 2d 1103; *Breed v. Philgas Co.*, 118 Conn. 128, 171 A. 14; *Manning v. St. Paul Gaslight Co.*, 129 Minn. 55, 151 N.W. 423, L.R.A. 1915 E, 1022, Ann. Cas. 1916 E, 276; 38 C.J.S. Gas, Section 42.

In *Clay v. Butane Gas Corp., supra*, where the defendant was held liable in damages to plaintiff for injury to his building and the personal property therein caused by an explosion of Butane gas due to defendant's negligence in filling the Butane tank under the circumstances on the day of the explosion, or in failing to discover the leak in the pipes, the Supreme Court of Nebraska said: "It being common knowledge that gas is a powerful and dangerous force that requires care on the part of those furnishing it, a gas company which knows of the location of the tank, pipes, and cutoffs in a customer's building is under the obligation and duty, in filling the tank, to exercise that degree of care, to protect the building and its occupants from injury, commensurate with the dangers incident to the use of such gas."

Davidson v. American Liquid Gas Corp., supra, was an action to recover damages to plaintiff's dwelling house and its contents resulting from defendant's negligence in permitting escape of

Butane gas being transferred from defendant's tank truck to storage tanks on plaintiff's premises. The gas was pumped by means of the motor from the truck through a rubber hose which was attached near the middle of the truck. The engine of the truck was left running during the entire filling process. During the process of filling the tanks a blast occurred. A witness, who was standing back of the truck, stated that the truck moved two or three feet and a flash hit him and burned his sweater, his right eye and the back of his neck. Plaintiff's house and its contents were totally destroyed by the fire. In affirming a recovery for plaintiff, the Court said: "By the process of elimination of all evidence of any possible negligence on the part of respondent or that the excess amount of escaping gas might have been ignited by any act of his, and in view of the fact that the escaping gas was ignited and the remaining evidence produced indicates that the only reasonable inference that could be drawn from the circumstances was that the back-fire from the exhaust ignited the excess escaping gas, we feel that the court was reasonably justified in finding that the damage was the result of appellants' negligence."

The allegations of negligence in the complaint are: One, the pump and equipment owned and used by the defendant in pumping gas from its tank truck into Julius Bullard's storage tank was defective, and was forcing the gas from the tank truck into the storage tank under too great a pressure and at too great a speed. Two, the defendant was negligent in making a faulty hose connection between its tank truck and the storage tank, and made the connection in such a manner as to allow large quantities of gas to escape. Three, the defendant's driver was negligent in that, when the gas safety exhaust valve began to release gas, he took a heavy metal object, and struck the safety exhaust valve several times, which caused the exhaust valve to release more gas. Four, after gas was escaping from the exhaust safety valve, defendant's driver continued to force a large quantity of gas from its tank truck into the storage tank, until huge quantities of gas escaped, and vaporized in heavy clouds, and drifted into and penetrated Julius Bullard's home, where it exploded upon coming in contact with the pilot lights that were burning in the house. The complaint also alleges: "That the said gas was ignited from a spark as a result of the defendant's agent striking the metal exhaust valve with some heavy metal object, or was caused by the escaping gas seeping into the house where it came in contact with the burning pilot lights, or was caused as a result of both."

The precise kind of gas delivered by the defendant on this occasion is not shown. Plaintiff alleges in its complaint that the

defendant is engaged in the sale, installation and service of bottled gas, and defendant admits this in its answer. In its brief defendant states it "is engaged in the selling and distribution of liquid petroleum gas to its customers." The complaint alleges that the gas was Propane or Butane bottled gas.

The evidence discloses that defendant's driver had complete control of its tank truck, when it was putting liquefied gas in Julius Bullard's storage tank, that, while this operation was going on, the hose of the tank truck connected with the storage tank caught on fire, that gas was escaping from the hose connected to the tank, and fog and fire were blowing out of the end hot enough to melt the screen wire of the house. The gas was burning. Considering the evidence in the light most favorable to the plaintiff, it permits the legitimate inferences that defendant in making a delivery of the gas from its tank truck to Julius Bullard's storage tank was using insufficient or defective equipment, or making improper use of its equipment, and by reason thereof forced the liquefied petroleum gas into the open, and right up to his house, where it vaporized, and at once became extremely hazardous, that as a result of defendant's negligence in permitting this gas to escape into the open, and right up to his house, it became ignited from the fire on the hose of the tank truck, or from the burning pilot lights, or from some other fire coming from the tank truck, and that such negligence of the defendant in permitting the gas to escape was a proximate cause of the explosion and fire, which damaged Julius Bullard's home and its contents.

It is familiar learning that there must be, under the old or new system of pleading, *allegata* and *probata*, and the two must correspond with each other. *Sale v. Highway Com.*, 238 N.C. 599, 78 S.E. 2d 724; *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14.

Accepting plaintiff's evidence as true, which we are required to do in consideration of a motion for judgment of nonsuit, it tends to show that the defendant's negligence in permitting the liquefied gas to escape into the open, and right up to Julius Bullard's house, where it vaporized, created an extremely hazardous situation, which set the stage for an explosion, if fire, or a spark of fire, came in contact with it. While plaintiff's allegations of the source of the fire that ignited the gas causing the explosion probably do not strictly conform with the proof as to its source, yet considering all the facts, and the further fact that there is neither allegation, nor proof, of any contributory negligence on the part of Julius Bullard, the proof does not sufficiently depart from the allegations of the complaint to require a compulsory nonsuit on the ground of a fatal variance between allegation and proof.

Plaintiff is entitled to have a jury to pass upon the evidence, and the judgment of compulsory nonsuit below is

Reversed.

D. C. McCOTTER, SR., J. MUSE McCOTTER AND D. C. McCOTTER, JR., TRADING AS D. C. McCOTTER & SON, v. HUGH H. BARNES AND H. FOLEY BARNES.

(Filed 10 January, 1958.)

1. **Railroads § 15—**

A conveyance of land for use as a railroad right of way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of G.S. 60-37(4), and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the *habendum* and warranties are in harmony therewith, it conveys the fee and not a mere easement. *Shepard v. R. R.*, 140 N.C. 391, cited and distinguished.

2. **Deeds § 11—**

Where the granting clause, *habendum* and warranties of a deed are plain and unambiguous as to the quality of the estate conveyed, there is no room for construction to ascertain the intent.

3. **Same—**

A conveyance will be construed to be in fee simple unless an intent to convey an estate of less dignity is apparent from the plain and express language of the instrument. G.S. 39-1.

4. **Deeds § 13a: Railroads § 15—**

Where the granting clause in a deed purports to convey the fee and the *habendum* and warranties are in harmony therewith, a clause in the description that the conveyance was a right of way 100 feet wide does not limit the conveyance to an easement.

5. **Railroads § 15—**

The term "right of way" has a two-fold meaning: one, to designate an easement, and the other, as descriptive of the use or purpose to which a strip of land is put, without reference to the quality of the estate.

6. **Deeds § 13a—**

Where the granting clause purports to convey an estate in fee simple and the *habendum* and the warranties are in harmony therewith, other clauses in the deed repugnant to the interest thus conveyed are ineffective.

7. **Deeds § 11—**

The fact that a deed is written by insertions in a deed form is without significance.

8. Deeds §§ 13a, 16b: Railroads § 15—

A clause in the description of a fee simple deed that "there shall be no building other than for railroad use" is at most a personal, restrictive covenant, which does not run with the land, and therefore, after the death of grantors and the transfer of the property after its use for railroad purposes had ceased, the clause is without force and effect, since its purposes and objects no longer exist.

APPEAL by plaintiffs from *Fountain, Special Judge,* at February Term, 1957, of PAMLICO.

Civil action to restrain trespass and to try title to land, involving interpretation of a deed.

The plaintiffs allege that they are the owners and in possession of a strip of land in Pamlico County, which was part of the roadbed and right of way of the now abandoned Washington-Vandemere branch of the Atlantic Coast Line Railroad Company. The strip of land is 100 feet wide along the east line of N. C. Highway No. 304 where the right of way crossed the highway, and runs back southeastwardly over the abandoned right of way a distance of about 488 feet. The plaintiffs further allege that the defendants have barricaded the plaintiffs' entrance to the land and in so doing are committing a continuing trespass thereon. The defendants, answering, deny the trespass and allege that they own the land in fee simple.

The case was heard below on an agreed statement of facts. These in pertinent part are the facts agreed:

"1. Under date of September 14, 1904, A. P. Barnes and wife, Drussilla A. Barnes, executed and delivered a deed of conveyance to the Carolina Land and Improvement Company, which is duly of record in Book 39 at page 209, Office of the Register of Deeds of Pamlico County, . . ." The deed is in words and figures as follows:

"STATE OF NORTH CAROLINA
COUNTY OF PAMLICO.

THIS INDENTURE, made and entered into, on this the *14* day of *September,* A. D., 1904 by and between *A. P. Barnes & wife Drusillia A.* of the county and State aforesaid as par*ties* of the first part and 'THE CAROLINA LAND AND IMPROVEMENT COMPANY' a corporation duly created and existing under and by virtue of the laws of the State of North Carolina as party of the second part.

WITNESSETH:- That the said par*ties* of the first part for and in consideration of the sum of *Two (2.00) Dollars,* to them in hand this day paid by said party of the second part, the receipt of which is hereby forever admitted, released

and remised, have given, granted, bargained and sold and by these presents do hereby give, grant, bargain and sell unto the party of the second part, its successors and assigns, a tract or parcel of land *100* feet in width to be cut out of the following described tract of land situated, lying and being in the county and State aforesaid and in No. 3 township adjoining the lands of *C. A. Flowers, S. H. Muse and others, A right of way 100 feet wide (To be located by said party of second part and when so located to become a part of this description) across the homestead tract. The said location to be through the southwest corner of said tract of land. There shall be no building other than for railroad use.* The said tract hereby conveyed is to be *100* feet in width and to extend through the entire tract above described.

TO HAVE AND TO HOLD, the aforesaid tract or parcel of land as above described together with all the rights, ways, privileges and easements thereunto belonging or in anywise appertaining unto it the said party of the second part its successors and assigns. And the said par*ties* of the first part on behalf of *themselves their* heirs and assigns hereby covenant to and with the said party of the second part on behalf of itself, its successors and assigns as follows, to wit:

1st. That they are seized of the said property above conveyed in fee.

2nd. That the same is free and clear from any and all encumbrances.

3rd. That they will forever warrant and defend the title to the said land against the lawful claims of any and all persons Claiming by Through or Under Them. PROVIDED NEVERTHELESS, That if the said party of the second part shall fail to build, complete and put in operation a Rail Road either electric or steam for conveying passengers and freight on the land above described within a period of *five* years from the date hereof then the estate hereby conveyed is to cease and determine and the property hereby conveyed is to revert to and become the property of the grantors herein. But if a Rail Road as above specified shall be built by the said company, its successors or assigns within the period above provided, then and in that event this conveyance is to become absolute without the power of revocation from any cause whatsoever and the said par*ties* of the first part on behalf of *themselves, their* heirs and assigns hereby, for the consideration aforesaid, cov-

enant to and with said second party, its successors and assigns, that they will procure such further assurances of title as may be necessary and will and do hereby release and remise any and all claims for damages arising from the building of the said Road not arising from the negligence of the said Company, its successors, assigns, agents, employees, or contractors. In testimony whereof the said par*ties* of the first part *have* hereunto set their hand*s* and seal*s* this the day and year aforesaid."

"The written portion of the foregoing deed is underlined as distinguished from the printed portion."

"2. That the Carolina Land and Improvement Company went into possession of the land described in the deed, and the railroad specified in the deed was built within the five-year period therein provided.

"3. That by mesne conveyances whatever right, title and interest passed under the deed above set out vests now in the plaintiffs in this action who are in possession of the land described in the complaint and in said deed, said land being located as shown by letters A. B. C. D. and E on a map prepared by Darrel D. Daniels, C. E. . . ." (A copy of the map was attached to the facts agreed; however, it is here omitted as not being pertinent to decision. It definitely delineates the plot of land, about 100 feet wide and 488 feet long, stipulated in the facts agreed as the land embraced in the complaint and in the deed.)

"4. That on or about the 31st day of December, 1952, the railroad running from Washington, N. C., to Vandemere, N. C., across the land described in the complaint, was abandoned by the railroad company and the tracks removed, and it is no longer being used for railroad purposes.

"5. That subsequent to the execution of the deed referred to in paragraph 1, A. P. Barnes and Drussilla A. Barnes died intestate, and among their heirs at law are the defendants; the defendant Hugh H. Barnes, by deed dated 14 day of May, 1954, and recorded in the office of the Register of Deeds of Pamlico County in Book 117, page 24, acquired all of the right, title and interest of his co-tenants except the interest of the defendant H. Foley Barnes in and to the lands described in the complaint, . . ."

From judgment decreeing that the plaintiffs have no title to the land, and that the defendants are the owners thereof in fee simple, the plaintiffs appeal.

Barden, Stith & McCotter for plaintiffs, appellants.

Robert G. Bowers and Sam J. Morris for defendant, appellees.

JOHNSON, J. The only question for decision is this: Did the deed made by A. P. Barnes and wife to The Carolina Land and Improvement Company convey fee-simple title or only an easement in the strip of land in controversy?

If the deed conveyed only an easement, the estate of the railroad company ceased and terminated when its tracks were removed and the railroad was abandoned, and the defendants, having succeeded to the rights of A. P. Barnes, would be entitled to an affirmance of the judgment below. On the other hand, if the deed conveyed the strip of land in fee simple, title has passed to the plaintiffs by mesne conveyances from the grantee of Barnes, and the judgment below should be reversed.

Manifestly the deed is a railroad-purpose deed. At the time of its execution the general powers of railroad corporations were prescribed by Chapter 138, Public Laws of 1871-1872. The pertinent parts of this Act, then codified as Sections 1957 (2) and (3) of the Code of 1883, now codified as G.S. 60-37, provided that "Every railroad corporation shall have power: . . . (3) To Take Property by Grant.—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only. 4. To Purchase and Hold Property.—To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation."

The instant deed is a regular form deed of bargain and sale. It recites a valuable consideration. Upon the facts agreed and on this record, the deed is presumptively a deed of purchase within the meaning of the section of the Act of 1871-1872 now codified as G.S. 60-37 (4). This being so, the deed must be interpreted as an ordinary deed. When this is done, it is manifest that the deed conveys title in fee simple:

The granting clause in the Barnes deed conveys an unqualified fee-simple estate: "That the said parties of the first part for and in consideration of the sum of Two (2.00) DOLLARS, to them in hand this day paid by said party of the second part, the receipt of which is hereby forever admitted, released and remised, have given, granted, bargained and sold and by these presents do hereby give, grant, bargain and sell unto the party of the second part, its successors and assigns, a tract or parcel of land 100 feet in width to be cut out of the following described tract of land situated lying and being in the county and State

aforesaid and in No. 3 township adjoining the lands of C. A. Flowers, S. H. Muse and others. . . ."

The *habendum* clause places no limitation on the estate in fee conveyed by the granting clause: "TO HAVE AND TO HOLD, the aforesaid tract or parcel of land as above described together with all the rights, ways, privileges and easements thereunto belonging or in anywise appertaining unto it the said party of the second part its successors and assigns."

The covenants of seizin and warranty harmonize with the fee previously granted: "And the said parties of the first part on behalf of themselves their heirs and assigns hereby covenant to and with the said party of the second part on behalf of itself, its successors and assigns as follows, to wit: 1st. That they are seized of the said property above conveyed in fee. . . . 3rd. That they will forever warrant and defend the title to the said land against the lawful claims of any and all persons Claiming by Through or Under Them."

Since all the operative clauses of the deed refer to a fee-simple estate, without restriction or limitation, it necessarily follows that no ambiguity or contradiction is disclosed by these clauses. Hence, as to these clauses there is no need for application of the ordinary rules of construction. *Jackson v. Powell,* 225 N.C. 599, 35 S.E. 2d 892.

Moreover, the plaintiffs' contention that the Barnes deed conveyed a fee is supported by Ch. 148, Public Laws of 1879, now codified as G.S. 39-1, which provides that a conveyance shall be construed to be a conveyance in fee unless "such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

We have given consideration to the defendants' contention that the use of the term "right of way" in the description limits the conveyance to an easement. The contention is untenable. The term "right of way" has a two-fold meaning: it may be used to designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put. It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the "right of way," with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land. 77 C.J.S., 394. Here, we think the term "right of way" was used as merely descriptive of the purpose to which the land was to be put, and was not intended to cut down to the easement the fee conveyed in the granting clause. Annotation: 132 A.L.R., 142, 150. But

in any event, under application of the rule of construction that the granting clause will prevail in case of repugnancy, the term "right of way" as here used in the description must yield to the granting clause in fee, and especially so in view of the fact that the granting clause harmonizes with the *habendum* and with the covenants of seizin and warranty. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922.

In *Artis v. Artis, supra,* at p. 761, it is stated: "Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum,* the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected."

Here the fact that the description was inserted in a form deed is without controlling significance. *Jeffries v. Parker, supra.*

The clause in the description purporting to limit the property to "railroad use" is also without significance. Conceding that this clause may have had operative force as a restrictive covenant, at most it was a covenant personal to the grantors, which is no longer enforceable, now that (1) the grantors are dead, (2) the railroad has been abandoned, and (3) title to the right of way property has passed from the original owners. It is elemental that a personal covenant does not run with the land. *Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38; *Craven County v. Trust Co.,* 237 N.C. 502, 517, 75 S.E. 2d 620, 631; *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895. See also Annotation: 132 A.L.R. 142, 163. Besides, a restrictive covenant ordinarily loses its operative force when its purposes and objects no longer exist. *Cessante causa, cessat effectus.*

It follows from what we have said that the Barnes deed conveyed title in fee simple to the grantee.

We have not overlooked the decision in *Shepard v. Railroad,* 140 N.C. 391, 53 S.E. 137, wherein it is stated in the third headnote that, "A deed to the right of way gives a railroad no more rights than it would have acquired by condemnation." This headnote is based upon the following statement appearing in the opinion, at p. 393: "The deed to the right of way gives the defendant no more rights than he would have acquired by condemnation. *Hodges v. Tel. Co.,* 133 N.C. 233." Upon a casual reading of the foregoing headnote and opinion in the Shepard case, it is understandable how the decision has been misinterpreted to stand for the general proposition that land purchased by a railroad company for a right of way passes only an ease-

ment, no matter how the deed may be worded. However, a study of the decision, in connection with the record in the case, discloses that the decision stands for no such proposition. In fact, the foregoing excerpt may be treated as *obiter dictum.* The record in the case presented no question for deed construction. The only question for decision was one of statutory construction. The plaintiff Shepard owned a two-acre lot in the town of Edenton which he used as a pasture. The defendant railroad company, under deed from the plaintiff, built its road across the lot. In doing so, it tore down his fence and failed to erect cattle guards. The plaintiff sued for damages, relying on a statute which required a railroad company in constructing its road over enclosed land to erect and maintain cattle guards at the points of entrance to and exit from the enclosure. The defendant, answering, alleged (1) that in crossing the land it was acting under "a deed executed to it by the plaintiff" and that it "committed no act which it had not the right to commit under the deed"; and (2) that the statute did not apply to the plaintiff's lot for the reason it was located in the town of Edenton where by the charter and laws of the town stock were not permitted to run at large. There was a verdict and judgment in favor of the plaintiff in the amount of $15 for damage to the fence and $26 damages for failure to put up cattle guards. The defendant appealed from the judgment only in respect to the $26 award of damages for failure to put up guards. The record on appeal discloses and the appellant's brief states that the only question presented for decision is whether the cattle guard statute (Sec. 1975 of the Code of 1883) applied to an enclosed town lot. The Court resolved the question in favor of the plaintiff and upheld his recovery of $26. The record discloses that the defendant offered no evidence, and the deed is not included in the record. In fact, the only reference to the deed found in the case on appeal is this statement (R. p. 8) ; "The plaintiff had conveyed to the defendant, by deed in due form, a right of way over the said lot before the road was constructed." From the statement that the deed conveyed "a right of way *over* the lot," (italics added) the natural inference is that the term "right of way" was used in the sense of an easement—an easement *over* the lot. It thus appears that the defendant claimed nothing more than an easement over the lot. This being so, it would seem that the Court was assuming that the deed on its face granted only an easement when it stated by way of obiter, "The deed to the right of way gives the defendant no more rights than he (it) would have acquired by condemnation." This interpretation of the foregoing excerpt from the Shepard decision is fortified by the fact that *Hodges v. Tel. Co.,* 133 N.C. 225, 45

S.E. 572, is cited as authority. An examination of the Hodges case discloses that the deed there involved granted only a "right of way and easement."

We conclude therefore that the decision in *Shepard v. Railroad, supra,* is factually distinguishable from the instant case and is not authority for the proposition that the conveyance here involved should be cut down to an easement.

The judgment below is

Reversed.

DORA BETTY BELL v. LEROY SIMMONS.

(Filed 10 January, 1958.)

1. **Appeal and Error § 51—**

In passing upon appellant's exception to involuntary nonsuit, evidence admitted at the trial, whether competent or incompetent, must be considered.

2. **Trial § 22c—**

Discrepancies and contradictions, even in plaintiff's evidence, are to be resolved by the jury and not the court.

3. **Libel and Slander § 1—**

Good faith is no defense to the recovery of compensatory damages for libel.

4. **Same—**

A person giving verbal statements to reporters for the purpose of having the statements published in a newspaper is liable to the extent that libelous matter contained in the article is predicated in sense and substance on such statements.

5. **Libel and Slander § 4—**

It is for the court to determine whether a communication is capable of a defamatory meaning and for the jury to determine whether it was understood in its defamatory meaning by the public.

6. **Libel and Slander § 12—Evidence held for jury as to whether libel tended to injure plaintiff in her occupation or profession.**

Plaintiff was employed as the treasurer and office manager of a corporation and, as extra or incidental employment, was secretary-treasurer of an affiliated organization. Plaintiff's evidence was to the effect that defendant made statements to newspaper reporters for the purpose of publication, that the article published contained matter based on defendant's statements, which, in effect, charged that important records of the organization in plaintiff's custody were missing without explanation, that the sheriff had been called to investigate the matter of the missing records, and that payments due by the organization had not been made because of the loss of the records. *Held:*

The evidence was sufficient to overrule defendant's motion to nonsuit as establishing the publication of words tending to injure plaintiff in her trade or profession.

HIGGINS, J., dissenting.

APPEAL by plaintiff from *Phillips, J.*, March Term, 1957, of DUPLIN.

Action to recover compensatory and punitive damages for alleged defamatory statements of and concerning the plaintiff, alleged to have been made by defendant to one Paul Barwick, a local correspondent, and by telephone to one Charles Clay, a Raleigh reporter, incorporated in an article published in the News & Observer in its issue of October 13, 1955, under a Kenansville dateline of October 12, 1955.

The newspaper article, as alleged in the complaint, was in these words, viz.:

"FARM BUREAU RECORDS MISSING
FROM DUPLIN COUNTY ASC OFFICE

"The mystery has thickened at the Duplin County office of the Agricultural Conservation and Stabilization agency with the discovery that virtually all records of the Duplin Farm Bureau are missing from that office.

"The discovery was made when Farm Bureau President LeRoy Simmons went to the office to find out why home demonstration club members hadn't been paid for work in last year's membership drive.

"Simmons said Harvey D. Arnold of Rose Hill, suspended Chairman of the Duplin ASC Committee, was at the office and advised him to 'keep it quiet.'

"Simmons, who lives at Albertson, said he didn't take the advice because he thinks public matters should be kept 'above board' and the records 'are essential to us and they're valuable to us.'

"The records also would be valuable to a political faction at this time with the hottest ASC election in the history of Duplin coming up next week.

"Without an ASC committee for some time now since an investigation of alleged irregularities in the office's operations began, Arnold and other suspended members of the Committee reportedly are working to get re-elected.

"Horace Godfrey of Raleigh, State ASC Chairman, has said the committee would be removed if the probe substantiates the charges. Whether any findings would be known before the election on October 18 remained to be seen.

"The shocker to Simmons, he said tonight, was that the records had been missing for some time and he still wouldn't know about it if he hadn't 'stumbled on it' October 3.

"Simmons said he went to see Mrs. Dora Betty Bell—who has the dual role of office manager for the ASC and Secretary-Treasurer of the Farm Bureau—when he learned that the club women hadn't been paid the $10 they were due last December for each 50 members they signed up in the Farm Bureau last year.

"Simmons said Mrs. Bell was reluctant to give him the records or a reason why the club members hadn't been paid. When he pressed the matter, Mrs. Bell said the solicitors hadn't been paid because she had no records, Simmons said.

"Simmons said that so far as he has learned no money is missing. He said the money due the drive workers is in the bureau's treasury, and they are now being paid.

"The office, located in the Agricultural Building here, was not broken into and at least $120 in ASC money was untouched.

"The missing records include, along with the list of people who had helped to write Farm Bureau memberships, a check book and financial statements of the past. Only a few scattered sheets of the records were left, Simmons said.

"Simmons said he had been asked by political candidates for Farm Bureau lists but that he had 'never given them to any political figure or anybody else who wanted them for a mailing list.'

"A Farm Bureau committee composed of Simmons, Eugene Carlton of Magnolia, Taft Herring of the Scott's Store section and Arthur Whitfield of Kenansville turned the matter over to Sheriff Ralph Miller today.

"Simmons said today that the club women 'should have been paid last December and I thought they had.' The fact that they hadn't, he indicated, accounted for 'only a handful' of people at a kick-off meeting recently for this year's membership campaign.

"In reference to Arnold's advice on the records, Simmons said he was 'going to cut wood and let the chips fall where they may.' He said he couldn't understand why he, as president of the bureau, wasn't informed about the loss of the record."

Plaintiff alleged, by way of *innuendo*, that said article, which defendant caused to be so published, was intended to charge plaintiff and did charge her with serious wrongdoing, including criminal conduct, as specified in nine separate paragraphs.

Plaintiff alleged that defendant's alleged wrongful conduct caused her to suffer a great nervous shock, causing her to be incapacitated and hospitalized for several weeks, to incur medical and hospital expense of about $500.00, humiliation, mental anguish, damage to reputation, etc.

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

H. E. Phillips, Norwood Boney and Albion Dunn for plaintiff, appellant.

Johnson & Johnson and Jones, Reed & Griffin for defendant, appellee.

BOBBITT, J. There was evidence which, taken in the light most favorable to plaintiff, tended to show the facts narrated below.

Plaintiff, since 1943, had been treasurer of the Agricultural Stabilization Corporation (ASC) in Duplin County. Its office was in the County Agriculture Building. Since 1952, she had been office manager. ASC paid her a salary of $5,100.00 per year.

Since 1945, plaintiff had been Secretary-Treasurer of the Farm Bureau in Duplin County. During this period she had received and disbursed Farm Bureau funds in the total amount of $31,807.30. She received no stipulated compensation from the Farm Bureau. From time to time, she received "a token of appreciation," or "a Christmas present." The last such present or payment was received on January 13, 1953; and the total received by her over the period of approximately eleven years was $600.00.

The Farm Bureau had no separate office. Plaintiff performed her services for it, "on the side," in the ASC office, and "on nights and on Saturdays after office work."

Defendant, for some four or five years, had been President of the Farm Bureau in Duplin County.

Prior to October, 1955, the three members of the Duplin County ASC Committee had been suspended. Prior to October 13, 1955, the News and Observer "had carried various stories . . . about an investigation of the office by the State ASC Committee." Whatever the alleged reason for said suspension of the committee members, plaintiff was not affected thereby. She continued as secretary-treasurer and office manager until November 1, 1956, when, on account of her impaired health, she resigned. It is noted that the suspended (ASC) committee members were re-elected.

Shortly prior to October 12, 1955, according to Barwick, defendant told him that "soon he would have a red-hot news story for us." On October 12, 1955, late in the afternoon, defendant talked with Barwick in the office of the Duplin Times, Kenansville. Barwick, having made a memorandum of the conversation, telephoned Clay and passed on to Clay what defendant had told him. At Clay's request, defendant was called to the phone; and then Clay and defendant conversed. Thereafter, Clay wrote the article but not the caption.

It appears that defendant asked Clay "not to bring the other issue (ASC) into the Farm Bureau Issue." It appears also that portions of the published article were based on information obtained otherwise than from defendant; also, that certain words and phrases, such as "the mystery has thickened," and "the shocker," are interpretations of what defendant said rather than exact statements made by defendant. Even so, enough remains, based on statements attributed to defendant, to permit these inferences: (1) that plaintiff should have, but did not, pay certain club women the ten dollars to which they were entitled the preceding December for each fifty members they had signed up in the Farm Bureau in 1954; (2) that plaintiff, when pressed for an explanation, stated that she had not done so because she had no records; (3) that Farm Bureau records had been missing for some time, a fact defendant was surprised to learn on October 3rd when he "stumbled on it"; (4) that important records of the Farm Bureau, which should have been in plaintiff's custody, were missing, without explanation; and (5) that the sheriff was called in to investigate the matter of the missing records.

Also, there was evidence that the last paragraph of the published article was to the effect that "Simmons also said that Mrs. Bell who lives near Mount Olive, N. C., will be relieved of her duties with the Farm Bureau." The said paragraph does not appear in the portion of the complaint purporting to quote the published article. But this evidence, whether competent or incompetent, must be considered in passing on defendant's motion for nonsuit. *Kientz v. Carlton,* 245 N.C. 236, 246, 96 S.E. 2d 14, and cases cited.

We refrain from discussing the evidence in detail. Suffice to say, plaintiff's evidence is to the effect that no Farm Bureau or other records were or are missing. Her testimony tends to dispel any suggestion of neglect or wrongful conduct on her part.

It appears that the ASC office had been entered early in 1955, at which time a small desk drawer in which plaintiff kept records, including certain records of the Farm Bureau, had

been prized open; that plaintiff promptly reported this to the ASC people; but that, since nothing relating to the Farm Bureau was missing or affected, she did not report it to defendant. The evidence tends to show that the sheriff was called in, when the Farm Bureau people learned of this incident, to investigate the said entry and opening of the desk drawer, not to investigate or to search for missing records. It appears further that the sheriff had no information on which to conduct and did not attempt to conduct any investigation. However, a person reading the published article did not have the benefit of this information.

Defendant, on adverse examination, testified that all he told Barwick and Clay as to missing Farm Bureau records was what plaintiff had told him; and Barwick and Clay testified that defendant so stated to them. However, as to this, the evidence of plaintiff is directly in conflict, both as to the actual facts and as to what she told defendant. True, plaintiff offered in evidence the testimony given by defendant on adverse examination; but discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107; *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881.

The evidence is susceptible of the interpretation that defendant acted in good faith in providing the data for the published article and in the honest belief that he conceived it his duty to make public what he had "discovered," even though he may have acted impulsively and under misapprehension of the facts. But evidence as to good faith, etc., is not determinative as to plaintiff's right to recover compensatory damages. *Ivie v. King,* 167 N.C. 174, 83 S.E. 339; *Fields v. Bynum,* 156 N.C. 413, 72 S.E. 449.

It is noted that plaintiff both alleged and offered evidence tending to show that she had suffered special damages, to wit, illness sufficient to require medical and hospital care and expense.

In *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55, it is stated by *Barnhill, J. (later C. J.)* that a publication is actionable *per se,* "if, when considered alone without *innuendo:* . . . (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession," citing authorities. The published article, when restricted to the statements attributed by plaintiff's evidence to defendant, contains defamatory language within the scope of both (3) and (4). See *Kindley v. Privette,* 241 N.C. 140, 84 S.E. 2d 660, and cases cited.

Devin, C. J., citing numerous authorities, states this general rule: "It is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally." *Taylor v. Press Co.*, 237 N.C. 551, 75 S.E. 2d 528, where the alleged libelous matter was in a newspaper advertisement published in the exact language of the individual who procured and paid for its publication.

As to whether the evidence is sufficient to support an action for libel as distinguished from slander, there is ample evidence that defendant's statements to Barwick and Clay were made, not only with knowledge that they would be made the basis of a newspaper article but that defendant made the statements for that purpose.

In Prosser, Law of Torts, Second Edition, Sec. 94, the author makes this statement: "There may be responsibility for publication by another, as in the case of defamation published by an agent within the scope of his authority, or an express or implied authorization to publish, as where a statement is made to a newspaper reporter." However, as the author points out, the rule is otherwise when there is no authorization to publish.

The published article can be considered libelous as to defendant only to the extent it contains false and defamatory matter predicated in sense and in substance on statements made by defendant for publication.

The rule has been stated as follows: "The fact that the defamatory words are spoken with the intention that they be embodied forthwith in a physical form makes the speaking of them not only the publication of a slander, but a libel as well provided they subsequently are so embodied. On the other hand, if defamatory words are spoken which the defamer intends to be reduced to writing, he has published a slander and not a libel if they are not so reduced. His intention that the defamatory statement be embodied in a written form is not alone enough to make him the publisher of a libel if in fact the statement is not so embodied but is repeated only by word of mouth." Restatement of the Law of Torts, Sec. 577f.

In *Klos v. Zahorik*, 113 Iowa 161, 84 N.W. 1046, an article written by defendant was rewritten by the newspaper before publication. The opinion contains the following: "And it is too plain to require extended comment that, if the communication from defendant to the paper was in itself unobjectionable, then defendant could not be held liable for improper matter contained in the newspaper article, even though the article might have been to some extent instigated by or based upon defendant's communication."

While we do not think the published article, either in its entirety or in respect of the portions thereof attributed by plaintiff's evidence to statements made by defendant, may be fairly interpreted to charge wrongdoing on the part of plaintiff to the full extent alleged by way of *innuendo*, we are of the opinion that it does charge conduct from which unfitness for a position such as secretary-treasurer of the Farm Bureau may be implied. It is noted: "(1) The court determines whether a communication is capable of a defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient." Restatement of the Law of Torts, Sec. 614.

While plaintiff's employment by the Farm Bureau seems to have been an extra or incidental employment, it must be remembered that her principal occupation, that of secretary-treasurer and office manager of ASC, a position in which she had served for many years, involved responsibilities different in extent but of like kind. In such occupation, which was her established means of livelihood, the care and custody of records was a primary responsibility.

"Where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of his business great confidence must necessarily be reposed, they are actionable, . . ." 33 Am. Jur., Libel and Slander Sec. 64; 53 C.J.S., Libel and Slander Sec. 32(b).

Our conclusion is that plaintiff offered evidence sufficient to require submission of her case to the jury. Hence, the judgment of involuntary nonsuit is reversed.

Reversed.

HIGGINS, J., dissenting:

It seems to me that back of this case is a political controversy, and in such matters I think public good demands that they be discussed freely. Of course, the discussion should be honest. Viewed in this light, it occurs to me that the words used do not go beyond the bounds of proper political debate and discussion and are, therefore, not actionable. I vote to affirm.

TEDDY LEE BARNES v. WILLIAM ALEXANDER HORNEY.

(Filed 10 January, 1958.)

1. Automobiles § 36—

There is no presumption of negligence from the mere fact that an accident has occurred.

2. Automobiles § 42k—

Evidence tending to show that a pedestrian, who had been without sleep for two days and nights, sat down by the side of a narrow dirt and gravel road and went to sleep, and that he was lying parallel with and between the ruts in the road when run over by defendant's car, *is held* to disclose contributory negligence as a matter of law on the part of the pedestrian.

3. Automobiles § 33—

While a motorist, in the exercise of his duty to maintain a proper lookout, is required to anticipate that other travelers, including pedestrians, will be using the highway, he is not required to anticipate that a person will be lying prone on the highway.

4. Automobiles § 45: Negligence § 10—

The doctrine of last clear chance is not predicated on the original negligence of defendant, but upon his failure, after negligence and contributory negligence have canceled each other, to avoid the injury, and the doctrine cannot apply unless defendant has sufficient opportunity, in the exercise of ordinary care, to discover and appreciate plaintiff's perilous position in time to avoid injuring him.

5. Automobiles § 42n—

Evidence that plaintiff was lying prone, parallel with the ruts of a shady dirt road, that defendant was driving his automobile with the lights on low beam and could have seen plaintiff for a distance of some 200 feet, and that defendant did see an object in the road, which he mistook for an old box or trash, but didn't recognize the object as a body until too late to avoid injury, *is held* insufficient to show that defendant had opportunity to avoid the injury after he discovered or should have discovered plaintiff's perilous position, and therefore the doctrine of last clear chance does not apply to preclude nonsuit.

JOHNSON, J., dissenting.

PARKER AND BOBBITT, J.J., concur in dissent.

APPEAL by plaintiff from *McKeithen, S.J.*, May, 1957 Term, RANDOLPH Superior Court.

Civil action to recover for personal injuries to the plaintiff alleged to have resulted from the actionable negligence of the defendant in the operation of his automobile at an excessive rate of speed, without proper lights, and in a reckless and careless manner. The defendant denied negligence and pleaded contributory negligence on the part of the plaintiff. By reply, the plaintiff alleged the defendant had the last clear chance to avoid the injury.

The plaintiff, a soldier, was at home on leave. Just before dark on July 4, 1955, he sat down by the side of a narrow dirt and gravel road in Randolph County and went to sleep. He had been drinking beer and had not slept for two days and nights. He was awakened by being run over by an automobile. As a result he suffered serious and permanent injuries.

The plaintiff introduced the adverse examination of the defendant in which appeared the following: "There is a dirt road all the way from my brother's residence to where I ran over Barnes. No, I did not cut my lights on just as I crossed the Jackson Creek bridge. I cut them on before, when I struck the hill. I cut them on dim. I didn't cut them on bright. When I say dim, I mean the lower division of my driving lights. . . . I did not cut on parking lights. . . . As to how far I was from him when I first saw him, I would say five or six feet . . . from my front bumper . . . he had on a pair of pants, no shirt, army shoes. . . . As to whether I saw him, I saw an object. I had no idea it was a man. Looked like a box or something. Looked like an old box where somebody had thrown out some trash. . . . I didn't see a head, I didn't recognize it was a body. My car straddled Mr. Barnes. Those are two ruts and he was lying . . . half way between the two ruts. This is a dirt road with gravel on it. The two ruts I speak of were used for single lane traffic. . . . The part of my car that hit him was the oil pan. . . . As to how many feet of vision I had as I rounded the curve . . . facing the location that Barnes was in the road at that particular place, . . . I would say 20 or 25 feet . . . road makes a turn there. . . . I went 25 feet past him before I brought my vehicle to a stop. . . . I was making about 30 as I was in no hurry. It was a crooked road . . ."

There was other evidence that the point where Barnes was run over could be seen for a distance of about 200 feet. There was no evidence automobile lights would enable the driver to see a man lying in the road at that distance, or at any particular distance. There was evidence that weeds, bushes, and trees grew on both sides of the road and some of the branches of the trees extended over the road. The accident occurred about 8:30 p. m.

At the close of plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Ottway Burton, for plaintiff, appellant.
McNeill Smith and John Dortch.
Smith, Moore, Smith, Schell & Hunter.
By: McNeill Smith, for defendant, appellee.

HIGGINS, J. The plaintiff's allegations of speed are not supported by evidence. While the plaintiff argues the defendant was driving after dark with lights on dim, it is obvious from the evidence, however, the defendant was operating his car with lights on low beam at a speed of about 30 miles per hour on a narrow, crooked, dirt and gravel road. The plaintiff's

evidence is to the effect that as the defendant proceeded along this shaded dirt road he perceived some object in the road at a distance of 20 or 25 feet; that he thought it was a trash box. The evidence discloses the plaintiff was lying parallel with and between the ruts. Whether his head or his feet were in the direction of the defendant's approach is not disclosed.

If the case were made to turn solely on whether the defendant was negligent, the question might present some difficulty. Negligence is not presumed from the mere fact an accident has occurred. *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411; *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; *Shinault v. Creed,* 244 N.C. 217, 92 S.E. 2d 787; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406. However, the very fact the plaintiff, without sleep for two days and nights, attempted to make his bed in the middle or on the side of a crooked, shaded, dirt road, shows negligence as a matter of law. *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904. A driver of an automobile may anticipate that other travelers will be using the highway and he should be on the lookout for them. However, it would seem to be too much to require him to anticipate the highway would be used as sleeping quarters. Of course, a pedestrian has the right to use the highway, but a pedestrian is a foot traveler, and the right to walk does not carry with it the right to lie down and go to sleep. One who voluntarily places himself in a position of known peril fails to exercise ordinary care for his own safety. *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162.

The plaintiff, apparently realizing the danger of placing his reliance on the issues of negligence and contributory negligence, contends that the judgment of involuntary nonsuit should be reversed upon the theory the defendant had the last clear chance to avoid the injury. Liability under the last clear chance, or discovered peril, doctrine is predicated, not on any original negligence of the defendant, but upon his opportunity to avoid injury after discovering the perilous position in which another has placed himself. Defendant's liability is based upon a new act of negligence arising after negligence and contributory negligence have canceled each other out of the case. Liability on the new act arises after the defendant has had sufficient opportunity, in the exercise of ordinary care, to discover and to appreciate the plaintiff's perilous position in time to avoid injuring him. *Garrenton v. Maryland,* 243 N.C. 614, 91 S.E. 2d 596; *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150; *Mount Olive Mfg. Co., v. R. R.,* 233 N.C. 661, 65 S.E. 2d 379; *Holderfield v. Trucking Co., supra; Johnson v. Morris' Administratrix,* (Ky.) 282 S.W. 2d 835.

The evidence in this case is insufficient to show the defendant had the opportunity to avoid the injury after he discovered, or should have discovered, the plaintiff's perilous position. The judgment of nonsuit entered in the court below at the close of the plaintiff's evidence is

Affirmed.

JOHNSON, J., dissenting. There is no evidence here that this boy consciously bedded up in the road. He was a paratrooper. He was at home, out in the country from Asheboro, on a weekend furlough which included Sunday, July 4th. Friday night he was on guard duty at camp, and got no sleep. Saturday night he was en route home on the bus, and did not sleep. Sunday afternoon before his injury he rode around the countryside with his friend Hunt. Just before dark they were in the vicinity of the home of Hunt's girl friend—whom he later married. Hunt wanted to drop by her home and deliver a message. The plaintiff, not wishing to go with his friend on this mission, was put out side of the road a few hundred yards from the girl's home, to be picked up a little later by Hunt. There was a ditch on each side of the road. Beyond each ditch was a bank. The plaintiff sat down on a rock on the bank on the east side of the road. He was facing the road, with his feet in the side ditch. There, according to all the evidence, he went to sleep. A few minutes later he was awakened by being run over in the middle of the road by the defendant's automobile.

This line of evidence points unerringly to the inference that the boy simply moved in his sleep from the place of safety beyond the ditch to the place of danger in the road. It is a matter of common knowledge that some people sometimes walk and move around while asleep and are wholly unconscious of their movements. See Macbeth, Act V, Scene 1.

The majority opinion states that the boy had been drinking beer. This is so, but it is doubtful whether any of the evidence justifies the inference that beer drinking had anything to do with causing the boy to be asleep in the road. The plaintiff's evidence clearly shows that he was in nowise intoxicated. The most that the evidence discloses against him in this respect is that he and his companion Hunt drank some beer earlier that day, but none within five or six hours of the time of the injury.

Since the plaintiff "must have done that which he ought not to have done, or omitted that which he ought to have done, *as a conscious being*," (italics added) (38 Am. Jur., Negligence, p. 671) in order to have been contributorily negligent as a matter of law, it may be doubted that this record justifies charging him with such negligence.

But be this as it may, and conceding that the plaintiff for being down in the middle of the road was chargeable with contributory negligence, it seems to me it is a clear-cut case for the application of the last clear chance or discovered peril doctrine.

In *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150, *Ervin, J.*, states the salient facts in that case this way: "The plaintiff is subject to dizzy spells of a disabling character. Despite this infirmity, he undertook to walk eastward upon the main-traveled portion of the highway sometime before four o'clock on the morning of 24 July, 1952. While so doing, he became dizzy, lost consciousness, fell, and came to rest athwart the center of the pavement with his feet and legs projecting into the southern traffic lane. Shortly thereafter the defendant Hicks came upon the scene from the west, driving his employer's eastbound motor truck along the southern traffic lane at a speed of about forty-five miles an hour. The truck was equipped with burning headlights which fell upon the plaintiff's helpless and prostrate body and rendered it plainly visible to Hicks when the vehicle in his charge was 225 feet away. Although he could have seen the plaintiff throughout the intervening 225 feet and could have avoided striking him by stopping the truck or by driving it onto the southern shoulder of the highway, Hicks drove the vehicle straight ahead at unabated speed along the southern traffic lane and ran over the plaintiff's ankles and feet, inflicting painful and permanent injuries upon him." *Held,* the case was properly submitted to the jury under the last clear chance doctrine, and the verdict and judgment in favor of the plaintiff were upheld.

Quoting further from the opinion by *Ervin, J.*: "Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him." (Citing authorities) The evidence on which

the plaintiff in the instant case relies satisfies all four of the foregoing elements.

Here the clear, unobstructed sight distance down the road from where the plaintiff was lying was placed by the witnesses at some 200 to 300 feet. W. A. Carter, a supervisor of roads, testified: "I'd say the sight distance was from 200 to 250 feet." C. O. Moore, a highway patrolman, testified: "With respect to vision, I would say you could see 100 yards." The evidence discloses no woods or bushes along the sides of the road that interfered with the defendant's vision as he approached where the plaintiff was lying, and the evidence indicates and the photographs show the overhanging branches were high enough not to have interfered with his vision. The surveyor's profile map shows that from a point 203 feet below where the plaintiff was lying, looking in the direction from which the defendant approached, the road was practically straight but was slightly downgrade for the first 90.42 feet, and then gradually upgrade for the remaining 112.40 feet. The lowest point in this 203-foot section of the road is only about six feet below an imaginary straight line projected between the high point at each end of the section. There is no valid reason why the defendant by the exercise of reasonable care and the use of proper headlights should not have seen the plaintiff during the last 200 feet before reaching him.

G.S. 20-129(a) provides: "Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required. . . ."

G.S. 20-131(a). provides: "The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided . . . they will at all times mentioned in Sec. 20-129, 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. . . ."

The defendant was driving with his lights on dim—low beam. There was no reason why the lights should not have been on bright beam. This was negligence. *Pierce v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884.

Thus, it seems manifest that the defendant was not keeping a proper lookout. "The requirements of prudent operation are not necessarily satisfied when the defendant 'looks' either preceding or during the operation of his car. It is the duty of the driver of a motor vehicle not merely to *look* but to keep an

outlook in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

"It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty also requires that the operator must be reasonably vigilant, and that he must anticipate and expect the presence of others." *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332.

Conceding, as stated in the majority opinion, that "It would seem to be too much to require him (the defendant) to anticipate the highway would be used as sleeping quarters," nevertheless the defendant was required to keep a proper lookout and to see what he should have seen in the road ahead of him.

As I interpret this record, there was ample evidence to carry the case to the jury under the doctrine of the last clear chance. This doctrine was pleaded by the plaintiff. My vote is to reverse the nonsuit.

PARKER AND BOBBITT, J.J., concur in this dissent.

SAMPSON JACKSON v. ZELZAH McCOURY

(Filed 10 January, 1958.)

1. Appeal and Error § 49—

In an action within the purview of the Small Claims Act, where neither party aptly demands a jury trial, the findings of fact made by the presiding judge have the force and effect of a jury verdict and are binding on appeal if supported by competent evidence.

2. Automobiles § 17—

A stipulation of the parties that there was a stop sign erected on the east side of a street before its intersection with another street is sufficient to raise the inference that such sign was erected pursuant to competent authority. G.S. 20-158(a).

3. Same—

The failure of a driver along a servient street or highway to stop in obedience to a stop sign before entering an intersection with a dominant street or highway is not negligence or contributory negligence *per se,* but is only evidence thereof to be considered with other facts in the case upon the appropriate issue.

4. Same—

The driver of a vehicle along a servient street or highway, who is required to stop by sign duly erected before entering an intersection with a dominant street or highway, should not only stop but should not proceed into the intersection until, in the exercise of due care, he can ascertain that he can do so with reasonable assurance of safety.

5. Automobiles § 41g—

Plaintiff's evidence to the effect that defendant, driving along a servient street, failed to stop in obedience to a stop sign before entering the intersection with the dominant street and that his car was struck on its right side by the vehicle driven by plaintiff along the dominant street and entering the intersection from defendant's right, renders the issue of defendant's negligence a jury question, and supports an affirmative conclusion thereon in a trial by the court where right to trial by jury is not preserved.

6. Automobiles § 17—

The driver of a vehicle along a dominant street or highway is not under duty to anticipate that the operator of a vehicle approaching the intersection along the servient highway will fail to stop as required by statute, but may assume, in the absence of anything which gives or should give notice to the contrary, even to the last moment, that the operator of a vehicle traveling along the servient street or highway will stop before entering the intersection.

7. Same—

Even though the driver of the vehicle along a dominant street or highway has the right to assume that motorists approaching the intersection along the servient highway will yield him the right of way, the driver along the dominant highway is nevertheless required to exercise due care, to keep a reasonably careful lookout, to drive at a speed that is no greater than is reasonable and prudent under conditions then existing, to keep his vehicle under control, and to take such care as would be exercised by an ordinarily prudent person to avoid collision when danger of a collision is discovered or should be discovered in the exercise of ordinary care.

8. Automobiles § 42g—

Evidence tending to show that plaintiff was driving along the dominant street, that he did not see defendant's vehicle, which was approaching the intersection along the servient street from plaintiff's left, until plaintiff was some 45 to 50 feet away from the intersection, that defendant's vehicle was then in the street, and that plaintiff applied his brakes and skidded his car some 34 feet before the left front of plaintiff's car struck the right side of defendant's car, *is held* to raise the question of plaintiff's contributory negligence for the determination of the jury, but not to establish contributory negligence as a matter of law.

9. Automobiles § 13—

The mere skidding of a motor vehicle does not imply negligence.

APPEAL by defendant from *Phillips, J.*, at June 1957 Assigned Civil Term, of WAKE.

Civil action under Small Claims Act for recovery of property damage allegedly caused by negligence of defendant, heard by the judge presiding without a jury.

These facts appear uncontroverted: This action arose out of an automobile collision between plaintiff's 1955 Ford and defendant's 1954 Pontiac, at intersection of Martin and Harrington Streets, on Saturday, 7 April, 1956, about 9:40 A. M. Martin Street runs east and west, and Harrington Street runs north and south. Plaintiff was operating his Ford west on his right side of Martin Street, and defendant was operating his Pontiac north on his right side of Harrington Street. As result of the collision both automobiles were damaged,—plaintiff's Ford in the front, and defendant's Pontiac on its right side.

Plaintiff alleges in substance that his automobile was damaged as a proximate result of negligence of defendant in driving his said automobile upon one of the main streets of the city of Raleigh: (a) Recklessly in violation of G.S. 20-140; (b) without adequate brakes in good working order, all in violation of G.S. 20-124; and (c) negligently failing to stop before entering the main-traveled thoroughfare, all in violation of G.S. 20-158; and (d) entered into an intersection of two streets in said city and unlawfully failed to yield the right of way to traffic already upon said intersecting street, all in violation of G.S. 20-155, to the damage of plaintiff in amounts alleged.

On the other hand, defendant, answering, denies in material aspect the allegations of the complaint as to negligence, and as a further answer and defense, and as a counterclaim against plaintiff defendant avers that at the time and place in question his automobile was damaged as a direct and proximate result of the carelessness and negligence of the plaintiff in failing (a) to keep and observe a proper lookout, (b) to give warning by horn or otherwise of his approach to the intersection, (c) to yield the right of way to defendant's automobile which entered the intersection first, (d) to keep his automobile under control, and (e) to decrease the speed of his automobile as he approached the intersection, so as to avoid colliding with the automobile of defendant which was already in and more than half way across the intersection, and in that he drove his automobile at a dangerous and excessive rate of speed under the circumstances and conditions then existing; and that by his own negligence plaintiff caused or helped to cause such damage to his automobile as he may have sustained; and defendant pleads such negligence on the part of plaintiff in bar of any recovery herein.

Upon the trial in Superior Court, police officer L. M. Smith, of the city of Raleigh, who investigated the accident, and intro-

duced by plaintiff, testified in pertinent part: "* * * When I got to the scene the nose of the Pontiac was right about even with the north curb line of Martin Street, and the nose of the 1955 Ford came into the intersection and curved slightly northwest. There is a stop sign on Harrington Street 15 feet south of the intersection. A building at the southeast corner of the intersection is 12 feet from the street, and the stop sign is 4 feet behind the building. The stop sign is 16 feet from the corner. Skid marks of the Ford were 34 feet long. There were no skid marks from the Pontiac. Each of the these streets is 42 feet wide. The accident occurred in the business area. The speed limit in this particular section * * * was 35 miles per hour * * * The defendant was present when the plaintiff made a statement that he didn't think the defendant stopped at the stop sign."

Then on cross-examination the witness continued: "* * * The Pontiac was * * * on its right-hand side of Harrington Street * * * on which it was traveling. The nose of the car was headed kind of in a northwesterly direction, pushed slightly to the left, and the front of the Ford was headed to its right slightly * * * It was on its right-hand side of Martin Street * * * The front part of the Ford collided with the right side of the Pontiac * * * it hit right in the door post. The left front fender and grille of the Ford seemed to hit the Pontiac first * * * The Pontiac had passed considerable over half way across the street. The point of impact was 12 feet from the north curb of Martin Street. That means it had gone 30 feet into the intersection. The Ford had gone only 16 feet from the east curb of Harrington Street into the intersection."

Then on re-direct and re-cross-examination, the witness concluded his testimony as follows: "A car coming into the intersection on Harrington Street would have to get the nose of the car practically even with the curb line before it could see up Martin Street. If the defendant stopped at the stop sign, he could not see along Martin Street,—he would have to stop even with the line of the street * * * In a Pontiac automobile, from where the driver sits to the front bumper of the car is approximately 8 or 10 feet. The sidewalk on the south side of Martin Street is 10 or 12 feet."

And the plaintiff Sampson Jackson, as witness in behalf of himself, testified in pertinent part: "* * * As I approached the intersection I was traveling from 20 to 25 miles per hour * * * As I approached the intersection I looked both ways on Harrington Street and did not see any automobile coming. I was meeting a car or truck one * * * on my left. * * * That was as I was going into the intersection. The defendant was out in the

street the first time I saw him, and I applied my brakes. I would say half of the defendant's car was out in the street. I did not see the defendant stop his automobile. I would say he was going 15 or 20 miles per hour. It looked like he was picking up speed. I skidded my car 34 feet." And the witness continued: "When I saw the defendant's car, I would say I was about 45 to 50 feet from the intersection. I am familiar with this intersection and have been driving over it for years * * * Prior to the accident my car was in good shape. Brakes were in good working order * * * When the accident occurred the weather was clear and the pavement dry."

Then plaintiff continued: "* * * When I saw the defendant's car I put on brakes and stopped. I skidded 34 feet and that carried me into the intersection a little. I struck the defendant's car on its right-hand side. * * * The damage to my car was the front. The damage to the defendant's car was on the right side * * * I met the car going in an opposite direction just a little ways before I got to the intersection. I met the truck and then I was entering the intersection, and he was coming out. I met the car 26 or 36 feet from the intersection."

Then on re-direct examination plaintiff testified: "* * * The truck was coming east and had just cleared the intersection when I first saw the defendant's automobile. After the wreck my car was so I could not drive it. The whole repair bill was $498.99."

And the parties stipulated that there was a stop sign on the east side of S. Harrington Street 16 feet south of the intersection.

Here, plaintiff rested his case; and after reserving exception to the denial of motion for judgment as of nonsuit, defendant testified and offered the testimony of other witnesses tending to show that he stopped at the stop sign, and after stopping and looking both ways and seeing nothing but a truck that had passed he started across the intersection, and got almost over—when plaintiff's car hit his car on its right side about the post between the two doors and mashed in the side, and that when he first saw plaintiff's car "it was close, 10 or 12 feet, I imagine. I hadn't seen it before that time."

Defendant reserved exception to denial of motion for judgment as of nonsuit at close of all the evidence.

The trial judge answered the issues in favor of plaintiff, and did not answer the issues arising on defendant's counterclaim.

Defendant also excepts to finding of fact embodied in each of the issues answered by the court, and excepts to the judgment entered in accordance therewith, and appeals to Supreme Court and assigns error.

Mordecai, Mills & Parker for Plaintiff Appellee.
Smith, Leach, Anderson & Dorsett for Defendant Appellant.

WINBORNE, C.J.: The question involved on this appeal, as aptly stated in brief of defendant appellant, is "Whether the court erred in denying his motion for nonsuit made at close of plaintiff's evidence and renewed at the close of all the evidence, in finding the facts incorporated in the judgment, and in rendering the judgment."

In this connection it must be borne in mind that this action is based on what is denominated a small claim, defined and authorized by 1955 session of the General Assembly of North Carolina in an act entitled "An Act to Expedite the Adjudication of Small Claims in the Superior Court." Under this act, in pertinent part, a small claim is defined in Section 1, subsection (a) as "An action in which the relief demanded is a money judgment and the sum prayed for (exclusive of interests and costs) by the plaintiff, defendant, or other party does not exceed one thousand dollars."

It is declared in Section 3 of the act that in such action no jury trial shall be had unless a party thereto, in the first pleading filed by him, shall demand a jury trial. And it does not appear that in case in hand a jury trial was demanded by either party. Therefore findings of fact made by presiding judge, supported by competent evidence, have the force and effect of a jury verdict, and are binding on appeal.

And in connection with the question presented, it must be borne in mind that by virtue of the provisions of G.S. 20-158 (a) Martin Street is a through or dominant street and Harrington Street is subservient thereto. This statute, G.S. 20-158, prescribes that (a) The State Highway and Public Works Commission, with reference to State highways, and local authorities with reference to highways under their jurisdiction, are authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and that whenever any such signs have been so erected, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. And the same section of the statute declares that "No failure so to stop, however, shall be considered contributory negligence *per se* in any action for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether plaintiff in such action was guilty of contributory negligence." See *Sebastian v. Motor Lines*, 213 N.C. 770, 197 S.E. 539; *Johnson v. Bell*, 234 N.C. 522,

67 S.E. 2d 658; *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357, and cases cited. G.S. 20-158 (a).

Plaintiff alleges in his complaint that at the southeast intersection of Martin and Harrington Streets there is a duly erected stop sign requiring northbound traffic on Harrington Street to stop before entering and proceeding through the said intersection. And the parties stipulate that there was a stop sign on the east side of S. Harrington Street 16 feet south of said intersection. This is sufficient to raise the inference that such sign was erected pursuant to competent authority. *Johnson v. Bell, supra; Smith v. Buie*, 243 N.C. 209, 90 S.E. 2d 514. Compare *Bobbitt v. Haynes*, 231 N.C. 373, 57 S.E. 2d 361.

And regarding this statute it is held in *Sebastian v. Motor Lines, supra*, that "As a necessary corollary or as the rationale of the statute, where the party charged is a defendant in any such action the failure to stop is not to be considered negligence *per se*, but only evidence thereof to be considered with other facts in the case in determining whether the defendant in such action is guilty of negligence."

In like manner and for the same reason, the principle may be extended to anyone who violates the statute. See *Johnson v. Bell, supra*, and cases cited.

"The purpose of highway stop signs," as stated by this Court in opinion by *Devin, J.*, later *C. J.*, in *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d, 361, "is to enable the driver of a motor vehicle to have opportunity to observe the traffic conditions on the highways and to determine when in the exercise of due care he might enter upon the intersecting highway with reasonable assurance of safety to himself and others. * * * And the statute G.S. 20-154 also requires that before starting from a stopped position and moving into the line of traffic the driver shall first see that such movement can be made in safety."

And in the Matheny case the Court went on to say that "Since at the intersection described in the case at bar the driver of an automobile approaching the intersection from the north was required (G.S. 20-158) to bring his automobile to a complete stop, the right of way, or rather the right to move forward into the intersection would depend upon the presence and movement of vehicles on the highway which he intended to cross. The rule as to right of way prescribed by G.S. 20-155 applies to moving vehicles approaching an intersection at approximately the same time * * * When the driver has already brought his automobile to a complete stop, thereafter the duty would devolve upon him to exercise due care to observe approaching vehicles and to govern his conduct accordingly. One who is required to stop before en-

tering a highway should not proceed, with oncoming vehicles in view, until in the exercise of due care he can determine that he can do so with reasonable assurance of safety * * * Generally when the driver of an automobile is required to stop at an intersection he must yield the right of way to an automobile approaching on the intersecting highway * * * and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can cross in safety he must delay his progress until the other vehicle has passed." See also *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d, 115; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d, 532; *Hawes v. Refining Co., supra; Badders v. Lassiter, supra.*

In the light of these principles, applied to the evidence in case in hand, whether defendant, under the circumstances, acted as a reasonably prudent person would have under similar circumstances, is properly a jury question, and the judge has resolved the issue in this respect in favor of plaintiff.

On the other hand defendant, appellant, contends and insists that upon his own evidence plaintiff is guilty of contributory negligence in the operation of his automobile at the time and place in question.

In this connection, the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway. *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d, 239; *Johnson v. Bell, supra; Hawes v. Refining Co., supra; Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d, 373.

However, as stated in *Blalock v. Hart, supra,* in opinion by *Johnson, J.,* "The driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3)

to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding a collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered," citing *Hawes v. Refining Co., supra; Reeves v. Staley, supra.*

In the light of these principles, applied to case in hand, this Court holds that the evidence shown in the record is sufficient to take the case to the jury on the issue of contributory negligence of plaintiff, but is not sufficient to compel the inference of negligence on the part of plaintiff as one of the proximate causes of the collision and resultant damage to him. The mere skidding of a motor vehicle does not imply negligence. For recent declarations on the subject see *Wise v. Lodge, ante,* 250, and *Durham v. Trucking Co., ante,* 204. And the judge has found that plaintiff did not, by his own negligence, contribute to his damage as alleged in the answer, and such finding is binding on this appeal.

For reasons stated the judgment below is
Affirmed.

STATE v. JULIUS BUNTON

(Filed 10 January, 1958.)

1. **Criminal Law § 159—**

Assignments of error not brought forward in the brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned.

2. **Criminal Law § 111—**

In this case it *is held* the court correctly instructed the jury that defendant's evidence of good character should be considered as substantive evidence on the question of guilt or innocence.

3. **Homicide § 27h—**

Where the State's evidence establishes murder committed in the perpetration of a robbery from the person, the offense is murder in the first degree, irrespective of premeditation or deliberation, and therefore in such prosecution the court is not required to submit the question of defendant's guilt of murder in the second degree upon defendant's contention that he was too intoxicated at the time to premeditate and deliberate. Further, the evidence in this case is not sufficient to make available to defendant the defense of intoxication.

4. **Criminal Law § 114—**

The charge of the court upon the jury's right to recommend life imprisonment if they should find defendant guilty of murder in the first degree *held* without error. G.S. 14-17.

APPEAL by defendant from *Olive, J.*, at March 11, 1957 Criminal Term of GUILFORD—High Point Division.

Criminal prosecution upon bill of indictment charging "that Julius Bunton and John Kollock, Jr., late of Guilford County, on the 5th day of January, A.D. 1957, with force and arms, at and in said county, feloniously, willfully, and of his malice aforethought, did kill and murder Clifford Witt Phillips against the form of the statute in such case made and provided, and against the peace and dignity of the State," returned by the grand jury as a true bill against defendants Julius Bunton and John Kollock, Jr.

Upon the call of the above case for hearing before the presiding judge at the January 21, 1957 Criminal Term of Superior Court of Guilford County, defendant Julius Bunton was brought into court by the sheriff. And it appearing to the court (1) that this defendant stands indicted for the crime of murder, and that the case is calendared for trial on February 18, 1957; and (2) that this defendant does not have counsel and does not have sufficient funds or means to obtain counsel, the presiding judge, pursuant to the statute in such cases made and provided, and by written order, appointed James W. Clontz, attorney at law, to represent the defendant and to prepare such defense as he might have to said charge of murder.

And upon arraignment on Monday, 11 March 1957, at a regular term of Superior Court of Guilford County (High Point Division) for the trial of criminal cases, defendant Julius Bunton and his codefendant John Kollock, Jr., their respective counsel being present, each pleaded not guilty, and placed himself upon God and his country for trial.

And upon trial at said term of court last above mentioned the defendants and their respective counsel being present, the State offered evidence tending to show substantially the following:

The lifeless body of Clifford Witt Phillips, with wound in the back of the head, was found by officers of the High Point Police Department about 1:50 a.m., 5 January, 1957, in taxicab parked on Hoskins Street, approximately one-half block off Washington Street in the city of High Point, North Carolina. All the lights were on except those inside the cab. The body was sitting under the wheel slumped over to the right. Blood was on the back of the front seat, and on the floor board. The glove compartment was open. His cap and paper, match covers, and the like, were on the seat. And it was later ascertained that the right-hand, and the left-hand-hip pockets of his trousers were turned "wrong side out". Upon examination by the coroner the hole in the back of the head was, in his opinion, made by a bullet, which caused the death of Phillips. A .38 caliber bullet was

found in the head and taken out—and left with police officer, who marked it for identification.

As a consequence of telephone call five officers of city police department were sent to Bennettsville, South Carolina, on 8 January, 1957, where the said defendants, Julius Bunton and John Kollock, Jr., were there in the custody of the sheriff.

Interviewed at the sheriff's office, the officers testified each of the defendants made statements in relation to the events pertaining to the death of Phillips. In substantial accord, they detailed a plot to get some money, and to get it from a taxi driver, —and how they executed the plot. Kollock got in the front seat, and Bunton in the back seat directly behind the driver. They gave direction to driver as to course to take, and as they turned off Washington Street into Hoskins Street defendant Bunton shot the driver in the back of his head. Kollock stopped the taxi. They both went through the pockets of Phillips as well as the glove compartment and got his money, approximately $15.00, and divided it between themselves. They then wandered around and spent the night in the woods. In the meantime Bunton stuck the gun in weeds beside a telephone pole, and threw the pocket book into the weeds.

The court found as a fact that the statements which the officer who first testified says were made to the officers by defendant Kollock and by defendant Bunton were freely and voluntarily made without any threats or duress, promise of reward, or alleviation of punishment.

The officers brought defendants from Bennettsville, S. C., to High Point, N. C., and upon arrival at High Point the pistol, a .38 caliber revolver, and the pocket book were found where indicated above. The pistol had in it an empty shell, and two loaded shells. The pistol, empty shell, and the bullet found by the coroner, as above recited, were examined by ballistic expert —who testified, in his opinion, that the bullet had been shot from the pistol.

And defendant Bunton, upon being asked by one of the officers "if there was any reason why this thing had taken place," stated that he had been drinking, and that was the only statement he made. And there is evidence that he had taken some drinks, and that he was under influence of intoxicating liquor when he left the Brown home about 10:45—when he and Kollock left.

Verdict: The jury returned for its verdict and said (1) that the defendant Bunton is guilty of murder in the first degree as charged in the bill of indictment; and (2) that the defendant John Kollock, Jr., is guilty of murder in the first degree and recommends imprisonment for life in the State Prison.

And, the jury, upon being polled at request of counsel for Julius Bunton, each juror answered to his name as called, and, for his verdict, said that the defendant Julius Bunton is guilty of murder in the first degree as charged in the bill of indictment and that he still assents thereto.

Judgment: As to defendant Kollock: Confinement in the State Prison at Raleigh, North Carolina, for the term of his natural life.

As to defendant Julius Bunton: Death by inhalation of lethal gas as provided by law.

To the judgment so rendered, defendant Julius Bunton, through his attorney, James W. Clontz, excepted and gave notice of appeal, and appeals to Supreme Court. And as shown of record defendant Julius Bunton was permitted to appeal without making bond or the deposit required, that is, in *forma pauperis;* and Guilford County was ordered to pay the costs of obtaining a transcript of the proceedings had, and the evidence offered on the trial for use of defendant, Julius Bunton, also to pay necessary cost of preparing the copies of record and briefs required of defendant on such appeal.

Attorney General Patton, Assistant Attorney General Bruton for the State.

J. W. Clontz for defendant appellant.

WINBORNE, C. J.: Of the twenty-nine assignments of error grouped in the case on appeal, only exceptions to which assignments of error numbered 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 27 relate are set out in defendant appellant's brief, or in support of which reason or argument is stated or authority cited. Hence, under Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562, and decisions of this Court pursuant thereto, all other exceptions will be taken as abandoned by him.

The question then arises: Is there error in matters challenged by exceptions presented? Careful review and consideration of the record and case on appeal fails to disclose prejudicial error.

I. An inspection of the record proper, in the light of proper practice in trial of homicide cases, such as this is, discloses that orderly procedure was followed, and there is no error apparent upon the face of the record.

II. Assignments of error 21 and 25, based upon exceptions 21 and 25 to failure to charge in respect to character evidence, the defendant not having testified, or put on evidence as to his good character: Under cross-examination, witnesses put on the stand by defendant Kollock did testify to good character and reputa-

tion of defendant Bunton. And the court, in charging the jury, called attention to the fact that there was some character evidence introduced as to both defendants; that such evidence is substantive in that the jury would consider it as to the guilt or innocence of defendants,—as to whether a person whose character is testified to be good would commit such a crime. The charge is in substantial accord with proper instruction. *S. v. McMahan*, 228 N.C. 293, 45 S.E. 2d, 340.

III. Assignments of error Numbers 17, 18, 19, 20, 22, 23 and 26, are based upon exceptions of like numbers, to portions of the charge which defendant Bunton contends are erroneous in that the court restricted the jury to the return of one of three verdicts—guilty of murder in the first degree, or guilty of murder in the first degree with recommendation of life imprisonment, or not guilty—without including murder in the second degree. Defendant, appellant, contends that the evidence as to his intoxication is sufficient to require the submission of question of second degree murder, and that, hence, it was the duty of the trial court to instruct the jury as to second degree murder as one of the verdicts which the jury might return. In support of this position these cases are cited: *S. v. Murphy*, 157 N.C. 614, 72 S.E. 1075; *S. v. Shelton*, 164 N.C. 513, 79 S.E. 883, and *S. v. Edwards*, 211 N.C. 555, 191 S.E. 1.

In this respect, speaking to the question of intoxication in *S. v. Murphy, supra, Hoke, J., later C.J.*, delivering the opinion of the Court, had this to say: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide * * * The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder 'a purpose to kill, previously formed after weighing the matter' * * * a mental process, embodying a specific, definite intent, and if it is shown that an offender charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense. It is said in some of the cases, and the state-

ment has our unqualified approval, that the doctrine in question should be applied with great caution * * * ."

However, it is provided by statute, in this State, that a "murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * or other felony shall be deemed murder in the first degree * * * ." G.S. 14-17. *S. v. Lane,* (1914) 166 N.C. 333, 81 S.E. 620; *S. v. Donnell,* (1932) 202 N.C. 782, 164 S.E. 352; *S. v. Glover,* (1935) 208 N.C. 68, 179 S.E. 6; *S. v. Exum,* (1938) 213 N.C. 16, 195 S.E. 7; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Miller,* (1941) 219 N.C. 514, 14 S.E. 2d 522; *S. v. King,* (1946) 226 N.C. 241, 37 S.E. 2d 684, and other cases.

To this statute, G.S. 14-17, the General Assembly of 1949, Chapter 299, S. 1, added the following: "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's Prison, and the court shall so instruct the jury." This proviso has been the subject of discussion in several cases. *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897; S.C. 236 N.C. 340, 72 S.E. 2d 743; *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *S. v. Conner,* 241 N.C. 468, 85 S.E. 2d 584; *S. v. Carter,* 243 N.C. 106, 89 S.E. 2d 789; *S. v. Adams,* 243 N.C. 290, 90 S.E. 2d 383; *S. v. Cook,* 245 N.C. 610, 96 S.E. 2d 842.

In the present case all the evidence shown in the record of case on appeal tends to show that the defendant, in the perpetration of a robbery, shot and killed Clifford Witt Phillips. A homicide so committed is declared by the statute, G.S. 14-17, to be murder in the first degree. *S. v. Alston, supra.* Thus when a homicide is committed in the perpetration of a robbery, the State is not put to the proof of premeditation and deliberation. In such event the law presumes premeditation and deliberation. *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684. See also *S. v. Maynard, ante,* 462, cotemporaneous herewith, where this Court in opinion by *Parker, J.,* restates the principle in this manner: "Where a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought," citing cases.

Moreover, while evidence tends to show that the defendants were drinking, and that they were "pretty drunk", when the witness James McCollum last saw them before the time the body of the deceased was found, there is no evidence tending to show that defendant Bunton did not know what he was doing, both in the planning and in the execution of the robbery.

Indeed, the evidence is not sufficient to make available to him the defense of intoxication. Hence there is no prejudicial error in the court limiting the verdicts as above indicated.

In respect to Assignments 16 and 27 it is noted that the trial judge charged the jury as to the provision added to G.S. 14-17 by the act of 1949 Session Laws, Chapter 299, Section 1, above quoted in respect to recommendation of life imprisonment, all in substantial accordance with decisions of this Court. *S. v. McMillan, supra,* and other cases above cited.

After careful consideration of the record proper, the record of case on appeal, and all assignments of error, both those brought forward in brief of the appellant, and those deemed abandoned, error of prejudicial nature, sufficient to require the disturbing of the verdict, and judgment from which appeal is taken is not made to appear.

Hence the judgment is affirmed, and in the trial there is

No Error.

CITY OF GREENSBORO, GEORGE H. ROACH, WILLIAM B. BURKE, TOM E. BROWN, J. M. DENNY, D. NEWTON FARNELL, JR., WILLIAM FOLK, JR., ELBERT F. LEWIS, ALBERT F. STEVENS, JR., AND E. R. ZANE, REDEVELOPMENT COMMISSION OF GREENSBORO, JOSEPH T. CARRUTHERS, JR., M. A. ARNOLD, MRS. ELIZABETH BRIDGERS, VANCE CHAVIS AND BYNUM HINES v. PERCY L. WALL.

(Filed 10 January, 1958.)

1. **Declaratory Judgment Act § 2—**

Jurisdiction under the Declaratory Judgment Act may be invoked only when there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.

2. **Same: Appeal and Error § 6—**

The Declaratory Judgment Act does not authorize the courts to give a purely advisory opinion.

3. **Statutes § 4: Declaratory Judgment Act § 2—**

The validity of a statute may be determined in an action under the Declatory Judgment Act only when its validity is directly and necessarily involved and specific provisions thereof are challenged by a person who is directly and adversely affected thereby.

4. **Statutes § 4—**

A statute may be valid in part and invalid in part, and the validity of a statute should not be determined upon a general attack of its constitutionality, but only in respect of its adverse impact upon personal or property rights in a specific factual situation.

5. Appeal and Error § 1—

The constitutionality of a statute will not be determined unless the judicial power is properly invoked and it is necessary to determine the question in order to protect the constitutional rights of a party to the action.

6. Constitutional Law § 4—

A party who is not personally injured by a statute is not permitted to assail its constitutionality.

7. Declaratory Judgment Act § 2—

Plaintiff municipal corporations and the members of its boards instituted this action to test the validity of the Urban Redevelopment Law. G.S. 160-454 *et seq.* Defendant, a citizen and taxpayer, admitted all facts alleged and made a general denial of plaintiffs' legal conclusions as to the constitutionality of the Act, without challenging any specific actions or proposed actions of plaintiffs as violative of any particular constitutional or statutory rights of defendant. *Held:* The pleadings present no controversy justiciable under the Declaratory Judgment Act, and the action must be dismissed.

8. Declaratory Judgment Act § 2: Taxation § 38a—

While a taxpayer may challenge the illegal expenditure of tax funds by a municipality and the validity of proposed municipal bonds, a general attack on the constitutionality of the statute under which a municipal agency was created, without attacking any particular tax, expenditure or bond issue on any specific constitutional ground, does not present a justiciable controversy.

9. Declaratory Judgment Act § 5—

In a proceeding under the Declaratory Judgment Act, where the facts are established by defendant's unequivocal admissions, the court must determine the controversy upon the facts admitted, and has no authority to consider evidence and find additional facts, and findings incorporated in the judgment different from or in addition to facts established by the pleadings will not be considered on appeal.

APPEAL by defendant from judgment of *Preyer, Resident Judge,* signed October 12, 1957, in Chambers, in action pending in GUILFORD Superior Court, Greensboro Division.

Plaintiffs seek a judgment declaring that none of their alleged actions violates Art. 7, Sec. 7, or Art. 5. Sec. 4, or Art. 1, Sec. 7, or Art. 1, Sec. 17, or Art. 2, Sec. 1, or Art. 5, Sec. 3, of the Constitution of North Carolina, or the provisions of G.S. 160-399(d). No reference to any of said constitutional and statutory provisions appears in the pleadings except in *plaintiffs' prayer for relief.*

Answering, defendant admitted all of plaintiffs' allegations except paragraph XIII wherein plaintiffs alleged: ". . . that the Redevelopment Commission of Greensboro is a duly constituted agency of the City of Greensboro; that it and the City Council are authorized by the laws and ordinances hereinabove referred to and pleaded herein to proceed with the redevelop-

ment plan above described and to spend public money on said project and that the laws and ordinances above referred to and pleaded herein are valid and constitutional exercises of the legislative power of the General Assembly of North Carolina and the City Council of the City of Greensboro."

Plaintiffs are (1) the City of Greensboro, a municipal corporation, (2) the individuals who comprise its City Council, (3) the Redevelopment Commission of Greensboro, a separate and distinct body corporate and politic, and (4) the individual members of the Commission.

The complaint, summarized, alleges:

The City Council of Greensboro, by ordinance of October 15, 1951, created the Redevelopment Commission. Upon the filing of a certified copy of this ordinance in his office, the Secretary of State issued a charter to the Redevelopment Commission. Thereupon the City Council appointed the members of the Commission. Its organization was completed by the election of officers, adoption of bylaws, etc.

On December 13, 1955, the Planning Board of Greensboro, at the request of the Commission, certified a described area within the corporate limits as a "redevelopment area." Thereupon the Commission prepared a comprehensive "redevelopment area plan."

The Commission "is proceeding with a proposal for the redevelopment of the area, which includes the proposed redevelopment contract, with the developer selected; that monies have been and will be expended in the development of said plan and that the development of said plan cannot proceed further without expenditure of substantial sums."

The City Council, by resolution, expressed its desire that the Commission prepare plans and surveys to carry out "an urban redevelopment project" and "agreed that the City of Greensboro would provide an amount in cash, streets, utilities, etc., which will not be less than one-third of the net project cost."

Attached exhibits show the metes and bounds of the "redevelopment area" and the various projects and features of the "redevelopment area plan."

Defendant is a citizen, resident and taxpayer of Greensboro. On July 26, 1957, he wrote a letter requesting that the City Council "take proper steps to have . . . determined by the courts of North Carolina" whether plaintiffs' actions or proposed actions would be in violation of any of the constitutional and statutory provisions referred to above.

The judgment recites that a jury trial was waived and the cause heard on "the pleadings, *affidavits* and exhibits" (our italics); and based thereon the court made extended *findings of*

fact. It was then adjudged that the Redevelopment Commission of Greensboro and the City Council of Greensboro "are authorized . . . to proceed with the redevelopment plan above described and to spend public money on said project." It was further adjudged that their actions and proposed actions do not and will not violate any of the constitutional and statutory provisions referred to above.

Defendant excepted to the judgment in its entirety and appealed therefrom.

H. J. Elam, III, and King, Adams, Kleemeier & Hagan for plaintiffs, appellees.

Adam Younce for defendant, appellant.

Weston P. Hatfield and John T. Morrisey as amici curiae.

BOBBITT, J. Jurisdiction under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, may be invoked "only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404, and cases cited. It must appear that "a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, . . ." *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56. The existence of such genuine controversy between parties having conflicting interests is a "jurisdictional necessity." *Tryon v. Power Co.,* 222 N.C. 200, 22 S.E. 2d 450.

"It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, . . ." *Stacy, C.J.,* in *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532. "The statute (G.S. 1-253 *et seq.*) does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Seawell, J.,* in *Tryon v. Power Co., supra.* "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Ervin, J.,* in *Lide v. Mears, supra.* Also, see *Calcutt v. McGeachy,* 213 N.C. 1, 195 S.E. 49; *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334, and *NASCAR, Inc., v. Blevins,* 242 N.C. 282, 87 S.E. 2d 490.

The validity of a statute, when *directly and necessarily* involved, *Person v. Watts,* 184 N.C. 499, 115 S.E. 336, may be determined in a properly constituted action under G.S. 1-253 *et seq., Calcutt v. McGeachy, supra;* but this may be done only when some specific provision(s) thereof is challenged by a

person who is directly and adversely affected thereby. Compare *Fox v. Comrs. of Durham*, 244 N.C. 497, 94 S.E. 2d 482.

Conner, J., reminds us that confusion is caused "by speaking of an act as unconstitutional in a general sense." *St. George v. Hardie*, 147 N.C. 88, 97, 60 S.E. 920. The validity or invalidity of a statute, in whole or in part, is to be determined in respect of its adverse impact upon personal or property rights in a specific factual situation. As noted below, the General Assembly, when it enacted the "Urban Redevelopment Law," was well aware of the fact that "a statute may be valid in part and invalid in part." 82 C.J.S., Statutes Sec. 92; *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E. 2d 163, and cases cited; *Keith v. Lockhart*, 171 N.C. 451, 457, 88 S.E. 640.

The judicial duty of passing upon the constitutionality of an Act of Congress or of an Act of the General Assembly is one "of great gravity and delicacy." *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785; *Person v. Doughton*, 186 N.C. 723, 120 S.E. 481. Since "every presumption is to be indulged in favor of" the validity of an Act of the General Assembly, *S. v. Lueders*, 214 N.C. 558, 200 S.E. 22, the established judicial policy is to refrain from deciding constitutional questions unless (1) the judicial power is properly invoked, and (2) it is necessary to do so in order to protect the constitutional rights of a party to the action. *S. v. Lueders, supra; Turner v. Reidsville*, 224 N.C. 42, 46, 29 S.E. 2d 211. "A party who is not personally injured by a statute is not permitted to assail its validity; . . ." *Adams, J.*, in *Yarborough v. Park Com.*, 196 N.C. 284, 288, 145 S.E. 563.

Persons directly and adversely affected by the decision may be expected to analyze and bring to the attention of the court all facets of a legal problem. Clear and sound judicial decisions may be expected when specific legal problems are tested by fire in the crucible of actual controversy. So-called friendly suits, where, regardless of form, all parties seek the same result, are "quicksands of the law." *A fortiori*, this is true when the Court is asked to pass upon a complicated and comprehensive statute and multiple actions thereunder when no particular provision thereof or action thereunder is drawn into focus and specifically challenged by a person directly and adversely affected thereby.

The "Urban Redevelopment Law," now codified as G.S. 160-454 *et seq.*, was enacted by our General Assembly in 1951. The original Act (Ch. 1095, Session Laws of 1951) comprises fifteen and one-half pages, single space, 8-point type. Section 21 thereof, which was not codified, provided: "Separability of Provisions. Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative

intent that if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

Plaintiffs alleged that *all* of their actions and proposed actions are authorized by the "Urban Redevelopment Law."

Do the pleadings disclose a justiciable controversy? Defendant's answer does not challenge *any* of plaintiffs' alleged actions and proposed actions as violative of any particular constitutional or statutory provision. Defendant pleads no position whatever beyond his simple general denial of the legal conclusions alleged in plaintiffs' paragraph XIII. Indeed, it appears affirmatively that defendant suggested that this action be instituted, not because he challenged any of plaintiffs' actions and proposed actions but because he thought it advisable, in the phrase of *Seawell, J.*, to obtain an advisory opinion, which "the parties might, so to speak, put on ice to be used if and when occasion might arise."

The primary impact of plaintiffs' actions and proposed actions will be upon persons who reside or have property interests in the "redevelopment area," the area found by the Commission to be a "blighted area" as defined in G.S. 160-456(q). The ground of alleged unconstitutionality stressed by defendant *in his brief* in this Court is that the "Urban Redevelopment Law" purports to vest in the Commission the power of eminent domain. G.S. 160-465. Yet defendant neither resides nor has property interests in the "redevelopment area." *If* unconstitutional in this respect, defendant is not directly and adversely affected thereby. Defendant's status is that of a citizen, resident and general taxpayer.

Conceding that a general taxpayer may challenge an illegal expenditure of the tax funds of the City of Greensboro and the validity of a proposed issuance of municipal bonds without legal authority, we are confronted by the fact that defendant's answer does not attack any of plaintiffs' actions on this or any other specific ground.

Defendant, *in his brief*, incidental to his said contention relating to the Commission's power of eminent domain, contends that "redevelopment" would not be "for a public use or public purpose."

But *even in his brief* defendant makes no contention that the City of Greensboro, in respect of contracts involving the expenditure of municipal funds for "redevelopment" purposes, must comply with the provisions of G.S. 160-399(d); or (apart from a *statement* that "redevelopment" is not a *public purpose*,

hence cannot be considered *a necessary expense*) that the expenditure by the City of Greensboro of tax funds and bond proceeds would not be "for the necessary expenses" of the municipality within the meaning of Art. VII, Sec. 7, Constitution of North Carolina; or that the City of Greensboro has no power to issue municipal bonds for "redevelopment" purposes except upon compliance with the provisions of Art. V, Sec. 4, Constitution of North Carolina. If we assume that "redevelopment" is for a public purpose (Art. V. Sec. 3, Constitution of North Carolina), the constitutional provisions cited bear upon whether authority for the expenditure by the City of Greensboro of tax funds and bond proceeds does or may depend upon the approval of the voters in a municipal election.

It is understandable that plaintiffs desire blanket approval of their actions and proposed actions. But questions as to the validity and interpretation of the provisions of the "Urban Redevelopment Law" must await judicial decision until specific provisions thereof are challenged by persons directly and adversely affected thereby. Such persons are entitled to their day in court to show, if they can, that the enforcement of all or any of its provisions will result in an invasion or denial of their specific personal or property rights under the Constitution. They should not be precluded or prejudiced by a broadside decision in a case where the controversy is formal rather than genuine.

At the hearing below, plaintiffs offered and the court considered certain affidavits and in part based findings of fact thereon. Upon submission of a controversy without action under G.S. 1-250, the cause is for determination on the agreed facts. The court is without authority to consider evidence and find additional facts. *Realty Corp. v. Koon,* 216 N.C. 295, 4 S.E. 2d 850, and cases cited. This rule applies when the facts are stipulated. *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273. Too, it applies to an action under the Declaratory Judgment Act when the pleadings do not raise issues of fact. G.S. 1-262. Here the facts are established by defendant's unequivocal admission of all of plaintiffs' factual allegations. Hence, the court should not have considered the affidavits offered by plaintiffs; and the findings of fact incorporated in the judgment to the extent they differ from or go beyond the facts established by the pleadings are not considered here.

Our conclusion is that consideration and decision of the several questions *suggested by plaintiffs* relating (1) to the powers of the Commission, and (2) to the limitations upon the City of Greensboro in respect of the appropriation of tax funds and the issuance of municipal bonds for "redevelopment" pur-

poses, must be deferred until actions either of the Commission or of the City of Greensboro are properly and specifically challenged by a person directly and adversely affected thereby.

The absence of a genuine justiciable controversy requires that the judgment be reversed and the action dismissed. It is so ordered.

Reversed.

JAMES M. WILLARD v. P. T. HUFFMAN, INDIVIDUALLY AND P. T. HUFFMAN TRANSFER, INC.

(Filed 10 January, 1958.)

1. Master and Servant § 6b—

Evidence that plaintiff was discharged because of his activities in regard to joining a labor union *held* sufficient to be submitted to the jury in this action for wrongful discharge. G.S. 95-81.

2. Same—

An employer has the right to discharge an employee for any reason or no reason at all except in those instances in which the employee is protected from discharge by statute.

3. Same—

An employee is protected from discharge by G.S. 95-81 for membership or nonmembership in a labor union only if it is the sole reason for his discharge or is the motivating or moving cause of his discharge, and where there is evidence that plaintiff employee was discharged for breach of a company rule against drinking on the premises and also for such employee's activities in regard to joining a labor union, an instruction to the effect that the employer would be liable for wrongful discharge if the employee's activity in regard to joining a labor union was one of the reasons for his discharge, is reversible error.

APPEAL by defendants from *Rousseau, J.*, January Civil Term 1957 of GUILFORD (Greensboro Division).

This is a civil action instituted by the plaintiff to recover damages for his alleged wrongful discharge by the defendants in violation of G.S. 95-81.

The evidence tends to show that the plaintiff entered the employment of the defendant P.T. Huffman Transfer, Inc. in May 1955 and was discharged on 18 January 1956. Plaintiff testified that on 17 January 1956 the individual defendant, P. T. Huffman, had a meeting in his office with his drivers around 8:45 a.m. "He * * * said * * * he had heard there were some dissatisfied drivers and he would like to know if there was anything he could do to make us happy. * * * he had heard

from a friend that all of the drivers were over at my house last night, except two, and he wanted to know who the spokesman was. He had heard that we were discussing the Union. He * * * said he wished he could pay union wages but he couldn't, that he would have to close his business down before he could pay it. He asked if any of the men wanted to see his books. * * * and, he wanted to know if he had done anything wrong, anything we didn't like, or said anything." That when he was discharged on 18 January 1956, Mr. Huffman said, "Well, as bad as I hate to, I have got to let you go." That he inquired on what grounds, and he said, "You have violated a company rule * * * drinking on company premises."

This witness admitted that four days before he was fired he did drink some whiskey on the premises of the defendants, but denied any knowledge of a rule prohibiting such conduct.

The plaintiff's evidence further tends to show that a decision was made at the plaintiff's home to get in touch with a Mr. Jones, a representative of the union. However, there is no evidence in the record that the plaintiff or any other driver of the defendants actually joined the union.

The defendant Huffman denied he had said anything about a union in the meeting with the drivers; that he had no written contract of employment with the plaintiff. He testified that on 17 January 1956 he discussed with his drivers some rules about loading and unloading freight and that he could not pay any higher wages than he was then paying. That he was president and manager of the defendant corporation; that at the time of Willard's discharge the defendants were operating 16 or 17 trucks; that about ten per cent of their operation is interstate. That on 6 January 1956 a rule was promulgated to the effect that no employee of the company was permitted to drink on the company property at any time; that each driver employed by the company, including Mr. Willard, was personally informed of the rule.

The evidence tends to show that the plaintiff Willard, Walter McCormick and Charlie Foust, all drivers, and Jack Neal, rate clerk and assistant traffic manager of the company, participated in the drinking on 14 January 1956. According to the evidence of the defendant Huffman, he was informed that Willard, McCormick and Neal were drinking on the defendants' premises on 14 January 1956; that he discharged Willard and McCormick for that reason and for no other, and so informed them at the time of their discharge; that Neal was informed that any recurrence of his conduct would result in his discharge; that he was retained because it was brought to his attention that Neal was not present at the meeting when the rule was put into

effect; that the witness did not know that Foust had been drinking on the defendants' premises until after a witness so testified about an hour earlier.

Evidence was offered by the defendants that the company had frequently employed Union members and at the time of the trial had in its employ drivers who had been union members at other companies.

The jury by its verdict found that the plaintiff was discharged by the defendants "because he did not abstain or refrain from membership in a labor union or labor organization," and awarded damages in the sum of $625.00.

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

Robert S. Cahoon, for plaintiff appellee.

Brooks, McLendon, Brim & Holderness, for defendants appellant.

DENNY, J. The defendants assign as error the refusal of the court below to sustain their motion for judgment as of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence.

We think the evidence adduced in the trial below, when considered in the light most favorable to the plaintiff, as it must be on such motion, is sufficient to carry the case to the jury, and we so hold. This assignment of error is, therefore, overruled.

In our Right to Work statute, enacted by Chapter 328, Session Laws of 1947, now codified as G.S. 95-78 through 95-84, it was "declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association." (G.S. 95-78.) See also *In re Publishing Co.*, 231 N.C. 395, 57 S.E. 2d 366.

The plaintiff is relying upon the following provisions of our Right to Work statute as the basis for his right to recover in this action. "G.S. 95-81. Nonmembership as condition of employment prohibited.—No person shall be required by any employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"G.S. 95-83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of G.S. 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with

him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

The defendants' assignment of error No. 4 is to the following portion of the court's charge to the jury: "Now, if you find * * * by the greater weight of the evidence that on the night of January 17th that this plaintiff, with nine other employees of the defendant company, met at the plaintiff's home and discussed joining a union, and the members there, those ten men, voted to become members and notified Mr. Jones, and you find * * * that the defendant knew that the plaintiff had met with the other members in his employment for the purpose of joining some union, and you find by the greater weight of the evidence that that was the reason, and the sole reason, or one of the reasons why he was discharged by the defendant company and the individual defendant, Mr. Huffman, and you find those facts and all of them by the greater weight of the evidence, then * * * you'd answer this issue yes."

In other portions of the charge the court likewise instructed the jury to answer the first issue in favor of the plaintiff if it found that the sole reason or one of the reasons for plaintiff's discharge was because he did not abstain or refrain from becoming a member of the union or some labor organization. The defendants excepted to each one of these instructions and assign them as error.

These assignments of error present for determination this question: Is it sufficient to sustain a verdict in favor of a plaintiff in an action based on the alleged violation of the provisions of G.S. 95-81, if the jury should find that the discharge for such violation was only one of the reasons for such discharge?

This identical question has not been presented heretofore to this Court for determination under the provisions of our Right to Work statute. However, the federal act, involving the same principle in respect to proof, has been interpreted. The federal statute in pertinent part reads as follows: "It shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *" 29 U.S.C.A., Section 158 (a) (3).

In *Rubin Bros. Footwear v. National Labor Relations Bd.*, 203 F. 2d 486 (C.C.A. 5th), the Court said: "If anything is settled in labor law and under the act, we think it is that membership in a union does not guarantee the member against a discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity."

In the case of *Stonewall Cotton Mills v. National Labor Relations Bd.*, 129 F. 2d 629 (C.C.A. 5th), the Court said: "* * * the invoked section (29 U.S.C.A., Section 158 (a) (3)) does not, of course, mean that membership or office in a union is a guarantee against discharge, layoff, or demotion. An employee though he belong to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason prohibited by the Act." This view is sustained by many authorities, among which we cite: *Associated Press v. National Labor Relations Bd.*, 301 U.S. 103, 81 L.Ed. 953; *National Labor Relations Bd. v. Jones & L. Steel Corp.*, 301 U.S. 1, 81 L.Ed. 893; *National Labor Relations Bd. v. Electric City Dyeing Co.*, 178 F. 2d 890 (C.C.A. 3rd); 31 Am. Jur., Labor, Section 149, page 895. See also Anno: 123 A.L.R. 619; 306 U.S. 346, 83 L.Ed. 691.

We are bound to recognize that in many instances an employee may be discharged for one, or two or more reasons. Consequently, based on the evidence adduced in the trial below, in order for the plaintiff to recover for damages allegedly sustained as a result of his discharge in violation of the provisions of G.S. 95-81, the burden is on him to show by competent evidence, and by the greater weight thereof, that he was discharged solely by reason of his participation in the discussions with his fellow employees in connection with their proposed plan to join a labor union or that such participation therein was the "motivating" or "moving cause" for his discharge.

Webster's New International Dictionary, 2d Edition gives the following definition of "moving cause": "that which acts as the immediate agency for the production of effect * * *"

In *National Labor Relations Bd. v. Whitin Machine Works*, 204 F. 2d 883 (C.C.A. 1st), the Court said: "In order to supply a basis for inferring discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist," citing *National Labor Relations Bd. v. Electric City Dyeing Co., supra.*

In the case of *Wells, Inc. v. National Labor Relations Bd.*, 162 F. 2d 457 (C.C.A. 9th), it is said: "Nor, under the special facts of the case, is a motive for the discharge irrelevant, as Wells alternatively asserts. The prohibition of Section 8 (3) by its plain terms, extends to any discriminatory discharge, the purpose and manifest effect of which is to discourage employee membership of a labor organization. The existence of some justifiable ground for discharge is no defense if it was not the moving cause."

In *National Labor Relations Bd. v. McGahey*, 233 F. 2d 406 (C.C.A. 5th), the Court said: "Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section (8) (a) (3) forbids."

In light of the above authorities, in our opinion, where there is a conflict in the evidence as to the reason for discharge, in an action brought under the provisions of our Right to Work statute, in order for a plaintiff to recover damages thereunder, the jury must find that the discharge resulted solely from the plaintiff's exercise of rights protected under the Act, or that the plaintiff's exercise of such rights was the motivating or moving cause for such discharge, and we so hold.

The assignments of error based on exceptions to portions of the charge, as pointed out herein, are sustained. Therefore, the defendants are entitled to a new trial, and it is so ordered.

The defendants filed a motion in this Court for alternative relief to that sought on their appeal, to wit: That this cause be remanded to the Superior Court of Guilford County to determine whether or not the State courts have jurisdiction of the cause. The defendants contend that the doctrine of federal pre-emption is applicable to the facts in this case. In view of the disposition made of this appeal, we deem it unnecessary to rule on this motion, since the defendants will have an opportunity to raise the question posed in the trial court.

New Trial.

ORANGE SPEEDWAY, INC. v. ODELL H. CLAYTON, SHERIFF OF ORANGE COUNTY.

(Filed 10 January, 1958.)

1. **Constitutional Law § 4: Injunctions § 4g—**

The threatened enforcement of a statute may be enjoined when necessary to protect constitutional rights of person or property against injuries otherwise irremediable.

2. **Statutes § 2—**

A local act is valid unless prohibited by the Constitution.

3. **Same**

Professional automobile and motorcycle racing is an employment or business engaged in for gain or profit within the meaning of Article II, Section 29, of the State Constitution, and therefore a statute ap-

plicable to one county alone which attempts to regulate professional racing rather than racing in general, is void as a local act regulating labor or trade.

APPEAL by plaintiff from *Williams, J.*, September Term 1957 of ORANGE.

This is a civil action instituted in the Superior Court of Orange County, North Carolina, on 12 September 1957, for the purpose of obtaining a permanent injunction against the defendant to prevent the defendant from interfering with the plaintiff in promoting and conducting automobile races on its race track in Orange County by the enforcement of the provisions of Chapter 588 of the Session Laws of 1957, ratified on 8 May 1957, the pertinent parts of which read as follows:

"Section 1. For the purposes of this Act, the terms 'motorcycle racing' and 'auto racing' are defined as covering any type of competitive racing by motorcycles or by automobiles regardless of the manner in which the racing vehicle is constructed or powered.

"Sec. 2. On and after the effective date of this Act, all persons, firms or corporations promoting, holding, staging, presenting or otherwise being responsible for motorcycle or auto racing events in Orange County shall obtain casualty and liability insurance sufficient to provide the following coverage at each and all racing events:

"(a) Personal accident liability coverage paying up to five thousand dollars ($5,000.00) for injury to any competing driver or rider, owner of a racing car or motorcycle, mechanic or track official participating in the race event, same to cover the cost of hospitalization and medical attention and to give limited, reasonable compensation to the injured person on a weekly basis for time lost from work.

"(b) Personal accident liability coverage sufficient to pay a minimum of five thousand dollars ($5,000.00) for the death of any competing driver or rider, owner of a racing car or motorcycle, mechanic or track official participating in the race event whose death is attributable to his participation in any activity connected with the race event.

"(c) Insurance liability coverage providing a minimum of five thousand dollars ($5,000.00) for property damage sustained by a spectator at the event.

"(d) Death and injury coverage paying up to fifty thousand dollars ($50,000.00) to an individual spectator and a minimum of two hundred thousand dollars ($200,000.00) covering any one accident occurring at the scene of the race and causing injury or death to more than one spectator.

"Sec. 3. Prior to staging, presenting or holding a motorcycle or automobile race, the promoter or person, firm or corporation staging or conducting the race shall file with the Clerk of Superior Court of Orange County a certificate or certificates of insurance showing that the insurance required by this Act has been purchased and will be in effect when the racing events covered will be presented. This insurance coverage must be obtained from a reputable insurer approved by the State Commissioner of Insurance.

"Sec. 4. The privilege to hold or present a motorcycle or automobile race or of practicing therefor, of any type on a Sunday or Sundays or after six P. M. on other days of the week is expressly forbidden.

"Sec. 5. No person under eighteen (18) years of age shall be permitted by the promoter, person, firm or corporation to participate as a competitor in any motorcycle or automobile race.

"Sec. 6. Failure to comply with the provisions of this Act shall constitute a misdemeanor and violators shall be fined not less than fifty dollars ($50.00) or more than two hundred fifty dollars ($250.00) or imprisoned for not more than sixty (60) days for each racing motorcycle or automobile of any type participating in the event in which the violation occurs, and each racing event conducted in violation of any provision of this Act shall be deemed a separate violation."

A temporary restraining order was issued and the case came on for hearing before his Honor Clawson L. Williams, the judge holding the courts of the Fifteenth Judicial District, on 3 October 1957, the time the temporary restraining order had been made returnable. His Honor found the facts from the complaint and the answer and the evidence offered by the parties and held said Act to be constitutional and valid in all respects. Consequently, his Honor dismissed the temporary restraining order and denied the plaintiff's prayer for a permanent injunction against the defendant.

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

Robert G. Sanders, J. C. Sedberry, for plaintiff.
Graham & Ranson, for defendant.

DENNY, J. Equity jurisdiction may be exercised to enjoin the threatened enforcement of a statute which contravenes our Constitution wherever it is essential in order to protect property rights and the rights of persons against injuries otherwise irremediable. *McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870; *Advertising Co. v. Asheville,* 189 N.C. 737, 128 S.E. 149.

See concurring opinions of *Hoke, J.*, in *Turner v. New Bern*, 187 N.C. 541, 122 S.E. 469, and *Stacy, C.J.*, in *McCormick v. Proctor, supra*. See also *Terrace v. Thompson*, 263 U.S. 197, 68 L.Ed. 255; *Truax v. Raich*, 239 U.S. 33, 60 L.Ed. 131.

Among the findings of fact by the court below are these:

"4. That the plaintiff engages in the business of promoting and conducting motor vehicle races, particularly stock car races, on its privately owned race track in Orange County, State of North Carolina.

"6. That said Act, by its terms, is applicable only to Orange County, State of North Carolina.

"7. That in promoting, advertising, and conducting motor vehicle races on its race track in Orange County, the plaintiff, through its officers, servants and employees, engages in much detailed work and labor.

"8. That the servants and employees of the plaintiff are paid their wages for their work and labor from the profits derived from the operation of said race track.

"9. That the officers and stockholders of the plaintiff derive a substantial part of their income from the profits derived from the operation of said race track and the profits so received constitute a portion of the means of livelihood of said officers and stockholders.

"12. That some of the auto racing car drivers who have participated in races on the track of the plaintiff in Orange County, before the passage of said Act, earn(ed) all or a large part of their means of livelihood from their trade or calling of driving automobiles in racing meets.

"13. That the defendant herein has threatened and now threatens to initiate criminal prosecutions against the officers, servants and employees of the plaintiff, and the professional racing car drivers, and all others who participate in promoting, conducting, or engaging in an automobile race on the plaintiff's race course in Orange County.

"14. That the said Act of the General Assembly, under consideration herein, places upon those who would engage in the trade or business of promoting and conducting automobile races in Orange County, burdens, duties and liabilities."

The Act under consideration applies only to Orange County and is a local Act. Even so, it is not unconstitutional merely because it is local unless it is violative of some provision of our Constitution.

In the case of *S. v. Ricketts*, 74 N.C. 187, it is said: "In this State in general every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there may be some act of the Legislature forbidding it to be done on that

day." *White v. Morris,* 107 N.C. 92, 12 S.E. 80; *S. v. Penley,* 107 N.C. 808, 12 S.E. 455; *Taylor v. Ervin,* 119 N.C. 274, 25 S.E. 875; *Rodman v. Robinson,* 134 N.C. 503, 47 S.E. 19, 65 L.R.A. 682, 101 Am. St. Rep. 877.

There is no general statutory law in North Carolina authorizing, forbidding or regulating automobile or motorcycle races, promoted and conducted on privately owned race tracks or courses, and therefore, the common law applies as the only general, statewide law in North Carolina relating to automobile and motorcycle races on privately owned race tracks. G.S. 4-1; *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676; *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251. There is a statewide act with respect to racing on streets and highways in this State, Chapter 1358 of the Session Laws of 1957, now codified as G.S. 20-141.3, but it has no application to the facts in this case.

There is also a local statute in effect in Wake County, North Carolina, Chapter 177 of the Session Laws of 1949, which we upheld in the case of *S. v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297. The pertinent part of this local Act is to the effect that, "It shall be unlawful for any person, firm, or corporation to engage in, promote, or in anywise participate in any motorcycle or other motor vehicle race or races on Sunday in Wake County, North Carolina." *Bobbitt, J.,* speaking for the Court, said: "The statute does not disclose a purpose to regulate labor or trade. The purpose of the promotion may be recreation, sport or charity; or it may be a business venture, for profit. The participants may be volunteers or compensated, amateurs or professionals. The race may be widely advertised, drawing large crowds; or it may arise upon a sudden challenge and be known and of interest only to the participants. * * *

"Were the statute directed solely against labor, *e.g.,* compensated labor, or trade, *e.g.,* business ventures, for profit, in relation to the conduct of motor vehicle races on Sunday in Wake County, the question posed would be serious indeed. But where the statute in sweeping terms bans an activity, to wit, all motor vehicle races on Sunday in Wake County, making it a misdemeanor to promote or engage in the proscribed activity, without regard to the commercial or noncommercial character of the activity, the fact that these defendants promote and engage in such activity for profit and for compensation puts them in no better position than those who promote and engage in such activity without reference to profit or compensation."

It would seem to be unreasonable to suppose that any person, firm or corporation would construct and maintain a race track in Orange County and procure the insurance coverage required

by Chapter 588 of the Session Laws of 1957, unless such person, firm or corporation was engaged in the business of racing for profit. In fact, the defendant concedes in its brief that the Act "had for its object the regulation of motorcycle and auto racing in Orange County * * *" A trade within the meaning of our tax laws, as well as within the meaning of Article II, Section 29 of our Constitution, includes any employment or business embarked in for gain or profit. *S. v. Worth,* 116 N.C. 1007, 21 S.E. 204; *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521.

Therefore, it seems clear to us that the Act under consideration on this appeal is not concerned with the act of racing *per se,* as was the case in *S. v. Chestnutt, supra,* but is aimed at the "persons, firms or corporations promoting, holding, staging, presenting or otherwise being responsible" for racing events.

Hence, in our opinion, the purpose of the Act under consideration is the regulation of the trade or business of promoting and conducting motorcycle or motor vehicle races for profit in Orange County, North Carolina, and we so hold. Moreover, we think the facts found by the court below support this conclusion.

Article II, Section 29 of the Constitution of North Carolina, in pertinent part, provides: "The General Assembly shall not pass any local, private or special act or resolution * * * regulating labor, trade, mining, or manufacturing; * * * Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have the power to pass general laws regulating matters set out in this section."

In view of the conclusions we have reached, we hold the statute challenged on this appeal is in conflict with Article II, Section 29 of the Constitution of North Carolina and is, therefore, null and void. *Taylor v. Racing Ass'n.,* 241 N.C. 80, 84 S.E. 2d 390; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Lamb v. Bd. of Education,* 235 N.C. 377, 70 S.E. 2d 201; *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313; *Sams v. Cm'rs. of Madison,* 217 N.C. 284, 7 S.E. 2d 540; *S. v. Dixon, supra. Cf. Crook v. Commonwealth,* 147 Va. 593, 136 S.E. 565, 50 A.L.R. 1043.

The judgment of the court below is

Reversed.

HAMPTON JOHNSON AND WIFE, MARIE JOHNSON v. GEORGE E. McLAMB AND WIFE, ANALIZER McLAMB; MARY McLAMB, SINGLE; LULA McLAMB JERNIGAN, WIDOW; DEWEY McLAMB AND WIFE, ETHEL McLAMB; CHARLIE McLAMB AND WIFE, EVA McLAMB; JOHNNIE B. McLAMB AND WIFE, LELA McLAMB; LESSIE McLAMB PHILLIPS AND HUSBAND, GARLAND PHILLIPS; CALLIE McLAMB, SINGLE; BETTIE McLAMB BYRD AND BRYANT BYRD; ANNA LEE ROBERTS AND HUSBAND, JOHN ROBERTS; FERNIE LEE AND WIFE, ANNERIA LEE; PAUL HARDISON AND WIFE, CLETHA HARDISON; ANDREW HARDISON AND WIFE, LEDA HARDISON; NOAH HARDISON AND WIFE, MINNIE HARDISON; NOLA ALTMAN AND HUSBAND, EUGENE ALTMAN; MILA DANIELS AND HUSBAND, W. H. DANIELS; MARTHA WARREN AND HUSBAND, FELTON WARREN; GOLDEN McLAMB AND WIFE, LOUISE McLAMB; ISHAM McLAMB AND WIFE, MAUDE McLAMB; C. D. McLAMB AND WIFE, MILDRED McLAMB; INEZ STRICKLAND AND HUSBAND, RONALD STRICKLAND; JAMES ROLAND McLAMB, SINGLE; WILLIAM HENRY STANCIL AND WIFE, MAMIE STANCIL; FELTON STANCIL AND WIFE, DOLLIE STANCIL; WAITUS STANCIL AND WIFE, EVELINA STANCIL; SARAH McCAUSLEY AND HUSBAND, SAM McCAUSLEY; CARSON McLAMB AND WIFE, NETTIE McLAMB; BRUNO McLAMB AND WIFE, ELSIE McLAMB; LALLA KROKER AND HARRY KROKER; MADRIS TYNER AND HUSBAND, JAP TYNER; BESSIE CREECH AND HUSBAND, THURMAN CREECH; MAUDE WORLEY AND HUSBAND, JOHN WORLEY; MYRTLE STAFFORD AND HUSBAND, ALTON STAFFORD; CHRISTINE WALLACE AND HUSBAND, WILLIAM WALLACE; CARLISE McLAMB, SINGLE; CASPER McLAMB AND WIFE, MARTHA McLAMB; JANIE BRASWELL AND HUSBAND, REGINALD BRASWELL; JAMES McLAMB AND WIFE, MARY ELLEN McLAMB; ALMA COBB AND HUSBAND, FRANK COBB; C. L. McLAMB AND WIFE, MYRTLE McLAMB; JOSEPH McLAMB AND WIFE, MARGIE McLAMB; WILBERT McLAMB, JR. AND WIFE, HELEN McLAMB; VELMA WADSWORTH AND JOHN WADSWORTH; AND ELMER McLAMB, DELMAR McLAMB AND PEGGIE McLAMB, MINORS.

(Filed 10 January, 1958.)

1. Adverse Possession § 15—

Ordinarily any instrument constitutes color of title if it purports to convey title but is defective or void for matters *dehors* the record, or even if the defects are discoverable from the record.

2. Same: Adverse Possession § 7—

The rule that deed of one tenant in common purporting to convey the entire tract does not constitute color of title as against the cotenants is to be strictly confined to deeds executed by a tenant in common, and will not be extended to judicial sales for partition or to tax foreclosures instituted against a single tenant.

3. Same: Taxation § 40g—

Commissioners' deed in tax foreclosure proceedings instituted against one tenant in common is color of title as against the cotenants who were not parties to the foreclosure.

APPEAL by answering defendants from *Seawell, J.*, at May Civil Term, 1957, of JOHNSTON.

Civil action under G.S. 41-10 to remove alleged cloud upon title to real estate, a lot in the Town of Benson.

The case was heard below on an agreed statement of facts, which discloses that the lot was originally owned by Thomas I. McLamb. It passed under his will in 1930 to his nine children, one of whom was Mary McLamb. On account of the nonpayment of taxes assessed against the lot in the name of Mary McLamb, the Town of Benson instituted an action in the Superior Court of Johnston County, "obtained a judgment forfeiting the interest" of Mary McLamb in the lot, and appointing a commissioner to expose the lot for sale. At the sale the lot was bid off by the Town of Benson, and deed dated 9 September, 1940, was made by the commissioner conveying the "lot of land to the Town of Benson." The deed was duly registered in the Public Registry of Johnston County on 10 September, 1940. The Town of Benson by deed dated 16 January, 1942, duly registered 26 January, 1942, "conveyed the lot of land" to Maggie McLamb Wilson, who in turn conveyed the "lot" to C. N. Bostic and wife by deed duly registered 5 February, 1942. Bostic and wife conveyed the "lot" to the plaintiffs by deed dated and registered 13 September, 1955.

In the facts agreed it is further stipulated: "That the Town of Benson, and its successors in title to the undivided one-ninth interest owned by Miss Mary McLamb, . . . have been in the adverse possession of the said lot of land since September 10, 1940." This action was instituted 10 December, 1956.

The plaintiffs allege that the defendants who are descendants of Thomas I. McLamb claim title to the lot under him. The answering defendants comprise five different groups of claimants. Each group as heirs at law of one of the nine devisees of Thomas I. McLamb claims title to a one-ninth undivided interest in the lot. The defendants who allegedly claim title to the other interests in the lot did not answer or otherwise plead to the complaint.

The court below entered judgment decreeing that the plaintiffs own the lot in fee, and that all the title and interest which the "defendants may have owned" in the lot "has been acquired by adverse possession under color of title" by the plaintiffs, and that the defendants own no interest in the land.

From the judgment so entered, the answering defendants appeal.

N. H. McGeachy, Jr., Willis D. Brown, and I. R. Williams for appellants.

J. R. Barefoot for appellees.

JOHNSON, J. At the time of the tax foreclosure, Mary McLamb owned only a one-ninth undivided interest in the lot. She alone was joined as a defendant. The single question here presented is whether the tax foreclosure deed is color of title against the cotenants who were not parties to the foreclosure.

The deed meets all the essential requirements prescribed by the general rules definitive of colorable title. Says *Walker, J.*, in *Burns v. Stewart,* 162 N.C. 360, 365, 78 S.E. 321, 323: "Color of title has been variously defined by the courts of this country. It was early held to be any writing which on its face professes to pass a title, but which it fails to do, either from want of title in the person making it or from the defective mode of conveyance employed; but it must not be so obviously defective as not to mislead a person of ordinary capacity, but not skilled in the law. (citation of authorities) The courts have generally concurred in defining it to be that which in appearance is title, but which in reality is not."

Ordinarily any instrument constitutes color of title if it purports to convey title but is defective or void *(Trust Co. v. Parker,* 235 N.C. 326, 69 S.E. 2d 841) for matters *dehors* the record *(Lofton v. Barber,* 226 N.C. 481, 39 S.E. 2d 263), or even if the defects are discoverable from the record. *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365.

True, in this jurisdiction we adhere to a principle, operating as an exception to the general rule, that a deed made by one tenant in common of the entire estate is not sufficient to sever the unity of possession and does not constitute color of title as against the cotenants. The theory of this exception to the general rule is that the grantee of one tenant in common takes only his share and "steps in his shoes," becoming a tenant in common in his stead, and that therefore it requires twenty years, rather than seven, adverse possession of the whole, under claim of ownership, to bar entry by the other tenants in common. *Cloud v. Webb,* 14 N.C. 317; *Hicks v. Bullock,* 96 N.C. 164, 1 S.E. 629; *Breeden v. McLaurin,* 98 N.C. 307, 4 S.E. 136; *Bullin v. Hancock,* 138 N.C. 198, 50 S.E. 621; *Cooley v. Lee,* 170 N.C. 18, 86 S.E. 720; *Cox v. Wright,* 218 N.C. 342, 11 S.E. 2d 158.

In *Roper Lumber Co. v. Cedar Works,* 165 N.C. 83, 80 S.E. 982, *Walker, J.*, speaking for the Court, said at p. 85: "We are aware that this Court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they are bound together, and does

not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby. (Citation of authorities) We are not inadvertent to the fact that this State stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc., 1078 and notes); but it has too long been the settled doctrine of this Court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the Court."

It thus appears to be the established policy of the Court to keep the exception strictly confined to the single class of cases to which it applies, *i.e.*, cases involving in each instance a deed made by a tenant in common purporting to convey not only his interest in the land but also the interest of his cotenants.

The exception has been restricted so rigidly that it has no application to deeds based on judicial sales for partition. In this connection our decisions are to the effect that where in a judicial proceeding to sell the common estate of tenants in common for partition, and less than the whole number of tenants are joined as parties, a deed made under order of the court purporting to convey the entire estate is like a deed of a stranger to the title, and therefore when registered, seven years adverse possession thereunder by the grantee or those claiming under him by registered deeds *(Justice v. Mitchell,* 238 N.C. 364, 78 S.E. 2d 122) will ripen title and bar the cotenants who are not parties to the proceeding. *McCulloh v. Daniel,* 102 N.C. 529, 9 S.E. 413; *Amis v. Stephens,* 111 N.C. 172, 16 S.E. 17; *Roper Lumber Co. v. Cedar Works, supra* (165 N.C. 83); *Alexander v. Cedar Works,* 177 N.C. 137, 98 S.E. 312; *Perry v. Bassenger, supra* (219 N.C. 838).

It appears from the appellants' brief that they are fully advised respecting the general rules which control the doctrine of colorable title. They are here urging the Court to extend the exception to cover tax foreclosures, like this one, where less than all the tenants in common were made parties to the foreclosure suit. We have given consideration to the arguments

presented. However, the view prevails that the exception should be kept in bounds and not extended to cover the situation here presented. According to the weight of authority, instruments based on judicial proceedings, including tax foreclosures, ordinarily are color of title. Annotation: 88 Am. St. Rep. 701, 723 *et seq.;* 1 Am. Jur., Adverse Possession, Sections 199 and 201 (Cumulative Supplement); see also exhaustive annotation: 38 A.L.R. 2d 986.

In *Trust Co. v. Parker* and *Parker v. Trust Co., supra* (235 N.C. 326, 69 S.E. 2d 841), it had been decided in a prior action *(Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449) that a foreclosure, wherein the trustee in the deed of trust was not a party, was void and ineffectual to pass title, nevertheless in the cited case (235 N.C. 326) this Court held that the commissioner's foreclosure deed constituted color of title under which the grantee acquired title by adverse possession for seven years. Chief Justice Devin, speaking for the Court, said at p. 332: "Color of title may be defined as a paper writing which on its face professes to pass the title to land but fails to do so because of want of title in the grantor or by reason of the defective mode of conveyance used. (Citation of authorities) If the instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. G.S. 1-38. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. (Citation of authorities). Accordingly, it has been held that a fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner who has right of action to recover possession and is under no disability. (Citation of authority). And where in a partition proceeding to sell land less than the whole number of tenants in common have been made parties, a deed made pursuant to an order of court to the purchaser is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties. (Citation of authorities). And in the langauge of Justice Brown, speaking for the Court in *Canter v. Chilton,* 175 N.C. 406, 95 S.E. 660: 'So an entry upon and taking possession of land under a judicial decree is good

color and this is generally true, although the decree is irregular or even void.' " *Cf. Ange v. Owens,* 224 N.C. 514, 31 S.E. 2d 521.

It is also noted in connection with the old practice of selling land for taxes by sheriff's deed, that our Reports contain numerous decisions holding that sheriff's deeds, though defective for various reasons, are color of title. As illustrative of this line of cases, see: *Fowle & Son v. Warren,* 169 N.C. 524, 86 S.E. 293; *Kivett v. Gardner,* 169 N.C. 78, 85 S.E. 145; *Fowle & Son v. Whitley & Warren,* 166 N.C. 445, 82 S.E. 841; *Greenleaf v. Bartlett,* 146 N.C. 495, 60 S.E. 419. See also *Lofton v. Barber, supra* (226 N.C. 481, 39 S.E. 2d 263).

We are concerned here only with the question of title as it relates to the asserted claims of the defendants who answered below and appealed to this Court. As to them the judgment is

Affirmed.

STATE v. GRACE BROWN

and

STATE v. CLARENCE EDWARD JONES.

(Filed 10 January, 1958.)

1. **Searches and Seizures § 3—**

The undisputed evidence that defendant led officers to his car, took the key from under the floor mat and opened the trunk and a bag, which contained the merchandise in question, discloses defendant's voluntary consent to the search, waiving the requirement of a warrant.

2. **Larceny § 9—**

Where there is sufficient evidence of defendant's guilt of larceny upon a warrant charging larceny and receiving stolen property, and the court instructs the jury that the count of receiving stolen property would not be submitted, a general verdict of guilty will be interpreted in the light of the instructions and relates only to the charge of larceny.

3. **Same: Criminal Law § 165—**

Where there is sufficient evidence of defendant's guilt of larceny but not of his guilt of receiving stolen property, a general verdict of guilty on a warrant charging both larceny and receiving stolen property necessitates a new trial, since defendant cannot be guilty of both larceny and of receiving the same stolen property, and it is impossible to determine to which count the verdict relates.

APPEAL by defendants from *Williams, J.,* at May 15, 1957 Criminal Term, of DURHAM.

Criminal prosecutions: As to *Grace Brown,* upon three warrents issued 9 April, 1957, out of Recorder's Court of Durham County, North Carolina, each charging in substance that Grace Brown, at and in Durham County, did on 6 April, 1957, willfully, unlawfully and feloniously steal, take and carry away certain wearing apparel of values (1) $14.95, (2) $98.00 and (3) $85.00, respectively, of the goods and chattels of (1) Lerner Shop, (2) Ellis-Stone Company, and (3) Ellis-Stone Company, respectively, and did then and there receive and conceal the said property in each case, with intent to appropriate the same to her own use knowing same to have been stolen; and

As to *Clarence Edward Jones,* upon two warrants issued 9 April, 1957, out of said Recorder's Court, each charging in substance that Clarence Edward Jones, at and in Durham County, did on 6 April, 1957, willfully, unlawfully and feloniously steal, take and carry away in each case a ladies' suit of the values of $98.00 and $75.00, respectively, of the goods and chattels of Ellis-Stone Company, and did then and there receive and conceal the said property in each case with intent to appropriate the same to his own use knowing same to have been stolen.

Defendants pleaded not guilty in each case. And after hearing the evidence the Recorder of said Recorder's Court found the defendant guilty in each case, and pronounced judgment in each case, from which defendants appealed to Superior Court.

In Superior Court the record shows three cases Numbers 6790, 6791 and 6792 against Grace Brown, and two cases Numbers 6801 and 6802 against Clarence Edward Jones,—all of which by consent of counsel for defendants and of the Solicitor for the State were consolidated for trial. Each defendant pleaded not guilty.

Upon trial in Superior Court the State offered evidence tending to show substantially the following: About 5:30 o'clock on the afternoon of 6 April, 1957, Captain Gates of the Detective Department of the city of Durham, North Carolina, saw defendants Grace Brown, hereinafter called Brown, and Clarence Edward Jones, hereinafter called Jones, standing together in front of Jones and Frasier Jewelry Store. It was a very warm spring day, sun shining, and lots of people were on the street in shirt sleeves. Brown had on a big, long, heavy winter coat and heavy skirt. Jones, too had on a big heavy overcoat,—long heavy, winter coat.

Pursuant to a telephone call pertaining to a misdemeanor, unnamed, and from source not revealed, but not from Lerner or Ellis-Stone Company, Captain Gates approached the two, Brown and Jones, and, after salutation and identifying himself as an officer, placed them under arrest. He took them to the Detective

Bureau, where he separated them, Brown in back or interrogation room, with door fastened, and Jones in his office. Later it was discovered that Brown had taken off bloomers and hid them under two electric fans in the room where she was. And she made statement to officers, without threat, offer of reward or inducement, freely and voluntarily, in which she said: That she came to Durham that morning on a car with Jones; that she did not have any people there; that she came from New York; that she lived there and in Baltimore; that she left Baltimore the 4th month and the 4th day; that she went to Richmond; that "they" went to Raleigh on the 4th or 5th; and that she came from Raleigh to Durham; that she had been with Jones since last July; that they traveled from Richmond to Durham (the court ruled her statement competent only as to her, and not as to Jones); that they had been traveling together as man and wife; that they had been shoplifting; that she and Jones went to Ellis-Stone's; that she got two suits; that Jones got those in the car; that they went to Lerner's and she got the hat and pocket book, and Jones waited outside; and that when no one was looking she took the rack, rolled it up and put it in her bloomers under her skirt.

Captain Gates then interrogated Jones, and on being questioned, Jones said: That he came to Durham on a car from Winston-Salem, with a friend, whom he did not know; that he didn't see the kind of car it was; that he did not have any identification; that he didn't have a car; that, being told by the officer that he would be held until the officer found out who he was, and, after officer McCrae came in, Jones said, "Well, I will carry you to the car," or words of similar import; that the three of them walked from police department to Seaboard freight station where the car was parked; that on the way Jones told the officers that "You will find four suits in there" (the car), "ladies'" suits; that Jones raised the floor mat on the right side and got the key from under the floor mat, and opened the trunk and a bag which contained the four ladies' suits; that Jones did not make any objection to searching the car,—but consented to it; that the suits were the ones later identified by E. J. Stone; that the labels had been cut—but on later search the four labels were found under the front seat, along with other labels and papers.

And later in the room where Jones was, officers found a pair of "bloomers" or "pajamas" or "pants" under the desk. Also Jones was seen holding in his hand a leather belt that would go through the loops on the pants found under the desk.

There was evidence: That Lerner's had in store a combination of a bag, a hat and a suit, which matched, at price $14.98 plus

tax, one of which was missing around April 6th; that the hat and bag which had been identified did not have the tag showing that it had been sold.

As to the four suits, E. J. Stone, assistant manager of Ellis-Stone Company, testified substantially as follows: That he examined the four ladies' suits down at the police department on Monday, 8 April; that they were in the store two days prior to 6 April; that permission was not given to Brown and Jones to take them; that the retail values of the suits were $98.00, $85.00 and $75.00; that, quoting him, "I was sure they came from our store * * * because they still had our hanging tags on them. However, our labels were removed. I think Captain Gates has these in his possession at this time." And to this question on cross-examination: "Q. There could be hundreds of the same kind of suits?" he answered, "A. But only four have our sales tags"; and that the labels shown him are the labels which had been cut out.

Defendants offered no evidence, but reserved exceptions to denial of motions aptly made for judgment as of nonsuit.

The trial judge instructed the jury that the charge of receiving stolen property as contained in the warrants is not submitted in the case against defendant Brown; but is submitted as to defendant Jones.

The jury returned verdict of guilty in each case against each defendant.

Thereupon the court entered judgments as follows: *As to defendant Grace Brown:* In each case, imprisonment in quarters provided for women by the State Highway and Public Works Commission under the provisions of G.S. 148-27 for a term of two years to be worked under the supervision of the Prison Authorities,—the term in case No. 6791 to commence at the expiration of prison sentence in case No. 6790, and the term in case No. 6792 to commence at the expiration of prison sentence in case No. 6791, but to be suspended for a period of three (3) years from the date of her release from prison on condition that she remain of good behavior, violate no law of the State or Federal Government and remains gainfully employed,—upon violation of the terms of this suspended sentence capias and commitment to issue on motion of Solicitor at Term Time.

And as to defendant Clarence Edward Jones: In each case, imprisonment in the common jail of Durham County for a period of two years to be assigned to work the public roads under the direction of the State Highway and Public Works Commission,—the execution of the sentence in No. 6802 to

commence at the expiration of the road sentence imposed in case No. 6801.

Each defendant respectively appeals from the judgment as it relates to her or to him to Supreme Court, and assigns error.

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

F. B. McKissick, Arthur Vann, Lisbon C. Berry, Jr. for Defendants Appellants.

WINBORNE, C.J.: While in the record of case on appeal here presented appellants group eighty-two assignments of error, based upon like number of exceptions, and in their brief filed in this Court refer to twenty-five of the exceptions so grouped, the underlying question is this: Was the search of the automobile of defendant Jones unlawful? The answer is No.

In the recent case of *S. v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501, opinion by *Parker, J.*, it is stated by this Court that: "It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such waiver, only if it clearly appears that the person voluntarily consented, or permitted or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated," citing among others the case of *S. v. Moore*, 240 N.C. 749, 83 S.E. 2d 912, where many cases are assembled.

In the light of undisputed testimony Jones lead the officers to his car, and on the way told them that four ladies' suits were in the trunk of the car. And then on arriving at the car, took the key from under the floor mat and opened the trunk and a bag, which contained the suits. This constitutes voluntary consent to the search, and a waiver of his rights to be free from unreasonable search and seizure.

Such being the case, and taking the evidence in the light most favorable to the State, as is done when considering demurrer to the evidence, did the court properly deny defendants' motions for judgment as of nonsuit?

As to defendant Brown: The trial judge held, and instructed the jury, that the count charging defendant Brown with receiving stolen property, knowing it to have been stolen, would not be submitted. This was tantamount to granting a nonsuit on this charge. Therefore the action of the judge in overruling the demurrer to the evidence necessarily related only to the count against her charging larceny. And the voluntary statement of this defendant that she and Jones had been shoplifting;

that they went to Ellis-Stone's, and she got two suits,—those in the car, and that they went to Lerner's and she got the hat and pocket book, is sufficient to support a verdict of guilty as to the charges of larceny preferred against her. Hence the general verdict as to her will be interpreted in the light of the instruction so given by the court.

And as to defendant Jones: The evidence against him, taken in the light most favorable to the State, is not sufficient to support verdict of guilty on the counts charging the crime of receiving stolen property, knowing it to have been stolen. But under the doctrine as to recent possession, *S. v. Neill,* 244 N.C. 252, 93 S.E. 2d 155, the evidence is sufficient to support a verdict of guilty of the charges of larceny. Thus there is error in overruling Jones' demurrer to the evidence as it related to the counts charging receiving stolen property.

Moreover, since larceny and receiving stolen property are two separate and distinct criminal offenses, "the nature of which is such that guilt of one necessarily excludes guilt of the other," as stated by *Bobbitt, J.,* in *S. v. Meshaw,* 246 N.C. 205, 98 S.E. 2d 13, the defendant Jones could be guilty of one or the other, but not both. *S. v. Neill, supra.* So, on general verdict of guilty as charged it would be impossible to determine to which count the verdict related, and, hence, a new trial must be awarded to defendant Jones. *S. v. Meshaw, supra.* Other points discussed in brief filed need not be considered.

For reasons stated: In the judgment as to defendant Brown, there is

No Error.

In the case against defendant Jones, *New Trial* is ordered.

IN THE MATTER OF: ROY C. SOUTHERN, SR. S. S. No. 237-05-1672 EMPLOYEE, AND OTHERS CONE MILLS CORPORATION WHITE OAK PLANT, PROXIMITY PLANT, GREENSBORO, N. C., EDNA PLANT, REIDSVILLE, N. C.

and

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

(Filed 10 January, 1958.)

1. Master and Servant § 62—

The findings of fact of the Employment Security Commission in a hearing before it are conclusive when supported by any evidence. G.S. 96-15(i).

2. Master and Servant § 60—

Evidence that the employer shut down its mills for the week ending 30 December and posted notices advising the employees when work would cease and when the employees would be expected to return to their jobs, *is held* to support the Commission's finding that the week was a vacation week within the purview of G.S. 96-13(c).

3. Same—

Where an employer, in addition to one week paid vacation provided for in the contract, shuts down its plant for an additional week of vacation during the Christmas period, its employees are not entitled to unemployment compensation for the additional week. G.S. 96-13(c).

4. Same—

An employer has the inherent right to determine its vacation policy, and an agreement between it and its employees for one week paid vacation between stipulated dates does not circumscribe the employer's right to suspend work for an additional week during the year without conferring on its employees the right to claim unemployment benefits for the second week of vacation.

APPEAL by Roy C. Southern, Sr., employee, and others, from *Rousseau, J.*, June 10, 1957 Civil Term of GUILFORD (Greensboro Division).

Appellants, employees of Cone Mills, filed claims with the Employment Security Commission seeking payment of benefits for the week ending 30 December 1956. The right of the employees to benefits claimed being questioned, the matter was referred to a deputy for hearing as provided by G.S. 96-15 (b) (2).

The deputy held a hearing. The employer and employees offered evidence. The deputy found these facts: Cone Mills is engaged in manufacturing cotton goods in fourteen plants in North Carolina. Among these plants are White Oak and Proximity at Greensboro and Edna at Reidsville. It had approximately 4,000 employees at these three plants. These employees are claimants in this cause. On 7 December 1956 Cone Mills posted on the bulletin board of its Edna Plant a notice advising the employees at that plant it would be closed for Christmas holidays beginning at 11:00 p.m. 21 December and continuing until 11:00 p.m. 1 January 1957. On 10 December 1956 Cone Mills posted on the bulletin boards of its White Oak and Proximity Plants notices advising the employees at those plants that those plants would be closed from 11:00 p.m. on 21 December 1956 until 11:00 p.m. 1 January 1957 for "Christmas-New Year Vacation Period." The plants were closed during the period indicated for the "Christmas-New Year Vacation Period," and claimant employees were unemployed during the week ending 30 December 1956 by reason of such vacation.

During 1956 these plants were closed for a vacation period from 23 July to 30 July, pursuant to a contract with the bargaining agent of the employees. No other vacation had been granted by the employer at any of these plants during 1956.

Following the designated "Findings of fact" summarized above are "Reasons and Conclusions of Law": "(e) From the findings of fact above set forth it is shown that the employer closed its three plants involved during the period indicated for a Christmas vacation or holiday; thus under the provisions of the Employment Security law such individuals cannot be considered available for work during such period, if it appears that such individuals have not, prior to the period in question, been granted as much as two weeks vacation. . . .

"The employees contend that this particular period granted during the Christmas Holiday season was not in fact a vacation, but that the plants were closed for economic reasons; namely, a shortage of orders.

"The word 'vacation' as used in the Employment Security Law is not defined in such law with any specific meaning. Therefore, we must apply the usual, ordinary definition of the word. In the case of IN RE DAUBER, 30 A. 2d 214, 216, 151 Pa. Super. 293, the Court said: ' "Vacation" implies a recess or leave of absence, a respite from active duty, an intermission or rest period during which activity or work is suspended. It is a period of freedom from duty, but not the end of employment.'

"(g) 'It is the conclusion of the undersigned that in this case a vacation was granted by the employer, in that the employees were notified when work would cease and when they would be expected to return to their jobs; thus, it appears to the undersigned that this was a respite or time of respite from active duty and was a period of freedom from duty, but not the end of employment.' "

After referring to statutory changes made in 1949, the deputy concludes: " 'UNDER THE PROVISIONS OF THE LAW IT IS THE PREROGATIVE OF THE EMPLOYER TO GRANT A VACATION AT ANY TIME IT SEES FIT.' However, no individual can be disqualified or declared ineligible for benefits by reason of a vacation period if it appears that such individual has already been granted two weeks vacation in the calendar year."

On his findings and conclusions the deputy decided that claimants, employees, were not entitled to benefits for the week claimed.

The Commission reviewed the deputy's findings, conclusions, and decisions; adopted as its own his findings and conclusions, and affirmed the decision. Claimants excepted to each finding

of fact, each conclusion, and appealed. The decision of the Commission was affirmed by the Superior Court. Claimants appealed.

Robert S. Cahoon for employee appellants.
Brooks, McLendon, Brim & Holderness for employer appellee.
W. D. Holoman, R. B. Billings, and D. G. Ball for Employment Security Commission, appellee.

RODMAN, J. The Legislature in its discretion has made the findings of fact by the Commission conclusive when supported by any evidence. G.S. 96-15(i). The validity of this section has been consistently recognized and effect given thereto. *In re Stevenson,* 237 N.C. 528, 75 S.E. 2d 520; *In re Employment Security Com.,* 234 N.C. 651, 68 S.E. 2d 311; *Employment Security Com. v. Jarrell,* 231 N.C. 381, 57 S.E. 2d 403; *Employment Security Com. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *Employment Security Com. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580; *In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544.

The employment manager for Cone testified: "We did have a shutdown at our plants at White Oak, Proximity, and Edna on the week ending December 30, 1956. That was vacation week. We did notify the employees ahead of time that would be a vacation week." Copies of the notices posted on the bulletin boards were offered in evidence. There was other evidence to support the Commission's findings. Hence they are conclusive and the exceptions taken thereto have no merit.

Do the findings justify the legal conclusion and support the decision denying compensation? We think the statute granting benefits for unemployment requires an affirmative answer. G.S. 96-13 provides: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . . (c) He is able to work, and is available for work: . . . Provided further, however that effective January 1, 1949, no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation."

As originally enacted, the statute contained no provision restricting the payment of benefits when work was suspended to give employees a vacation. S. 4, c. 1, P.L. Ex. Sess. 1936. The 1943 Legislature inserted two restrictions on the right of an unemployed individual to draw compensation benefits. It denied benefits for a period of three months prior and a like period subsequent to the birth of a child to such individual. S.L. 1943, c. 377, s. 5. That same section also "Provided further, however, that no individual shall be considered available for work for any week, not to exceed two in any benefit year, in

which the commission finds that his unemployment is due to a customary and well established vacation. This provision shall apply only if it is found by the commission that employment will be available to him at the end of such vacation." The provision that the vacation should be "customary and well established" proved objectionable to employers and employees. The Commission found it difficult of administration. The Commission recommended, and the Legislature in 1949 rewrote the provision with respect to the vacation to read as it presently exists. The language of the statute, when read and understood in the light of its history, we think demonstrates as the Commission says that the time for vacation was, if not fixed by agreement of the parties, to be determined by the employer.

The employer and its employees may by contract fix the date or dates for the vacation. Vacation may be one two-week period or two one-week periods. The statute does not prescribe; it merely limits the total vacation period for which an employee is ineligible for compensation to a total of two weeks.

"Under our system of private enterprise an employer in general may operate his business as he sees fit, in the absence of restrictions imposed in a collective bargaining agreement. One of an employer's inherent rights is to determine vacation policy in his own business particularly as to whether vacations shall be on a staggered basis or whether the plant shall be shut down so that the employes may enjoy their vacations all at the same time." *Philco Corp. v. Unemployment Compensation Bd. of R.*, 105 A. 2d 176 (Pa.).

The week which includes Christmas cannot be said to be an inappropriate time for a vacation. The announced purpose for suspension of work and the period of suspension conformed to accepted definitions of a vacation. *Kelly v. Administrator, Unemployment Comp. Act*, 72 A. 2d 54 (Conn.); *Mattey v. Unemployment Compensation Board of Review*, 63 A. 2d 429 (Pa.); *In re Dauber*, 30 A. 2d 214 (Pa.); *Gutzwiller v. American Tobacco Co.*, 122 A. 586 (Vt.); 91 C.J.S. 774.

Employer and the union representing its employees agreed that the employer would provide its employees one week's vacation with pay between 1 June and 1 September. This agreement does not purport to enlarge or diminish employees' right to compensation benefits nor could it do so. *Neff v. Board of Review, Etc.*, 117 N.E. 2d 533 (Ohio). The agreement does not undertake to fix the time for the second week of vacation permitted by statute.

The employer had a right by statute to suspend work for a total of two weeks for vacation without conferring on his employees a right to claim benefits on account of unemployment.

The Commission has found that the employer exercised its right and suspended work during Christmas week to give its employees a vacation at that time. The purpose of the employer in suspending work at that time was a question of fact which has been resolved by the Commission. The findings made by the Commission, supported as they are by evidence, are conclusive. These findings require a denial of the right to the benefits claimed.

The judgment is
Affirmed.

BESSEMER IMPROVEMENT COMPANY v. CITY OF GREENSBORO

(Filed 10 January, 1958.)

1. **Pleadings § 19c—**

A demurrer for failure of the complaint to state a cause of action cannot be sustained if the facts alleged entitle plaintiff to relief of some character, even though not to the extent or in the form asked for or reason asserted.

2. **Municipal Corporations § 7c—**

The opening and closing of streets is a governmental function of a municipality, G.S. 160-200(11), G.S. 160-204, G.S. 160-222, and a contract of the city to the extent it purports to restrict the statutory discretion vested in its governing body in this regard is *ultra vires* and void, and no action for compliance with such contract can be maintained.

3. **Same—City may not acquire property in consideration of its use in a particular manner and elect not to use it in such manner without paying fair compensation.**

Plaintiff, the owner of land within a municipality, alleged that it conveyed certain streets therein to the municipality as part of the consideration for the city's agreement to maintain the streets as shown on map, and that thereafter the municipality conveyed the main thoroughfare to the State Highway Commission for a limited access highway. *Held:* While plaintiff may not maintain an action to recover damages to its property resulting from the conversion of the main street to a limited access highway or force compliance by the city of its agreement to keep the other streets open, the city acquired the easements for the streets as consideration for their use in a particular manner, and upon its election not to make compensation in the manner agreed upon, it is under obligation to pay the fair and just value of the property, and therefore demurrer to the complaint should have been overruled.

APPEAL by plaintiff from *Olive, J.*, September 9, 1957 Civil Term of GUILFORD, Greensboro Division.

Defendant demurred to the complaint for failure to state facts sufficient to constitute a cause of action. The demurrer was sustained, the action dismissed, and plaintiff appealed.

Jordan, Wright & Henson and Walser & Brinkley for plaintiff appellant.

H. J. Elam, III and King, Adams, Kleemeier & Hagan for defendant appellee.

RODMAN, J. Does the complaint, liberally construed, state facts which suffice to show that plaintiff has been injured by some wrongful act of defendant?

The demurrer cannot be sustained if the complaint states facts which entitle plaintiff to relief of some character, even though not to the extent or in the form asked for or reason asserted.

The complaint in brief alleges: Plaintiff is and was, prior to 29 October 1948, the owner of a tract of land approximately a mile square, situate within the boundaries of defendant municipal corporation. A public street of defendant, Bessemer Avenue, crossed this property, dividing it into two approximately equal parts. Bessemer Avenue is an east-west street. It intersects Summit Avenue, a north-south street of defendant and plaintiff's western boundary. On the east it crosses the tracks of Southern Railway, plaintiff's eastern boundary. Prior to October 1948 plaintiff had prepared and partially consummated a plan for the subdivision of its property. It or its predecessor in title had laid water and sewer mains. Streets had been plotted, marked and paved so as to provide convenient access not only to the various parts of plaintiff's property but to differing parts of the City of Greensboro. Plaintiff had zoned the various parts of its property so as to confine them to appropriate uses. The plan of development, including location of streets, zoning of areas, and other details were worked out to conform with an overall plan of the Planning Department of the City of Greensboro. The city's Planning Department proposed the construction and maintenance of broad thoroughfares to carry traffic from one part of the city to another. Its plan called for a north-south boulevard to run from the northern portion through the eastern portion to the southern portion of the city. To accomplish this purpose the city proposed to use Benbow Road, a private road constructed by plaintiff, running north and south and approximately through the middle of plaintiff's property, intersecting Bessemer Avenue about the center of the property. In furtherance of the work of the Planning Department, plaintiff and defendant, on 29 October 1948, entered into

a contract, copy of which is annexed to and made a part of the complaint. The recitals and contract provisions here material follow:

"WHEREAS, certain paved streets and highways are located on the said property, which streets and highways are in need of repairs and resurfacing, and the party of the first part desires the City to make the said repairs and resurfacing to the said streets and highways and to take over the said existing paved portions of said streets and highways as paved streets; and, further, to maintain said streets and highways as a part of the city system of streets and highways; and

"WHEREAS, the party of the first part desires to dedicate the said streets and highways as city streets, and the City is willing to accept the dedication of the said streets and highways and the existing paved portion thereof as paved streets provided that the said streets and highways are repaired and resurfaced; and . . .

"NOW, THEREFORE, for and in consideration of the sum of $50,000.00, the receipt of which is hereby acknowledged, the City of Greensboro agrees to take over, as paved streets and as of the date of this contract, all of the existing paved portions of said streets shown on the attached map as paved streets, and to place the said sum in its maintenance and repair fund to be used in repairing and resurfacing the existing paved portions of said streets; and further agrees to keep up the existing paved portions of said streets as paved streets in as full and ample a manner as other paved streets are now maintained, the width of the pavement to be maintained by the City not to exceed thirty-six (36) feet, and without further charges against the owners of the abutting property for the maintenance or repair of the said streets. . . .

"It is further understood and agreed that the Bessemer Improvement Company reserves the right to cross all streets, within that part of the property shown hereon which is now zoned for industrial purposes, with railway tracks and industrial sidings at such points as may be reasonably necessary to serve such properties, except Benbow Road, which shall be crossed at only one point. . . .

"It is further understood and agreed that certain streets shown on the said map may be closed or changed, by mutual agreement between the party of the first part and the City, in accordance with the statutes and ordinances in such cases made and provided."

As a part of the consideration for the contract plaintiff gave to defendant a right of way 120 feet in width from its northern to its southern boundary for the extension of Benbow

Road as one of the thoroughfares to be constructed and maintained by the city. On 8 December 1950, at the request of the engineering department of the city, plaintiff conveyed to it a small triangle near its southern boundary to be used in connection with the planned development of Benbow Road. When the rights of way for Benbow Road were conveyed, it was specifically agreed that the city would construct a boulevard along Benbow Road in accordance with the then existing plans. Defendant, without notice to plaintiff, abandoned the plans agreed upon for the construction of the boulevard using Benbow Road as a part thereof and in May 1955 entered into a contract with the State Highway Commission for the construction of a limited or controlled access highway through plaintiff's property, and in compliance with said contract, defendant transferred to the Highway Commission the rights of way along Benbow Road which defendant acquired in 1948 and 1950 from plaintiff. The Highway Commission has, in accord with its contract with defendant city, constructed a highway across plaintiff's property with a division strip all the way down the center of the highway. The several streets constructed by plaintiff, taken over by defendant under the contract of 1948, have been closed and access via these streets denied to what was Benbow Road. Plaintiff's property abutting on the highway is likewise denied access to the highway, and as a result thereof the values of this property have been substantially reduced. Plaintiff avers that defendant breached its contract of October 1948 by contracting with the Highway Commission for changes in Benbow Road and the closing of other streets without plaintiff's consent. It asserts it has been damaged in the sum of $581,870 by defendant's breach of contract.

Defendant would shield itself from liability on these legal principles: (a) the opening, closing, and manner of maintaining streets is a governmental function which cannot be bargained away, and any contract purporting to do so is *ultra vires* and void; (b) the construction of O. Henry Boulevard (the new name given to Benbow Road) was the act of the Highway Commission, and if the construction of the highway has resulted in a taking of plaintiff's property, it has an adequate remedy under Ch. 40 of the General Statutes.

Defendant is correct in its assertion that the opening and closing of streets is a governmental function, G.S. 160-200(11), 204, and 222. *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Sanders v. A.C.L.,* 216 N.C. 312, 1 S.E. 2d 902; *Plant Food Co. v. Charlotte,* 214 N.C. 518, 199 S.E. 712; *Ham v. Durham,* 205 N.C. 107, 170 S.E. 137; *Hoyle v. Hickory,* 164 N.C. 79, 80 S.E. 254; *Tate v. Greensboro,* 114 N.C. 392.

A contract purporting to restrict the statutory discretion vested in the governing body of a municipality is *ultra vires* and to the extent of such limitation void and can of course furnish no right of action for noncompliance. *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37; *Madry v. Scotland Neck,* 214 N.C. 461, 199 S.E. 618; *Realty Company v. Charlotte,* 198 N.C. 564, 152 S.E. 686; 25 Am. Jur. 553; 39 C.J.S. 1033.

While no liability can be imposed for noncompliance with a void contract, properties acquired as a consideration for the contract cannot be retained without making compensation therefor. The fact that the municipality is an agency of the State does not affect the obligation to make fair compensation for the property transferred and retained. *Mfg. Co. v. Charlotte,* 242 N.C. 189, 87 S.E. 2d 406; *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561; *Moore v. Lambeth,* 207 N.C. 23, 175 S.E. 714; *Brunswick County v. Inman,* 203 N.C. 542, 166 S.E. 519; *Stephens Co. v. Charlotte,* 201 N.C. 258, 159 S.E. 414; *Realty Co. v. Charlotte, supra;* 38 Am. Jur. 193; 63 C.J.S. 595.

The demurrer admits that defendant, in 1948, acquired an easement 120 feet wide across plaintiff's property and an additional easement in 1950 on the promise that the property so conveyed would be used by defendant in a specific manner which would materially benefit plaintiff. Defendant has conveyed this property to the Highway Commission to be used for a different purpose. Defendant had legislative authorization to purchase the easement acquired in 1948 and 1950. G.S. 160-204. It promised to compensate plaintiff for the property rights so conveyed. It now elects not to make compensation in the manner then agreed upon. It is within its right in so electing, but this does not relieve it of the obligation of paying the fair and just value of the property rights which it acquired by virtue of its unenforceable promise.

Plaintiff cannot, in this action, recover damages to its property resulting from the conversion by the Highway Commission of Benbow Road, a street or way open to unlimited use, to O. Henry Boulevard, a limited access highway.

Reversed.

TROY MONROE ANDREWS, NITA ANDREWS AND JEAN CHANDLER ANDREWS, PLAINTIFFS v. MARY J. LOVEJOY AND HUSBAND, A. R. LOVEJOY, DEFENDANTS AND JOSIE CATE (WIDOW), ROBERT J. AYERS AND WIFE, LUCILLE O. AYERS, ADDITIONAL DEFENDANTS.

(Filed 10 January, 1958.)

1. **Easements § 1—**

Where the owner of a tract of land abutting a highway sells a portion thereof away from the highway by deed expressly granting the right of ingress and egress to the highway, the deed creates an easement appurtenant over the land retained, the deed being under seal and duly recorded.

2. **Easements § 5—**

Where the grantor of land conveys an easement over land retained by him, he, as owner of the servient estate, has the right to locate the easement, and he exercises his right to locate the easement when he thereafter conveys the servient estate by deed setting forth the location of the road.

3. **Same: Highways § 15—**

Where the grantee of lands is also conveyed an easement appurtenant across adjacent lands, his suit to establish his right of easement is not a suit to establish a cartway or an easement by necessity, and it is error for the judgment declaring his right to the easement to remand the cause for the assessment of damages, since he cannot be compelled to pay for the easement a second time.

4. **Reference § 9—**

A party to a compulsory reference cannot be entitled to trial by jury upon appeal as to facts admitted in the pleadings or as to facts irrelevant to the cause, since such facts are not issuable facts in the case.

5. **Easements § 1—**

In an action for a declaratory judgment establishing an easement appurtenant granted by deed, as distinguished from an action to establish an easement by necessity, the existence or nonexistence of an easement across adjacent lands owned by another is irrelevant.

6. **Appeal and Error § 21—**

An exception to the judgment cannot be sustained when no error appears on the face of the record.

APPEAL by plaintiffs and defendants from *Williams, J.*, September-October 1957 Term of ORANGE.

Plaintiffs seek a declaratory judgment determining their right to cross defendants' land to reach the Chapel Hill-Hillsboro Highway. They predicate their right on the deeds under which they and defendants claim title.

Defendants denied plaintiffs' right to cross their land and asserted that plaintiffs have access to the highway over a road

on the lands of Mrs. Josie Cate which road has been in existence for more than fifty years. Mrs. Cate was, on motion of defendants, made an additional party defendant. She answered, admitting the existence of a road on her land but denied that plaintiffs could use it as of right.

A reference was ordered. Plaintiffs and defendants excepted and demanded a jury trial. The referee made findings of facts and conclusions of law. He concluded: "That by construction of the deeds the plaintiffs are entitled to a right-of-way for the purpose of providing ingress and egress from their property to the Chapel Hill-Hillsboro Highway along the northern boundary of the land of the original defendants, Lovejoy; and that they are entitled to a right-of-way of reasonable and convenient width; that the undersigned referee finds as a fact and concludes that fourteen feet is a reasonable and convenient width for a right-of-way."

Defendants filed exceptions to the referee's findings and conclusions and demanded a jury trial on issues which they tendered. The court declined to submit the issues tendered, overruled the exceptions, approved and adopted the referee's findings of fact and conclusions of law and then remanded the cause to the Clerk of the Superior Court of Orange County "to appoint Commissioners, as provided by law, to lay out a cartway providing plaintiffs ingress and egress to their property, and to assess damages, as provided by law." Plaintiffs and defendants excepted to the judgment and appealed.

William S. Stewart for plaintiffs.

Bonner D. Sawyer for defendants Mary J. Lovejoy and husband, A. R. Lovejoy.

RODMAN, J. Plaintiffs' appeal presents for determination the correctness of the judgment directing the assessment of damages. Plaintiffs disavow any intent to obtain a cartway under the provisions of Art. 4, c. 136, of the General Statutes. They seek merely an adjudication of presently existing property rights.

Plaintiffs allege and defendants admit that their titles trace to a common source. The land presently owned by plaintiffs and defendants was, prior to 15 September 1927, owned by T. L. Cate as a single tract. His land was bounded on the east by the Chapel Hill-Hillsboro Highway and on the north by the land of Josie Cate. In September 1927 he sold to Gary Hogan and others, by deed duly recorded in May 1928, twenty acres from the western part of his land. Following the specific description of the twenty acres then conveyed is this language: "And

granting further to the parties of the second part, their heirs and assigns, the right of ingress and egress over a road from the East edge of the property herein conveyed to the Chapel Hill-Hillsboro Highway." Plaintiffs are now the owners of that twenty acres including such rights as the quoted paragraph conveys.

In April 1942 Cate contracted to convey the land between the highway and plaintiffs' property to W. E. Barker. Before the conveyance was consummated Cate died; his administrator and widow, complying with the contract, conveyed the property to W. E. Barker and wife. This deed, after specifically describing the land conveyed, contains this provision: "Reserving, however, along the northern boundary of the property herein conveyed a right of way for the purpose of providing an outlet for the 20-acre tract of land heretofore conveyed by Thomas L. Cate and wife to Gary Hogan, *et al,* by deed dated September 15, 1927, recorded in office of the Register of Deeds of Orange County in Book 90, at page 192, and granting to the parties of the second part the right to use the said road or right of way jointly with the owners of the said twenty acre tract." Defendants acquired from Barker, subject to the reservation quoted above.

The evidence shows that many years ago there was a road along the southern line of the Josie Cate land, extending from the Chapel Hill-Hillsboro Highway westwardly to a schoolhouse near plaintiffs' northwest corner. The Josie Cate title is entirely distinct from the title to the T. L. Cate lands presently owned by plaintiffs and defendants. The deed to Mrs. Josie Cate contains a reservation for a road twenty feet wide along her southern line for the benefit of the property owners claiming under her ancestor in title. The old school has been closed for approximately twenty years and the road, except for occasional lumber operations, has not been used since the closing of the school. In places this road extended over on the property of defendants some two, three, or four feet in the first 400 feet back from the Chapel Hill Highway. Beyond that point it is presently impossible to determine where the old road was located.

The easement granted plaintiffs' ancestor in title is appurtenant to the land sold by T. L. Cate and is an estate or interest in land. It is created by written instrument under seal, duly recorded. The deed from Cate to Hogan for the land presently owned by plaintiffs made the land conveyed the dominant estate and the land retained by Cate the servient estate.

Cate's deed for plaintiffs' land did not fix the location of the road which was appurtenant to the property conveyed. As the owner of the servient estate he had the right to fix the location

of that road. *Cooke v. Electric Membership Corp.*, 245 N.C. 453, 96 S.E. 2d 351; *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541; *Bender v. Telegraph Co.*, 201 N.C. 355, 160 S.E. 352; *White v. Coghill*, 201 N.C. 421, 160 S.E. 472; *Mfg. Co. v. Hodgins*, 192 N.C. 577, 135 S.E. 466, s. c. 190 N.C. 582, 130 S.E. 330; *Ingelson v. Olson*, 110 A.L.R. 167, and annotations; 17A Am. Jur. 711; 28 C.J.S. 761.

Cate, in 1942, when he conveyed the servient estate, exercised his right to locate plaintiffs' easement. It is expressly provided in the deed for defendants' land that the right of way should be along the northern boundary of the servient estate. Plaintiffs accept that location and insist on their property rights. Plaintiffs do not seek a cartway or to have an easement implied from a sale of the property by Cate. They limit their claim to the easement expressly granted. Having bought and paid for the easement, they cannot now be compelled to pay for it a second time. There was error in remanding the cause to the clerk for the appointment of commissioners to assess damages.

Defendants assign two errors: the first, to the denial of the demand for jury trial on issues tendered.

Defendants excepted to parts of four findings of fact and tendered issues relating to these exceptions. The steps requisite to a jury trial when a compulsory reference has been ordered are enumerated with copious citations of authorities in *Bartlett v. Hopkins*, 235 N.C. 165, 69 S.E. 2d 236. Some, if not all of defendants' exceptions fail to meet the third condition there enumerated. That defendants' land lies between the highway and plaintiffs' land is shown by the deeds attached to the complaint, admitted in the answer as sources of title under which the parties claim, and by the testimony in the case. The court is not required to submit an issue to establish admitted facts.

Likewise the existence of a road on the property of an adjoining landowner which plaintiffs might be permitted to use could not deprive plaintiffs of the property rights they had bought and paid for. The deed from Cate to Hogan *granted* a right of ingress and egress. He could only grant that right with respect to his property. He could not *grant* a right to use the property of another. The existence or nonexistence of such a road was not an issuable fact in this case.

Defendants' first exception fails to comply with the rules. It cannot be sustained. *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467.

Defendants' second assignment of error is to the judgment. No error appears on the face of the record. The facts found support the judgment, insofar as it affirms the referee's conclusions. Defendants' second exception cannot be sustained.

On plaintiffs' appeal: Error and Remanded for Proper Judgment.

On defendants' appeal: Affirmed.

STATE OF NORTH CAROLINA EX REL W. JACK HOOKS, SOLICITOR OF THE SUPERIOR COURTS OF THE FOURTH SOLICITORIAL DISTRICT v. J. PERCY FLOWERS AND WIFE, MRS. DELMAR FLOWERS.

(Filed 10 January, 1958.)

1. **Nuisances § 8b: Constitutional Law § 21—Order for inspection and inventory of private safe without showing that contents were relevant to inquiry held to invade property rights without due process.**

Where, in an action to abate a public nuisance on the sole ground that the premises were used for the unlawful sale of whiskey and the storing and secreting thereon of materials for the unlawful manufacture of whiskey, G.S. 19-1, a safe found in the padlocked building is opened by the sheriff and no whiskey or other intoxicating beverages found therein, the court may not thereafter require that the safe be reopened for the purpose of taking an inventory thereof, there being nothing to show the materiality of anything in the safe as bearing upon the question of abatement. Such inventory would be an invasion of the property rights of defendant without due process of law.

2. **Appeal and Error § 3—**

An order entered in a proceeding to abate a public nuisance directing the making of an inventory of the contents of defendant's safe found in the padlocked building, without any showing that the contents of the safe were relevant to that proceeding, is an order affecting a substantial right of defendant, from which appeal lies. G.S. 1-277.

APPEAL by defendants from *Williams, J.*, August 19, 1957, of JOHNSTON.

Civil action instituted 6 July, 1957, by the State of North Carolina *ex rel* W. Jack Hooks, Solicitor of the Superior Court of the Fourth Solicitorial District of North Carolina, under the provisions of Chapter 19 of the General Statutes of North Carolina for the abatement of an alleged nuisance,—a place for the purpose of illegal sale of whiskey, maintained and operated by defendant J. Percy Flowers, to wit: A large store building situate in Wilder's Township, Johnston County, on the west side of N. C. Highway No. 42, approximately seven miles north of Clayton, N. C.

On the same day, and upon the petition and affidavits filed, *Williams*, Judge of Superior Court, signed an order that the

sheriff of Johnston County immediately go upon the said premises of defendants, and securely close, lock, fasten and padlock same, and to keep same padlocked until further orders in the cause; and by said order defendants were temporarily restrained and enjoined from the operation and maintenance of said place of business pending further orders in this cause. And the sheriff was further directed to seize all furniture, fixtures and instruments found in the building and to hold same pending further orders in this cause relating to their disposition. And defendants were required to appear at the courthouse in Sanford, N. C., on 22 July, 1957, at hour and place named, and show cause, if any they have, why this order should not be made permanent, and they be perpetually enjoined from conducting the nuisance of which complaint is made.

Also on the same day, 6 July, 1957, the cause being heard upon the affidavit and motion of petitioner in the cause (though neither appears in the record) from which it appears that upon the search of the store building described in the complaint the agents of the State Bureau of Investigation and the sheriff of Johnston County found an iron safe belonging to the defendant J. Percy Flowers which contained a large amount of cash money, and for safe keeping an order was entered by Williams, J., as aforesaid, authorizing and directing the sheriff of Johnston County to remove the iron safe from the store building to First Citizens Bank & Trust Company at Smithfield—for its care and preservation.

And in petition for *supersedeas* it appears that in the process of the seizure and levy by the sheriff, the said safe was opened while on the premises of defendant J. Percy Flowers and it was ascertained by them that it contained no liquor or intoxicating beverages, as stated by William W. Melvin, an agent of State Bureau of Investigation, and by the sheriff in their respective affidavits filed.

Defendants answered the complaint or petition (interchangeably so designated), admitting the maintenance and operation of a large store building at place described, but denying in material aspect all allegations of illegal use.

On 19 August, 1957, Judge Williams signed another order in which after reciting that "this cause coming on to be heard and being heard * * * upon motion of plaintiff to fix a date and place for the opening and inventory of the contents of a certain iron safe, seized by the sheriff in the above entitled action, now in the custody of said sheriff in the courthouse at Smithfield, N. C., and the court finding that the combination for opening said safe is not known to said sheriff, and is known to the defendant J. Percy Flowers, and that the said safe probably

cannot be opened unless said combination to the locks thereof is furnished said sheriff, without injury or damage thereto," it was "Ordered and Adjudged that the defendant J. Percy Flowers appear at the office of the sheriff of Johnston County, at the courthouse in Smithfield, N. C., at ten o'clock a. m. on Friday, the 23rd day of August 1957, then and there to furnish said sheriff with the combination to said safe and open the same, and said sheriff shall inventory the contents thereof and furnish copies of said inventory to the parties to this action as provided in an order entered in this cause on this date, and to the District Director of the United States Revenue Service of the United States Treasury Department, and his representative;

"It is further ordered that a complete inventory of the contents of said safe be delivered to the First Citizens Bank & Trust Company, and that the moneys and securities therein, if any, be deposited with said banking institution, as Trustee of the Superior Court of Johnston County, North Carolina, subject to the further orders of the court and the validity of the claim of lien of the United States Treasury Department and Director of the United States Internal Revenue Service, under 'Notice of Seizure and Levy' served upon the defendants, and the sheriff of Johnston County for non-payment of tax alleged to be due the United States, by the defendants herein;

"It is further ordered that the defendants or their counsel be present at the opening and inventory of the contents of said safe at said time and place;

"And it is further ordered that in the event the sheriff of Johnston County should be unable to open said safe with the combination furnished, the said sheriff is authorized and empowered to use such means and methods as may be available and necessary to obtain access to said safe and its contents, with as little injury and damage thereto as possible, and make return of this order to the court; and this order is retained."

And the record does not contain the motion or notice of motion on which the foregoing order purports to be predicated. Nor does the record contain any other order entered in this cause on 19 August, 1957.

To this order of 19 August, 1957, defendants excepted and gave written notice of appeal to Supreme Court on 21 August, 1957, service of which was accepted by Solicitor Hooks on the same date, and assign error.

W. R. Britt for Plaintiff Appellee.

L. L. Levinson, Clem B. Holding for Defendants Appellants.

WINBORNE, C.J.: Chapter 19 of the General Statutes of North Carolina provides a remedy for the abatement of certain types

of public nuisances. Pertinent sections of this chapter of the General Statutes are as follows:

(1) G.S. 19-1 declares that "whoever shall * * * maintain * * * any building * * * or place used for the purpose of * * * illegal sale of whiskey * * * is guilty of nuisance, and the building * * * or place upon which * * * illegal sale of liquor is conducted * * * and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated, as hereinafter provided."

(2) G.S. 19-2 prescribes the judicial machinery by which the abatement may be accomplished. This action was instituted pursuant to these provisions.

And (3) it is noted that the only allegations contained in the complaint with respect to any alleged public nuisance are that unlawful sale of whiskey is transacted on and around the premises, and that materials for the unlawful manufacture of whiskey are kept, stored and secreted there.

Therefore, when it appears that the iron safe found in the padlocked building has been opened by the sheriff, to whom the order to padlock was issued, and no whiskey or other intoxicating beverages are found therein, may the court thereafter require that the safe be re-opened for purpose of taking an inventory of the contents thereof to be furnished to others who are not parties to this action? Defendants contend, and we hold rightly so, that the effect of such inventory for such purpose is an invasion of the property rights of defendants without due process of law.

Suggestion is made, however, that the examination of the contents of the safe by the sheriff and the agent of the State Bureau of Investigation may have been superficial and they may not have discovered everything that was in the safe. The officers do not say so. Indeed, the agent of the State Bureau of Investigation stated in this affidavit that he "searched the safe for intoxicating liquor, and found none." And there is in the record no affidavit to the contrary. Moreover the record fails to show that defendants had notice that it was proposed to re-open the safe. Other than cash money there is no specification of what is in the safe, or as to the materiality of anything there may be in it.

In this connection it is appropriate to compare the provisions of G.S. 8-89 and G.S. 8-90 relating to when and under what conditions a judge, upon due notice, may order the inspection and production of any books, paper, and documents containing evidence relating to the merits of the action or the defense therein. Decisions of this Court in respect thereto hold that the affidavit supporting an order for such inspection must suffi-

ciently designate the writings, and show their materiality to the immediate issue in controversy. See *Thomas v. Trustees of Catawba College,* 242 N.C. 504, 87 S.E. 2d 913; *Patterson v. Ry. Co.,* 219 N.C. 23, 12 S.E. 2d 652, and others to like effect.

But the plaintiff contends that this appeal is premature and fragmentary. In this connection, G.S. 1-277, relating to right of appeal, provides that "an appeal may be taken from every judicial order or determination of a judge of a Superior Court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding * *."

Defendants contend, and we think rightly so, that in instant case a substantial right of defendants is affected by the court order, in that it delves into their private property without legal process. See *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717, and cases cited.

No sufficient reason being made to appear of record to support the order of 19 August, 1957, it is hereby set aside.

Error.

IN THE MATTER OF HENRY BANE, ADMINISTRATOR OF THE ESTATE OF CHARLES WILLIAM HILL, DECEASED.

(Filed 10 January, 1958.)

1. **Executors and Administrators § 2a—**

Where motion is made by the widow of decedent to vacate letters of administration issued by the clerk on the ground that decedent, at the time of his death, was not a resident of this State, but was a resident of another state in which the widow had been appointed and qualified as administratrix, the proceeding is not one to remove an administrator under G.S. 28-32, but is an attack of the letters entered here on the ground of want of jurisdiction, and when neither the clerk nor the judge makes any finding as to the jurisdictional fact of residence, judgment denying the motion must be set aside and the cause remanded.

2. **Appeal and Error § 49—**

Where a judgment is not supported by a finding of fact on the crucial question of jurisdiction involved in the proceeding, the judgment must be vacated and the cause remanded.

APPEAL by Carolyn D. Hill, movant, from *Williams, J.,* May Civil Term, 1957, of DURHAM.

Judge Williams' judgment affirmed a judgment of January 29, 1957, signed by the Clerk of the Superior Court of Durham

County, which "confirmed and approved" letters of administration he had issued on February 11, 1955, to Henry Bane as administrator of the estate of Charles William Hill, deceased, and "dismissed" the motion of Carolyn D. Hill that said letters of administration be vacated and set aside.

Charles William Hill died February 10, 1954, in Duke Hospital, Durham, N. C. Carolyn D. Hill is his widow.

The gist of her motion was that the legal residence and domicile of her husband at the time of his death was Orlando, Orange County, Florida; that on May 22, 1954, she was duly appointed and qualified in Orange County, Florida, as administratrix of her husband's estate; that her husband's visit to North Carolina was for the sole and temporary purpose of obtaining medical treatment at Duke Hospital; and that, when letters of administration were issued to Bane, there were no assets of the estate in North Carolina and no debts or liabilities of any kind or in any amount due by decedent to any person in North Carolina. She asserted that, at the time of her husband's death, his only assets in North Carolina were his automobile, a watch of nominal value and his clothes; that, prior to the appointment of Bane, she had sold the automobile and the proceeds of sale were being administered in Florida; and that she had sent the decedent's watch and his clothes to decedent's sister.

The answer of Bane denies the material allegations of the motion, averring that decedent was a citizen and resident of Durham County, North Carolina, at the time of his death and then owned property "which should be distributed according to the laws of the State of North Carolina by his duly qualified administrator, Henry Bane."

At the hearing before the clerk, movant offered evidence in support of her allegations, including an exemplified copy of the Florida letters of administration and, for the purpose of attack, the letters of administration previously issued by the clerk to Bane.

The clerk's judgment was entered at the close of movant's evidence. No evidence was offered by Bane. The clerk's judgment set forth as the basis therefor the following:

"And . . . the Court finding as a fact that the letters of administration issued to the said Henry Bane, Esq., as Administrator of the Estate of Charles William Hill, on the 11th day of February, 1955, . . . were properly issued and that the said Henry Bane, Esq., was entitled to said letters of administration, and that Henry Bane, Esq., is the duly qualified and acting Administrator of the Estate of Charles William Hill;

"And . . . the Court finding as a fact that said movent has failed to produce satisfactory evidence to show that said Henry

Bane, Esq., should be removed as Administrator of the Estate of Charles William Hill, Deceased."

Upon movant's appeal from the clerk's judgment, the hearing by Judge Williams was "upon the record, including the transcript of evidence taken before the clerk."

After a finding that the clerk "had jurisdiction of the subject matter and of the parties to this proceeding," Judge Williams found, as the basis for his judgment, that "the findings of fact of the Clerk . . . are supported by competent evidence, and further than the facts found therein support said judgment of the Clerk . . ."

Thereupon, *Judge Williams* signed judgment wherein he "ratified, approved and affirmed" the clerk's judgment.

Movant excepted and appealed.

Spears & Spears for movant, appellant.

Bryant, Lipton, Strayhorn & Bryant for appellee.

BOBBITT, J. Appellee's contention that movant is proceeding under G.S. 28-32, notwithstanding she did not so specify, is untenable. G.S. 28-32 prescribes procedure for the removal of *a particular person* as administrator for causes specified therein; and, upon removal of such person, "the clerk must immediately appoint some other person to succeed in the administration of the estate." G.S. 28-33; *Harrison v. Carter,* 226 N.C. 36, 36 S.E. 2d 700.

Rightly interpreted, the motion is a direct attack upon the jurisdiction of the clerk to issue letters of administration to *any person.* No question is raised as to the competence or conduct of Bane. The motion is *to vacate and set aside* the letters of administration issued to Bane as void for want of jurisdiction. They are void unless the clerk had jurisdiction of the subject matter. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108. If, as movant alleged, decedent's residence and domicile at the time of his death was not in Durham County, North Carolina, but in Orange County, Florida, the clerk had no jurisdiction of the subject matter. *In re Ryan,* 187 N.C. 569, 122 S.E. 289; *In re Martin,* 185 N.C. 472, 117 S.E. 561; *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240.

There was evidence, which, if accepted, was sufficient to support movant's said allegations. However, neither the clerk nor the judge made a finding of fact determinative of the crucial question, whether decedent's residence and domicile at the time of his death was in Durham County.

Absent any finding as to this *jurisdictional* fact, we need not consider (1) whether the judge would be bound by appropriate

findings of fact made by the clerk (Compare *Aylor v. Barnes,* 242 N.C. 223, 87 S.E. 2d 269, and cases cited), or (2) whether the judge would be bound by such findings of fact in the absence of exceptions directed to specific findings. As to the latter, it is noted that *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421, and cases cited, involve proceedings under G.S. 28-32. *In re Ryan, supra,* and *In re Martin, supra,* would seem relevant.

The finding by the judge, noted in the above statement of facts, that the clerk "had jurisdiction of the subject matter and of the parties to this proceeding," when considered in context, connotes nothing more than a finding that this proceeding was duly constituted and properly before him. It falls far short of a finding of fact as to decedent's residence and domicile. The so-called findings of fact in the clerk's judgment are legal conclusions.

The record presents no question as to an ancillary administration in Durham County. The letters of administration issued to Bane were based solely on the recital or finding "that Charles William Hill, late of the said (Durham) County, is dead, without having made and published any last will and testament." Neither in said letters nor in the evidence does it appear that, when Bane was appointed, there was in North Carolina any property belonging to the decedent's estate or any person to whom the estate was indebted.

It is noted (1) that the record contains no evidence relating to the civil action referred to in Bane's answer to Mrs. Hill's motion, and (2) that nothing in the record indicates the interest, if any, of Bane or of any person at whose instance he applied for letters of administration, in the decedent's estate.

The judgment, because not supported by determinative findings of fact on the crucial (judisdictional) question presented, must be and is vacated; and the cause is remanded for further hearing and findings of fact as to decedent's residence and domicile at the time of his death, that is, findings of fact determinative of the clerk's jurisdiction to issue letters of administration relating to decedent's estate.

Error and remanded.

BOBBY EDWARDS, BY HIS NEXT FRIEND, C. E. EDWARDS, v. LARRY JENKINS.

(Filed 10 January, 1958.)

1. Process § 15—

Abuse of process consists of the existence of an ulterior purpose and an act in the use of process not proper in the regular prosecution of a proceeding.

2. Same—

Ulterior motive or bad intention does not give rise to a cause of action for abuse of process when the process is used in the proper and regular prosecution of the proceeding.

3. Evidence § 29—

An acquittal in a criminal prosecution does not constitute evidence of innocence in a subsequent civil action based on the criminal act.

4. Assault and Battery § 3: Pleadings § 10: Process § 16—

In an action to recover damages for a wilful, wanton and malicious assault, defendant may be arrested, G.S. 1-410, and defendant may not set up a counterclaim for abuse of process upon allegations that plaintiff had had him arrested for the purpose of making defendant pay the damages claimed for the alleged wanton and wilful assault, and that defendant had been found not guilty in a prior criminal action based on the same assault, and demurrer to such counterclaim is properly sustained.

5. Appeal and Error § 6—

Where demurrer is sustained to defendant's counterclaim, defendant's appeal from judgment of the court allowing the motion to strike certain allegations of the counterclaim becomes academic.

6. Pleadings § 31—

Where plaintiff's complaint describes his injuries in detail, allegations of the answer that defendant had been unable to obtain information in regard to the extent of the injury and that plaintiff had unlawfully withheld such information, are properly stricken on motion.

APPEAL by defendant from *Craven, S.J.*, 31 May 1957 Term of ALAMANCE.

Civil action to recover damages for a wilful, wanton, and malicious assault with a rifle on plaintiff by defendant, heard on plaintiff's motion to strike paragraph five of defendant's answer, and all of his further answer and defense and counterclaim, and on plaintiff's written demurrer to defendant's further answer and defense and counterclaim.

From an order of the court allowing the motion to strike in part and denying it in part, and from another order of the court sustaining the demurrer, defendant appeals.

John D. Xanthos for Defendant, Appellant.
Long, Ridge, Harris & Walker for Plaintiff, Appellee.

PARKER, J. This is a summary of defendant's further answer and defense and counterclaim:

Defendant is a law abiding citizen, and had been living with his wife and one-year-old daughter at 221 Border Street, Burlington, North Carolina, about one week prior to 6 October 1956. He had been informed of several break-ins, and other riotous

conduct, by juveniles in his neighborhood. About 7:30 p. m. on 6 October 1956, he was sitting in his living room, and heard a noise on the back porch of his home, and heard someone turn the doorknob on his back door. He investigated, and returned to his living room. Shortly thereafter he heard a scraping noise along the outside walls of his home, and heard someone tampering with the oil drum. He got his rifle, went outside in the rainy, dark night, heard someone running alongside his house, and fired his rifle in the ground to make the person halt. Any injury suffered by plaintiff was due to his negligent and criminal acts.

The next friend of Bobby Edwards has threatened to kill, and attempted to frighten defendant. He was arrested on a charge of assaulting Bobby Edwards with a deadly weapon, tried on this charge in the Municipal Court of the City of Burlington, and found Not Guilty.

In this action plaintiff had the defendant arrested, and he was held in custody by the Sheriff of Alamance County until he gave bail. That as he was acquitted of assaulting plaintiff in the Municipal Court of the City of Burlington, his arrest in this action was an abuse of process, which arrest and abuse of process has greatly damaged him in his good name and reputation in the amount of $1,000.00. That his arrest in this civil proceeding was done with the sole purpose of making him submit to the unlawful demands of plaintiff and his father. That plaintiff has always been behind in his studies and has a bad reputation in school and elsewhere.

Wherefore, defendant prays that he recover damages of plaintiff in the sum of $1,000.00, that plaintiff's written undertaking, as required by G.S. 1-412, be increased to $1,000.00, etc.

Plaintiff demurred in writing to defendant's further answer and defense and counterclaim on three grounds: One, in it no facts are alleged which entitle defendant to any recovery against plaintiff; two, it alleges no cause of action against plaintiff, because it appears on its face that the arrest of defendant was under legal process as provided by law in such cases; and three, there is a misjoinder of causes of action in that the counterclaim is not connected with the subject of plaintiff's action.

G.S. 1-410 provides that a defendant may be arrested in a civil action "for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton or malicious injury to person. . . ."

Proceeding under this statute plaintiff had the defendant arrested for an alleged wilful, wanton or malicious assault and battery with a rifle on him by the defendant. This Court said in *Finance Co. v. Lane*, 221 N.C. 189, 19 S.E. 2d 849: "There is no abuse of process where it is confined to its regular and

legitimate function in relation to the cause of action stated in the complaint. . . . As we have stated, the defendant has alleged that the plaintiff had an ulterior purpose in the institution and prosecution of the original action, but there is no allegation of any act done by the plaintiff which could be classified as abuse of process. Mere adjectival denunciation will not be sufficient. Facts must be alleged upon which the court could determine that the gravamen of his action is of that character."

"An abuse of process consists in its employment or use for some unlawful purpose, which it was not intended by the law to effect, and amounts to a perversion of it." *Wright v. Harris,* 160 N.C. 542, 76 S.E. 489.

"However, the only essential elements of abuse of process are: First, the existence of an ulterior purpose and, second, an act in the use of the process not proper in the regular prosecution of the proceeding." *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223.

In *Melton v. Rickman,* 225 N.C. 700, 36 S.E. 2d 276, the Court, quoting from 1 Cooley, Torts, 3rd Ed., p. 354, said: "Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process."

Defendant in his counterclaim has alleged no oppressive treatment of himself while in custody under the order of arrest. Neither has he alleged in his counterclaim that anything was done abnormally or out of the ordinary in his arrest in this proceeding.

The defendant alleges that as he was acquitted of assaulting plaintiff in the Municipal Court of the City of Burlington, his arrest in this action was an abuse of process. "Where the same acts or transactions constitute a crime and also give a right of action for damages or for a penalty, the acquittal of defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action." 50 C.J.S., Judgments, p. 272, where numerous cases from many jurisdictions are cited, which support the text, and the 1957 Cumulative Annual Pocket Part cites many more cases from many jurisdictions to the same effect.

Annotations in 31 A.L.R., p. 270, *et seq.* and in 18 A.L.R. 2d, p. 1315, *et seq.* list numerous cases from many jurisdictions, which have applied the rule that an acquittal in a criminal prosecution does not constitute evidence of innocence in a subsequent civil action based on the criminal act.

When defendant's allegations are considered in the light of the above principles of law, it becomes apparent that he has not alleged a cause of action for abuse of process.

See *Insurance Co. v. Smathers,* 211 N.C. 373, 190 S.E. 484, which was an action to foreclose a deed of trust. A receiver was appointed to hold the rents and profits from the property pending the sale, in accord with plaintiff's prayer. Defendant set up a counterclaim in his answer alleging that the appointment of the receiver was illegal and void, and resulted in damage to defendant in injuring him in his character, reputation and financial standing. The Court said: "The counterclaim is a tort action. We do not think, under our most liberal and elastic code practice, it can be set up in the present action. If defendant has a cause of action in tort for abuse of process, he must bring a separate action."

The trial court having correctly sustained plaintiff's written demurrer to defendant's further answer and defense and counterclaim, the question as to whether it committed error in its former order in striking out part of defendant's further answer and defense and counterclaim is academic.

Paragraph 5 of plaintiff's complaint describes in detail the wound inflicted on his left foot when the defendant fired on him with a rifle or shotgun, and alleges his pain and suffering, his being taken to a hospital, his treatment there, his confinement at home causing him to miss school, and that his injuries are serious and permanent. Paragraph 5 of defendant's answer is as follows: "(That notwithstanding repeated efforts on the part of the defendant to obtain information from the plaintiff regarding any injury said plaintiff may have suffered the said plaintiff has failed, refused and unlawfully withheld any such information to the extent that this defendant is unable to answer properly the allegations contained in paragraph 5 of the complaint, but notwithstanding this effort on the part of the plaintiff to frustrate and confuse the defendant,) the defendant says that the allegations contained in said paragraph are untrue and exaggerated and are therefore, denied." Plaintiff made a motion to strike that part of defendant's paragraph 5 of the answer in parentheses. The order of the court allowing the motion to strike is correct.

The order below allowing plaintiff's motion to strike part of paragraph 5 of defendant's answer, and the order sustaining plaintiff's written demurrer to defendant's further answer and defense and counterclaim are

Affirmed.

WILKES POULTRY COMPANY, INC. v. CLARK TRAILER AND EQUIPMENT COMPANY, INC.

(Filed 10 January, 1958.)

1. Negligence § 16—

Plaintiff alleged negligence in the performance of a repair to a particular part of a vehicle and damages resulting from an accident when such part gave way while the vehicle was being operated on the highway, but did not allege any contractual agreement of defendant to recondition the vehicle and put it in first class condition. Plaintiff's evidence was to the effect that the part in question was defective, but that defendant did not repair this part. *Held:* Nonsuit for variance was properly entered.

2. Pleadings § 24: Trial § 23f—

Allegation and proof must correspond, and when there is a material variance between the allegation and proof, there can be no recovery without an amendment, and nonsuit is proper.

APPEAL by plaintiff from *Phillips, J.*, June Term 1957 of WILKES.

This is a civil action instituted by the plaintiff to recover damages resulting from the alleged defective and negligent workmanship of the defendant in reconditioning a 1950 model Great Dane, AATEZ, tandem axle, deep freeze trailer, 32 feet long, Serial No. 5715, which the defendant sold to the plaintiff on or about 17 May 1956.

It is further alleged that the trailer had the capacity to transport a load of 35,000 pounds, and was purchased for the purpose of transporting perishable mechandise therein and that the defendant knew it was purchased for such purpose.

The evidence shows that on 18 August 1956, around 2:15 p.m., that the plaintiff, through its agents, servants, and employees, was operating a tractor to which was attached the trailer herein described, in an easterly direction on U. S. Highway 22, about 25 miles from Cambridge, Ohio, and after the tractor and trailer had just crossed a bridge and commenced a climb up a long winding hill, suddenly there was a loud snapping and popping noise; the trailer jackknifed to the left and broke loose from the tractor, causing the tractor and trailer to break through the guard rails on the edge of said highway and turn over off said highway, causing substantial damage to the tractor, trailer and cargo of the plaintiff. At the time of the occurrence complained of, the trailer was transporting around 33,000 pounds of beef.

The complaint expressly alleges defective workmanship on the part of the defendant in that it failed to weld properly the rear edge of the towing pin or pintle plate to the second cross

frame of the trailer; that said welding was not done in a workmanlike manner; "that the defendant, by and through its agents, servants and employees, negligently and carelessly failed to use proper weld or welding to attach said pin plate to the cross members of the semi-trailer frame when it knew or, in the exercise of ordinary care, should have known that in the use of said trailer for the purposes for which it was intended, all of which was known to the defendant, that said pin plate would break and shear off and thereby cause damage to the property of this plaintiff."

It is further alleged in the complaint that said negligent acts were the sole and proximate cause of said mishap on 18 August 1956, and the resulting damage to the property of the plaintiff, as set out in the complaint.

The plaintiff's evidence tends to show that the plaintiff and the defendant entered into a contract whereby the plaintiff agreed to purchase the trailer referred to herein, and that the defendant agreed to recondition the trailer and put it in first class condition and to install an aluminum floor therein. That the plaintiff paid the defendant the sum of $460.00 for the work required to recondition the trailer pursuant to the terms of the contract.

The evidence with respect to the condition of the pintle plate, according to a witness admitted to be an expert, was to the effect that the plate had not been properly welded to the frame of the trailer and that a proper inspection of the trailer and the pintle plate by the defendant or one of its employees on 17 May 1956 would have disclosed the lack of weld on the back side of the pintle plate.

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

W. H. McElwee, W. L. Osteen, Larry S. Moore, for plaintiff appellant.

Trivette, Holshouser & Mitchell, for defendant appellee.

DENNY, J. Plaintiff does not allege in its complaint that the defendant agreed to recondition the trailer and put it in first class condition, but on the contrary it alleges that the "defendant by its act represented that such work had been safely and securely done." It does allege defective and negligent workmanship on the part of the defendant in connection with the welding of the pintle plate to the frame of the trailer, but there is no evidence tending to show that such welding was done by the defendant. In fact, the plaintiff's evidence tends to show to

the contrary. The plaintiff's expert witness made a drawing of the pintle plate on a blackboard and described the condition of the plate when he examined it immediately after the accident. He testified that the back of the pintle plate had not "been welded for some time * * * I mean on the back side of this plate in this area right here, it had not been welded * * * had been loose for some time * * * There were also marks of broken weld in this zone that were very extensively rusted, far more rusted than the welds on the other part; so we can assume that these were broken for a considerable length of time; my opinion is that they had been broken for some time." In support of his opinion in this respect, he further testified, "It is my opinion that an inspection of the trailer and the pintle plate by the defendant or one of its employees on May 17, 1956, would have disclosed the lack of weld on the back side of the pintle plate and the fact that the weld along the right and left sides and across the front was of intermittent character with gaps."

As we construe the allegations of the complaint, the plaintiff bottoms his cause of action on the negligent and defective manner in which the defendant undertook to weld the pintle plate to the frame of the trailer. On the other hand, the plaintiff offered evidence tending to show that the defendant never attempted to weld the pintle plate to the frame of the trailer at all, but that the defective condition of the pintle plate existed at the time the defendant reconditioned the trailer, and such condition, upon a proper inspection, could have and would have been discovered. Such evidence tends to support the contention of the plaintiff that the defendant failed to recondition the trailer and put it in first class condition. However, the cause of action pleaded is not based on a breach of contract to recondition the trailer and to put it in first class condition. 46 Am. Jur., Section 327, page 507, *et seq.*

In *Talley v. Granite Quarries Co.*, 174 N.C. 445, 93 S.E. 995, this Court said: "It has so often been said as to have grown into an axiom that proof without allegation is as unavailing as allegation without proof. There must, under the old or new system of pleading, be *allegata* and *probata*, and the two must correspond with each other. When the proof materially departs from the allegation, there can be no recovery without an amendment. *McKee v. Lineberger*, 69 N.C. 217; *Brittain v. Daniels*, 94 N.C. 781; *Faulk v. Thornton*, 108 N.C. 314 (12 S.E. 998); *Pendleton v. Dalton*, 96 N.C. 507 (2 S.E. 759); *Hunt v. Vanderbilt*, 115 N.C. 559 (20 S.E. 168); *Green v. Biggs*, 167 N.C. 417 (83 S.E. 553). It was never intended even by our liberal Code system, that a plaintiff should be allowed to prove a cause of action which he has not alleged." See also *McIntosh*, North Caro-

lina Practice and Procedure (2nd Ed.), Volume 1, page 522, Section 981; *Sale v. Highway Commission,* 238 N.C. 599, 78 S.E. 2d 724; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147.

In our opinion, in light of the pleadings as now cast and the evidence adduced in the trial below, there is a fatal variance between the pleadings and the proof. Hence, the ruling of the court below is

Affirmed.

JAMES E. HANNAH v. GEORGE R. HOUSE, ORIGINAL DEFENDANT; AND HOWERTON-BRYAN COMPANY, INC. AND ALTON L. TEMPLE, ADDITIONAL DEFENDANTS.

(Filed 10 January, 1958.)

Automobiles: § 48: Parties § 10: Pleadings: § 10: Torts § 10—

Where a passenger in a car sues the driver and owner of the other car involved in the collision, such defendants are not entitled as a matter of right to have the driver of the car in which the plaintiff was riding joined as additional defendant upon allegations that such additional defendant's negligence was the sole proximate cause of the accident, there being no claim of liability as a joint tort-feasor, G.S. 1-240, or contention of primary and secondary liability. Such additional party is not necessary to the determination of the issues involved in plaintiff's action.

APPEAL by the original defendant, George R. House, from *Williams, J.,* April-May Civil Term 1957 of DURHAM.

This is a civil action instituted by the plaintiff on 21 September 1956 against the original defendant, George R. House, to recover damages for personal injuries sustained in an automobile collision which occurred in the City of Durham, North Carolina, on 22 September 1953.

In the complaint, plaintiff alleged that he was riding in a Chrysler automobile owned by Howerton-Bryan Company, Inc. and being driven by Alton L. Temple, an employee of said company, when it collided with a Buick automobile, owned and being driven by the defendant, George R. House, at the intersection of Holloway and Roxboro Streets in the City of Durham; that in said collision he suffered serious and permanent injuries. Plaintiff further alleged that the collision and his injuries resulted solely by reason of the negligence of the original defendant in the operation of his automobile on said occasion, and prayed that he recover judgment against the said defendant for his injuries.

The original defendant filed answer to the complaint on 18 January 1957, denying the allegations of his negligence in the operation of his automobile and, by way of a further answer and defense, alleged that said collision was solely and proximately caused by the negligence of Alton L. Temple, employee of Howerton-Bryan Company, Inc., in his operation of said company's automobile; that Alton L. Temple, in driving the automobile owned by his employer upon the occasion in question, was acting in the course and scope of his employment. The original defendant further alleged that at the March Civil Term 1954 of the Superior Court of Durham County, he obtained judgment against Alton L. Temple and Howerton-Bryan Company, Inc. in a civil action instituted by him to recover damages for personal injuries sustained by him in said collision, and that no appeal was taken therefrom and that the judgment has been paid in full. The original defendant further alleged that, by virtue of said judgment, he was entitled to be indemnified, exonerated, and held harmless by Howerton-Bryan Company, Inc. and Alton L. Temple from and against any liability to the plaintiff.

The original defendant, upon motion and without notice, obtained an order from the assistant clerk of the Superior Court of Durham County making Howerton-Bryan Company, Inc. and Alton L. Temple additional parties defendant in this action.

Before expiration of the time for answering the original defendant's cross-action, the additional parties defendant filed separate motions to vacate the order making them parties respectively, and to strike out the original defendant's cross-action. The motions were allowed and the original defendant appeals, assigning error.

Reade, Fuller, Newsom & Graham, for plaintiff appellee.

Ruark, Young & Moore, and Bryant, Lipton, Strayhorn & Bryant, for original defendant appellant.

Spears & Spears, Wallace Ashley, Jr., for additional defendant Howerton-Bryan Company, Inc. appellee.

Lina Lee S. Stout, for additional defendant Alton L. Temple appellee.

DENNY, J. At the threshold of this appeal we are confronted by these facts: The original defendant does not seek contribution pursuant to the provisions of G.S. 1-240, *Hobbs v. Goodman*, 240 N.C. 192, 81 S.E. 2d 413; or to establish primary and secondary liability, *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 63 S.E. 2d 118; but complete indemnification and exoneration from liability resulting from any judgment the plaintiff may

obtain. In his answer, he denies any negligence on his part but alleges that the collision complained of was solely and proximately caused by the negligence of Alton L. Temple, employee of Howerton-Bryan Company, Inc., in driving the automobile owned by his employer, upon the occasion in question, while acting in the course and scope of his employment.

When a complete determination of a controversy cannot be made without the presence of other parties, the court must cause them to be brought in. G.S. 1-73. "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. *Colbert v. Collins*, 227 N.C. 395, 42 S.E. 2d 349; *Jones v. Griggs*, 219 N.C. 700, 14 S.E. 2d 836; 39 Am. Jur., Parties, Section 5; 67 C.J.S., Parties, Section 1." *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843.

However, as stated by *Barnhill, C.J.*, in *Kimsey v. Reaves*, 242 N.C. 721, 89 S.E. 2d 386, "Ordinarily it is within the discretion of the court to allow or deny a motion to make a party who is not a necessary party to the proceeding a party plaintiff or defendant, and the order entered is not reviewable. *Aiken v. Mfg. Co.*, 141 N.C. 339 (53 S.E. 867); *Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859." Certainly these additional parties are not necessary in order to determine the controversy involved in this action as between the plaintiff and the original defendant.

Moreover, the facts in this case present the identical question for decision that was presented in *Kimsey v. Reaves, supra*, and which was decided adverse to the appellant's contention on this appeal. In fact, counsel for the appellant conceded, in his oral argument before this Court, that unless the above decision is overruled, the appellant is not entitled to the relief he seeks.

The decision in the Kimsey case, in our opinion, should not be overruled. Hence, we affirm the ruling of the court below on the authority of and for the reasons stated in the opinion in that case.

Affirmed.

JOHN BARHAM v. R. LARRY DAVENPORT AND WIFE, REBECCA M. DAVENPORT.

(Filed 10 January, 1958.)

1. Vendor and Purchaser § 6—

The lease in question granted lessee or assigns option to purchase the premises at the expiration of the five-year term or at any time

thereafter during a renewal period upon written notice given at least ninety days prior to the expiration of the five-year term. *Held:* The language is plain and unambiguous and provides that, notwithstanding the actual closing of the purchase might be postponed until any time during a renewal period, written notice of such intention should be given at least ninety days prior to the expiration of the original term.

2. Contracts § 12—

Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written, and the courts may not disregard the plainly expressed meaning of its language, and by construction substitute a new contract for the one made by the parties.

APPEAL by plaintiff from *Johnston, J.*, 3 September, 1957, Term of GUILFORD (Greensboro Division).

Frazier & Frazier for plaintiff, appellant.
Douglas, Douglas & Ravenel for defendants, appellees.

JOHNSON, J. This is a civil action for specific performance of an option on real estate. The case was heard below on *demurrer ore tenus* to the complaint for failure to state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff appeals.

These in substance are the crucial allegations of the complaint: On 29 April, 1948, W. T. Davenport leased the *locus in quo* to Robert A. Young and John N. Young for a term of five years, beginning 1 June, 1948, and ending at midnight 31 May, 1953, with right of renewal for one year or for a period of five years. The lease was duly registered 28 May, 1948.

The lease grants the lessees and their assigns an option to purchase the premises. The option provisions are as follows:

> "9. Lessor hereby grants to Lessee the privilege and option to purchase the premises herein demised on the 1st day of June, 1953, or at any time thereafter, if the same shall be during a renewal period of this lease, as herein provided, and said lease shall have, in fact, been renewed, for the cash sum of TWENTY THOUSAND ($20,000.00) DOLLARS, upon written notice by Lessee to Lessor of Lessee's election to exercise said option and purchase said premises, which said notice shall be given to Lessor at least ninety (90) days prior to the 1st day of June, 1953."

This controversy relates solely to the interpretation of the foregoing paragraph.

The plaintiff alleges that the lease has been assigned to him; and that the defendant is now the owner of the premises

subject to the lease. It is alleged also that on 16 May, 1957, the plaintiff notified the defendant in writing of his desire to exercise the option to purchase; and that the defendant on 22 May, 1957, refused to convey the premises.

The single question presented for decision is whether the plaintiff gave timely notice of his intention to purchase. The court below held that the plaintiff's notice to the defendant on 16 May, 1957, was given too late, and allowed the defendant's *demurrer ore tenus*. In this ruling we concur.

The lease was made 29 April, 1948, for a term of five years. The tenant was given the option to purchase the premises on 1 June, 1953, or at any time during a renewal period, but in either case the tenant was required to give written notice of his election to exercise the option at least ninety days before 1 June, 1953. Nevertheless, the tenant waited until after this date, during the five-year renewal period, to give notice of his election to purchase.

The plaintiff contends that the provisions relating to the option are ambiguous and contradictory and should be interpreted, favorably to the tenant, to mean that he had the right to purchase by giving notice of intention ninety days before expiration of any renewal period. Here, however, the language is plain, unambiguous, and free of contradiction. It gave the tenant no right to wait beyond the original term of the lease to give notice of his desire to purchase.

True, the lease states that the tenant may purchase the premises at any time during a renewal period, but it is stated in plain language that the tenant's election to exercise the option shall be made, and written notice thereof given, at least ninety days before 1 June, 1953. There is nothing ambiguous about the language of this provision. It simply fixed the option so that if the tenant intended to purchase the premises, it was necessary for him to make up his mind and give the landlord notice of his election to purchase at least ninety days before 1 June, 1953, so that thereafter he would be legally bound by contract to purchase the property, notwithstanding the actual closing of the purchase might be postponed until any time during a renewal period. This provision, though somewhat unusual, is by no means unreasonable. There are sound reasons why a landlord in granting a tenant a long period in which to purchase property should desire, as was done here, to limit to a shorter period the time within which his offer to sell should remain open subject to acceptance.

To interpret the option provision in accordance with the plaintiff's contention would have the effect of disregarding the clear language of the clause requiring written notice of intention to

purchase to be given at least ninety days before 1 June, 1953. It also would require the court to read into the option a provision not inserted by the parties. Courts may not disregard the plainly expressed meaning of a lawful contract, and by construction substitute a new contract for the one made by the parties. *Engine Co. v. Paschal*, 151 N.C. 27, 65 S.E. 523. Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written. *Brock v. Porter*, 220 N.C. 28, 16 S.E. 2d 410. "The contract is to be interpreted as written." *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E. 2d 906, 907. The "only office of judicial construction is to remove doubt and uncertainty." 12 Am. Jur., Contracts, Sec. 229; *McCain v. Ins. Co.*, 190 N.C. 549, 130 S.E. 186; *Jones v. Realty Co., supra.* There is no uncertainty or doubt here.

The complaint shows upon its face that the plaintiff failed to give notice of his election to exercise the option within the time limited. This being so, the judgment sustaining the *demurrer ore tenus* will be

Affirmed.

MRS. NELLIE HODGIN v. GUILFORD TRACTOR AND IMPLEMENT COMPANY, A CORPORATION, AND W. G. SILER.

(Filed 10 January, 1958.)

1. **Appeal and Error § 20—**

A party may not complain of alleged error relative to an issue answered in his favor.

2. **Automobiles § 33—**

The fact that a pedestrian attempts to cross a highway at nighttime at a place not an intersection or crosswalk, is not negligence or contributory negligence *per se*, but such pedestrian is required to yield the right of way to traffic and, in the exercise of ordinary care for his own safety, to see that he can cross the highway without danger from approaching vehicles, and the court's instruction on the issue of contributory negligence of plaintiff pedestrian upon the evidence in this case *held* as favorable to plaintiff as the law permitted.

APPEAL by plaintiff from *Rousseau, J.*, April, 1957 Civil Term, GUILFORD Superior Court, Greensboro Division.

Civil action for personal injury alleged to have been caused by the actionable negligence of the defendants. The plaintiff based her claim upon an injury received on March 30, 1953. At the time, the plaintiff was employed as a nurse at the Garden

Terrace Convalescent Home located on the north side of Highway No. 421, approximately one mile west of the corporate limits of Greensboro. At about 10:30 p. m. the plaintiff left the convalescent home with the intention of crossing to the south side of the highway for the purpose of boarding a Duke Power Company bus into the city. There was no intersecting street, road, marked or unmarked crosswalk at the point at which the plaintiff undertook to cross the highway. She waited on the north side of the road for about ten minutes before she attempted to cross. She testified: "The bus customarily stopped at that spot for the nurses when someone signaled it. We did not really have to signal but all of them but two or three of the drivers would stop in front of the home and pick us up. . . . On this night it was perfectly clear. . . . No, I did not have a chance to signal the bus. I saw him coming. Well, when I got within eighteen inches or so of the mark in the middle of the highway I had to stop and I was afraid the bus was not going to stop. I saw it was driving pretty fast. The bus did not stop. . . . I remained standing. I didn't step a step back or turn. I threw this shoulder in just a little. . . . The Greyhound bus was immediately behind the Duke Power bus. Well, of course, I couldn't go back . . . Well, as I stated, the mirror on his car hit me and his fender hit me. . . ."

On cross-examination, plaintiff testified: "I just kept standing there (north side of the highway) until I saw the bus coming and I looked toward Greensboro and I saw Mr. Siler's car. I knew I had time to get across the street (to the south side) but the bus didn't stop so I had to stop. When I realized the bus was not going to stop I was about eighteen inches from the middle line. . . . I looked at Mr. Siler's car one time and then I did not look back because, as I stated, I knew I had time to get across if the bus stopped. I did not look back in the direction from which the car came again. I didn't have time to wave the bus down."

Issues of negligence and contributory negligence were answered, "Yes." From the judgment that the plaintiff recover nothing and be taxed with the costs, she appealed.

Frazier & Frazier for plaintiff appellant.
J. Owen Lindley for defendants appellees.

HIGGINS, J. The plaintiff's assignments of error Nos. 1 through 7 involve the admission or exclusion of evidence on the first issue, and assignments Nos. 8, 9, 16 and 18 relate to the court's charge on that issue. Since the jury decided it in the plaintiff's favor, error, if any, was rendered harmless. "Plaintiff is in no

position to complain of error, if any there was, in the charge on the first issue, since that issue was answered in his favor." (citing cases) *Anderson v. Office Supplies,* 236 N.C. 519, 73 S.E. 2d 141. For additional authorities, see Strong's North Carolina Index, Vol. 1, Appeal & Error, Sec. 20, Note 213, p. 91.

The plaintiff does not assign as error the admission or exclusion of testimony on the second issue. She does, however, especially by assignments Nos. 14 and 15, question the correctness of the court's charge relative to the duty of a pedestrian in crossing a highway not at an intersection or crosswalk. The court charged: ". . . the duty was upon her to look east and look west and act as an ordinary prudent person and first ascertain as an ordinary prudent person if she could cross this road in safety from oncoming traffic, and she had a right to do it under those conditions. . . . Now, if . . . when she started across this highway . . . you find . . . by the greater weight of the evidence that she did not yield the right of way to the defendant, and that the defendant was so close . . . that she could not as an ordinary prudent person reasonably believe and ascertain . . . that she could walk across this highway before this defendant's car approached, and you find that she attempted to walk across under these conditions and you find that was one of the proximate causes that produced this injury, . . . then you would answer this issue 'Yes.' "

The court had previously charged the jury: "If you answer issue No. 1 (defendant's negligence) 'No,' that ends the case. You don't take up No. 2 (plaintiff's contributory negligence). But if you answer No. 1 'Yes,' you take up issue No. 2, and if you answer that, 'No,' you go down to the third issue (damages); but if you answer issue No. 1, 'Yes,' and issue No. 2, 'Yes,' that this plaintiff contributed to her own injury, then that ends the case."

The court then charged that the burden of proof on the first and third issues was on the plaintiff and the burden on the second issue was on the defendant. The court went into considerable detail in stating the contentions of the parties.

The evidence on the issue of contributory negligence was simple. It was not in serious dispute. According to the plaintiff's own story, and for some unexplained reason, she stood on the north side of the road for ten minutes waiting to catch a bus on the south side. Sometimes the bus stopped. Two or three of the drivers did not stop. When the bus approached she looked one time to the east, saw the defendant's car, concluded she had time to cross. She never looked towards the defendant again. Her calculation insofar as the defendant was concerned was correct, but what she should have done and did not do was to see that

she could cross the defendant's lane of travel in safety and also that she could cross the south lane. The passing Duke Power Company bus she had hoped to catch, and the Greyhound bus immediately behind it, failed to stop. Their continued movement not only kept her from completing the crossing, but marooned her eighteen inches north of the center line and in the defendant's lane of traffic. Not knowing whether the bus would stop, she took the chance according to her own story. The mere fact she undertook to cross even in the nighttime is not negligence *per se*. *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817; *Goodson v. Williams*, 237 N.C. 291, 74 S.E. 2d 762; but when considered in the light of traffic conditions as she detailed them, if contributory negligence does not appear as a matter of law, the margin by which it falls short is narrow. *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879; *Tysinger v. Coble Dairies*, 225 N. C. 717, 36 S.E. 2d 246.

The Court, in effect, told the jury to consider the plaintiff's conduct in the light of her duty to use due care for her own safety. *Merrell v. Kindley*, 244 N.C. 118, 92 S.E. 2d 671; *Gaskins v. Kelly*, 228 N.C. 697, 47 S.E. 2d 34.

The charge, considered in its entirety, was certainly as favorable to the plaintiff on the decisive second issue as the law permitted. No valid reason is made to appear why the verdict and judgment should be disturbed.

No error.

MRS. ELIZABETH CROSS WILLIAMS, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF MRS. JOHN W. CROSS (SUBSTITUTED PLAINTIFF FOR MRS. JOHN W. CROSS, DECEASED) v. R. E. KING AND WILLIAM KING.

(Filed 10 January, 1958.)

Landlord and Tenant § 15—

Lessees holding over after the expiration of their term are not relieved of liability for rent by turning over the premises to a corporation formed by them, later becoming insolvent, when the lessor does not agree to relieve lessees of their obligation to pay rent or accept the corporation as substitute tenant, and mere notice to lessor of the circumstances is insufficient.

APPEAL by defendants from *Carr, J.*, April, 1957 Term, WAKE Superior Court.

Civil action to recover $250.00—two months' rent—alleged to be due by reason of the defendants having held over after their lease had expired. Other issues were raised by the pleadings; however, they have been eliminated and are not involved in this

appeal. The jury found the defendants were liable to the plaintiff for $250.00 unpaid rent for the months of June and July, 1955. From the judgment, the defendants appealed.

Manning & Fulton, and Charles F. Blanchard By: Howard E. Manning, for plaintiff, appellee.

Vaughan S. Winborne, Samuel Pretlow Winborne By: Vaughan S. Winborne, for defendants, appellants.

HIGGINS, J. The defendants admitted the execution of the lease of a certain lot on Blake Street in Raleigh for a term of three years, beginning May 1, 1950, at a stipulated monthly rental. The leased premises were for use by the defendants in the operation of their partnership grocery business. The lease contained an agreement to renew for another three-year period at a monthly rental to be agreed upon, or in the absence of agreement, to be fixed by arbitration.

At the end of the original three-year term the plaintiff tendered a lease for a second term which the defendants refused to sign. The defendant R. E. King testified he told plaintiff's representative that he was getting out and that his son, William King, was taking over. However, the defendants neither vacated nor surrendered the premises, but held over. During the first year of the holdover period the partnership apparently was dissolved. The defendant William King and two others incorporated under the name, King Produce, Incorporated. The defendants having divided their partnership property, each conveyed his share to the corporation. The corporation executed a chattel mortgage to R. E. King for $10,000 to secure the payment for his share. The transfer to the corporation was completed before the end of the first year of the holdover period; however, both defendants continued to work for the corporation, R. E. King on a part-time basis, and William King in his capacity as president. The corporation became insolvent and went out of business after occupying the leased premises for three months of the third year after the lease expired. At that time the plaintiff took possession. The rent was paid for the first month. It is admitted, however, that $250.00 remained unpaid. The sole question is who is liable.

The plaintiff claims the original lessees, having held over, are liable. The defendants deny their liability and assert the defunct corporation is liable. ". . . where a tenant has leased premises for a definite term and holds over after the expiration of the term without any new contract between him and the landlord, a tenancy from year to year is thereby created by presumption of law, . . ." *Harty v. Harris*, 120 N.C. 408, 27 S.E. 90. "The de-

fendant, by continuing on, was presumed to be in for a year, as before, on the same terms. . . ." *Holton v. Andrews,* 151 N.C. 340, 66 S.E. 212. "He (landlord) may treat his tenant, who holds over, as a trespasser, and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year . . . 'Notifying the landlord that the tenant does not intend to renew the lease is ineffectual if the tenant wrongfully holds over, for the intent is inferred from the act, and it is this that gives the landlord the right to treat him as a tenant for a renewed term.' " *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55. "Ordinarily it may be said that a contract is considered to remain in force until it is rescinded by mutual consent, or until the party claiming under it does some act, inconsistent with the duty imposed upon him by the agreement, which amounts to an abandonment . . . on his part." *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12. In the absence of an agreement or consent on the part of the owner, the tenant does not relieve himself of responsibility for rent by the mere act of selecting and installing a new tenant.

The record fails to show the plaintiff ever agreed to relieve the lessees of responsibility for rent or to accept the corporation as a substitute lessee. After the business was incorporated both defendants continued with the business. R. E. King was the holder of a mortgage on its assets for $10,000. William King was its president. The defendants would appear to remain bound for rent until they surrendered the premises or until they obtained an agreement from the lessor to relieve them and accept the corporation as lessee. The record fails to show they did either. The statement of R. E. King to the plaintiff's agent that he was getting out falls far short of a surrender of the premises and he does not even claim the plaintiff agreed to relieve him of further obligation.

The well considered opinion of Justice Parker in the case of *Bank v. Bloomfield,* 246 N.C. 492, 98 S.E. 2d 865, settles the question adversely to the defendants' claims: "The fact that Bloomfield . . . 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 . . . to pay rent and to substitute the corporation in his place."

Notwithstanding the defendants' failure to offer either evidence of an agreement to relieve them of the obligation to pay rent or to accept the corporation as a substitute tenant, the court left the entire matter of the defendants' responsibility to the jury and charged the jury as follows:

"If the plaintiff has satisfied you by the greater weight of the evidence that there was a lease for three years expiring on or about the 30th day of April, 1953, and that the defendants continued to occupy the building from that time onward and up until the institution of this suit, and that the plaintiff was not notified that the defendants were not going to continue to assume responsibility for the payment of the rent, and particularly were not notified of that fact prior to April 30, 1955, and has further satisfied you by the greater weight of the evidence that two months' rent was due . . . it would be your duty to answer this first issue, '$250.00.'; if the plaintiff has failed to satisfy you of those facts, by the greater weight of the evidence, then it would be your duty to answer that issue: 'Nothing.' "

Certainly the court gave the defendants the full benefit of their evidence and contentions, and the jury resolved the issue against them. No reason appears why the verdict and judgment should be disturbed.

No error.

D. W. PARRISH AND WIFE, MAXINE S. PARRISH; J. J. PARRISH AND WIFE, HAZEL O. PARRISH; COY PARRISH AND WIFE, ANNIE JUNE C. PARRISH; GENA P. SUGGS AND HUSBAND, ANDREW SUGGS v. WADIE L. PARRISH, WIDOW.

(Filed 10 January, 1958.)

Estates § 9c—

In an action by remaindermen against the life tenant for waste, G.S. 1-533, judgment must be in accord with G.S. 1-538, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid the life tenant, the relief provided in G.S. 41-11 being available only in a special proceeding begun before the clerk and having no application in an action for waste.

APPEAL by plaintiffs from *Craven, S. J.*, May, 1957 Civil Term, ALAMANCE Superior Court.

Civil action for waste instituted by the plaintiffs, remaindermen, against defendant, life tenant. After denying the allegations of waste the defendant inserted the following in her further defense and prayer for relief:

"3. That the defendant further avers that on account of the condition of said premises and her inability to make the necessary repairs, she hereby agrees that her dower

interest may be computed to cash upon a public sale of said property for a division and will join in the necessary proceedings for that purpose. * * *

"(b) That the court decree a sale of said land for division and that defendant's dower interest be computed and paid to her in cash . . ."

The jury found the defendant had committed waste and assessed damages at $1,200. The plaintiffs tendered judgment that they recover $1,200, and if the sum is not paid on a day to be fixed by the court, that the plaintiffs recover the property. To the court's refusal to sign the judgment tendered, the plaintiffs excepted. The court entered a judgment that the plaintiffs recover $1,200 and,

"IT IS FURTHER ORDERED pursuant to the statutory authority contained in G.S. 41-11 Amended and in the exercise of the court's inherent equity jurisdiction, and on the authority of *Stepp v. Stepp*, 200 N.C. 237, that the foregoing described real property be sold at public auction . . . in its discretion the court orders that the value of said life tenant's share . . . be ascertained . . . said share shall be thereby diminished in the amount of this judgment and the costs, and the balance remaining, if any, shall be paid . . . to the life tenant absolutely . . ."

The court named a commissioner to make the sale. The plaintiffs excepted to the judgment, and appealed.

Long, Ridge, Harris & Walker, for plaintiffs, appellants.
No counsel contra.

HIGGINS, J. The judgment in an action for a wrong in the nature of waste may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. Article 42, G.S. 1-533. "In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment." G.S. 1-538.

"So that it is left within the sound discretion of the judge who tries the action to determine whether he will give single or treble damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been meantime actually paid." *Sherrill v. Conner*, 107 N.C. 543, 12 S.E. 588; Mordecai's Law Lectures, Vol. 1, 2d Ed., p. 710.

The learned trial judge committed error in attempting to grant the relief provided for in G.S. 41-11 and discussed in *Stepp v. Stepp*, 200 N.C. 237, 156 S.E. 804. Since the enactment of Chapter 96, Session Laws 1951, a sale under G.S. 41-11 can be ordered only in a "special proceeding" which must be instituted before the clerk of the superior court. Judgment in an action for waste must be in conformity with G.S. 1-538 and is granted after a trial in term. Judgment in G.S. 41-11 must be entered in a special proceeding before the clerk. The latter section has no application.

The judgment appealed from is set aside and the cause is remanded to the Superior Court of Alamance County for the entry of a proper judgment upon the verdict.

Error and remanded.

WILLIAM S. FRANKS v. JOHN JENKINS

(Filed 10 January, 1958.)

1. **Judgments § 27a—**

On motion to set aside a judgment under G.S. 1-220 on the ground of mistake, inadvertence, surprise and excusable neglect, the trial court's finding, upon supporting evidence, that the neglect was not excusable, is binding, notwithstanding contrary averments in affidavits offered by defendant, the court not being obligated to accept as true each and every statement of fact set forth therein.

2. **Same—**

On motion to set aside judgment for surprise and excusable neglect under G.S. 1-220, the neglect of defendant's liability insurance carrier is relevant only to the extent it may be imputed to defendant, and the findings of fact relating thereto are not determinative of the rights and liabilities of defendant and his insurance carrier *inter se*.

3. **Same: Process § 10—**

Service on a nonresident automobile owner under G.S. 1-105 has the same legal force as personal service, and a defendant so served is not entitled to have a default judgment against him set aside and to defend the action on its merits under G.S. 1-108.

APPEAL by defendant from *Williams, J.*, July 29, 1957, Regular Civil Term, ALAMANCE.

Plaintiff, a resident of Alamance County, North Carolina, seeks to recover damages alleged to have been caused by the negligence of defendant, a resident of New York City. The action, instituted April 9, 1957, grows out of an automobile collision in Davidson County, North Carolina, on September 12, 1956.

Service was made on defendant in accordance with G.S. 1-105, defendant having received (by mail) on April 12, 1957, in New York City, a copy of the summons and of the complaint.

Judgment by default and inquiry was signed June 12, 1957.

Defendant's copy of the summons and of the complaint were delivered to North Carolina (Greensboro) counsel on June 17, 1957, with instructions to act in behalf of defendant.

The hearing was on defendant's motion under G.S. 1-220 to set aside said judgment on the ground of mistake, inadvertence, surprise and excusable neglect.

Judge Williams' judgment, which includes his findings of fact and conclusions of law, denied defendant's said motion. Defendant excepted and appealed.

Sanders & Holt for plaintiff, appellee.

Smith, Moore, Smith, Schell & Hunter for defendant, appellant.

PER CURIAM. The findings of fact established (1) a meritorious defense, and (2) *inexcusable* neglect. Hence, defendant's motion was properly denied. *Sanders v. Chavis,* 243 N.C. 380, 90 S.E. 2d 749.

Affidavits offered by defendant provided the only information before the court as to what occurred in New York after the court papers were served on defendant on April 12, 1957. The court was not obliged to accept as true each and every statement of fact set forth in these affidavits.

Unquestionably, the court's findings of fact, which are supported by competent (defendant's) evidence, support the court's legal conclusion and judgment.

Defendant's liability insurance carrier is not a party to this action. Its neglect is relevant herein only to the extent it may be imputed to the defendant. *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849. Hence, the findings of fact relating thereto are not determinative of the rights and liabilities of defendant and his liability insurance carrier *inter se. Sanders v. Chavis, supra.*

By amendment to its motion, defendant asserts that since service was made under G.S. 1-105, G.S. 1-108 entitles him to have the judgment set aside and to defend the action on its merits. But G.S. 1-108, in respect of relief *after* judgment, applies only when the service is by publication. As to service on defendant in accordance with G.S. 1-105, this statute provides that such service "shall be of the same legal force and validity as if served on him personally."

Affirmed.

EARL G. WEBSTER v. CARL O. WEBSTER.

(Filed 10 January, 1958.)

Automobiles §§ 21, 41r—

Plaintiff was injured when the tongue of a trailer, upon which he was riding, broke. There was no evidence tending to show that the manner in which the defendant drove the car towing the trailer contributed to the injuries or that defendant had any knowledge that the tongue was cracked, except that sometime prior thereto both parties, while using the vehicle, heard a noise which might have been the cracking of the tongue, but made no inspection and did not discover any defect. *Held:* Nonsuit was proper.

APPEAL by plaintiff from *Craven, Special Judge,* April Civil Term 1957 of ALAMANCE.

This is a civil action instituted by the plaintiff to recover for personal injuries sustained as a result of the alleged negligence of the defendant.

On 14 June 1955 the plaintiff and the defendant were engaged in loading and hauling some rough lumber belonging to the plaintiff. They loaded the lumber on a two-wheel, flat-bed trailer of wooden construction with a wooden tongue. They hitched the trailer to an automobile belonging to the defendant. The trailer belonged to one Bruce Walker, from whom the defendant had borrowed it. Prior to 14 June 1955 the plaintiff and defendant had worked together for about six weeks, using this same trailer to haul stumps off of a lot owned by the defendant.

After loading the rough lumber, the plaintiff took a position on top of the load on the trailer, intending to ride it to the mill to help hold the load down. The defendant drove the automobile which towed the trailer. After going out on the highway, the trailer began to wobble, and when the defendant slowed down, the trailer tongue broke and plaintiff jumped to the side of the road and as a result of the impact when he hit the ground, he was seriously injured.

The only evidence tending to show that the tongue was cracked on or before 14 June 1955 is that the plaintiff and defendant were loading the trailer and the plaintiff testified, "I heard it crack. * * * It was not a very loud crack. * * * After that I forgot about the crack because I didn't even think it could be the tongue. * * * Carl said something to the effect, 'I believe that is the tongue cracked.' I never looked at it. I said it could have been a root or something, or spring, it sounded like it could have been any other noise." The parties continued to use the trailer after that on three or four occasions without mishap.

Plaintiff further testified that his brother, the defendant, visited him while he was in the hospital and in discussing the

occurrence on 14 June, said, "I am not surprised, I knowed the tongue was cracked. I think it was cracked that day we were loading the stumps."

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

Long, Ridge, Harris & Walker, for plaintiff.
Sanders & Holt, for defendant.

PER CURIAM. There is no evidence tending to show that the manner in which the defendant towed the trailer contributed to the plaintiff's injuries, or that the defendant had any knowledge that the tongue was cracked, except when he heard something crack while they were loading stumps. There is no evidence to support the view that the defendant examined the tongue prior to the time it broke and found it to be in a defective condition. In our opinion, the plaintiff's evidence is insufficient to show actionable negligence on the part of the defendant.

The ruling of the court below is

Affirmed.

BENJAMIN N. BALDWIN v. RUSSELL NOLAN PERRY

(Filed 10 January, 1958.)

APPEAL by plaintiff from *Craven, Special Judge,* and a jury, January, 1957, Civil Term of ORANGE.

James R. Farlow for plaintiff, appellant.
J. Q. LeGrand for defendant, appellee.

PER CURIAM. This is a civil action in tort involving a motor vehicle collision at a street intersection in Chapel Hill. The jury answered the issues of negligence and contributory negligence in the affirmative, and from judgment in favor of the defendant, the plaintiff appeals.

The plaintiff's assignments of error have been examined with care. They involve only the application of established principles of law which need no further elaboration or discussion. Prejudicial error has not been made to appear. The trial and judgment will be upheld.

No error.

FAY BIZZELL v. J. EUSTACE BIZZELL.

(Filed 31 January, 1958.)

1. **Accord and Satisfaction § 1—**

An accord and satisfaction is composed of two elements: the accord which is the agreement and the satisfaction which is the execution or performance of such agreement.

2. **Same—**

Where it is plain from a contract of accord and satisfaction that only the performance of the agreement should bar action on the original controversy, proof of such performance is necessary for final judgment sustaining the plea in bar.

3. **Appeal and Error § 3—**

An interlocutory judgment is not appealable unless it affects some substantial right which will be lost if not corrected prior to final judgment.

4. **Same—**

Where, in an action for an accounting, the defendant pleads an accord and satisfaction in bar of the action, judgment holding that there was an accord and continuing the cause to a subsequent term to determine whether defendant is able to and does fully perform the satisfaction, is an interlocutory judgment which does not affect any substantial right, and is not appealable.

5. **Appeal and Error §12—**

An attempted appeal from a nonappealable interlocutory order continuing the cause to a subsequent term does not deprive the superior court of jurisdiction to hear the cause at the later term.

6. **Appeal and Error § 49—**

Findings of fact which are supported by competent evidence are conclusive on appeal.

7. **Accord and Satisfaction § 1—**

Any new and valuable consideration is sufficient to support an agreement of accord and satisfaction, and therefore evidence tending to show that plaintiff was entitled to receive, under the agreement, an interest in realty free of any claim by defendant for a large sum of money furnished by defendant for the enlargement and modernization of the building thereon, is sufficient to support the finding by the court that the agreement was supported by valuable consideration regardless of evidence relating to other considerations furnished by defendant.

8. **Parties § 10—**

Where defendant pleads an accord and satisfaction in bar of plaintiff's action for an accounting, the refusal of the court to join other parties having an interest in the realty constituting part of the subject matter of the original controversy cannot be prejudicial to plaintiff, such additional parties not being necessary to the determination of the plea in bar.

9. **Appeal and Error § 47—**

Exception to the refusal of motion to strike certain allegations of a pleading cannot be sustained when appellant fails to show prejudice.

10. Trial § 54—

In a trial by the court under agreement of the parties, the rules of evidence are not so strictly enforced as in a trial by jury, the assumption being that the court will not consider incompetent testimony or be misled by that which is irrelevant and inconclusive.

11. Appeal and Error § 49—

Where there is sufficient competent evidence to support the court's findings of fact, and such findings are sufficient to support the court's conclusions of law, the court's interlocutory and final judgments entered in the cause will be affirmed, notwithstanding appellant's contention that the court also heard incompetent evidence, there being a rebuttable presumption that the court disregarded any incompetent evidence, and there being nothing in the record to rebut such presumption.

12. Appeal and Error §39—

Error will not be presumed, but the burden is upon appellant to show error amounting to the denial of some substantial right.

APPEAL by plaintiff from *Moore, Clifton L., J.*, May Term 1957 of WAYNE.

Civil action for an accounting for rents and profits, to recover such sum as may be found due as the result of the accounting, and to recover $24,000.00 from the proceeds of the sale of realty. Defendant in his answer and cross-action alleges that he is not indebted to plaintiff, and pleads as a bar to the action a contract of accord and satisfaction, and requests either specific performance of the contract or damages for its breach: defendant further alleges that if it should be found that he is indebted to plaintiff for rents and profits, then such indebtedness is barred by the three-year Statute of Limitations. Plaintiff in her reply alleges that she is not bound by the alleged contract of accord and satisfaction for the reason that defendant procured it from her by fraud, duress and undue influence, but if it should be found there was no fraud, duress or undue influence, then defendant has breached the contract of accord and satisfaction by nonperformance, and she further alleges that the contract of accord and satisfaction was without consideration. Plaintiff in her reply alleges two other defenses which would constitute no defense, and afford plaintiff no relief, if the judgment herein is sustained. Defendant filed a replication to the reply, and plaintiff filed a further reply to the replication. The pleadings, and the exhibits attached thereto, are voluminous covering some 104 pages in the Record, and contain allegations of various transactions and facts, which will necessitate a trial, if the purported contract of accord and satisfaction is not a bar to plaintiff's action.

This case came on to be heard at the March Civil Term 1957 of the Wayne County Superior Court. At a pre-trial conference

the court announced that the action involved a complicated accounting, title to most of the real estate involved, and a plea in bar of accord and satisfaction, and that only the plea in bar of accord and satisfaction would be tried at that term, and if the plea in bar were not sustained, the matter would be referred for determination of the other matters. Whereupon, plaintiff and defendant, and their respective counsel, agreed and announced that they waived a jury trial, and consented that the judge might hear the evidence, find the facts, and make his conclusions of law with respect to the plea in bar of accord and satisfaction, and enter judgment upon this phase of the case.

Whereupon, Judge Moore heard the plea of accord and satisfaction in bar of plaintiff's action upon evidence offered by plaintiff and defendant, and upon the stipulations and agreements of the parties and their respective counsel. Mrs. Louise B. Stengel, a sister of the parties, and Carey K. Bizzell, a brother of the parties, testified for the defendant. From the evidence, stipulations and agreements, Judge Moore found the following facts, and upon his findings of fact made conclusions of law, and entered judgment.

Plaintiff and defendant are sister and brother. It was not controverted that plaintiff is the owner in fee of an undivided interest in several lots of land in the main business district of Goldsboro. On many of these lots are business structures, which realty is of considerable value and produces considerable rents. The defendant claims an undivided interest in fee in this realty, which claim is denied by plaintiff. At the time of the institution of this action the fair market value of this realty was $350,000.00, and the gross annual rental income was approximately $30,000.00. One piece of this realty is known as 128, 130 and 132 North Center Street in Goldsboro, and is on the east side of that street, having a frontage thereon of 70 feet. On this piece of realty there has been constructed a modern store building occupied by McLellan's, which land and building have a fair market value in excess of $150,000.00.

The plaintiff has resided in Washington, D. C. since 1926, though she has frequently visited in Goldsboro. Plaintiff acquired an interest in a portion of the realty involved in this action through a deed from her mother, who died in 1929. Mary Bizzell and Eula Bizzell, sisters of the parties, also owned an interest in the property conveyed by their mother. After their mother's death they managed the property and collected the rents with the advice and assistance of their brother, the defendant. Carey K. Bizzell, a brother of the parties, also had an interest in the property. He was, and is, a nonresident of the State, and did not assist in the management of the property.

Another sister of the parties, Mrs. Louise B. Stengel, has never resided in the State of North Carolina. Mary Bizzell and Eula Bizzell died without issue. Eula Bizzell survived Mary Bizzell, and died in 1943. The defendant returned to North Carolina in 1942, and since then has lived in Goldsboro, and managed and supervised the property, and collected the rents.

Defendant, while he was assisting his sisters Mary and Eula Bizzell in the management of the property, and after he took over the complete management thereof in 1943, acquired additional properties, taking title to the same in the name of his sisters and brother, and also improved the buildings on the original realty and on the after acquired properties. Such improvements and purchases were made for the most part from rental income from the property, but the defendant furnished $70,000.00 for the construction of what is known as the Colonial Store on John Street, and also furnished a considerable portion of the $130,000.00 used in the enlargement and modernization of the building at 128, 130 and 132 North Center Street.

By reason of the use of the rental income to acquire other property, and to improve the structures on the property, little income was available for distribution to the owners of the realty. Since 1943 defendant has lived at the homeplace in Goldsboro without paying rent. Beginning in 1949 plaintiff received $75.00 per month from the rent income, which amount was later increased to $200.00.

About 1952 plaintiff became dissatisfied with the income she was paid from the property, and the accounting she was receiving as to the management thereof, and demanded a greater share of the income and a strict accounting of the management of the property. The defendant began to negotiate with plaintiff for a settlement of their respective interests and rights on some definite basis. In February 1954 plaintiff, defendant, and their brother Carey K. Bizzell met in Washington, D. C., but no settlement was arrived at.

In May 1954 plaintiff came to Goldsboro. Her brother Carey K. Bizzell was there. There was a conference between Carey K. Bizzell and plaintiff in which she agreed to the terms of a settlement between herself and the defendant. Plaintiff and defendant did not talk to each other, but acted through a third person. According to the agreement reached the defendant executed and delivered to plaintiff a promissory note for the payment to her of $250.00 a month so long as she lived. Plaintiff refused to accept the first draft of the note, and prepared in her own handwriting a form of note which she would accept, she being a licensed attorney. A note was typed from this form of note prepared by plaintiff, and was executed by the defendant, and de-

livered to plaintiff, and accepted by her. At the same time a contract in writing was prepared with reference to the real estate, and was executed by plaintiff, defendant and his wife, by Carey K. Bizzell and his wife, and Louise B. Stengel and her husband. A photostatic copy of this contract is attached to defendant's answer as Exhibit I, and by reference is made a part of the findings of fact. Before this contract was executed plaintiff in her own handwriting made certain minor alterations, and these alterations were initialled by the parties at the time of the execution of the contract. Plaintiff was the first person to execute the contract. At the same time defendant orally agreed with his sister Mrs. Louise B. Stengel that he would pay her $60,000.00 in installments with interest in lieu of her interests and rights in the property. All the parties agreed that the agreements entered into in May 1954 should be a complete settlement of all the controversies between them.

The contract made a part of the findings of fact is as follows:

"THIS AGREEMENT, made as of May 1, 1954, by and between J. E. Bizzell and wife, Harriet P. Bizzell, C. K. Bizzell and wife, Olga R. Bizzell, Louise B. Stengel and husband, Arthur Stengel, and Fay Bizzell, unmarried.

"WITNESSETH: That, in consideration of the sum of Ten Dollars ($10.00) and other valuable considerations each to the other in hand paid, receipt of which is hereby acknowledged, the parties hereto for themselves, their heirs, executors, administrators and assigns, hereby covenant and agree as follows:

"1. That J. E. Bizzell shall forthwith and without unreasonable delay acquire title to the property in Goldsboro, North Carolina, known as No. 128 East Center Street, North, and cause said property to be improved by constructing thereon a store building which is to be a part of and of the same type of construction and design as the adjoining property known as No. 130-132 East Center Street, North, all at his own expense.

"2. Upon the acquisition by J. E. Bizzell of the property at No. 128 East Center Street, North, above referred to, and the completion by him of the improvements on said property above provided for, J. E. Bizzell and wife, Harriet P. Bizzell, will convey said property to C. K. Bizzell and Fay Bizzell in fee simple as tenants in common free and clear of all liens and encumbrances except the lease to McLellan Stores.

"3. Upon the execution and delivery of the deed provided for in paragraph 2 hereof,

"(a) J. E. Bizzell and his wife, Harriet P. Bizzell, and Louise B. Stengel and her husband, Arthur Stengel, will execute and deliver to C. K. Bizzell and Fay Bizzell a deed releasing to C. K. Bizzell and Fay Bizzell all of their rights, titles, interests and estates (in pen and ink—WHICH THEY MAY NOW HAVE)* in and to the property in Goldsboro, North Carolina, known as No. 130-132 East Center Street, North, and C. K. Bizzell and his wife, Olga R. Bizzell, and Fay Bizzell will then execute such deeds and other instruments as may be necessary to vest the title to said property in C. K. Bizzell and Fay Bizzell in fee simple as tenants in common;

"*The above portion in pen and ink appeared on the lefthand margin and is also signed—*Fay Bizzell, C. K. Bizzell, Olga B. Bizzell, Louise B. Stengel, Arthur Stengel, J. E. Bizzell and Harriet P. Bizzell.*

"(b) C. K. Bizzell and his wife, Olga R. Bizzell, Louise B. Stengel and her husband, Arthur Stengel, and Fay Bizzell, will execute and deliver to J. E. Bizzell a deed or deeds conveying to J. E. Bizzell in fee simple all of the properties in Goldsboro, North Carolina, on the east side of John Street between Mulberry Street and Ashe Street, on the west side of John Street between Mulberry Street and Ashe Street, on the north side of Mulberry Street between John Street and William Street, and on the south side of Ashe Street between John Street and William Street which they, or any one or more of them (in pen and ink—MAY)* now own or in which they, or any one or more of them (in pen and ink—MAY)* now have any right, title, interest or estate.

"*The above portions 'may' appeared on the lefthand margin and is also signed by the parties (as above noted this page).

"4. In lieu of the estimated rent to be received by C. K. Bizzell from his one-half undivided interest in said property at No. 128 East Center Street, North, J. E. Bizzell will pay to C. K. Bizzell the sum of Two Hundred and Fifty Dollars ($250.00) on the first day of each and every month beginning May 1, 1954, and continuing until the execution and delivery of the deed provided for in paragraph 2 hereof.

"5. In lieu of the estimated rent to be received by Fay Bizzell from her one-half undivided interest in said property at No. 128 East Center Street, North, J. E. Bizzell will pay to Fay Bizzell the sum of Two Hundred and Fifty Dollars ($250.00) on the first day of each and every month beginning May 1, 1954, and continuing until the execution and delivery of the deed provided for in paragraph 2 hereof.

"6. Pending the exchange of deeds provided for in paragraph 3 hereof,

"(a) C. K. Bizzell and Fay Bizzell shall be entitled to all of the income from said property at No. 130-132 East Center Street, North, share and share alike, and shall be liable for all of the expenses in connection with said property, share and share alike; and

"(b) J. E. Bizzell shall be entitled to all of the income from the properties described in subparagraph (b) of paragraph 3 hereof and shall be liable for all of the expenses in connection with said properties.

"IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the day and year first above written."

Then follow the signatures and seals of all the parties.

The monies advanced and expended by defendant, and his claims to an interest in the real estate constitute a sufficient consideration to support the contract of agreement.

Within a month after the making of the contract of agreement plaintiff repudiated it, claiming that is was procured by fraud, duress and undue influence, and has refused to perform any of its requirements on her part. The contract of agreement was not procured by fraud or duress or undue influence on the part of defendant, or of any of the parties thereto.

Defendant, in accordance with his agreement with Mrs. Louise B. Stengel, has executed and delivered to her a note for $60,000.00. Defendant, in accordance with his agreement with plaintiff, has made payments to her as required by his note executed and delivered to her in May 1954, and has also made payments to plaintiff as provided in the contract of agreement. Defendant has also executed and tendered to plaintiff a deed conveying to her the real estate provided for in the contract of agreement. The defendant has acquired title to the Grady tract of land (128 North Center Street) as he had obligated himself to do in the contract of agreement. Plaintiff has refused to accept the deed so tendered, and while she contends she would not accept it in any event, she contends further defendant has breached his contract for the reason that the tendered deed shows an encumbrance against the property in violation of the contract of agreement.

Among other things provided for in the contract of agreement defendant was to acquire title to 128 North Center Street, Goldsboro, and was to convey a one-half undivided interest therein, and a one-half undivided interest in 130 and 132 East Center Street to plaintiff, together with a one-half interest in

the lease of McLellan Stores, Inc., which is a valuable lease, and which guaranteed to plaintiff a minimum $9,000.00 per year net income, and there was to be no other encumbrance upon this property except the McLellan lease.

At the time of the making of the contract of agreement, 128 North Center Street was owned by Mrs. Ella Grady, widow, for life, B. F. Grady, Jr. for life following the death of his mother, and then the contingent remaindermen under the will of B. F. Grady, Sr., who died in 1929. Defendant had acquired a lease for this property from the life tenants for forty years at a rental of $100.00 a month. In this lease was a provision that the lease should be owned by the title owner of the property. In 1955 Mrs. Ella Grady conveyed her life estate to B. F. Grady, Jr. During the same month a special proceeding was brought to sell the life estate and contingent remainders at a private sale to defendant. The order of sale and decree of confirmation provided for a sale of all rights, title and interest to said property. The commissioners appointed to make the sale executed and delivered a deed to defendant therefor, but following the description in the deed there is a provision that it should be subject to the lease from Ella Grady and B. F. Grady, Jr. to defendant, Carey K. Bizzell and plaintiff. This provision does not appear in the granting clause or in the *habendum* clause, and was inserted in the deed because Carey K. Bizzell and plaintiff were not parties to the special proceeding.

In the deed tendered by defendant to plaintiff under the provisions of the contract of agreement, it was provided in the *habendum* clause that the conveyance should be subject to the Grady lease, and reference to the lease was made in the warranty clause.

Defendant insisted at the trial that the insertion of the provision in the tendered deed referring to the Grady lease was not an encumbrance, and he sought thereby only to convey his interest therein. But defendant asserted that, if the court should find this provision to be an encumbrance, he was ready, able and willing, and would tender a deed free of the encumbrance, and in strict keeping with the contract of agreement.

Based upon his findings of fact Judge Moore made the following conclusions of law:

The oral agreements, the promissory note, and the written contract executed in May 1954 is an accord and agreement for settlement of the differences and controversies between the parties.

Defendant has performed the contract and agreements on his part in accordance with the provisions thereof, except as hereinafter stated in a further conclusion.

Defendant owns 128 North Center Street property free and discharged of any encumbrance thereon, except the McLellan lease, and particularly free and discharged from any encumbrance by reason of the Grady lease, except any interest in the Grady lease that may be owned by Carey K. Bizzell and Fay Bizzell (that is, the defendant owns all interest in the Grady lease, except the rights of Carey K. Bizzell and plaintiff thereunder).

The deed tendered plaintiff by defendant under the provisions of the contract of agreement of May 1954, whether intended or not, makes the Grady lease an encumbrance upon the property, and to this extent the defendant has failed to perform the contract of agreement of May 1954 on his part.

Inasmuch as the plaintiff has refused under any circumstances to perform on her part under the contract of agreement of May 1954, and inasmuch as defendant asserts he is ready, willing and able to perform on his part the contract, this court is of opinion the cause should be retained on the docket for further hearing at a subsequent term that it may be determined whether defendant can and will tender a proper deed to plaintiff according to the contract of agreement.

Whereupon, Judge Moore ordered, adjudged and decreed as follows:

The written contract, the promissory note from defendant to plaintiff and the oral agreements with respect thereto constitute an accord and satisfaction for settlement of all controversies and differences between the parties arising in this action, and when the provisions thereof are properly performed shall constitute a satisfaction of said controversies and differences.

This cause is retained upon the civil issue docket for further hearing by the court at a subsequent term to determine whether defendant is able to and does fully perform the contract and agreements on his part. If at a subsequent hearing it is found by the court the defendant cannot perform, or is unwilling to do so, then the case shall proceed for an accounting between the parties and for a determination of the other issues raised by the pleadings not under consideration at this time.

If at the subsequent hearing it is determined by the court the defendant is able to, and has performed on his part, in accordance with the contract of agreement, then he shall be put to his election as to whether he shall demand specific performance on plaintiff's part, or shall proceed for damages because of plaintiff's breach of the contract of agreement, and her refusal to perform.

The matter of costs is retained for determination at a future hearing.

Plaintiff excepted to the findings of fact, conclusions of law, and the signing of the judgment, and appealed to the Supreme Court.

This case came on again to be heard by Judge Moore at the May Term 1957 of the Wayne County Superior Court, when Judge Moore entered a final judgment. In this judgment Judge Moore after reciting in his final judgment the proceedings at the March Term 1957, and that the case was retained on the civil issue docket until a subsequent term in order that the court might render a final judgment, and that plaintiff was present with her attorneys James Keel and Henry Godwin, and defendant was present with his counsel J. Faison Thomson & Son, and after stating that defendant offered evidence, found the following facts:

Defendant has tendered to plaintiff, and upon her refusal to accept, has deposited with the court the following sums of money:

(a) $7,400.00, which represents the total amount of the monthly installments of $200.00 a month, extending up to and including May 1957, as provided by a note dated 1 May 1954, executed and delivered by defendant and payable to plaintiff.

(b) $9,250.00, which represents the total amount of the monthly installments of $250.00 due as rents to plaintiff for the property situate at 128 East Center Street, North, Goldsboro. Upon delivery of this money to plaintiff, the court orders and directs that the plaintiff transfer and assign to defendant all claims for rent due by McLellan Stores, Inc., from 1 February 1955 to 31 May 1957 on 128 East Center Street, North, the total amount due by McLellan Stores, Inc., for such rent is $7,000.00, which is to be paid and retained by defendant.

(c) $333.34, which represents one-half of the installments paid to defendant as rents for the months of May and June 1954 by McLellan Stores, Inc.

The court further finds as a fact that defendant has tendered to plaintiff, and deposited in court the following deeds:

(1) Deed from defendant and his wife to plaintiff, which conveys a one-half undivided interest in the property known as 128 East Center Street, North, Goldsboro.

(2) Deed from defendant and his wife, Louise B. Stengel and husband, to plaintiff and Carey K. Bizzell, conveying to plaintiff and Carey K. Bizzell all their rights, title and interest in, and to the property known as 130 and 132 East Center Street, North, Goldsboro.

(3) Deed from Carey K. Bizzell and wife, Louise B. Stengel and husband, and plaintiff to defendant. Carey K. Bizzell and wife, and Louise B. Stengel and husband have executed and

delivered this deed, and it has been recorded. Plaintiff has not executed and delivered this deed.

Defendant has complied with the terms of the contract of agreement of 1 May 1954, and is ready, willing and able to comply with its terms in all respects. Defendant has elected to require plaintiff to specifically perform the terms of the contract of agreement, and to convey to him in fee simple all the properties in Goldsboro described as follows:

> " 'On the east side of John Street, between Mulberry Street and Ashe Streets; on the west side of John Street, between Mulberry Street and Ashe Street; on the north side of Mulberry Street, between John Street and William Street; and on the south side of Ashe Street, between John Street and William Street, in which Fay Bizzell held an interest on May 1, 1954.' "

All matters in controversy between plaintiff and defendant were agreed to be, and were settled, as of 1 May 1954, which contract was partly in writing and partly oral.

Whereupon, Judge Moore ordered and decreed that plaintiff shall execute and acknowledge the execution of the deed from Carey K. Bizzell and wife, and Louise B. Stengel and husband, as filed in the office of the Clerk of the Superior Court of Wayne County, and deliver the same to defendant on or before 20 May 1957; and that in the event plaintiff fails to execute and deliver this deed to defendant, this judgment shall have the legal effect of transferring to defendant the legal title to such property in accord with G.S. 1-227 and G.S. 1-228, and this judgment shall be regarded as a deed of conveyance, and defendant shall hold the legal title to the property in the same condition and estate as though plaintiff had executed the deed, and this judgment shall bind plaintiff and entitle defendant in the same manner, and to the same extent as a conveyance would if executed by plaintiff according to this judgment. Judge Moore further ordered and decreed that upon failure of *defendant* (it is plain that this is a clerical error, and that Judge Moore meant plaintiff) to comply herewith, then this judgment conveying the property heretofore described in this judgment (the judgment describes it again) shall be recorded as a deed and registered as provided in G.S. 1-228, and the Register of Deeds of Wayne County shall index and cross-index the judgment, showing plaintiff as grantor and defendant as grantee.

The plaintiff is taxed with the costs.

Plaintiff excepted to the signing of the judgment and appealed.

N. H. Godwin and Bryant, Lipton, Strayhorn & Bryant for Plaintiff, Appellant.

J. Faison Thomson & Son for Defendant, Appellee.

PARKER, J. Plaintiff's assignment of error No. 32 is based upon his exceptions 33 through 40, both inclusive. Each of these exceptions relate to the admission of evidence by the court at the May Term 1957 in respect to defendant's tender of monies and deeds to plaintiff to show full performance on his part of the agreement of 1 May 1954, copied in full above. Plaintiff contends that she appealed to the Supreme Court from the judgment rendered at the March Term 1957, and while such appeal was pending in the Supreme Court, the Superior Court of Wayne County was *functus officio*, and could hear no evidence, and enter no judgment as to defendant's plea in bar of accord and satisfaction at the May Term 1957.

A technical question might be raised as to whether defendant's plea in bar is one of accord and satisfaction, or one of compromise and settlement. However, this question is not raised by the briefs of counsel, and the case was heard on the theory that the plea in bar was one of accord and satisfaction. Plaintiff's action is for an accounting for rents and profits, and to recover $24,000.00 from the proceeds of the sale of realty: it is not an action seeking recovery of a freehold or inheritance. "Some confusion arises in the use of the terms 'accord and satisfaction,' 'compromise and settlement,' and 'release,' for in the practical situations out of which the cases arise these concepts coalesce. . . . There has generally been an interchangeable use of the terms 'accord and satisfaction' and 'compromise and settlement.' The view has been taken that any distinction between the two is unimportant where the agreement is executory, since, like satisfaction to an accord, in order to be a defense to an action on the original claim, a compromise must be followed by a settlement in the sense of payment; but the better rule, and the one which gives force to the distinction between these subjects, is that although performance is necessary to a complete accord and satisfaction, this is not essential to a valid compromise. Moreover, a compromise must be based upon a disputed claim, while an accord and satisfaction may be based upon an undisputed or liquidated claim." 11 Am. Jur., Compromise and Settlement, p. 247. Following the theory of the trial below, *Lyda v. Marion*, 239 N.C. 265, 79 S.E. 2d 726, we shall consider the plea in bar as one of accord and satisfaction. To call it a compromise and settlement would be of no practical benefit to plaintiff.

The accord is the agreement, and the satisfaction is the execution or performance of such agreement. *Dobias v. White*,

239 N.C. 409, 80 S.E. 2d 23. In the agreement entered into by and between defendant and his wife, C. K. Bizzell and wife, Louise B. Stengel and husband, and plaintiff, dated 1 May 1954, it is plain that the parties thereto agreed that it is only the performance of that agreement that shall have the effect of an accord and satisfaction. Therefore, if defendant could not prove that he had fully performed the agreement, his plea in bar of accord and satisfaction would constitute no defense, and would not bar plaintiff's action.

Judge Moore heard only one phase of this case: defendant's plea of accord and satisfaction as a bar to plaintiff's action. His judgment at the March Term 1957 was not a final judgment disposing of the case and leaving nothing to be judicially determined between plaintiff and defendant in the trial court, because he left the matter open to be heard at a subsequent term as to whether the defendant could show that he had fully performed the agreement. Until that was determined no final judgment on defendant's plea in bar of accord and satisfaction could be rendered. His judgment entered at the March Term 1957 was interlocutory, because it was a judgment made during the pendency of the plea in bar of accord and satisfaction, which did not dispose of the plea, but left it for further action by the trial court in order to hear and determine such plea by a final judgment. *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377, where this subject is fully discussed with citation of authority. In that case *Ervin, J.,* said for the court: "An appeal lies to the Supreme Court from a final judgment of the Superior Court. Citing authority. An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." The exception has no application here. "As a 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 the final judgment." McIntosh, N. C. Practice and Procedure, Second Ed., Vol. 2, p. 207.

The appeal, or attempted appeal, by plaintiff to the Supreme Court from the nonappealable interlocutory judgment rendered by Judge Moore at the March Term 1957 was a nullity, and did not deprive the Superior Court of Wayne County of jurisdiction at a subsequent term to hear evidence on defendant's plea in bar of accord and satisfaction as to the full performance of the agreement by defendant, and then to enter final judgment

as to such plea in bar. *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879. Plaintiff's assignment of error No. 32 is overruled.

The decisions cited by plaintiff in her brief, wherein the lower court became *functus officio* pending appeal, are readily distinguishable.

Plaintiff assigns as error Judge Moore's finding of fact that the defendant himself furnished $70,000.00 for the construction of what is known as the Colonial Store on John Street, and that he furnished a considerable portion of the $130,000.00 used in the enlargement and modernization of the building at 128, 130 and 132 North Center Street on the ground that such finding of fact is not supported by the evidence. She further assigns as error the judge's conclusion of law based thereon that the monies advanced and expended by defendant and his claim to an interest in real estate constitutes a sufficient consideration to support the agreement of 1 May 1954. Plaintiff further assigns as error that the judge found as a fact that all matters in controversy between the plaintiff and the defendant were settled as of 1 May 1954, which contract was partly in writing and partly by parol, and also assigns as error the judge's finding of fact that the defendant has complied with the terms of the agreement in all respects. Plaintiff contends in his brief that "the findings of fact are not based upon the greater weight of the evidence," and that the accord and satisfaction here is not based upon any consideration, and has not been performed by defendant. Suffice it to say that the above findings of fact are supported by competent evidence, and are conclusive on appeal, and Judge Moore's finding of fact supports his conclusion of law that there was a consideration for the accord and satisfaction. *Reid v. Johnston*, 241 N.C. 201, 85 S.E. 2d 114; *Trust Co. v. Finance Corp.*, 238 N.C. 478, 78 S.E. 2d 327; *Fish v. Hanson*, 223 N.C. 143, 25 S.E. 2d 461. "Any new consideration, though insignificant or technical merely, is sufficient consideration for a contract of accord and satisfaction, provided it is valuable." 1 Am. Jur., Accord and Satisfaction, p. 236. "The consideration may present itself in any of numerous different shapes or guises, but in some form or other it must be present—there must be either some advantage, or presumed or assumed advantage, accruing to party who yields his claim, or some detriment to the other party. This is all that the law requires by way of consideration. . . ." 1 C.J.S., Accord and Satisfaction, Sec. 4. Since the agreement of 1 May 1954 entitles plaintiff to receive a one-half undivided interest in the property known as No. 130-132 East Center Street, North, in Goldsboro, free from the interest defendant has in it for furnishing a considerable portion of the $130,000.00 used in the enlargement and modernization of the building at 128, 130 and

132 East Center Street, North, in Goldsboro, that alone without considering the other evidence, supports the agreement for the accord by a valuable consideration. These assignments of error are overruled.

Plaintiff assigns as error No. 2, that the Judge presiding at the February Term 1957 of Wayne County Superior Court refused her motion to make Carey K. Bizzell and wife, Louise B. Stengel and husband, and defendant's wife parties to the action. Plaintiff contends this was error, for the reason that their title to real estate was being attacked in the action. Judge Moore, during the hearing of defendant's plea of accord and satisfaction in bar of plaintiff's action, told plaintiff's then lawyer, Mr. Keel, "I am not passing on the title." Whether these persons should be made parties, if defendant's plea in bar of accord and satisfaction had been overruled, is not before us for decision. Certainly, the failure to make these persons parties is not prejudicial to plaintiff, and they are not necessary parties, in the determination of defendant's plea in bar of accord and satisfaction. This assignment of error is overruled.

The plaintiff assigns as error No. 1 the denial of her motion to strike certain parts of defendant's answer and cross-action. These are allegations, which in a large measure state facts not relevant to a hearing and determination of defendant's plea in bar of accord and satisfaction. Plaintiff has not shown that she was prejudiced by the refusal to strike these allegations so far as this appeal is concerned, and such assignment of error is overruled.

Plaintiff has numerous assignments of error as to the admission and exclusion of evidence over her objection and exception. Judge Moore allowed counsel on both sides wide latitude in the offering of evidence. When the parties waived a jury trial, Judge Moore occupied a dual position: he was the judge required to lay down correctly the guiding principles of law, and he was also the tribunal compelled to find the facts. In such a trial the rules of evidence as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. *Reid v. Johnston, supra; Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913; McIntosh, N. C. Practice and Procedure, Second Ed., Vol. I, p. 759; 89 C.J.S., Trial, Sec. 589.

In Annotated Cases 1917C p. 660 *et seq.*, there is a note entitled "Effect of Admission of Incompetent Evidence in Trial before Court without Jury," where the cases are collected from a large number of states and from the Federal courts. In this note it is stated: "The general rule deducible from the cases appears to be that where a case has been tried before the court

without a jury the admission of incompetent evidence is ordinarily deemed to have been harmless unless it affirmatively appears that the action of the court was influenced thereby. In other words it is presumed that incompetent evidence was disregarded by the court in making up its decision." In support of the text decisions are cited from 23 States, the Federal courts, and the District of Columbia. In the same note it is said: "In reviewing a trial before the court without a jury it will be presumed that incompetent evidence was disregarded and the issue determined only from a consideration of competent evidence, and accordingly the admission of the incompetent evidence does not constitute reversible error." To support the text cases are cited from 22 States and cases from the Federal courts. In the note it is also said: "In a trial before the court without a jury if there is sufficient competent evidence supporting the judgment or finding, the admission of incompetent evidence does not constitute reversible error." Cases are cited in support of the text from 32 States, and cases from the Federal courts. These statements are subject to qualifications, which are not applicable to the instant case. See 53 Am. Jur., Trial, Sec. 1125, and also *Birmingham v. State*, 228 Wis. 448, 279 N.W. 15, 116 A.L.R. 554, and annotation to that case in A.L.R. as to the reception of incompetent evidence in criminal cases tried by court without a jury. In this annotation it is said there is a presumption in the Federal courts and in several state courts that where the court sits without a jury in a criminal prosecution, it acts only on the basis of proper evidence, and the cases are cited.

In 89 C.J.S., Trial, p. 374, it is written:

> "Since the rules of exclusion in the law of evidence as applied in a court of law are largely a result of the jury system, the purpose of which is to keep from the jury all irrelevant and collateral matters which might tend to confuse them or mislead them from a consideration of the real question involved, when an action is to the court sitting without a jury the rules of exclusion are less strictly enforced, the assumption being that the court will not be confused or misled by that which is irrelevant and inconclusive."

The learned trial judge was well able to weigh the evidence, and to disregard the incompetent evidence. There is nothing in the record to show that, if incompetent evidence were admitted, it influenced his findings of fact, and his interlocutory and final judgments in any way. In the record there is competent evidence to support his findings of fact, and such findings of fact are sufficient to support his conclusions of law and his interlocutory and final judgments based thereon. *Reid v. John-*

ston, supra; Woody v. Barnett, 239 N.C. 420, 79 S.E. 2d 789. In addition, from the record before us there is a rebuttable presumption that Judge Moore disregarded any incompetent evidence, if there were such, and made his findings of fact and rendered his interlocutory and final judgments on competent evidence, and there is nothing in the record to rebut such presumption. All assignments of error as to the admission and exclusion of evidence have been examined, and are overruled.

All plaintiff's assignments of error have received proper consideration by the court, and all are overruled.

On appeal error will not be presumed. *Beaman v. R.R.,* 238 N.C. 418, 78 S.E. 2d 182. Technical error is not sufficient. The burden is on the appellant to show prejudicial error amounting to the denial of some substantial right. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 657; *Beaman v. R.R., supra.* This, plaintiff has not done.

The clerical error in the final judgment, where the word defendant is used instead of plaintiff, as set forth in the statement of facts, will be corrected by the Wayne County Superior Court, when this opinion is certified down.

The interlocutory and final judgments entered below are Affirmed.

MRS. MARY CREWS POINDEXTER AND MARY ELIZABETH POINDEXTER v. THE FIRST NATIONAL BANK OF WINSTON-SALEM.

(Filed 31 January, 1958.)

1. **Executors and Administrators § 30: Trial § 36—Where necessary for clarity, each element of damages should be separately submitted.**

In an action against the administrator for wrongfully or negligently administering the estate, based upon allegations of numerous separate acts of malfeasance or nonfeasance, including failure to collect from the principal a note upon which the deceased was endorser, failure to collect the salary due decedent at his death, and unauthorized and negligent acts in carrying on the business of decedent, *held,* exception to the charge in submitting the questions under the single issue whether defendant wrongfully or negligently administered the estate, without differentiating between the numerous items of damage and instructing the jury as to each of them so that the jury could clearly apply the law to the facts and contentions of the parties, is sustained.

2. **Executors and Administrators § 30—**

Where, in a special proceeding by an administrator to sell lands to make assets to pay debts, respondents, heirs and distributees, by verified answer admit the allegations of the verified petition that a par-

ticular note constituted a liability of the estate, and judgment is rendered therein directing the sale of the lands, *held*, the heirs and distributees, in their later action against the administrator for wrongful or negligent administration of the estate, are estopped to allege any negligent or wrongful conduct of the administrator in connection with the note.

3. **Judgments § 32—**

Where a material fact is in issue and decision of such matter is necessary to the rendition of the judgment, such matter becomes *res judicata* and may not be again litigated in a subsequent action between the same parties, regardless of the form the issue may take in the subsequent action.

4. **Damages § 13a: Trial § 31b—**

Where there are numerous elements of damages based upon separate acts of nonfeasance or malfeasance, it is error for the court to fail to state the measure of damages or state the evidence as to each element of damage and apply the law to the evidence in regard to each.

APPEAL by defendant from *Armstrong, J.*, at October 22, 1956, Term of FORSYTH as No. 380 at Spring Term 1957, carried over to Fall Term 1957 of Supreme Court.

Civil action to recover of defendant, in accordance with allegations of complaint, as finally amended, these items: (1) Loss by reason of failure of defendant to collect the note of $13,750.00, dated 8 July, 1951, executed by Winston Manufacturing Company, Inc., to defendant, for money borrowed by said company, with certificate for 983 shares of capital stock of Winston Manufacturing Company of Hickory, formerly Terry Crouch Furniture Company, a North Carolina corporation, as collateral security, and with N. S. Poindexter, the decedent, and Mary Crews Poindexter, plaintiff here, as accommodation endorsers and sureties. (2) Net loss on claim for salary due by Winston Manufacturing Company, Inc., to N. S. Poindexter, the decedent, $7,415.01 by reason of failure of defendant to collect same. And (3) Loss of $65,000.00 sustained by the estate of N. S. Poindexter by reason of wrongful and negligent operation of the Winston Furniture Company, and allied industries in the manufacture of furniture.

The plaintiffs are the widow and daughter of N. S. Poindexter, deceased, and as such are his only distributees and heirs at law.

This case was in Supreme Court on former appeal, opinion being reported in 244 N.C. 191, 92 S.E. 2d 773.

The facts there stated will not be repeated here,—except to say that the record shows that Mr. Clock was elected president of Winston Manufacturing Company, rather than that the trust officer of the Bank was so elected.

It appears uncontroverted from the pleadings that on 8 July, 1951, plaintiff Mary Crews Poindexter and her husband, the

late N. S. Poindexter, became accommodation endorsers and sureties on a note in the amount of $13,750.00 executed by Winston Manufacturing Company, Inc., to defendant bank for money borrowed by said company, with interest at rate of 6%, due thirty days after date; that as shown on the face of the note the Winston Manufacturing Company pledged as collateral security for the payment of this note certificate for 983 shares of capital stock of Winston Manufacturing Company of Hickory, formerly known as Terry Crouch Furniture Company, a North Carolina corporation, 99 per cent of whose capital stock was owned by Winston Manufacturing Company. This note was not paid when it became due on or about the 7th day of August, 1951.

Plaintiffs allege in their complaint, summarily stated: That defendant in accepting the duties of administrator of the estate of N. S. Poindexter took control and possession of various assets of decedent, among which were: (1) One-half of the outstanding capital stock of said Winston Manufacturing Company, Inc., a furniture manufacturing concern, operating its main plant at Winston-Salem, and certain subordinate furniture manufacturing facilities at Hickory, Thomasville, and Troy, North Carolina, of the fair and reasonable net worth of $65,000.00, and "could have been sold for that amount"; and

(2) Claim for back salary of $7,740.01 (the exact amount is variously stated approximately at this figure), due from said Winston Manufacturing Company, all of which had fair market value of $72,000.00, as against liabilities of only $6,000.00 exclusive of contingent liability as endorser for Winston Manufacturing Company as above set forth. And, in addition thereto, decedent owned real estate worth approximately $20,000.00, subject, however, to being sold by the defendant administrator should the personal property be insufficient to pay decedent's debts.

And in the complaint, as finally amended, plaintiffs further allege that all the real property of decedent was sold by order of court at defendant's instance, and from the proceeds received defendant administrator immediately paid itself as a creditor $14,029.60, because of decedent's endorsement as aforesaid—even though defendant's own neglect, delay and bad faith had rendered the security worthless.

Plaintiffs also allege (paragraph XXII) that "By paying itself the said $14,029.60 from funds of the decedent's estate it was holding as fiduciary, as aforesaid, the defendant wrongfully and unlawfully converted assets of said estate to its own use and benefit, the decedent and plaintiff endorser having been previously relieved of all liability in connection with said note and endorsement in that:

"(a) defendant had neglected and failed to collect said note from the principal debtor during the long period of time it could have done so;

"(b) it had neglected and failed to sell said security in satisfaction during the long period it could have done so;

"(c) by defendant's own affirmative act said secured stock was involved in the contract for Clock's benefit and was wrongfully and negligently withheld from sale until said company's affairs deteriorated and said stock became worthless or of little value;

"(d) defendant, by its own affirmative act, disposed of the plant, equipment, inventory and all the physical assets of said Winston Manufacturing Company, Inc., of Hickory, the company the secured stock was in, thereby substantially diminishing the value of said stock and rendering it of little or no value, no assets of any kind thereafter remaining but a few disputed accounts receivable.

"(e) the said principal debtor was rendered insolvent and said note uncollectible from it by the defendant's own neglect and mismanagement as more particularly appears elsewhere, all of which acts and omissions were in violation of the duties owed plaintiff endorser and decedent's estate by the defendant creditor administrator and all said wrongful acts and omissions proximately caused the plaintiffs to be damaged in the amount of $12,787.81 when the decedent's estate was unlawfully diminished by this unjust payment of the defendant to itself."

And plaintiff also alleged (paragraph XXIII) that

"Defendant did not faithfully execute the duties of trust imposed by law upon it as administrator, and was negligent in wasting and dissipating the assets and property of said estate and acted wrongfully and unlawfully and in bad faith in so doing in that

"(a) it undertook to administer said estate and operate said furniture manufacturing business when it had a material conflict of interest, the defendant being the largest creditor of both decedent and said parent company, because of which plaintiffs and said estate did not receive the faithful, impartial services they were entitled to receive from the administrator;

"(b) it undertook, without legal authority, to operate a furniture manufacturing business of the type and scope here involved when it was unqualified to do so and also in that defendant falsely represented to plaintiffs that it was qualified and experienced to undertake said matter;

"(c) it failed, neglected and refused to liquidate decedent's interests for many months while the same were of value, know-

ing it was incompetent to preserve and safeguard the same during the continued operation thereof,

"(d) in operating said furniture manufacturing business it

"(1) employed and retained a manager, foreman and other employees that were not qualified to operate said business satisfactorily, which incapacity was known to defendant or could have been known through the exercise of due care;

"(2) it permitted expensive lumber and other materials to be wasted, and not properly utilized;

"(3) it allowed valuable machinery to rust and deteriorate, thereby diminishing in value because of lack of proper care;

"(4) it permitted high-salaried, skilled laborers to remain idle while drawing wages and also on occasions used them on low-salaried, common labor jobs and generally did not properly utilize the services of the employees;

"(5) it failed to see that orders received by said furniture company and subsidiaries were properly filled and completed in accordance with contract and purchase order specifications, thereby causing said companies to lose valuable patrons and resulting in shipments being rejected and returned after much expensive labor and material had been invested therein;

"(6) purchased new, expensive machinery and equipment that was unnecessary under the circumstances;

"(7) allowed some employees of said company exorbitant and unnecessary allowances for expense and travel and in numerous other ways handled said business interests in a wasteful, incompetent and inefficient way,

"all of which wrongful and negligent acts and omissions proximately and directly caused said business interest belonging to said estate, having a fair market value of $65,000 to be wasted and rendered worthless, thereby damaging plaintiffs in said amount."

Plaintiff further alleged (paragraph XXIV) that "Defendant also wasted the property and assets of said estate and acted wrongfully, unlawfully and without due care in permitting the decedent's claim for back salary in the amount of $7,415.01 to become worthless, in that defendant during the long period when said claim could have been collected by the exercise of due diligence, did nothing to accomplish collection and also committed the other wrongful acts heretofore set forth which caused said principal debtor to become bankrupt, as a consequence of which plaintiffs were also damaged in said amount of $7,415.01."

Furthermore, plaintiff alleged (paragraph XXV): "Because of all the matters and things herein set forth plaintiffs' lawful distributable share of said estate was wrongfully reduced in the amounts set forth as aforesaid, all directly and proximately because of the various wrongs of defendant, because of which plaintiffs are entitled to recover of the defendant for the wrongful conversion of estate assets as aforesaid and for the wasting and dissipation thereof the total sum of $85,202.82," for which judgment is prayed.

Defendant, as stated on former appeal, by answer denied the Winston Manufacturing Company was solvent at the time it qualified as administrator. It averred that it attempted to straighten out the business but that conditions of the plants, its accounts, books and records were such that the company failed, notwithstanding the good business management provided by defendant; that the defendant at all times and in all things acted in good faith and in the best interests of the estate and that it was not guilty of mismanagement in any particular.

And defendant, after having first obtained leave of court, for estoppel by judgment and *in pais*, on 23 January, 1956, filed amendment to its answer by averring the following:

"1. On the 8th day of July,1953, there was instituted in the Superior Court of Forsyth County, North Carolina, a special proceeding entitled: THE FIRST NATIONAL BANK OF WINSTON-SALEM, Administrator of the Estate of N. S. POINDEXTER, Deceased, PETITIONER, VS. MRS. MARY PASCHALL CREWS POINDEXTER and MARY ELIZABETH POINDEXTER, RESPONDENTS," for the purpose of obtaining authority to sell real estate belonging to the estate of N. S. Poindexter, the deceased husband of Mary Paschall Crews Poindexter, and father of Mary Elizabeth Poindexter, to make assets to pay debts of said N. S. Poindexter, deceased.

"2. In that proceeding Mrs. Mary Paschall Crews Poindexter and Mary Elizabeth Poindexter, who was the daughter of Mrs. Mary Paschall Crews Poindexter and N. S. Poindexter, deceased, were duly served with summons and thereby brought into said cause as respondents.

"3. In the petition filed in that cause the petitioner alleged that the personal property belonging to the estate of N. S. Poindexter, deceased, was insufficient to pay the debts of said estate and in listing the known debts then outstanding against the said estate there was included an item of indebtedness as follows: Note of Winston Manufacturing Company dated 7-8-51 in the amount of $13,750.00. Interest to 5-1-53 in the amount of $139.80. Endorsed by N. S. Poindexter and Mary Crews Poindexter—$13,889.80, and said petition is asked to be taken as a

part of this paragraph of this amendment to the answer of the defendant heretofore filed in this cause as though copied verbatim herein.

"4. On the 13th day of August, 1953, the respondents in that proceeding, Mrs. Mary Paschall Crews Poindexter and Mary Elizabeth Poindexter, filed a verified response to the petition previously filed in said proceeding by the petitioner, in which response it was admitted that the item of indebtedness above referred to in the total sum of $13,889.80 as evidenced by promissory note dated 7-8-51 was an outstanding item of indebtedness against the estate of N. S. Poindexter, deceased, and likewise admitted that the indebtedness outstanding against the estate of N. S. Poindexter, deceased, amounted to more than the value of the personal property belonging to said estate, that it was necessary that the real estate belonging to said estate be sold to pay debts of said estate and the respondents joined in the petition of the petitioner and requested that the land described in said petition be sold at private sale subject to confirmation of court. The response of Mrs. Mary Paschall Crews Poindexter and Mary Elizabeth Poindexter herein referred to is asked to be taken as a part of this paragraph of the amendment to the answer of the defendant as though fully written herein.

"5. On the 13th day of August, 1953, the court, based upon the petition and the response herein referred to, entered an order in which the court found the following facts: (A) That at that time the known debts of the estate of N. S. Poindexter, deceased, amounted to $20,344.67. (B) That the personal property belonging to said estate amounted to $436.98. (C) That the personal property belonging to said estate was insufficient to satisfy the debts against said estate and cost of the administration. (D) That it was necessary that the real estate belonging to the estate of N. S. Poindexter and described in said order be sold to pay debts against said estate. (E) That it was for the best interests of the estate of N. S. Poindexter, deceased, and the heirs of said estate to sell at private sale the real estate above referred to and described in said order. (F) That the widow of N. S. Poindexter, deceased, Mary Paschall Crews Poindexter, had waived or released her dower right in said real estate. (G) That the heirs designated in said orders were over the age of twenty-one (21) years and *sui juris*. (H) That all of said heirs had been properly served with summons in that special proceeding and that they had filed an answer in said proceeding in which they admitted the facts set forth in the petition, joined the petitioner in seeking an order of court to sell said real estate at private sale and affirmatively alleged that the petitioner was entitled to the relief prayed for in the petition.

"6. Based upon the findings of fact by the court in said order, the court proceeded to make the following adjudication: (a) That a sale of the real estate described in said order was necessary for the payment of the debts of the estate of N. S. Poindexter and cost of the administration. (b) That the First National Bank of Winston-Salem, Administrator of the Estate of N. S. Poindexter, deceased, be, and it is hereby authorized, empowered and directed to sell said real estate at private sale free of the dower rights of Mrs. Mary Paschall Crews Poindexter but subject to the approval of the court and subject to the 1953 taxes.

"The defendant in this cause asks that the order above referred to be taken as a part of this amendment to its answer as though fully written herein.

"7. On the 27th day of August, 1953, the petitioner in the special proceeding herein referred to filed in said proceeding a petition for confirmation of the private sale in which, among other things, it was reported to the court that Mary Elizabeth Poindexter had offered the petitioner the sum of $24,000.00 for the real estate described in said petition and recommended to the court that said offer be accepted and that it be authorized to sell said real estate to Mary Elizabeth Poindexter for the sum of $24,000.00.

"8. On the 27th day of August, 1953, and based upon the petition referred to in the preceding paragraph an order was entered by the court in which the petitioner in said proceeding was authorized and directed to sell to Mary Elizabeth Poindexter the real estate described in said order and hereinbefore referred to at the price of $24,000.00 and said order is asked to be taken as a part of this paragraph of this amendment as though fully written herein.

"9. Pursuant to the authority of court had and obtained in the special proceeding herein referred to and upon receipt of the purchase price of $24,000.00, the defendant in this cause proceeded to convey said real estate to Mary Elizabeth Poindexter by deed duly recorded in Deed Book 675, page 10, in the office of the the Register of Deeds of Forsyth County, North Carolina, and the conveyance to Mary Elizabeth Poindexter was made with the full knowledge, consent and approval of Mary Crews Poindexter.

"10. On the 28th day of September, 1953, the defendant in this cause filed its final account with the Clerk of the Superior Court of Forsyth County, North Carolina, showing the receipts had and disbursements made in connection with the administration of the estate of N. S. Poindexter, deceased, and one of the items listed in the list of disbursements made by it was the

payment of $14,029.60 in payment of the indebtedness and accrued interest on the note for $13,750.00 dated 7-8-51 hereinbefore referred to and after the filing and auditing of said final report the Clerk of the Superior Court of Forsyth County, North Carolina, entered on the 29th day of September, 1953, the following order of judgment: 'The foregoing and attached final report has been carefully examined and audited. From the report and evidence presented therewith, it is my opinion that, excepting disbursements for the purchase of investments, all disbursements shown therein are proper, that the report should be approved, and that the said representative should be discharged. I, therefore, hereby approve all disbursements shown in the said report, except disbursements for the purchase of investments, approve the settlement of all matters as shown in said report, and discharge the said representative from further duties or liabilities. Therefore, let the report with this certificate be recorded.'

"11. The plaintiffs in this cause had full opportunity in the special proceeding herein referred to to plead all of the matters and things now involved in this cause and to have adjudicated in that proceeding all the rights between the plaintiffs and the defendant in this cause, but the plaintiffs in this cause, who were the respondents in the special proceeding herein referred to, neglected to raise the questions of which they now complain in this cause and on the other hand admitted the material allegations of the petition filed in said special proceeding and joined with the petitioner in asking the court to grant to the petitioner the authority prayed for in the petition.

"12. The said special proceeding and the order and confirmation of sale as well as the conduct of the defendant therein constitute an estoppel both *in pais* and by judgment, and such estoppel is hereby pleaded in bar of this action."

On 22 October, 1953, the defendant by way of estoppel, after having first obtained leave of court, filed further amendment to its answer by alleging the following:

"1. That, if the defendant did not have authority to continue to hold the stocks of Winston Manufacturing Company and Winston Manufacturing Company of Hickory, Inc., the plaintiffs and each of them had full knowledge of the fact that the said stocks were held and that the said businesses were continued, and acquiesced and consented to the holding of said stock and such operation, and they are estopped by reason of the said knowledge, consent, and acquiescence to assert any alleged lack of authority and any alleged misconduct of the defendant in permitting the said businesses to be continued."

The case was submitted to the jury upon these issues, which the jury answered as indicated:

"1. Did the defendant, The First National Bank of Winston-Salem, wrongfully or negligently administer the Estate of N. S. Poindexter, deceased, as alleged in the complaint? Answer: 'Yes.'

"2. If so, are the plaintiffs, or either of them, estopped to claim damages by reason of the wrongful or negligent conduct of the defendant, the First National Bank of Winston-Salem? Answer: 'No.'

"3. What amount of damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: '$40,000.00.'"

To judgment in accordance therewith defendant excepts, and appeals to Supreme Court and assigns error.

Eugene H. Phillips for plaintiffs appellees.

McLennan & Surratt, Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant appellant.

WINBORNE, C. J.: The record and case on appeal here presented contains five hundred fourteen printed pages, in which there are seventy-nine assignments of error predicated upon one hundred twelve exceptions. And in brief filed in this Court defendant appellant states nine questions as involved on this appeal. However it appearing, upon consideration of the exceptions taken, assigned as error, that in the trial below there is prejudicial error for which a new trial must be granted, it is deemed expedient to advert only to some of them.

I. Assignment of error No. 71, based upon exception No. 104, is well taken. It is that the court erred in its charge on the first issue to differentiate between the numerous causes of action alleged by the plaintiffs, to state clearly the causes of action and the damages flowing therefrom, and to apply the law in each case to the evidence and other contentions of the parties in relation thereto as follows:

> "The defendant excepts to the failure of the court in its charge on the first issue to differentiate between and to state clearly the various causes of action of the plaintiffs and the alleged damages flowing therefrom. The complaint alleges primarily three elements of damage: (a) the loss of the value of 451 shares of the stock of Winston Manufacturing Company, (b) the failure to collect the note of Winston Manufacturing Company in the original principal amount of $13,750.00 secured by 983 shares of the capital stock of Winston Manufacturing Company of Hickory (Terry Crouch Furniture Shops), and (c) failure to collect the

alleged item of salary for the services of Nat S. Poindexter rendered prior to his death to Winston Manufacturing Company. The complaint further alleges that these losses arose from a variety of causes: (i) the lack of authority of the defendant to operate a business or businesses, (ii) the negligent operation of a business or businesses, (iii) the failure of the defendant to sell the stock of Winston Manufacturing Company or to attempt to sell it, (iv) the failure of the defendant in its banking department to offset the note for $13,750 against deposits of Winston Manufacturing Company, (v) the failure of the defendant to apply monies received by Winston Manufacturing Company from the sale of the assets of Winston Manufacturing Company of Hickory to the discharge of the note for $13,750, (vi) the negligent failure of the defendant to collect the salary item, (vii) the failure of the defendant to close and liquidate the businesses. Thus, six or more separate causes of action were submitted by the court to the jury under the first issue. It was the duty of the court to differentiate between the separate causes of action and items of damages clearly, and to charge the jury as to each of them so that it could clearly apply the law to the facts and the contentions of the parties, which the court failed to do. The defendant therefore excepts to the failure of the court to submit the issues clearly to the jury, to charge the jury upon the law relating thereto, and to apply the law to the facts as required by law."

II. Defendant appellant excepts to that portion of the charge to the jury in which the court instructed "that if the jury find from the evidence the facts to be as all the evidence tends to show, that you will answer the second issue submitted to you in this case 'No'." Exception No. 100, assignment of error No. 68. In the light of the amendments to answer of defendant, and evidence in relation thereto, the exception is well taken.

Furthermore, defendant, in apt time, requested the court to instruct the jury on the second issue as follows:

"The defendant contends and has offered evidence tending to show that it commenced, on July 8, 1953, a special proceeding to sell lands owned by Poindexter at the date of his death to make assets to pay debts, that the petition prayed for a public sale, that the petition set forth the debts remaining unpaid, including the note of Winston Manufacturing Company for $13,750.00; that the plaintiffs employed an attorney who represented them in the proceedings; that the plaintiffs, through their attorney, re-

quested the defendant to amend its petition to pray for a sale at private sale; that an arrangement was worked out to get the bank to lend to the plaintiffs about $25,000.00 which was enough to pay all the debts of the estate including the $13,750.00 note, the costs of administration, and other items, and that the defendant then amended its petition to pray for a private sale to the plaintiff Mary Elizabeth Poindexter, the plaintiffs filed an answer admitting the allegations of the petition as amended, and joined in the prayer of the petition for the sale of the land; that an order of sale was entered finding the facts alleged in the petition and admitted in the answer; that sale was ordered, and, after the offer remained open for ten days, the sale to the plaintiff Mary Elizabeth Poindexter was confirmed; that the plaintiffs then knew the terms of the $13,750.00 note, the collateral security deposited with it, and the endorsements on it; that the sale was closed, a deed delivered to Mary Elizabeth Poindexter, and the purchase price was paid from the proceeds of the loan made by the defendant to her; that the note given for the loan had a maturity of one year which had been allowed to enable the plaintiffs to dispose of enough of the land to pay the debt; that it was agreed that a quitclaim deed or deeds would be given for lands sold within the one-year period if the proceeds were paid on the note, and that some of the land was sold, and quitclaimed, and the proceeds of sale were credited on the note within the one-year period."

Also "You may consider the contentions of the defendant and the evidence offered in support thereof relating to the special proceedings to sell land to make assets to pay debts in connection with the note of $13,750.00. If you find from the evidence and by its greater weight that the contentions of the defendant, which I have stated (paragraph 1) are true, the court charges you that the plaintiffs are estopped to allege any negligence or wrongful conduct of the defendant in connection with the $13,750.00 note, and you will answer that issue YES as to the note for $13,750.00."

These requests were refused, and defendant excepts, exceptions numbers 73 and 75, assignments of error numbers 41 and 43.

Considering the evidence in respect to the proceeding to sell land to make assets as described in defendant's plea of estoppel, the Court is of opinion and holds that defendant is entitled to the requested instruction, and the exceptions to the refusal thereof are well taken and valid.

In this connection the evidence offered, as shown in the record, appears to support the statement of contention, on which the request is based. It is clear that in the verified petition to sell lands to make assets it is alleged by the petitioner as a fact that the $13,750.00 note is a debt of the estate of N. S. Poindexter, and the respondents, his widow and daughter, in their answer, verified by both of them, admit that the note is such a debt.

Having made such solemn admission they are estopped in the present action to contend otherwise. *Armfield v. Moore,* 44 N.C. 157; *Crawford v. Crawford,* 214 N.C. 614, 200 S.E. 421; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Smith v. Furniture Co.,* 232 N.C. 412, 61 S.E. 2d, 96; *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d, 345; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d, 289; *Pemberton v. Lewis,* 243 N.C. 188, 90 S.E. 2d, 245, and cases cited.

In *Armfield v. Moore, supra,* Pearson, J., writing for the Court and referring to definition of estoppel, had this to say: "The meaning of which is, that when a fact has been agreed on or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed * * * In other words, his mouth is shut, and he shall not say, that is not true which he had before in a solemn manner asserted to be the truth." This is cited with approval in numerous cases, some of which are cited in the Crawford case.

Moreover, the essential fact to be found to enable an administrator to maintain a proceeding to sell land to make assets, G.S. 28-81, *et seq,* is the insufficiency of personal property to pay the debts of the decedent. Therefore there must be definite statements in the petition as to the amount of debts outstanding against the estate, and as to the personal estate, and the application therefor, to enable the court to see that there is such insufficiency of personal property. And the respondents, heirs at law, who are required to be made parties to the proceeding, have the right to plead any defense against a debt for which sale of the lands are to be made. *Smith v. Brown,* 101 N.C. 347, 7 S.E., 890; *Matthews v. Peterson,* 150 N.C. 134, 63 S.E. 721; *Alexander v. Galloway,* 239 N.C. 554, 80 S.E. 2d, 369.

And much more, *a fortiori,* if the respondents have the right to challenge the validity of such a debt, they have the right to admit the validity of it. Such admission becomes material to the proceeding. And when solemnly made in pleading it should be effective.

Indeed, as stated by this Court in *Craver v. Spaugh, supra,* opinion by Barnhill, J., later C. J., " 'It is a fundamental principle of jurisprudence that material facts or questions which

were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties * * * regardless of the form the issue may take in the subsequent action.' 30 A.J. 920." And, continuing, it is said: "This rule prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto. If the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it shall be considered as having settled that matter as to all future actions between the parties. 30 A.J. 929."

The Court is not unmindful of the decisions in the cases of *Latta v. Russ* (1860), 53 N.C. 111; *Austin v. Austin,* (1903), 132 N.C. 262; 43 S.E. 827; 95 A.S.R., 637; 128 A.L.R. 472, at 527, anno.; *Trust Co. v. Stone* (1918), 176 N.C. 270, 97 S.E. 8; *In re Gorham* (1919) 177 N.C. 271, 98 S.E. 717. But it is considered that they are distinguishable in factual situations from that in hand.

III. The fifth question, stated by appellant as involved on this appeal, is this: "Did the court err in failing to comply with G.S. 1-180 on the third issue relating to damages, and particularly by failing to state any measure of damages, by failing to state the evidence as to each element of damage and by failing to apply the law to the evidence?" This question is founded upon assignments of error 69, 73 and 74, which are based upon Exceptions 101, 106 and 107, respectively.

A reading of the charge indicates that this challenge to its correctness is properly directed.

Since there must be a new trial, it is deemed inexpedient to launch upon any extended discourse on the subject to which this question relates.

And, too, matters to which other questions raised and assignments of error entered relate may not then recur. Hence the opinion will not be unduly lengthened to no useful purpose. Nevertheless, let it be noted that further rights of the parties in respect to defendant's pleas of estoppel are reserved for consideration and determination by the court in the light of evidence to be adduced upon the new trial.

For errors pointed out there must be a

New trial.

DOUGLAS AIRCRAFT COMPANY, INC., A CORPORATION v. LOCAL UNION 379 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (A. F. OF L.) AND FLOYD HENDERSON, BUSINESS AGENT OF LOCAL UNION 379 OF I. B. E. W. (A. F. OF L.); AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL WORKERS, LOCAL UNION No. 413 (A. F. OF L.) AND J. E. McELDUFF, BUSINESS AGENT OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL UNION No. 413 (A. F. OF L.).

(Filed 31 January, 1958.)

1. **Master and Servant § 2e—**

Employees or those seeking employment have the right in this State to picket in an orderly and peaceful manner the employer's place of business to secure the execution or performance of a contract not prohibited by law.

2. **Same—**

Orderly and peaceful picketing in an industry affecting interstate commerce to enforce the right to collective bargaining is guaranteed by Federal statute. 29 USCA 157.

3. **Appeal and Error § 50—**

In injunction proceedings, the findings of fact made by the trial judge are not conclusive, but such findings are nevertheless presumed correct and will be so treated in the absence of a showing to the contrary.

4. **Master and Servant § 2e—**

A firm awarded a contract by the Federal Government upon its low bid is not an employee of the United States, but is an independent contractor, and in the performance of the contract the United States is not an "employer" so as to render the Labor Management Relations Act inapplicable. 29 USCA 152(2).

5. **Same—**

G.S. 95, art. 10, is valid and does not impair any constitutional rights of employees, and therefore picketing for the purpose of forcing an employer to employ only union labor is for an unlawful purpose in this State. G.S. 95-79.

6. **Same: Injunctions § 4g—**

The power of courts of equity to enjoin picketing is not limited to preventing violence or a breach of the peace, but extends also to those instances where the picketing is to accomplish an unlawful or forbidden purpose, and an order which prohibits picketing intended to consummate a criminal act impairs no constitutional right.

7. **Injunctions § 4g—**

Injunction will lie to inhibit a criminal act when the act invades civil and property rights and no other adequate remedy is available, notwithstanding that the commission of the act would subject the perpetrator to criminal prosecution or make him liable for damages in an action in tort.

8. Constitutional Law § 1—

Although the United States and the individual states each have areas in which they may exercise supreme legislative authority, Congress may permit state action in any area in which the Federal authority is supreme.

9. Constitutional Law § 27: Master and Servant § 2e—

Problems growing out of labor-management relations which affect interstate commerce are governed by Federal law, and a state court may not issue an order at variance with Federal legislation as interpreted by the Supreme Court of the United States.

10. Master and Servant § 2e—

In an industry affecting interstate commerce within the purview of the Labor Management Relations Act, picketing by a labor union not certified as a representative of the employees of such concern for the purpose of forcing the employer to recognize or bargain with the union, is an unfair labor practice. 29 USCA 158(b).

11. Courts § 18—

The National Labor Relations Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce which is prohibited by the Federal Labor Management Relations Act, and no authority is given any state board or court in regard thereto, nor does the failure of the Board to act invest the courts with power to act in the premises.

12. Same—

Congress has expressly permitted action by the States, in the exercise of their discretion, to outlaw union or closed shop agreements in industries affecting commerce which are not governed by the Railway Labor Act.

13. Same—

The National Labor Relations Board has no authority to enforce the laws of this State, even though such laws are enacted pursuant to congressional authority and relate to matters over which Congress could exercise control.

14. Same: Master and Servant § 2e—

Where orderly and peaceful picketing is for the unlawful purpose of forcing an employer to breach our right to work law, G.S. 95-79, and also constitutes an unfair labor practice within the purview of the Federal Labor Management Relations Act, our State courts have no authority to issue a restraining order enjoining such picketing, since under the Federal decisions the Federal law exclusively pre-empts the field and removes the matter from the jurisdiction of the State courts.

APPEAL by defendants from *Moore (Dan K.), J.*, 19 July 1957 at Chambers, MECKLENBURG.

On application of plaintiff, a temporary restraining order issued by Judge Huskins enjoining defendants from picketing or interfering with plaintiff or its subcontractors. On the return day Judge Moore heard the evidence offered, made findings

of fact, and thereupon continued the restraining order until the final hearing on the issues raised by the pleadings.

As a basis for the restraining order the complaint alleged: Plaintiff, a Delaware corporation, has a place of business at Charlotte where it is engaged in manufacturing guided missiles under a contract with the United States. Defendants are unincorporated labor organizations and authorized representatives thereof. Plaintiff's plant is located on a tract containing 78 acres which is completely surrounded by a chain-link fence. Many of the processes used by plaintiff and its subcontractors and the manufactured products produced by plaintiff are classified by the Government as secret and are vital to the security of the United States. Plaintiff is responsible for safeguarding this information and the missiles and parts thereof produced on its Charlotte property. To provide the required secrecy plaintiff controls all entrances and exits to its grounds and supervises the movement of personnel within the area. On said tract are buildings occupied by other contractors performing work for the Government incidental to plaintiff's work, but plaintiff has exclusive responsibility for and control of all entrances to and exits from the grounds for security purposes. The Corps of Engineers of the Army entered into a contract with Boyd & Goforth, Inc., a construction firm, for the erection of buildings on the 78-acre tract. This contract is intended to facilitate the construction of guided missiles. No dispute exists between Boyd & Goforth and its employees. Defendants established a picket line at all the gates and entrances to the land occupied by plaintiff and its subcontractors. The picket lines carry signs or banners inscribed "UNFAIR TO BUILDING TRADES" without identifying the person or corporation so accused. There is no labor dispute between plaintiff or its subcontractors and their employees, and said picketing is not predicated on any controversy between them; but the picketing is the result of a conspiracy intended to compel plaintiff to deny admittance to the grounds by nonunion employees of Boyd & Goforth, thereby requiring Boyd & Goforth, as a condition to the performance of its contract with the Government, to confine its employment to members of defendant unions in violation of G.S. 95-78 *et seq.* As planned and anticipated by defendants, many of plaintiff's employees and many employees of its subcontractors have refused to cross the picket line established by defendants, and plaintiff has been hampered in the performance of its contract to supply the United States with guided missiles. Defendants had no legal right to picket plaintiff's property when no controversy existed between it and its employees. Defendant Henderson acknowledged this fact but stated that he proposed to cause as much

trouble as possible to force Boyd & Goforth to employ union labor.

Defendants filed an answer admitting the relationship of the parties and plaintiff's contract with the United States. They denied the allegations as to the cause for picketing. They allege that defendant unions had contracts with plaintiff for the performance of certain phases of the work done by plaintiff. They aver controversies arose between plaintiff and defendant unions with respect to these contracts, and the picketing was to force compliance by plaintiff with the provisions of the contracts between plaintiff and defendant unions. They further allege that Boyd & Goforth were discriminating against defendant unions in that it hired and employed nonunion members "for the sole reason that they were non-union, and did wrongfully and unlawfully encourage and influence the said employees not to join with defendant unions . . ." Defendants allege the picketing was peaceful, plaintiff was engaged in interstate commerce, and the National Labor Relations Board had exclusive jurisdiction of the controversy.

At the time fixed for the return of the temporary order, defendants moved to dismiss for that the court was without jurisdiction. This motion, treated as a demurrer, was overruled. Thereupon the court heard evidence both *parol* and by affidavit.

The court, on the evidence offered and the stipulations of the parties, found: (1) Plaintiff is an industry or business engaged in commerce within the meaning of that term as used in the Labor Management Relations Act of 1947. (29 U.S.C.A. 141 *et seq.*); (2) the facts stated in the complaint are true; (3) there has been no mass picketing, and the picketing has been peaceful. It was on these findings that the court continued the restraining order to the final hearing. Defendants excepted to the order and appealed.

Bell, Bradley, Gebhardt & DeLaney for plaintiff appellee.
William H. Booe for defendant appellants.

RODMAN, J. Defendants state the question presented by the appeal thus: "Does the Labor Management Relations Act place exclusive primary jurisdiction in the National Labor Relations Board and the Federal Courts of a suit by an employer, engaged in an activity affecting commerce within the contemplation of said act, for an injunction against peaceful picketing when the facts reasonably bring the controversy either within the section of the Act prohibiting such conduct or within the protective section of that Act?"

Defendants argue that the courts of North Carolina are without jurisdiction to proceed in this action for either of two reasons: (1) Defendants' conduct is unlawful and unfair, and because of its unfairness the courts of North Carolina are without authority to suppress such conduct; (2) defendants' conduct is lawful and the courts ought not to enjoin defendants from pursuing their legal rights.

It seems preferable first to consider and determine the validity of the second reason assigned. That reason, based on good morals, is sound in law. If it is also supported by the facts, there will be no necessity of determining whether the courts are deprived of authority to prevent conduct which the Legislature, in the exercise of its power, has declared unlawful, and Congress has said is unfair.

North Carolina has consistently recognized the rights of employees or those seeking employment to orderly and peacefully picket an employer's place of business to secure the execution or performance of a contract not prohibited by law. *S. v. Van Pelt,* 136 N.C. 633; *Citizens Co. v. Typographical Union,* 187 N.C. 42, 121 S.E. 31; *Hudson v. R. R.,* 242 N.C. 650, 89 S.E. 2d 441.

Such picketing to enforce the right to collective bargaining is, as to employees in an industry affecting interstate commerce, guaranteed by congressional statute, 29 U.S.C.A. 157.

Defendants' answer asserts the picketing was orderly, peaceful, and for a lawful purpose, *i.e.,* to compel compliance by plaintiff with the provisions of a lawful contract between the parties. The court heard the evidence offered, both *parol* and by affidavit. It found that the picketing was peaceful, but rejected the assertion that it was for a lawful purpose. To the contrary, the court found that the picketing was intended to force plaintiff to commit a forbidden act.

While the findings of fact made by the judge who heard the case are not conclusive; nevertheless, the presumption is that the findings so made are correct. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455; *Brown v. Candler,* 236 N.C. 576, 73 S.E. 2d 550; *Fremont v. Baker,* 236 N.C. 253, 72 S.E. 2d 666; *Banner v. Button Corporation,* 209 N.C. 697, 184 S.E. 508. Our review of the evidence does not disclose anything which leads us to conclude that the findings made by Judge Moore are in any manner incorrect. Hence, it follows that defendants are not justified in seeking to have the restraining order dismissed because their conduct was a mere exercise of a legal right.

We are, therefore, required to evaluate the other reason urged for dismissal, viz.: Defendants are entitled to have the

order vacated because their conduct, a violation of the criminal laws of North Carolina, was also an unfair labor practice as declared by the Congress of the United States.

An examination of applicable statutes and the interpretation of these statutes by the court charged with the responsibility of making the interpretation is necessary to find an answer to the question defendants propound.

Public policy has for many years required governmental needs to be supplied pursuant to contracts with low bidders ascertained by public advertisement. 10 U.S.C.A. Ch. 137, as reenacted 10 August 1956. North Carolina has for many years so provided. G.S. 143-129. Neither plaintiff nor Boyd & Goforth are employees of the government. They are independent contractors entitled to exercise their judgment as to the manner of performing their contracts. Hence we find no support for the assertion by plaintiff that the exclusion of the United States in the definition of "employer" in the Labor Management Relations Act of 1947 (29 U.S.C.A. 152(2)) makes that Act inapplicable to this case. True the United States is affected by the strike, but that is a mere incident. The strike, on the evidence, is intended to force plaintiff and Boyd & Goforth, who are employers, to submit to the demands of defendants.

Prior to 1947 orderly and peaceful picketing to induce an employer to limit employment to union members violated no law of the State of North Carolina. It was but the exercise of a legal right. Public policy did not condemn a contract so obtained. *S. v. Van Pelt, supra; Hudson v. R. R., supra.*

By Ch. 328, S.L. 1947, now Art. 10, Ch. 95, General Statutes, ratified 18 March 1947, the Legislature in emphatic language declared its public policy with respect to conditions incident to the right to employment. Sec. 2 of the Act (G.S. 95-79) provides:

"Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina."

The Act was promptly attacked as unconstitutional. This Court, by opinion filed 19 December 1947, held the Act a valid exercise of legislative authority. *S. v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860. In a companion case decided the same day it was

declared that a violation of this statute was a crime punishable as a misdemeanor. *S. v. Bishop,* 228 N.C. 371, 45 S.E. 2d 858.

The decision of this Court in the Whitaker case was appealed to the Supreme Court of the United States. It was there argued and considered with a similar case from Nebraska. The Supreme Court of the United States held that the Legislature of North Carolina did not, by the enactment of the questioned statute, impair any constitutional right and affirmed the judgment of this Court. *Lincoln Fed. L. U. v. Northwestern I. & M.,* 335 U.S. 525, 93 L.Ed. 212.

As pointed out above, orderly and peaceful picketing to obtain a lawful result is but the exercise of constitutional rights and cannot be prohibited; but when picketing, for a lawful purpose, is such as to disturb the public peace, it can and has repeatedly been enjoined or otherwise punished. *Wood Turning Co. v. Wiggins,* 247 N.C. 115; *Citizens Co. v. Typographical Union, supra; S. v. Dalton,* 168 N.C. 204, 85 S.E. 693; *Youngdahl v. Rainfair,* decided 9 December 1957, 355 U.S. ....., 2 L.Ed. 2d 151; 78 S.Ct. ....; *United A. A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,* 351 U.S. 266, 100 L.Ed. 1162, 76 S.Ct. 794; *Allen-Bradley Local v. Wisconsin E. Rel Bd.,* 315 U.S. 740, 86 L.Ed. 1154.

But the power of a court of equity to enjoin is not exhausted merely because violence is not present. If the threat to destroy one's business by the picketing is to accomplish an unlawful and forbidden purpose, courts may enjoin unless forbidden by some controlling statute. *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, is an affirmance of that power as related to the statute here under consideration.

Devin, J., (later C. J.), speaking in *Transit Co. v. Coach Co.,* 228 N.C. 768, 47 S.E. 2d 297, said: "Wrongful acts, which may also be criminal, but which threaten injury to private property rights may invoke the aid of equity to prevent irreparable loss. The power of the courts to enjoin wrongful and injurious acts is not divested because such acts may also be in violation of the criminal law. 'Injunction will issue to inhibit a criminal act when the act invades civil or property rights and where there is no other adequate remedy available.' 43 C.J.S. 762; 28 A.J. 339. Particularly is this so where a public service is involved."

It is, we think, now authoritatively settled that an order which prohibits picketing intended to consummate a criminal act impairs no constitutional right. *International Brotherhood v. Vogt,* 354 U.S. 284 1 L. Ed. 2d 1347, 77 S.Ct. 1166.

The United States and the individual states each have areas in which they may exercise supreme legislative authority. Congress may, however, permit state action in any area in which its authority is supreme.

The problems growing out of labor-management relations which affect interstate commerce are unquestionably in the field in which Congress has supreme authority. If the order issued in this case runs counter to congressional legislation as interpreted by the Supreme Court of the United States it was, of course, improvidently issued.

As noted, North Carolina's statute, G.S. 95, Art. 10, was enacted on 18 March 1947. On 23 June 1947 important amendments to then existing Federal labor statutes became effective. Asserted to be important to the decision in this case are two provisions which were new to Federal labor policies. One amendment deals with unfair labor practices by labor organizations. The statute, 29 USCA 158, as amended, provides: "(b) It shall be an unfair labor practice for a labor organization or its agents — . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in . . . concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: . . . (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

The other amendment here important gave the states the right to prohibit union or closed shops even in those industries which affected commerce. 29 USCA 164(b): "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

On the facts found or admitted the defendants engaged in an unfair labor practice. The National Labor Relations Board is, by 29 USCA 160(a), empowered "to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." No authority is given a state board or state court to "prevent any person from engaging in any unfair labor practice." The mere fact that the body authorized by Congress to prevent unfair labor practices declines to exercise its jurisdiction does not invest the courts with the power to act. That has been authoritatively settled by the recent decisions of the Supreme Court of the United States. *Guss v. Utah L.R.B.*, 353 U.S. 1, 1 L.Ed. 2d 601, 77 S.Ct. 598; *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20, 1 L.Ed. 2d 613, 77 S.Ct. 604; *San Diego Bldg. Trades Council v. Garmon*, 1 L.Ed. 2d 618. These cases do not, however, seem to be conclusive of the problem presented to us. Mr. Chief Justice War-

ren, in the Guss case, said: "Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . affecting commerce.' By this language and by the definition of affecting commerce elsewhere in the Act Congress meant to reach to the full extent of its power under the commerce clause."

But Congress has definitely and specifically said that the States might, in the exercise of their discretion, outlaw union or closed shop agreements in industries affecting commerce. Did Congress intend to deny to a State the power to enforce a law which it permitted that State to enact? It is suggested that the State may effectively enforce its valid law by criminal process and the individual damaged by the wrongful conduct may have his remedy by an action in tort. See *United Constr. W. v. Laburnam Constr. Corp.*, 347 U.S. 656, 98 L.Ed. 1025, 74 S.Ct. 833; *San Diego Building Trades v. Garmon, supra* (at p. 620).

Congress, in its discretion, has drawn a distinction between differing instrumentalities affecting commerce. Employees of rail carriers may insist on the union shop, notwithstanding a State statute to the contrary. The paramount Federal statute so provides. 45 USCA 152. The distinction between employees of railways and employees in other businesses affecting commerce where the question of union shop was involved was noted in *Hudson v. R.R., supra.* It was there held that the union shop contract was, because of the Federal statute, permissible and valid. Writing on the same question, Mr. Justice Douglas, in *Railway Employes' Dept. A. F. L. v. Hanson,* 351 U.S. 225, 100 L.Ed. 1112, said: "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States. (citing cases) The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein.' . . . We agree with that view." Thus it appears that except for the amendment to the Railway Labor Act of 1951, any State could prohibit conduct such as defendants engaged in. *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.,* 336 U.S. 301, 93 L.Ed. 691.

The National Labor Relations Board has no authority to enforce the laws of North Carolina even though the laws are

enacted pursuant to congressional authority and relate to matters over which Congress could exercise control. Its authority is limited to enforcement of Federal laws. It seems patent to us that Congress did not intend to authorize a State to enact a statute and at the same moment prohibit it from enforcing the statute.

Restraining orders are not the only remedies available to compel obedience to a valid statute. Criminal process and tort actions for damages are also constantly used for this purpose.

A Pennsylvania statute declares: "It shall be an unfair labor practice for an employer— . . . By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization." That is also the language of the Federal statute, 29 USCA 158(3). The Pennsylvania statute likewise parallels the provisions of subsection (b) (2) of section 158 of the Federal statute. The Teamsters, Chauffeurs and Helpers A. F. L. picketed Garner to force him, as an employer, to violate the Pennsylvania statute. A lower court in Pennsylvania enjoined the picketing, which was peaceful. The Supreme Court of Pennsylvania reversed on the grounds that the field had been pre-empted by Congress. *Garner v. Teamsters, Chauffeurs and Helpers, Etc.*, 94 A. 2d 893. The Supreme Court of the United States affirmed the decision, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161. It will be noted that the statute there dealt with was not one expressly authorized by Congress but dealt with the same subject and in the identical language used by Congress. Mr. Justice Jackson, in affirming, said: "But when two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts. But experience gives no assurance of either alternative, and there is no indication that the statute left it open for such conflicts to arise. . . . Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit."

The Garner decision was followed in the spring of 1955 by *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L.Ed. 546, 75 S.Ct. 480. The Supreme Court reversed the Missouri Courts which had issued a restraining order enjoining picketing in violation of section 158(b) (4) (D) and in violation of Missouri's restraint-of-trade statute. See also *J. J. Newberry Co. v. Retail Clerks International Ass'n.*, 298 P. 2d 375, reversed, 352 U.S. 987, 1 L.Ed. 2d 367, 77 S.Ct. 386.

Neither the Garner case nor the Weber case dealt specifically with an act declared by Congress to be an unfair labor practice, and by a State law authorized by Congress, also defined as unlawful.

The question of the right of a State to enjoin conduct violative of State law authorized by Congress was directly presented to the Supreme Court of Tennessee in the case of *Farnsworth & Chambers Co. v. Local Union 429, Etc.*, 299 S.W. 2d 8. The decision was announced 8 February 1957. Justice Prewitt stated the question for determination thus: "The demurrers filed to the original and supplemental bill raises one issue, that is, whether the Courts of Tennessee have the power to enforce the right to work law, T.C.A. Sec. 50-208, or whether it was the intention of Congress in the enactment of the Labor Management Act, Taft-Hartley Law, 29 U.S.C.A. Sec. 141 *et seq.*, to so exclusively pre-empt the field of Labor Management Relations in interstate commerce as to remove the matter from the jurisdiction of the State Courts." After reviewing various decisions of the Supreme Court of the United States, including *Weber v. Anheuser-Busch, Inc., supra,* the Tennessee Court reached the conclusion that power remained in State courts to enforce its so-called right to work statute.

On 27 May 1957 the Supreme Court of the United States reversed the Supreme Court of Tennessee. It merely said: "The petition for writ of *certiorari* is granted and the judgment of the Supreme Court of Tennessee is reversed. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L.Ed. 546, 75 S.Ct. 480; *Garner v. Teamsters, etc. Union,* 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161."

We can draw no distinction between the facts in the Farnsworth case and the facts found by Judge Moore. The Court having final authority to ascertain congressional intent has declared the law. Upon that declaration of the law, the Superior Court was without authority to issue the restraining order. The judgment appealed from is

Reversed.

J. J. ARMENTROUT, ADMINISTRATOR OF SARA JANE YOW HUGHES, DECEASED v. W. R. HUGHES.

(Filed 31 January, 1958.)

1. **Death § 3—**

Right of action for wrongful death did not exist at common law, but is purely statutory, and our statute does not provide for the recovery of punitive damages or nominal damages, but limits recovery to the pecuniary loss resulting from the death.

2. **Death § 7—**

Where, in an action for wrongful death, defendant admits he wrongfully killed deceased, and the sole issue submitted is the issue of damages, plaintiff's contention that he is entitled to nominal damages at least which would entitle him to costs, G.S. 6-1, is untenable, and the court's charge limiting recovery to the pecuniary loss resulting from the death is without error.

3. **Same—**

In an action for wrongful death, the court properly excludes evidence which might excite the allowance of punitive damages, but which has no relevancy to the question of any pecuniary loss resulting from intestate's death.

4. **Same—**

The inventory of the estate of the decedent is not competent in an action for wrongful death when the inventory does not tend to establish any earning capacity of decedent at the time of his death.

PARKER, J., dissenting.

APPEAL by plaintiff from *Gwyn, J.*, February 1957 Civil Term of RANDOLPH.

Plaintiff seeks damages for the wrongful death of his intestate, defendant's wife, assaulted and killed by defendant. The complaint alleges deceased was 80 years of age, in good health, with a life expectancy in excess of five years.

Defendant admitted the killing, his conviction for murder, and prison sentence. He denied the deceased had any earning capacity. This issue was submitted to the jury: "What amount, if any, is plaintiff entitled to recover of the defendant?" The jury answered: "None." Judgment was signed adjudging that plaintiff recover nothing of defendant, and that costs be taxed to plaintiff. Plaintiff excepted and appealed.

Miller & Beck for plaintiff appellant.

Moser & Moser for defendant appellee.

RODMAN, J. The assignments of error raise questions as to the competency of evidence, the accuracy and propriety of the

charge, and the adjudication that plaintiff take nothing when, as a matter of law, he was, on the admissions made in the pleadings, entitled to at least nominal damages which would entitle him to costs. G.S. 6-1.

Basic to a decision of each assignment of error is the correct interpretation of our statute permitting recovery of damages for the wrongful death of another.

English common law, adopted as the law of our State, gave no right of action for damages for tortious killing of a human being. *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307. England, in 1846, authorized recoveries in such cases by the statute known as "Lord Campbell's Act."

Our Legislature, eight years later, enacted a statute modeled on the English statute, c. 39, Laws 1854, R.C. c. 1, s. 9 and 10. The statute then enacted is now, without material change, incorporated in our laws as G.S. 28-173, 174. The statute by express language limits recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." It does not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of pecuniary loss.

The English statute was interpreted by the Courts of *Exchequer in Duckworth v. Johnson*, decided 4 June 1859, 4 H & N 653, 157 Eng. Rep. 997. The case turned on the provision of the statute dealing with the amount of damages which could be recovered. *Pollock, C.B.*, said: "My opinion is that, looking at the act of parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." *Watson, B.*, said: "I am also of opinion that the rule ought to be discharged. On one part of the case I have no doubt, namely, that no action can be maintained under the 9 & 10 Vict. c. 93, unless the plaintiff proves actual damage. I am clearly of opinion that negligence alone, without damage, does not create a cause of action."

This interpretation has been adhered to by the English courts. *Du Parcq, L.J.*, in 1941, said: "If they bring an action and prove no loss, actual or prospective, the defendant is entitled to the verdict: see *Duckworth v. Johnson.*" *Yelland v. Powell Duffryn Associated Collieries*, Ld., 1 K.B. 519.

Our statute has from its passage been interpreted to accord with the interpretation given by the English courts to Lord Campbell's Act.

In 1867, *Reade, J.,* said in *Collier v. Arrington,* 61 N.C. 356: "The reason why, at common law, an action against a trespasser died with the person was, that it was not so much an action for pecuniary loss, as it was for a *solatium* for the wounded feelings of the plaintiff, and for the punishment of the defendant. But the plaintiff could not be solaced, nor the defendant punished after death. But our statute, which gives an action to the representative of a deceased party, who was injured or slain by a trespasser, confines the recovery to the amount of *pecuniary injury.* It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being; how much has the plaintiff lost by the death of the person injured?"

Speaking in 1872, *Justice Reade* said, in *Kesler v. Smith,* 66 N.C. 154: "The English statute (9-10 Vict. ch. 93) is substantially the same as ours. It is not precisely as definite as ours as to the rule of damages, inasmuch as our statute specifies "pecuniary injury," whereas the English statute also makes it the duty of the jury to apportion the damages among the beneficiaries, which ours does not.

"Although the English statute omits *pecuniary,* yet the rule of damages which the courts have laid down is 'the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.' We have carefully examined the English cases, and although the rule is not laid down in all of them in precisely these words, yet in substance it is; and the *rule* may now be said to be *settled* as above."

Devin, C. J., speaking in *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49, said: "So that the action for wrongful death exists only by virtue of this statute and the statutory provision must govern not only the right of action but also the rule for determining the basis and extent of recovery of damages therefor." See also *Russell v. Steamboat Co.,* 126 N.C. 961; *Gray v. Little,* 127 N.C. 304; *Carter v. R.R.,* 139 N.C. 499; *Poe v. R.R.,* 141 N.C. 525; *Speight v. R.R.,* 161 N.C. 80, 76 S.E. 684; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Caudle v. R.R.,* 242 N.C. 466, 88 S.E. 2d 138; Tiffany's Death by Wrongful Act (2nd ed.) s. 180.

We are aware of the divergent views held by courts of other states: some accord with our view and permit recovery only for pecuniary loss; others treat the act as vindicating a right and, by way of punishment, require the assessment of nominal damages. We adhere to the interpretation consistently accorded our statute.

Since plaintiff is not, as a matter of law, entitled to nominal damages, it follows that his exception and assignment of error to the judgment itself is without merit.

The court charged the jury: "If the plaintiff is entitled to recover at all, this is the formula and this is the standard by which you would measure any damages which the plaintiff is entitled to recover, and it would be your duty to award the plaintiff such amount and only such amount as the plaintiff has satisfied you from the evidence and by the greater weight thereof that he is entitled to recover according to this measurement . . ."

The court follows the quoted portion of his charge by a statement of the rule to which no exception is taken.

Plaintiff excepted the portion of the charge as quoted. The exception is without merit. The accuracy of the rule by which to measure is not challenged. The portion of the charge quoted is not an expression of opinion prohibited by statute. It is a correct statement of the law imposing on the jury the duty of determining from the evidence the pecuniary loss, if any, sustained.

The exceptions to the exclusion of evidence are likewise without merit. A description and interpretation of pictures of plaintiff's intestate, taken at a funeral home after she had been murdered, could not possibly have helped the jury in finding an answer to the question submitted to them but could have easily persuaded the jury to award punitive damages. Nor does an inventory of the estate, which merely shows that deceased owned a farm, had household effects, and money deposited with a building and loan association, without explanation of when or how she acquired these assets, assist the jury in answering the question propounded. *Cooper v. R.R.*, 140 N.C. 209. The inventory was admitted in *Hanks v. R.R.*, 230 N.C. 179, 52 S.E. 2d 717, because it showed a claim for salary owing, thus tending to establish an existing earning capacity. The inventory here offered gave no indication whatsoever of any earning capacity.

No Error.

PARKER, J., dissenting. This is an action to recover damages for death by wrongful act. The defendant in his answer admitted that he unlawfully killed plaintiff's intestate, that he pleaded guilty to second degree murder in the killing of plaintiff's intestate, and is now serving a sentence in the State Prison for such murder.

The judgment of the Court recites that "the parties, by their counsel of record, stipulated and agreed that the following issue only be submitted to the jury: What amount, if any, is the plain-

tiff entitled to recover of the defendant?" The jury answered the issue None.

Plaintiff assigns as error a part of the charge which in effect instructed the jury that plaintiff under the admitted facts here could not recover at least nominal damages.

The right of action to recover damages for death caused by wrongful act was first given in England in 1846 by the statute known as Lord Campbell's Act. Thereafter, statutes providing a remedy for such wrongful act causing death in one form or another were enacted in all, or practically all, of the states of this nation, as well as by the U. S. Congress, and the remedy has also been made available in the Philippine Islands and in Hawaii. 25 C.J.S., Death, Sec. 14.

This is written in 25 C.J.S., Death, Sec. 96: "According to the general current of American authority, where it appears in a statutory action for death that the death was caused by defendant's negligence, nominal damages may be recovered, although no actual pecuniary damage has been shown, but in some states the rule is otherwise."

These cases hold that nominal damages are recoverable in an action for wrongful death, even though no actual pecuniary damage be sustained, or none proved. *Battany v. Wall,* 232 Mass. 138, 122 N.E. 168; *Young v. Columbus & G. Ry. Co.,* 165 Miss. 287, 147 So. 342; *Rice v. Erie R. Co.,* 271 Pa. 180, 114 A. 640; *Yellow Cab Co. v. Maloaf,* 3 Tenn. App. 11; *Johnson v. McKnight,* 313 Ill. App. 260, 39 N.E. 2d 700; *Chapman v. Gulf M. & O. R. Co.,* 337 Ill. App. 611, 86 N.E. 2d 552; *Stroud v. Masek,* (Supreme Court of Missouri, Division No. 2), 262 S.W. 2d 47, 51; *Turon v. J. & L. Const. Co.,* 8 N.J. 543, 86 A. 2d 192, 200; *Swift & Co. v. Johnson,* (C.C.A. 8th), 138 F. 867, 1 L.R.A. (N.S.) 1161; *Atchison, T. & S. F. R. Co. v. Weber,* 33 Kan. 543, 551, 6 P. 877, 52 Am. Rep. 543; *Coal Co. v. Limb,* 47 Kan. 469, 471, 28 P. 181; *Jacksonville Electric Co. v. Bowden,* 54 Fla. 461, 45 So. 755, 15 L.R.A. (N.S.) 451; *Johnston v. Cleveland & T. R. Co.,* 7 Ohio St. 336, 70 Am. Dec. 75; *Fordyce v. McCants,* 51 Ark. 509, 11 S.W. 694, 4 L.R.A. 296, 14 Am. St. Rep. 69; *American R. Co. of Puerto Rico v. Santiago,* C.C.A. Puerto Rico, 9 F. 2d 753; *In re California Nav. & Imp. Co.* 110 Fed. 670; *Central of Georgia R. Co. v. Alexander,* 144 Ala. 257, 40 So. 424; *Alabama Mineral R. Co. v. Jones,* 121 Ala. 113, 25 So. 814; *Burk v. Arcata & M. R.R. Co.,* 125 Cal. 364, 57 P. 1065, 73 Am. St. Rep. 52; *S.A.L.R. Co. v. Moseley,* 60 Fla. 186, 53 So. 718; *Rhoads v. Chicago & A. R. Co.,* 227 Ill. 328, 81 N.E. 371, 11 L.R.A. (N.S.) 623, 10 Ann. Cas. 111 (Rehearing Denied 6 June 1907); *Grace & Hyde Co. v. Strong,* 224 Ill. 630, 79 N.E. 967; *North Chicago St. R. Co. v. Brodie,* 156 Ill. 317, 40 N.E. 942; *Korrady*

v. Lake Shore & M. S. Ry. Co., 131 Ind. 261, 29 N.E. 1069; *Mulchahey v. Washburn Car Wheel Co.*, 145 Mass. 281, 14 N.E. 106, 1 Am. St. Rep. 458; *Carter v. Wabash R. Co.*, 193 Mo. App. 223, 182 S.W. 1061; *Morgan v. Oronogo Circle Mining Co.*, 160 Mo. App. 99, 141 S.W. 735; *Birkett v. Knickerbocker Ice Co.*, 110 N.Y. 504, 18 N.E. 108; *Ihl v. Forty-Second St., Etc., Ferry R.R. Co.*, 47 N.Y. 317, 7 Am. Rep. 450; *In re Ray's Will*, 208 Misc. 617, 143 N.Y.S. 2d 447. See also 25 C.J.S., Damages, Sec. 10, p. 468; 15 Am. Jur., Damages, Secs. 6 and 8.

There is contrary authority in England, *Duckworth v. Johnson*, 4 H. & N. 653, 157 English Reports, Full Reprint, 997; *Franklin v. South Eastern R. Co.*, 3 H. & N. 211, 157 English Reports, Full Reprint, 448, 8 E.R.C. 419; *Boulter v. Webster*, 11 L. T. Rep. N.S. 598; and apparently in Canada, 17 C.J., Death, p. 1322, Note 57; and in the following States of the United States: *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N.W. 44; *Van Brunt v. Cincinnati R. Co.*, 78 Mich. 530, 44 N.W. 321; *Cooper v. Lake Shore, Etc., R. Co.*, 66 Mich. 261, 33 N.W. 306, 11 Am. St. Rep. 482; *McGown v. International, Etc., R. Co.*, 85 Tex. 289, 20 S.W. 80; *Lazelle v. Newfane*, 70 Vt. 440, 41 A. 511; *Woodcock's Adm'r. v. Hallock*, 98 Vt. 284, 127 A. 380; *Regan v. Chicago, Etc., R. Co.*, 51 Wis. 599, 8 N.W. 292.

This Court said in *Hicks v. Love* and *Bruton v. Love*, 201 N.C. 773, 161 S.E. 394: "It is finally insisted that there is no evidence that justified the recovery of damages, and that the judge should have told the jury that the plaintiff could recover only a nominal amount. This position seems to be based on the theory that there is no direct evidence of the earning capacity of the deceased or of his net income. Direct evidence is not essential. More than nominal damages are recoverable for the negligent killing of an infant without direct evidence of the pecuniary damage other than sex, age, and health. *Russell v. Steamboat Co.*, 126 N.C. 961; *Davis v. R.R.* 136 N.C. 115. In the present case the recovery cannot be restricted to nominal damages."

In my opinion, this Court in the above case, and in *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191, has set itself on record that nominal damages at least can be recovered in an action for wrongful death in North Carolina, which is in line with the general current of American authority. The majority opinion quotes from *Collier v. Arrington*, 61 N.C. 356; *Kesler v. Smith*, 66 N.C. 154; and *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49. Those cases discuss the rule as to the recovery of actual damages in such cases. They, and neither of them, consider or mention the recovery of nominal damages in such cases. Nothing said in any of them militates, in my opinion,

against what this Court said in *Hicks v. Love* and *Bruton v. Love* as to the recovery of nominal damages in cases of wrongful death.

This Court said in *Hairston v. Greyhound Corp.*, 220 N.C. 642, 644, 18 S.E. 2d 166: "Nominal damages, consisting of some trifling amount, are those recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation."

In *Bond v. Hilton*, 47 N.C. 149, *Nash, C.J.*, in a full discussion of nominal damages, wrote a scholarly and illuminating opinion for the Court, which I quote *in extenso:*

"Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss it gives nominal damages by way of declaring the right, upon the maxim, *ubi jus ibi remedium*. In *Ashby v. White*, 1 Salk., 19, Lord Holt declared that 'every injury imports a damage, though it does not cost the party a farthing.' This principle has been applied to a variety of cases where the plaintiff's recovery is in damages; thus, in an action for words spoken, where no actual damage has been sustained; so, a trespass to the person or to realty. A remarkable case as exemplifying this doctrine is that of *Taylor v. Henniker*, 12 A. & E., 488. There the action is in 'case,' brought by a tenant against his landlord for illegally distraining for more rent than was due; it appearing that the proceeds of the sale were insufficient to satisfy the rent actually in arrear, the jury found a verdict for one shilling; a motion was made on the part of the defendant for a nonsuit, which was denied. *Denman, Chief Justice*, said: 'There was a wrongful act of the defendant, and though by reason of the nature of the goods taken falling short of the actual rent due no real damage was sustained, yet there was a *legal damage* and cause of action, for which the plaintiff was entitled to a verdict.' In *Laflin v. Willard*, 16 Pick., 64, a sheriff had neglected to return an execution; the action was in 'case,' and the Court declared that though there was no actual damages proved, where there is a neglect of duty the law presumes damages, and the plaintiff was entitled to a verdict for nominal damages. In *Whittimore v. Cutter*, 1 Gal., 429, *Justice Story* says: 'We are of opinion that where the law gives an action for a particular act, the doing that act imports itself a damage to the party; every violation of a

right imports some damage, and if none other be proved, the law allows a nominal damage.' The rule that the invasion of a right gives, in all cases, a claim to nominal damages applies equally to matters of contract; thus, in an action brought against a banker for refusing payment of a check, although in funds, no actual damage being shown, the Court of King's Bench decided that the plaintiff was entitled to nominal damages; *Marzetti v. Williams,* 1 B. & A., 415. See Sedgwick Dam., 46. In every contract implying a duty to be performed, the neglect of that duty gives, in law, a cause of action to the opposite party, under the maxim *ubi jus ibi remedium;* and where the law gives an action it gives damages for the violated right, and if no actual damage be shown, then the plaintiff is entitled to nominal damages."

The recovery of nominal damages entitles the plaintiff to have the costs taxed against the defendant. Nominal damages have been described as "a peg on which to hang costs." *Hutton v. Cook,* 173 N.C. 496, 92 S.E. 355; 25 C.J.S., Damages, Sec. 5.

Upon the facts admitted in the defendant's answer, and upon the stipulation of the parties that only one issue, that of damages, should be submitted to the jury, the law infers some damage by the defendant to the plaintiff, and the judge, in my opinion, should have charged the jury that they should, at the least, award plaintiff nominal damages. In failing to do so, he deprived the plaintiff of a substantial right, because a recovery of nominal damages would have carried the costs against the defendant. The judgment taxes the plaintiff with the costs.

I am aware of *Wolfe v. Montgomery Ward & Co.,* 211 N.C. 295, 189 S.E. 772, the headnote of which in our Reports reads: "Where the jury finds that plaintiff was slandered but does not award damages, the failure of the court to instruct the jury that an affirmative answer to the issue entitles plaintiff to nominal damages at least does not entitle plaintiff to a new trial, but the judgment must be modified to adjudge nominal costs, C.S., 1241 (4), and affirmed, since the item of costs is too small to justify a new trial." The modification of the judgment in that case so as to tax nominal costs against the defendant was based upon C.S., 1241 (4), now G.S. 6-18 (4), which reads: "In an action for . . . slander . . . , if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages." In that case by virtue of the statute the recovery of costs would be trifling. In *Cohoon v. Cooper,* 186 N.C. 26, 118 S.E. 834, cited as an authority in the Wolfe case, the court reduced the verdict in the amount of 95 cents.

I have known several cases where the costs taxed against the losing party amounted to as much as one thousand dollars. *Tichborne v. Lushington* was, perhaps, the greatest ejectment suit ever tried in an English-speaking Court, and came on to be heard on 10 May 1871 at Westminster before *Sir W. Bovill, Lord Chief Justice* of the Court of Common Pleas. A brilliant array of barristers were employed, and witnesses came from the four quarters of the earth. Sir John Coleridge, afterwards Lord Chief Justice of England, led for the defense. On a cold February day he closed his speech for the defendant—a speech that lasted for twenty-five sittings of the Court, and was the longest speech ever made in a British court of law—with one of the most impressive perorations ever delivered by an English barrister. It cost the Tichborne estate over 96,000 pounds to defend the case. MacGregor's "The Tichborne Imposter," p. 169. When the ejectment suit ended unfavorably to the plaintiff, who was known as the claimant, he was indicted for perjury, convicted and sentenced to imprisonment. *The Queen v. Thomas Castro, otherwise Arthur Orton, otherwise Sir Roger Charles Doughty Tichborne, Baronet,* (1874) L.R., 9 Q.B. 350; same case in the House of Lords, (1881) L.R., 6 App. Cas. 229. The criminal trial began on 23 April 1873, and ended on 28 February 1874. It was the longest criminal trial in the history of the English law courts. Again witnesses came from the ends of the earth. Dr. Edward Vaughan Kenealy, barrister for the defendant, spoke for 21 days. Sir Henry Hawkins, one of the ablest barristers in the long history of the English Bar and afterwards a famous judge, who led for the Crown, spoke for some 12 days. The eminent *Lord Chief Justice, Sir Alexander Cockburn,* presiding—formerly a top flight barrister—, occupied 20 days in summing up the case for the jury. *Mellor* and *Lush, J J.,* who sat with the Lord Chief Justice, had full right to dissent from anything the Lord Chief Justice said, but did not, both agreeing with his summing up in its entirety. The summing up of the Lord Chief Justice was widely acclaimed by Bench and Bar. The cost of the criminal trial to England was 55,315 pounds. MacGregor's "The Tichborne Imposter," p. 188. I have mentioned the Tichborne cases to show that court costs may at times be enormous, and that the taxing of costs is a substantial right. I know of one case to settle a boundary line dispute involving a few acres of swamp land, when on the fourth and final jury trial in the Superior Court the real contest was not to win the land, but who should be taxed with the costs.

The majority opinion has adopted a view that represents distinctly a very small minority view among the courts of this nation. Upon the defendant's admissions in his answer and his

stipulation as to the issues to be submitted to the jury, the law infers some damage to the plaintiff. *Bond v. Hilton, supra.* And yet, because plaintiff could show no basis for the recovery of actual damages, he is taxed with the costs, and a majority of my brethren approve the action of the lower court. To that I cannot agree.

I think that the assignment of error to the charge above set forth deprives plaintiff of a substantial right, and entitles him to a new trial.

MRS. JAMES R. STAMEY, JR., ADMINISTRATRIX OF THE ESTATE OF JAMES R. STAMEY, JR., DECEASED, v. RUTHERFORDTON ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT, AND BRAWLEY CONSTRUCTION COMPANY, ADDITIONAL DEFENDANT.

(Filed 31 January, 1958.)

1. **Appeal and Error § 7—**

An appealing defendant may file in the Supreme Court a demurrer *ore tenus* to the complaint on the ground that plaintiff's pleading fails to state facts sufficient to constitute a cause of action.

2. **Pleadings § 19c—**

A demurrer admits as true the allegations of fact contained in the complaint, but does not admit inferences or conclusions of law.

3. **Same—**

While a complaint must be liberally construed upon demurrer, G.S. 1-151, the case must be taken as made by the complaint, and the court cannot read into it facts not therein stated.

4. **Negligence § 16—**

In an action for negligence it is not sufficient for plaintiff to allege merely conclusions of negligence and proximate cause, but it is required that plaintiff allege facts constituting the negligence charged and also facts which establish such negligence as the proximate cause or one of the proximate causes of the injury.

5. **Electricity § 7—Facts alleged held insufficient to establish that alleged negligence was proximate cause of the injury.**

This action was instituted to recover for the death of an employee of an independent contractor engaged in the stringing of wires under a contract with defendant electric company. The complaint alleged that while intestate was on a pole engaged in assisting with the stringing of a nonenergized line, one of the nonenergized wires came into contact with defendant's highly charged power line, resulting in intestate's death. *Held:* In the absence of allegations of fact as to how the nonenergized wire came into contact with the energized wire, the complaint is insufficient to establish that alleged acts of negligence on the part of defendant were the proximate cause or one of the proximate causes of intestate's death, and demurrer *ore tenus* is allowed in the Supreme Court.

6. Pleadings § 20½—

In an action for negligence, where the facts alleged are insufficient to establish the element of proximate cause, defendant's demurrer must be sustained without prejudice to plaintiff's right to move for leave to amend. G.S. 1-131.

APPEAL by defendant Rutherfordton Electric Membership Corporation from *Moore, Dan K., J.*, 3 June 1957, Schedule A, Regular Civil Term of MECKLENBURG.

The amended complaint alleges two causes of action. For a first cause of action plaintiff alleges that her intestate was injured on 22 February 1956 by the actionable negligence of the defendant, and she seeks to recover damages for his pain and suffering and hospital and medical expense from the date of injury to his death on 26 February 1956. In a second cause of action plaintiff seeks to recover damages for the alleged wrongful death of her intestate resulting from such injuries.

The appealing defendant filed answer substantially denying the allegations of the amended complaint, but admitting, however, that it did own and control the transmission line, that it employed Brawley Construction Company as an independent contractor to erect the poles and wires upon which plaintiff's intestate was working when injured, and that plaintiff's intestate was an employee and servant of Brawley Construction Company. The answer alleged five further answers and defenses: (1) contributory negligence on the part of plaintiff's intestate; (2) insulating negligence on the part of Brawley Construction Company; (3) that the North Carolina Workmen's Compensation Act, and its contract with Brawley Construction Company bar the right of plaintiff to maintain these actions against it; (4) a plea in bar of the claim of the Bituminous Casualty Company, the workmen's compensation carrier of Brawley Construction Company, by reason of alleged negligence on the part of Brawley Construction Company; and (5) a cross-action against Brawley Construction Company to the effect that if it be held liable to plaintiff, Brawley Construction Company is obligated to indemnify it.

Upon motion of the appealing defendant Brawley Construction Company was made a party defendant. Brawley Construction Company filed a demurrer to the cross-action against it.

Plaintiff made a motion to strike from the appealing defendant's answer, and from the record, all of its further answers and defenses and its cross-action against Brawley Construction Company, with the exception of the first further answer alleging contributory negligence on the part of plaintiff's intestate, paragraphs 2 and 3 of its prayer for relief, and the order of

the court making Brawley Construction Company a party defendant, the summons issued for that purpose, and the name of Brawley Construction Company.

Judge Moore allowed plaintiff's motion to strike from the appealing defendant's answer its third further answer and defense in its entirety, and all of its fifth further answer and defense and cross-action against the Brawley Construction Company, and vacated the order making Brawley Construction Company a party defendant, and dismissed it. Judge Moore also struck the word "active" out of the fourth further answer and defense. The remainder of plaintiff's motion to strike was denied.

To Judge Moore's failure to strike the appealing defendant's second and fourth further answers and defenses, the plaintiff objected and excepted.

To Judge Moore's order striking from its answer its third further answer and defense and its fifth further answer and defense and cross-action, and his vacating the order making Brawley Construction Company a party defendant, and dismissing it, the defendant Rutherfordton Electric Membership Corporation objected and excepted.

The Rutherfordton Electric Membership Corporation conceiving that Judge Moore's order striking allegations contained in its pleadings will be prejudicial to it on the final hearing of the action, pursuant to Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766, petitioned this Court for a writ of *certiorari* within thirty days from the date of the entry of Judge Moore's order. On 4 September 1957 we allowed the petition.

Carpenter & Webb for Defendant, Appellant.

Carswell & Justice By James F. Justice and William H. Booe for Plaintiff, Appellee.

PARKER, J. In this Court the defendant Rutherfordton Electric Membership Corporation filed a demurrer *ore tenus* on the ground that the amended complaint does not state facts sufficient to constitute a cause of action. This it had a right to do. *Lamm v. Crumpler*, 233 N.C. 717, 65 S.E. 2d 336. Defendant reduced its demurrer *ore tenus* to writing, and specified the grounds of objection to the amended complaint as follows: One, the amended complaint fails to state facts as to how, or by what means, one of the nonenergized and dead wires, which plaintiff's intestate was on a pole erecting, came in contact with the defendant's energized and live and uninsulated power line, causing a high voltage of electricity to be transmitted therefrom

into the body of plaintiff's intestate proximately causing his injuries and death. Two, the amended complaint fails to state facts supporting the conclusion that defendant knew, or in the exercise of due care should have known, that at the time of plaintiff's intestate's injury its live transmission line was several feet from and in close proximity to the pole upon which plaintiff's intestate was working, "which was the first occasion the plaintiff's intestate had been in close proximity to the energized and live current line." Three, the amended complaint fails to state facts supporting the conclusion that defendant knew, or in the exercise of due and ordinary care should have known, the several matters alleged in sub-paragraphs (a) through (g) of paragraph 12 of each cause of action. Four, "while it affirmatively appears from the allegations of Paragraphs 5 and 6 of each cause of action that the plaintiff's intestate was the employee of an independent contractor doing work for this defendant, the Complaint does not set forth facts sufficient to bring the plaintiff's intestate within any exception to the general rule of law under which the defendant would not be liable to or responsible for employees of its independent contractor and the Complaint fails to set forth any facts from which it may be inferred that this defendant owed to the plaintiff or the plaintiff's intestate some legal duty, the breach of which proximately caused the injury to and death of the plaintiff's intestate."

The allegations of negligence against the defendant are verbatim in both causes of action stated in the amended complaint. This is a summary of the amended complaint's allegations necessary to be set forth in passing on defendant's demurrer *ore tenus:* Defendant, a North Carolina corporation, at the time complained of was operating a private electrical power corporation, electrical power poles, and lines for transmission and sale of electrical power and current for profit. Defendant owned and controlled a power substation near Lincolnton, and poles and power lines at other locations from the substation, for the purpose of transmission and sale of electric power and current for a distance of about 20 miles to a point, and at a place near the Lincolnton-Newton Highway, and thence in a northerly direction to other places. At the place in question defendant transmitted electrical power and current over its line to the extent of 7,200 volts. Defendant entered into an independent contract with Brawley Construction Company—hereafter called Brawley—to erect certain poles and nonenergized or dead lines for it on a new course, which passed near the energized and live power line of defendant at the place in question. Plaintiff's intestate was an employee and servant of Brawley, and at all times was keeping a proper lookout and exercising due care

for his own safety. Defendant had control and dominion over the power lines and poles, and property upon which they were located. About 3:00 o'clock p. m. on 22 February 1956 plaintiff's intestate was on one of the power line poles, and engaged in his duties as a groundman and employee for Brawley in the erection of the nonenergized power line. "The defendant corporation's energized and live and uninsulated power line containing approximately 7,200 volts was several feet from and in close proximity to the pole upon which plaintiff's intestate was working in connection with the erection of the nonenergized and 'dead' line, which was the first occasion the plaintiff's intestate had been in close proximity to the energized and 'live' current line, all of which was known or in the exercise of due care should have been known to the defendant corporation. On the occasion in question, while the plaintiff's intestate was on the pole engaged in assisting with the erection of the nonenergized and 'dead' line, one of the nonenergized and 'dead' wires came in contact with the defendant corporation's energized and 'live' and uninsulated power line, causing a high voltage of current and electricity to be transmitted from the defendant corporation's energized and 'live' and uninsulated wire into the body of the plaintiff's intestate which proximately caused and resulted in injuries to and the death of the plaintiff's intestate."

The allegations in paragraph 12 of each cause of action stated in the amended complaint are in exactly the same words. In these paragraphs plaintiff alleges that the injuries to, and death of, her intestate were proximately caused by the negligence of the appealing defendant, and sets forth the alleged negligence in nine sub-paragraphs, which are to this effect: Defendant negligently failed to cut off the high voltage of electrical current in its live wire, and negligently permitted its live wire to remain in an exposed condition, and uninsulated, in close proximity to the work being done by plaintiff's intestate as a groundman, and others, when it knew, or in the exercise of due care should have known, that this was highly dangerous under the existing conditions. Defendant negligently failed to place warning signs on its live wires, to give warning and notice of its live wire, and to guard its live wire, at the place where the nonenergized line was being constructed by plaintiff's intestate who was a groundman, and not an accomplished lineman, when it knew, or in the exercise of due care should have known, that the work of plaintiff's intestate was highly dangerous and unsafe under the existing conditions, and plaintiff's intestate was likely to come in contact with the live wire. Defendant negligently failed to erect and maintain a sufficient number of circuit-breaking switches, so that in the event of a contact with the live wire the safety

switches would kick off the current, when it knew, or in the exercise of due care should have known, that plaintiff's intestate working on the nonenergized line might be likely to come into contact with the live wire. Defendant negligently failed to turn over the premises along which the nonenergized line was being erected to the persons doing such work in a reasonably safe condition.

A demurrer to a complaint admits as true the allegations of fact therein stated, but does not admit any inferences or conclusions of law asserted by the pleader. *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568. G.S. 1-151 requires us to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. "On demurrer we take the case as made by the complaint," *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690, and cannot read into it facts that are not therein stated.

The Court said in *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193, speaking through *Johnson, J.:* "In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged."

The Court said in *Whitehead v. Telephone Co.,* 190 N.C. 197, 129 S.E. 602: "The bare statement, then, that the defendant's negligence was the proximate cause of the plaintiff's loss, unsupported by allegations of sufficient particularity to enable us to discover a causal relation between the negligent act and the loss is not sufficient. It is therefore essential that we ascertain from the complaint whether such causal relation is proximate or too remote to support the action."

The Court said in *Gillis v. Transit Corporation,* 193 N.C. 346, 137 S.E. 153: "An allegation of negligence must be sufficiently specific to give information of the particular acts complained of; a general allegation without such particularity does not set out the nature of plaintiff's demand sufficiently to enable the defendant to prepare his defense."

The complaint must show that the particular facts charged as negligence were the efficient and proximate cause, or one of such causes, of the injury of which the plaintiff complains. *Furtick v. Cotton Mills,* 217 N.C. 516, 8 S.E. 2d 597; *Moss v. Bowers,* 216 N.C. 546, 5 S.E. 2d 826; *Guthrie v. Gocking,* 214

N.C. 513, 199 S.E. 707; *Conley v. R.R.*, 109 N.C. 692, 14 S.E. 303; McIntosh, N. C. Practice and Procedure, Second Ed., Vol. I, Sec. 989; 65 C.J.S., Negligence, Sec. 188; 38 Am. Jur., Negligence, Sec. 264.

The amended complaint avers these facts: The defendant's live and uninsulated power line containing approximately 7,200 volts of electricity was several feet from the pole upon which plaintiff's intestate was working in connection with the erection of the nonenergized line, which was the first occasion plaintiff's intestate had been in close proximity to the live line. "While the plaintiff's intestate was on the pole engaged in assisting with the erection of the nonenergized and 'dead' line, one of the nonenergized and 'dead' wires came in contact with the defendant corporation's energized and 'live' and uninsulated power line, causing a high voltage of current and electricity to be transmitted" into the body of plaintiff's intestate proximately causing his death. The general allegations of paragraph 12 in each cause of action aver no facts which show how or why the nonenergized line upon which plaintiff's intestate was working came in contact with defendant's live wire, which was several feet away. Conceding, but not deciding, that the general allegations set forth in paragraph 12 of each cause of action stated in the amended complaint charge the defendant with negligence, there is nothing in the amended complaint to show that such alleged negligence proximately caused the injuries to, and the death of, plaintiff's intestate. Considering the amended complaint as a whole, and ignoring none of its charging parts, it is manifest that the efficient and proximate cause of the death of plaintiff's intestate was the nonenergized line coming into contact with defendant's live wire several feet away. The amended complaint contains no allegation of fact that the defendant did anything, even in the slightest degree, to cause the nonenergized line to come in contact with its live wire, and further the amended complaint avers no facts from which it can reasonably and fairly be inferred that the defendant did anything to cause the nonenergized line to come in contact with its live wire.

The mere fact that a pleader alleges that an act is one of negligence does not make it so. We can speculate that the nonenergized wire was caused to come in contact with the live wire, by reason of some act of the defendant, or of some other person having no connection with the defendant, or by some act of plaintiff's intestate, or by some freak of nature, but speculation cannot cure the insufficiency of the amended complaint. The defendant has the right to have set forth in the amended complaint a statement of facts constituting the negligence charged, and also a statement of the facts which establish such negligence

charged as the proximate cause, or as one of the proximate causes, of the injury and death complained of, sufficiently specific to inform it as to the nature of the action, so that it will not, without default on its part, lose the benefit of a complete defense, which it might possibly be in its power to make good but for the want of more definite information in the amended complaint. "It is necessary, in stating a cause of action, to set forth the duty which the defendant owed the plaintiff, as well as the manner in which the violation of that duty proximately contributed to the plaintiff's injury." *Parrish v. R.R.*, 221 N.C. 292, 20 S.E. 2d 299.

Plaintiff asserts in her brief that the allegations in the complaint in *Essick v. Lexington*, 232 N.C. 200, 60 S.E. 2d 106, are similar to the allegations in the instant case, and the Court there overruled the demurrer. The *Essick* case is readily distinguishable, for the complaint alleged: ". . . that the plaintiff's intestate was on top of the roof of the catwalk nailing down the capping while a fellow worker named David T. Smith was handing up the sections of capping through the uncovered portion of the center of the roof to the plaintiff's intestate, and that he handed up one section of said capping to plaintiff's intestate, and as the plaintiff's intestate pulled the said section through the uncovered portion of the roof, the said capping came in contact with an uninsulated portion of one of the high tension wires of the defendant, resulting in his electrocution and immediate death; and that the death of the plaintiff"s intestate was proximately caused by the carelessness and negligence of the defendants through their servants, agents and employees."

In our opinion, the demurrer *ore tenus* should be sustained, for the reason that the amended complaint considered in its entirety fails to allege a case of actionable negligence proximately causing the injury to, and death of, plaintiff's intestate, as set forth above. However, this is without prejudice to the plaintiff's right to move in the Superior Court for leave to amend her complaint under the provsions of G.S. 1-131.

The demurrer *ore tenus* to the amended complaint filed by the defendant in the Supreme Court is allowed. *Lamm v. Crumpler, supra.* The questions presented by our granting the defendant's petition for a writ of *certiorari* are not reached for decision.

Demurrer sustained.

MRS. RAYMOND ADAMS, DR. C. T. JOHNSON, H. D. JONES, AND MISS MARY McEACHERN v. FLORA MACDONALD COLLEGE, A CORPORATION.

(Filed 31 January, 1958.)

1. Pleadings § 19c—

Upon demurrer for failure of the complaint to state a cause of action, the pleading must be liberally construed to ascertain if, upon the facts alleged, plaintiffs have a cause of action.

2. Colleges § 2—

Where title to the property of a college is vested in the educational corporation, but the Presbyteries of the denomination are the beneficial owners thereof and control the college through trustees elected by them, the officers or the trustees of the corporation have no legal rights they may assert against the owning and controlling Presbyteries.

3. Same—

Where the Presbyteries of a denomination are the beneficial owners of the property of an educational corporation and in control thereof through trustees elected by them, the resolution of the Synod of the denomination directing the merger of the college with two other educational institutions is recommendatory only and in itself cannot constitute the basis of an action to enjoin such merger.

4. Same—

Where Presbyteries of a denomination direct three denominational colleges to merge, members of the board of trustees of one of such educational institutions cannot maintain an action to enjoin the merger on the ground that it was conditioned upon the merger of all three institutions and that one of such institutions had refused to join the merger, there being no allegation of any action undertaken or threatened towards the consummation of a merger which did not include all three institutions.

5. Injunctions § 1a—

Injunction will not lie to restrain a particular course of conduct which has neither been undertaken nor threatened.

6. Colleges § 2—

Whether denominational colleges should be maintained separately or should be merged is a question for the religious organizations owning and controlling such colleges and not for the courts.

7. Pleadings § 17—

G.S. 1-128 applies to all demurrers, written or oral, and if the grounds for demurrer are not distinctly specified, it may be disregarded.

8. Appeal and Error §§ 2, 7—

A defendant may demur *ore tenus* in the Supreme Court or the Court may take cognizance of the failure of the complaint to state a cause of action *ex mero motu.*

9. Appeal and Error § 7: Pleadings § 17—

If the demurrer in the lower court for failure of the complaint to state a cause of action fails to state the grounds therefor, but the demurrer *ore tenus* filed in the Supreme Court sufficiently specifies the grounds of objection, the deficiency is supplied.

10. Appeal and Error § 1—

Where the judgment of the lower court is correct, it will be affirmed irrespective of the grounds upon which the judgment was entered.

11. Pleadings § 20½—

Where the allegations of the complaint affirmatively disclose that plaintiff has no cause of action, the cause should be dismissed upon demurrer, but where there is a defective statement of a good cause of action, the complaint is subject to amendment, and the action should not be dismissed until time for obtaining leave to amend has expired. G.S. 1-131.

12. Injunctions § 8—

Where the complaint, in an action for a restraining order, contains a defective statement of a good cause of action, judgment sustaining demurrer should not dismiss the action, but should dissolve the temporary restraining order.

APPEAL by plaintiffs from judgment signed August 12, 1957, by *Nimocks, J.*, Presiding Judge of the Sixteenth Judicial District, in action pending in ROBESON Superior Court.

Plaintiffs' action is for an injunction "perpetually, permanently and forever enjoining the defendant, its trustees, officers, representatives, agents and employees from merging or consolidating . . . Flora Macdonald College with any other college or colleges or otherwise abandoning, abolishing or terminating . . . Flora Macdonald College and its maintenance and operation or in anywise interfering with or impairing the operation and expansion of said college."

On July 1, 1957, the date the action was instituted, Judge Nimocks, in accordance with plaintiffs' petition therefor, signed an *ex parte* temporary restraining order; also, an order that defendant appear before him on July 15, 1957, and show cause why the restraining order should not be continued until the trial.

At the hearing on July 15, 1957, the defendant appeared and demurred *ore tenus* to the complaint on the ground that it did not allege facts sufficient to constitute a cause of action.

The judgment entered by Judge Nimocks on August 12, 1957, from which plaintiffs appeal, (1) sustained defendant's said demurrer *ore tenus*, (2) dismissed the action, and (3) taxed plaintiffs with the costs.

Plaintiffs made the attached exhibits, which are alleged to be copies of the original charter and successive amendments thereof,

integral parts of the complaint. When so considered, the following are plaintiffs' pertinent factual allegations:

1. Defendant, a non-stock educational corporation, maintains and operates Flora Macdonald College, Red Springs, North Carolina.

2. Plaintiffs are members of defendant's board of trustees. In addition to their "official and fiduciary responsibility to said College," each plaintiff has made "financial contributions to said College," "has a personal . . . interest in said College and in the service it has rendered and is able to render, and has benefited by the operation of said College . . ."

3. According to its original charter (Private Laws of 1897, Ch. 210) the corporation was created "for the purpose of maintaining a school of high grade in the town of Red Springs, in the county of Robeson, for the intellectual, moral and religious development and training of young ladies, under the name and style of Red Springs Seminary." Provision was made for the management of its affairs by a board of trustees to be elected by Fayetteville Presbytery of the North Carolina Synod of the Presbyterian Church. It was provided (1) that "the board of trustees of said corporation shall not have the power to mortgage or sell any of the real estate belonging to the same, without first having obtained the consent and permission of Fayetteville Presbytery," and (2) that "all bequests and donations to the seminary shall be the property of Fayetteville Presbytery."

4. In 1903, the corporate name was changed from Red Springs Seminary to Southern Presbyterian College and Conservatory of Music, Inc., and the number of trustees was increased.

5. In 1907, the General Assembly (Private Laws of 1907, Ch. 121) enacted that Ch. 210, Private Laws of 1897, the original charter, "be amended so as to read as follows"; and the "Southern Presbyterian College and Conservatory of Music" was declared "to be a body politic and corporate" and a complete new charter for the corporation was provided. It was provided that "all property of every kind, both real and personal, now standing in the name of the trustees of Red Springs Seminary, or in the name of the trustees of the Southern Presbyterian College and Conservatory of Music, shall, by this act, and without further transfer, belong to and the title thereto be vested in this corporation." It was further provided that "the said corporation shall be controlled and governed by a board of trustees composed of twenty-four members, twelve of whom shall be elected by Fayetteville Presbytery and twelve by Orange Presbytery, of the Presbyterian Church in the United States: Provided, that by consent of the said two Presbyteries any other Presbytery or Presbyteries of the said church may be admitted into full par-

ticipation in the ownership, government and control of the said corporation without amendment to this charter; and the Presbyteries in control at the time of the admission of any other Presbytery may enlarge or diminish the number of trustees, and may by resolution prescribe the number to be elected by each governing Presbytery and the terms of office of such trustees." It was further provided that "the said corporation shall maintain and conduct, at some place in North Carolina, a college of high grade for the education of women."

6. In 1915, the 1907 charter was amended in two respects, viz.: (1) the corporate name was changed from Southern Presbyterian College and Conservatory of Music to Flora Macdonald College, and (2) it was provided "that the said Presbyteries (Fayetteville and Orange) may elect not more than six additional trustees who may or may not be residents of said Presbyteries, and if such additional trustees are elected, each of the controlling Presbyteries shall elect an equal number thereof."

7. Fayetteville, Orange and Wilmington Presbyteries "are now interested in said corporation and said college." (The nature and extent of the interest of Wilmington Presbytery is not alleged.)

8. "On July 13, 1955, the Presbyterian Synod of North Carolina, adopted a Resolution looking to the establishment of a Senior Co-educational College in the Eastern Section of North Carolina by the consolidation and merger of the said Flora Macdonald College, Peace College in Raleigh, North Carolina, and Presbyterian Junior College for Men in Maxton, North Carolina, . . . and by said Resolution the Synod called upon the Presbyteries of Fayetteville, Orange and Wilmington, to approve the Synod proposal of such a consolidated college and to direct the Trustees of the said Flora Macdonald College to merge or consolidate into the said educational corporation."

9. Thereafter, the Fayetteville, Orange and Wilmington Presbyteries, concurred in the Synod's said resolution relating to the merger or consolidation of said three colleges.

10. "The consideration and the only consideration" of and for the Synod's resolution and the concurrence of the three Presbyteries, so plaintiffs allege, "being the merger and the consolidation of the three said colleges into a single corporation and a single college."

11. "15. The plaintiffs are informed and believe, and they therefore allege, that Peace College will not join in said merger or consolidation and that Peace College has so acted and stated, and the plaintiffs allege that such action on the part of Peace College, and said fact that Peace College will not join in said merger or consolidation, invalidates the Synod's proposal and

resolution for the merger of the three said colleges and invalidates the concurrence in such proposal and resolution of each of the three said Presbyteries of Fayetteville, Orange and Wilmington, the sole consideration of and for said Synod resolution and of and for the three said concurring resolutions of the three said Presbyteries failing with Peace College out of said merger, said consideration being as aforesaid, for the three said colleges to merge into a single corporation and college, and the plaintiffs allege that because of such fact and such action on the part of Peace College, the defendant herein has no reason and no right, in law or in equity, to proceed or to undertake to proceed toward a merger with the termination of Flora Macdonald College thereby and that the defendant should not be permitted to do so."

12. "18. The plaintiffs are informed and they believe and they, therefore, allege that on June 26, 1957, the Presbyterian Synod of North Carolina adopted a resolution purporting to empower and direct the trustees of Flora Macdonald College, the trustees of Peace College, Inc., and the trustees of Presbyterian Junior College for Men, Inc., to proceed immediately with the execution of an Agreement of Consolidation which will accomplish the merger and consolidation of said three corporations into a single new corporation and take all other steps and execute all other documents which will aid or facilitate such merger and consolidation."

Plaintiffs assign the entry of said judgment as error.

Douglass & McMillan for the plaintiffs, appellants.

Smith, Leach, Anderson & Dorsett for defendant, appellee.

BOBBITT, J. The demurrer tests the sufficiency of the complaint. The rules applicable have been often stated and are well settled. *Pressly v. Walker*, 238 N.C. 732, 78 S.E. 2d 920, and cases cited. Our task is to determine whether plaintiffs, upon the *facts* alleged, liberally construed in their favor, have a cause of action.

The complaint and exhibits show that, while legal title to the property vests in defendant, the Fayetteville, Orange and Wilmington Presbyteries of the North Carolina Synod of the Presbyterian Church in the United States are the beneficial owners of defendant, and through trustees elected by them are in possession and control of its property and assets. As to this, plaintiffs' Exhibit D is explicit; and we find nothing in plaintiffs' allegations or exhibits in conflict therewith. No facts are alleged to support a contention that the defendant, its officers or trustees have any legal rights they may assert *against* the owning and controlling Presbyteries.

There is no need to determine whether the establishment, maintenance and operation of "a Senior Co-educational College in the Eastern Section of North Carolina" would be a material variance or departure from the provision in the 1907 charter that defendant "shall maintain and conduct, at some place in North Carolina, a college of high grade for the education of women." Should there be a properly authorized consolidation, the corporate powers of the consolidated corporation will be as set forth in its charter.

Plaintiffs are explicit in their allegations that the Fayetteville, Orange and Wilmington Presbyteries have authorized the consolidation of three colleges, to wit, Flora Macdonald, Peace and Presbyterian Junior. There is no allegation that the three Presbyteries have authorized the defendant to participate in any other consolidation.

Plaintiffs do allege, upon information and belief, that Peace will not join in the consolidation. If so, upon the facts alleged, the consolidation authorized by defendant's three controlling Presbyteries cannot be consummated; for defendant has no authority to enter any consolidation except a consolidation of Flora Macdonald, Peace and Presbyterian Junior colleges.

We advert to plaintiffs' allegation that the Synod on June 26, 1957, adopted a resolution "*purporting* to empower and direct" (Italics added) the trustees of Flora Macdonald, Peace and Presbyterian Junior colleges "to proceed immediately with the execution of an Agreement of Consolidation which will accomplish the merger and consolidation of said three corporations into a single new corporation . . ." Aside from the fact that this resolution, as alleged, refers solely to a consolidation of the *three* colleges, *the three Presbyteries*, not the Synod, own and control Flora Macdonald College. Upon the facts alleged, resolutions of the Synod are recommendatory, not authoritative.

Thus, upon the facts alleged, it appears: (1) the three controlling Presbyteries have authorized a consolidation that includes Peace as well as Flora Macdonald and Presbyterian Junior; (2) Peace will not join in the consolidation; and (3) defendant has no authority to enter into a consolidation agreement that does not include Peace. Hence, presently there is a deadlock.

Conceding plaintiffs' status as trustees would entitle them to enjoin a consolidation by defendant undertaken or threatened by its officers or by its trustees in violation of the authority conferred by the three Presbyteries, plaintiffs do not allege that defendant's officers or trustees have undertaken or threatened such action. Nor do plaintiffs allege that defendant's officers or trustees have undertaken or threatened any action whereby the

present operation of Flora Macdonald College will be discontinued. Indeed, plaintiffs, who as trustees presumably have knowledge of all relevant facts, make *no* allegations as to what, if anything, the officers or trustees of defendant have done.

In 43 C.J.S., Injunctions Sec. 21, this statement, apposite here, appears: ". . . an injunction will not lie to restrain one from doing what he is not attempting and does not intend to do . . ." Since the facts alleged disclose no unlawful action or threatened unlawful action by defendant's officers or trustees, the complaint fails to allege facts sufficient to constitute a cause of action.

Plaintiffs allege facts relating to the value of defendant's property, the adequacy of its financial support, its traditions and record of service, the interest and loyalty of its alumnae and friends, etc. Based thereon, they argue forcefully and eloquently that Flora Macdonald College should be allowed to operate at Red Springs, North Carolina, substantially as heretofore, without involvement, now or later, in any merger or consolidation that would materially affect the *status quo*. Suffice to say, whether the consolidation presently authorized or any other consolidation that may be authorized is wise or prudent is for determination by the three controlling Presbyteries, not by the court. The aid of the court may be invoked only to redress or to prevent injury caused or threatened by *unlawful* conduct.

Whether G.S. 55-171, 172 and 173, which relate expressly to the consolidation of "any two or more . . . educational . . . corporations not under the patronage and control of the State," have been repealed or superseded, in whole or in part, by the Business Corporation Act (Ch. 1371, Session Laws of 1955) or by the Non-Profit Corporation Act. (Ch. 1230, Session Laws of 1955), both effective on and after July 1, 1957, does not arise on this appeal.

If, as plaintiffs contend, defendant did not "distinctly specify the grounds of objection to the complaint," "it might well have been disregarded" by the court below. *Griffin v. Bank*, 205 N.C. 253, 171 S.E. 71. G.S. 1-128 applies to all demurrers, written or oral. *Seawell v. Cole*, 194 N.C. 546, 140 S.E. 85. But, as stated by Varser, J., in *Snipes v. Monds*, 190 N.C. 190, 129 S.E. 413: "Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus*, or the Court may raise the question *ex mero motu* that the complaint does not state a cause of action." Also, see G.S. 1-134; *Garrison v. Williams*, 150 N.C. 674, 64 S.E. 783, and cases cited.

Since defendant has sufficiently specified its grounds of objection to the complaint in its demurrer *ore tenus* filed in this Court, it becomes immaterial that the record does not show the grounds of objection, if any, presented to and considered by

Judge Nimocks. It appearing that the demurrer should be sustained, Judge Nimocks' ruling to that effect is affirmed.

However, we are constrained to hold that it was error to dismiss the action. Where there is a defective statement of a good cause of action, the complaint is subject to amendment; and the action should not be dismissed until the time for obtaining leave to amend has expired. G.S. 1-131. But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered. *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409, and cases cited. But a final judgment dismissing the action should be entered only if the allegations of the complaint *affirmatively disclose* that there is a defective cause of action, i.e., that the plaintiff has no cause of action against the defendant. *Scott v. Veneer Co.,* 240 N.C. 73, 81 S.E. 2d 146.

While, for the reasons stated, plaintiffs have not alleged facts sufficient to constitute a cause of action, yet it cannot be said that it appears affirmatively from the presently alleged facts that plaintiffs have no cause of action against the defendant. We do not intimate that there are facts, not presently alleged, which would be sufficient in law to constitute a cause of action. We simply hold that the procedure prescribed by G.S. 1-131 is applicable.

While it was error to dismiss the action, the judgment sustaining the demurrer should have dissolved the temporary restraining order. *Temple v. Watson,* 227 N.C. 242, 41 S.E. 2d 738. It is so ordered. *Rheinhardt v. Yancey,* 241 N.C. 184, 189, 84 S.E. 2d 655.

The result: The judgment, in respect of the sustaining of defendant's demurrer, is affirmed; but the portion of the judgment which dismisses the action and taxes plaintiffs with costs is reversed.

As to ruling on demurrer, judgment affirmed; as to dismissal of action, judgment reversed.

JAMES R. BARBOUR, JR., A CITIZEN AND TAXPAYER, FOR AND ON BEHALF OF RICHMOND COUNTY, v. RAYMOND W. GOODMAN, SHERIFF OF RICHMOND COUNTY, AND RAYMOND W. GOODMAN, INDIVIDUALLY.

(Filed 31 January, 1958.)

1. **Counties § 4—Tax collector held entitled to retain commission on prepayments of taxes, the county having ratified the transactions.**

The findings of fact were to the effect that the sheriff of a county was the tax collector thereof, G.S. 105-374, upon a 2 per cent commission, that the county commissioners appointed no prepayment tax

collector, that upon being sworn into office the sheriff was advised that the county auditor would receive prepayments on taxes for him and that he would sign the receipts, that the county auditor did receive and account for all prepayments of taxes, that the auditor turned over the tax books to the sheriff after receipt of all prepayments of taxes, and that the sheriff settled each year with the county for the entire tax levies, which settlement included commissions on prepayments of taxes as well as taxes collected by the sheriff, and which settlement was duly audited and found to be correct by the county auditor and tax supervisor. *Held:* The county is not entitled to recover of the sheriff the commissions paid him on prepayments of taxes, since the county commissioners could have appointed him collector of prepayments of taxes and by their actions ratified him in that position.

2. Same—

A sheriff who is tax collector of the county is entitled under G.S. 105-387(f) to fees for conducting tax sales and, after termination of his office as county tax collector, to fees for such sales made thereafter which constitute the completion of duty begun while in office as tax collector.

APPEAL by plaintiff from *Preyer, J.*, at June, 1957, Civil Term of RICHMOND.

Civil action brought by taxpayer of Richmond County to recover on behalf of the County alleged unearned fees and commissions paid to the County Tax Collector.

The action was brought under G.S. 128-10. Written demand was served upon the chairman of the Board of Commissioners to institute action for the fees and commissions. After the lapse of 60 days with no action being brought, the plaintiff instituted this action.

These are the items sought to be recovered on behalf of the County:

1. The sum of $15,491.00 paid by the County to the defendant as 2% commissions on prepayment taxes for the years 1951, 1952, 1953, and 1954. The prepayments were made direct to Mary Thomas Covington, County Auditor and Tax Supervisor, before the tax books were turned over each year to the defendant, Tax Collector.

2. The sum of $2,804.00 paid by the County as fees for conducting tax sales in 1952, 1953, and 1954, when it is alleged the County Fee Bill made no provision for such fees.

3. The sum of $1,166.00 as fees paid the defendant by the County for conducting tax sales in September, 1955, after the effective date of the County Salary Act, which allegedly terminated the fee system.

The defendant filed answer denying that the County is entitled to any refund.

The case was heard by the presiding Judge on waiver of jury trial. These are the controlling facts found by the Judge:

"4. The defendant was elected Sheriff of Richmond County in the General Election of 1950, served for a four-year term, and was re-elected in 1954 to serve for a second term of four years;

"5. That the Sheriff of Richmond County was on a fee basis from the time he was first elected until December 1, 1954, as fixed by Chapter 235 of the Session Laws of 1947, ratified March 5, 1947. That the defendant was on a salary basis after December 1, 1954, under Chapter 937 of the Session Laws of 1953, except that by Chapter 937 of the Session Laws of 1953, he was to continue as Tax Collector on taxes in his hands for collection until September 1, 1955.

"6. The Sheriff was the Tax Collector of Richmond County by virtue of G.S. 105-374 and gave bond in the amount of $15,000.00 on September 10, 1951, for the faithful performance of his duties of Tax Collector from September 10, 1951, through September 10, 1952, and gave renewal bonds, similar in amount and condition covering each succeeding year through the year ending September 10, 1955;

"7. That Mary Thomas Covington was Auditor and Tax Supervisor of Richmond County for each of the years 1951 through 1955 and she gave bond in the amount of $5,000.00 for each of the years 1951 through 1955, the condition of her bond being the faithful performance by her of her duties as Auditor and Tax Supervisor;

"8. The entire tax levy for each of the years 1951 through 1954 was charged to the defendant R. W. Goodman; all tax receipts for those years were issued in his name; Richmond County paid him two per cent (2%) commission on all taxes collected for the years 1951 through 1954 prior to his settlement and surrender of the tax books for each such year, including prepayments of taxes; the tax books were turned over to him on September 10th on each of these years 1951 through 1954, after all prepayments of taxes had been paid into the Auditor and Tax Supervisor's office; the Sheriff then collected current taxes and all such collections by him were paid by him into the office of the County Auditor and Tax Supervisor; the County Auditor and Tax Supervisor deposited to the credit of the governing body of Richmond County all taxes collected; thereafter the County paid the defendant two per cent (2%) commission on said tax collections for the years 1951 through 1954; the defendant did not withhold any taxes;

"9. All prepayments of taxes were made to the County Auditor and Tax Supervisor, but the minutes of the meetings of the County Commissioners show no order designating her as prepayment tax collector and show no order designating the defendant, nor anyone else, as prepayment tax collector; that the County Auditor and Tax Supervisor in the years 1951

through 1955 did not turn over the tax books to the Sheriff until after the prepaid taxes had been paid into the office of the County Auditor and Tax Supervisor; that the County Auditor and Tax Supervisor deposited these prepayments to the credit of the County.

"10. For each of the years 1951 through 1954 the defendant filed a settlement and account with the County Commissioners before the tax books for the following year were turned over to him; that these accounts were audited and approved and the defendant was discharged as to each of these years; that the amounts paid to the defendant as commissioners on the amount of taxes prepaid to the County Auditor for the years 1951 through 1954 are set out in Exhibit "A" to the Complaint (total amount: $15,491.00); that the amounts paid to the defendant for conducting sales for delinquent taxes in the years 1952, 1953, 1954 and 1955 are as set out in Exhibit "B" of the Complaint (total amount: $2,804.00); that the County paid the Sheriff for conducting the tax sales at the rate of 50c per tract of land sold. This amount was part of the cost of the sale of the property and was recovered by the County when the land in question was redeemed from the sale or was resold by the County.

"11. It had been the custom and practice in Richmond County, at least since 1936, to pay the various Sheriffs, in succession, commissions on all taxes collected in any year prior to the Sheriff's settlement with the County for such year; and it had been the custom since at least 1936 for the County Auditor and Tax Supervisor to accept prepayments of taxes into that office, and for the Sheriff to be paid two per cent (2%) on those prepaid taxes;

"12. On the first Monday in December of 1950, when the defendant was sworn into office, he went to the meeting of the County Commissioners and requested advice as to what revenue he could expect in order that he might set up and budget the operations of his office so that he could determine how many deputies he could afford to employ; that the Chairman of the County Commissioners, Mr. N. Palmer Nicholson, and the County Auditor told him that he would receive two per cent (2%) commission upon all taxes collected in any year prior to his settlement with the County for such year, which was in accordance with the established custom and practice of the County; *and that the Auditor would receive the prepayments on taxes for the defendant, and that the defendant would sign the receipts.* (Italics added.)

"13. The last delinquent tax sale made by the defendant was on September 5, 1955, and that his term as tax collector was terminated by statute effective from and after September 1, 1955; . . . the tax sale so made by the defendant on September

5, 1955, was made pursuant to advertisement by him prior to September 1, 1955. (Note: The total amount of fees here involved is $1,166.00)

"14. The defendant, in due time, fully and properly accounted to and settled with Richmond County for the entire tax levies charged to him for collection for the years 1951, 1952, 1953 and 1954, respectively; his settlement for each such levy has been duly audited and found to be correct by the County Auditor and Tax Supervisor; each such settlement, including the payment of commissions and fees to the defendant as shown in such settlement, was duly examined and approved by the Board of Commissioners and the defendant was duly discharged by the County from all liability by reason of the said tax levies having been so charged to him for collection."

Upon the facts found, the trial court made conclusions of law in part as follows:

"2. Section 6 of Chapter 235 of the Session Laws of 1947 provides that the Sheriff of Richmond County shall receive two per cent (2%) on all taxes collected by him other than Schedule "B" license taxes, of which he shall receive five per cent (5%). This statute contemplates the payment of commissions to the Sheriff on current taxes collected by him in money and does not authorize payment to the Sheriff of commissions on prepayments of taxes paid to another official who had been designated as Collector of tax prepayments under G.S. 105-378.

"3. Under Section 105-378 the County Commissioners were authorized to designate any county official to collect prepayments of taxes;

"4. The County Commissioners never explicitly designated any county official to collect prepayments of taxes, and that no formal order was ever entered in the Minutes of the County Commissioners designating any county official to collect these prepayments of taxes, but the Court concludes as a matter of law that by its failure to designate specifically any county official to collect prepayments under Section 105-378, and by its instructions (given by the Chairman of the Board) to the Sheriff as to the manner of collecting taxes and the payment of commissions, and by its acquiescence in the manner in which commissions were paid to the Sheriffs in the past years, the Board of Commissioners in effect designated the defendant as collector of prepayments of taxes under Section 105-378; (Note: The portion in parentheses above inserted for the purpose of clarification.)

"5. The Court concludes as a matter of law that the County Commissioners by approving the annual settlements of the defendant and in discharging him ratified the procedure followed in each such year by the defendant as Sheriff and Collector of prepayments on taxes and by the County Auditor and Tax

Supervisor *for him,* in the receipt and handling of prepayments on taxes and the payment to him and receipt by him of commissions thereon. There were no allegations of fraud or mistake made by the plaintiff in this case, and the Commissioners reaffirmed their action when this matter was brought to their attention as set out in Exhibit "A" in the Complaint (the plaintiff's demand that the action be instituted by the Board of Commissioners). The Court concludes as a matter of law that since the Board of Commissioners could ratify that which it might have authorized originally and since the County Commissioners could have appointed the Sheriff the collector of prepayments of taxes, the ratification of the above actions was within the authority of the Board of Commissioners, and the County is bound thereby; (Italics added.)

"6. That the fees paid to the defendant for conducting the tax sales for delinquent taxes for the years 1952 through 1954 were properly paid to the defendant under Sections 105-387(f) and 105-424 of the General Statutes.

"7. That the fees paid to the defendant for conducting the tax sale for delinquent taxes on September 5, 1955, were properly paid to the Sheriff under Section 105-387(f) and 105-424 of the General Statutes. The Court concludes as a matter of law that the Sheriff's office as tax collector terminated on September 1, 1955, and that he was no longer entitled to collect taxes after that date and no longer entitled to collect fees for sales of tax liens on real property for failure to collect taxes after that date, but the Court further concludes as a matter of law that, though he was not in office as tax collector on the date of the sale, that he was finishing an uncompleted duty incurred while in office and was entitled to payment therefor."

Judgment was entered by the court decreeing that nothing be recovered of the defendant. From the judgment so entered, the plaintiff appeals.

Jones & Jones for plaintiff, appellant.

Pittman, Webb & Lee and Fletcher & Lake for defendant, appellee.

JOHNSON, J. A careful study of the plaintiff's exceptions and supporting arguments discloses neither prejudicial nor reversible error. For the reasons stated in the foregoing conclusions of Judge Preyer, who heard the case below, we think the judgment should be upheld: 20 C.J.S., Counties, Sec. 101 p. 898, note 83; 14 Am. Jur., Counties, Sec. 32. See also *Suttle v. Doggett,* 87 N.C. 203. As to the services performed by the County Auditor

and Tax Supervisor, it is manifest that she was acting merely as agent of the defendant Tax Collector.

Affirmed.

THELMA INMAN, WIDOW OF HOWARD INMAN, DECEASED, v. L. A. MEARES T/A WHOLESALE DISTRIBUTORS, AND ST. PAUL MERCURY INDEMNITY COMPANY.

(Filed 31 January, 1958.)

1. **Abatement and Revival § 11: Master and Servant § 53b(1)—**

An employee filed claim for total temporary disability under G.S. 97-29. Some months thereafter he recovered from his disabling injury and returned to his employment, and was fatally injured in a compensable accident unconnected with the prior claim. *Held:* The claim for disability does not come within the proviso of G.S. 97-37, and the right to payments accrued at the time of the employee's death had vested and survives to his personal representative. The personal representative and not the widow must prosecute such claim.

2. **Appeal and Error § 41: Master and Servant § 55d—**

Where excluded documentary evidence is not a part of the record or before the court upon appeal from an award of the Industrial Commission, the court cannot find that the exclusion of such evidence was prejudicial.

APPEAL by defendants from *Mallard, J.*, at September Civil Term, 1957, of COLUMBUS.

Proceeding under Workmen's Compensation Act to determine liability of defendants on claim filed by Howard Inman, now deceased, for temporary total disability.

The jurisdictional facts are not disputed, and it was stipulated that Howard Inman on 18 October, 1954, was regularly employed by the defendant employer, and on that date sustained an injury by accident arising out of and in the course of his employment when he fell from a ladder, injuring his knee. Claim was filed by the employee, Howard Inman. However, he died 17 June, 1955, before the claim was heard. It was prosecuted thereafter by his widow.

These are among the facts found by the hearing Commissioner:

"2. That Howard Inman was temporarily totally disabled by reason of his injury from October 18, 1954, to June 13, 1955, at which time he returned to work for the defendant employer.

"3. That Howard Inman, the original plaintiff in this action, is now deceased, he having died on June 17, 1955, from causes disassociated with his injury in this case."

The hearing Commissioner concluded that Howard Inman as of the date of his death was due compensation at the rate of $30.00 per week from 18 October, 1954, to 13 June, 1955, for temporary total disability under the provisions of G.S. 97-29, and that such "compensation is therefore due and payable to his administratrix to be by her disbursed as provided by the Statutes of Distribution." An award was made in accordance with the foregoing conclusion. The defendants appealed to the Full Commission.

Pending the appeal, the death claim resulting from Howard Inman's injury of 15 June, 1955, was heard by a deputy Commissioner, who filed an opinion finding that Inman's death was compensable under the Workmen's Compensation Act. An award was entered 29 October, 1956, ordering payment of compensation to his widow and dependent children. No appeal was taken from this award, and payment under it was begun and has continued.

The defendants' exceptions in respect to the instant disability claim were overruled on appeal to the Full Commission, and the findings, conclusions, and award of the hearing Commissioner were affirmed.

From this decision, the defendants appealed to the Superior Court, where all their exceptions were overruled and the award was affirmed. From this latter ruling, the defendants appeal to this Court.

Poisson, Campbell & Marshall for defendants, appellants.
J. Bruce Eure for plaintiff, appellee.

JOHNSON, J. The determinative question presented for decision is this: Was the employee's right to compensation for temporary total disability under G.S. 97-29 a vested right which, upon his death from another accident found by the Industrial Commission to be compensable under G.S. 97-38, survived and became collectible by his personal representative?

We have no decision of this Court precisely decisive of the question. But by the weight of authority in other jurisdictions it is generally held that a claim for compensation which has accrued, but is unpaid, at the time of the death of the employee constitutes an asset of his estate, in the absence of any provision to the contrary. *Greenwood v. Luby*, 105 Conn. 398, 135 A. 578, 51 A.L.R. 1443; *Heuchert v. State Industrial Acc. Commission*, 168 Ore. 74, 121 P. 2d 453; *Western Indemnity Co. v. State In-*

dustrial Comm. 96 Okla. 100, 219 P. 147; *Roney v. Griffith Piano Co.*, 4 N.J. 31, 131 A. 686; *Parker v. Industrial Comm.* 87 Utah 468, 50 P. 2d 278. See also: 58 Am. Jur., Workmen's Compensation, Sec. 578; Annotations: 15 A.L.R. 821; 24 A.L.R. 441; 29 A.L.R. 1426; 51 A.L.R. 1446; 87 A.L.R. 864; 95 A.L.R. 254.

In *Greenwood v. Luby, supra,* the claim was for disability for a period immediately prior to the employee's death. There, as in the instant case, the employee had filed claim for compensation but died before the claim was determined. Thus, in the Greenwood case, as here, the question presented for decision was whether the accrued right to an award for compensation survived where application therefor had been made in the lifetime of the employee but death followed before the award was made. We quote from the Greenwood case: "In *Jackson v. Berlin Constr. Co.*, 93 Conn. 155, 157, 105 Atl. 326, we describe the relation, . . . of the employee to compensation which is paid to him for his incapacity, or which has accrued but is unpaid in these words: 'It (the compensation) is paid to him because the statute intends to provide support for him during his period of incapacity. Whatever is paid him belongs to him. Whatever of compensation accrues in his lifetime and is unpaid becomes upon his decease an asset of his estate.' . . .

"The act thus vests in the employee the right to an award for the compensation provided by the act for him. The right arises by operation of law as soon as the incapacity for the statutory period exists, and it continues during the incapacity of the employee and only ends with his decease. If the award has been made, the accrued portion of it remaining unpaid belongs to his estate in accordance with the decisions quoted. If the right to compensation has accrued, it belongs to the employee, and his right to it survives to his estate, under General Statutes, Sec. 6177, which provides: 'No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of such decedent.' . . .

". . . The compensation accrued before the workman deceased, his right to it had vested, hence it survived to his estate."

In *Roney v. Griffith Piano Co., supra,* the employee died before an award was finally made. Held: "It seems that no compensation has been paid in this case, and it is urged by respondent appellant that, as the petitioner has died there is now no person to whom any compensation is properly payable. The authorities cited in support of this view do not sustain that contention. On the contrary, the law is settled that the personal representative

of the deceased is entitled to the compensation which had accrued up to the date of death of the petitioner."

In *Parker v. Industrial Comm., supra,* the employee was awarded compensation for an injury. Before any payments were made the employee died. The question for decision was whether the administratrix was entitled to the accrued payments. Held: "The payment of compensation is, in a sense, a disability wage, and is earned by operation of law. The conditions making it payable all pertaining, the employee is entitled to it just as much as he is entitled to wages earned by contract. As disability payments are 'earned,' they become vested, and if the employee dies before they are paid, his estate is entitled to them."

In *Heuchert v. State Industrial Acc. Commission, supra,* there was an award to the injured employee and the defendant appealed. The employee died before the appeal was heard and the personal representative was substituted. The question for decision was whether the claim survived to the employee's estate. Held: "The question here involved has been decided in a number of sister jurisdictions wherein it has been held that recovery may be had by the personal representative upon installments accruing during the life of the original claimant. . . . We think that the better reasoning and the weight of authority support the rule as above stated, namely: that unpaid installments accruing before the death of the employee thereafter may be recovered by the employee's personal representative. For that reason we have entered the order of substitution as requested by the administratrix of the estate of the original plaintiff. . . . The overwhelming weight of authority is to the effect that, in case of the employee's death from a cause disassociated from the injury sustained in the accident upon which such employee's claim is based, his personal representative may recover only the installments accruing while the employee was living. . . . The judgment of the circuit court is affirmed as effective in the substituted plaintiff's favor to the extent only of the installments accruing under the award while the original plaintiff, . . . was alive."

There is no provision in our Workmen's Compensation Act which takes the instant claim out of the general rule. True, G.S. 97-37, which provides that when an employee is entitled to compensation under G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, the right to collect any unpaid balance survives, but is subject to the proviso that there shall be no survival of the right to any unpaid compensation where death is due to a cause which is compensable under the Act and the dependents of the deceased are awarded death benefits. But here the challenged award was made

under G.S. 97-29, and this section is not subject to the limitation imposed by the proviso of G.S. 97-37. Here the employee had recovered from his disabling injury and had returned to work. His right to compensation had fully accrued at the time of his death. His claim, filed as it was before his death, rested on a vested right of recovery. This being so, the claim survived to his personal representative under the provisions of G.S. 28-172. This statute provides:

> "Action survives to and against representative.—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate."

Decision here reached is not at variance with the decision in *Butts v. Montague,* 204 N.C. 389, 168 S.E. 215, cited by the defendants. *Cf. Queen v. Fibre Co.,* 203 N.C. 94, 164 S.E. 752.

The defendants' third assignment of error relates to the ruling of the hearing Commissioner in excluding certain Federal tax returns of the defendant employer. The excluded returns not being a part of the record or before the court, Judge Mallard correctly ruled that the court could not "find that the exclusion" of the returns "was prejudical to the defendants." *In re Smith's Will,* 163 N.C. 464, 79 S.E. 977; *Fulwood v. Fulwood,* 161 N.C. 601, 77 S.E. 763.

It necessarily follows from what we have said that the award in favor of the estate of the deceased employee will be upheld. However, it is noted that the claim is being prosecuted in the name of Thelma Inman, widow. This being so, payment of the award will be held in abeyance until the widow, or some proper person, is appointed and qualifies as personal representative and is substituted as plaintiff-claimant herein. Therefore, the cause will be remanded to the Superior Court and from that court to the Industrial Commission, to the end that a duly qualified and acting personal representative of the deceased Howard Inman may be substituted as plaintiff-claimant. When this is done, let the award heretofore made by the Industrial Commission be paid to the personal representative.

Remanded.

TOWN OF MORGANTON v. HUTTON & BOURBONNAIS COMPANY.

(Filed 31 January, 1958.)

Appeal and Error § 55: Declaratory Judgment Act § 3: Parties § 3—

In an action under the Declaratory Judgment Act to determine whether plaintiff had acquired the fee or merely an easement by condemnation, it appeared that defendant was the owner of an undivided interest in the lands at the time of the condemnation, and whether such defendant had later acquired the interest of the other tenant in common depended upon the construction of the deed executed by such other tenant to defendant. *Held:* The cause must be remanded for the joinder of the cotenant as a necessary party, since the rights of the cotenant cannot be adjudicated or precluded without his joinder. G.S. 1-260.

APPEAL by defendant from *Pless, J.*, at March Civil Term, 1957, of BURKE.

Civil action under the Declaratory Judgment Act for adjudication of the title to a tract of land in Burke County containing 2,131.59 acres. The land was condemned by the plaintiff for a watershed in a proceeding instituted in 1922 and terminated in 1928.

The immediate controversy involves the question whether the plaintiff has the right to harvest and appropriate to its own use the matured, merchantable timber on the watershed property. The answer to the question hinges on whether the plaintiff acquired in the condemnation proceeding (1) a fee simple estate, (2) a perpetual easement which includes the right to harvest the timber, (3) a limited easement, with the fee simple interest in the land and the timber remaining in the original owners or their heirs and assigns, or (4) whether, in any event, the plaintiff is estopped to claim more than an easement, limited as above stated.

The case was heard by the presiding Judge on waiver of jury trial, and both sides offered evidence.

The Town of Morganton alleged in its petition in the condemnation proceeding that it was necessary for it to "acquire the lands" as a watershed so as to protect from contamination its water supply from Upper South Fork River, which is fed in part by streams on the lands in controversy.

The final judgment in the condemnation proceeding adjudges that the judgment "shall operate as a deed of conveyance and shall transfer, convey to and vest in the petitioner, the Town of Morganton, its successors and assigns, during its corporate existence the lands of the defendants sought to be condemned herein for the uses and purposes mentioned and set forth in the petition."

The pleadings in the condemnation proceeding disclose that Hutton & Bourbonnais Company owned only an undivided 29/60 interest in the tract of land. The owners of the other undivided interests were joined as defendants.

Hutton & Bourbonnais Company is the only defendant named in the instant action. The case was tried on the theory that Hutton & Bourbonnais Company had acquired whatever outstanding interests, if any, their former cotenants had in the lands after the condemnation proceeding was concluded in 1928. For the apparent purpose of showing this, the plaintiff offered in evidence a deed dated 31 March, 1930, made by the executors of George N. Hutton, deceased, and A. B. Hutton and wife to Hutton & Bourbonnais Company, Inc., conveying the former 27/60 interest of G. N. Hutton and the 4/60 interest of A. B. Hutton in eight tracts of land in Burke County. The first seven tracts described in the deed are outside the boundaries of the watershed tract now in controversy. The eighth tract is a larger tract which includes within its boundaries the watershed tract. Following the specific description, the deed contains these further provisions:

> "It is further understood that this conveyance is made with the understanding, that the State Asylum at Morganton, North Carolina, has acquired a portion of the land in this boundary *and that the Town or City of Morganton has acquired a portion of this land for a watershed and such acquired portions are not hereby conveyed, but are excepted from the boundary.* The purpose of this conveyance being to convey only the interest of the said George N. Hutton and A. B. Hutton in said boundary of land, subject to all valid and proper exceptions." (Italics added.)

At the conclusion of the hearing, the presiding Judge announced his decision in favor of the plaintiff. It was agreed by the parties that proposed findings of fact, conclusions of law, and judgment should be submitted to the court later, and that final judgment might be signed out of term and out of the district. At a later hearing, after the plaintiff had submitted its proposed findings, conclusions and judgment, the defendant moved the court to include in its judgment a finding, based on the exception in the foregoing deed made by the executors of George N. Hutton and others to the present defendant, that all parties who may have or claim an interest in the lands in controversy have not been made parties to the action as required by statute. The motion was denied and the defendant excepted. Thereupon, attorney Marshall V. Yount advised the court that he represented Mrs. Doris H. Councill, who as heir at law of

A. B. Hutton claimed an undivided interest in the lands. Thereupon the defendant moved the court that the cause be continued and that all parties claiming an interest in the lands, including in particular Mrs. Doris H. Councill, be made parties to the action. The motion was denied and the defendant excepted. The defendant then moved the court to declare a mistrial for the reason "that all persons who may have or claim an interest in the lands in controversy who would be affected by a declaratory judgment rendered at this terms . . . have not been made parties to this action. . . ." The motion was denied, and the defendant excepted.

Thereupon the court signed judgment as tendered by the plaintiff, decreeing that the plaintiff is the owner of the watershed lands in fee simple absolute. The judgment also contains an alternate decree that the plaintiff, in any event, has an estate which entitles it to harvest as its own, subject to public health regulations, the timber growing upon the property. From the judgment so entered, the defendant appeals.

Patrick & Harper, Charles D. Dixon, and Frank C. Patton for defendant, appellant.

Womble, Carlyle, Sandridge & Rice, John H. McMurray, Livingston Vernon, Sam J. Ervin, III, and H. L. Riddle, Jr. for plaintiff, appellee.

JOHNSON, J. On authority of the decision in *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E. 2d 869, and cases there cited, it is apparent that we have here a fatal defect of necessary parties. In the Edmondson case we had for construction a last will and testament. Here we have, among other questions, the interpretation and construction of a judgment and judgment roll in a condemnation proceeding. There appears to be no practical difference between the two cases so far as the question of parties is concerned.

Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court. *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491; *Edmondson v. Henderson, supra.*

The plaintiff argues with considerable cogency that the deed from the defendant's former cotenants, notwithstanding the exception clause contained therein, is sufficient in form when properly interpreted and construed to divest the grantors of all title and interest of every kind in the property. As to the question thus posed, we intimate no opinion, other than to say that the

heirs or those who have succeeded to the rights, if any, of the grantors are entitled to be heard on the question of interpretation and construction, and should be made parties to this action.

The Declaratory Judgment Act provides (G.S. 1-260) that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, . . ." True, this section of the statute goes on to say that "no declaration shall prejudice the rights of persons not parties to the proceeding." However, this latter portion of the statute ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. When, as here, decision requires the construction of formal legal documents, vitally affecting the rights of several persons, some parties to the action and some not, can it be said with assurances of verity that the lower court may proceed to adverse judgment and the appellate court to affirmation without prejudice to the rights of those not made parties? It suffices to say that when and if the absent parties should assert their rights in an independent action, they would be at grips with the doctrine of *stare decisis.*

The appellant brief filed here by Mrs. Doris Hutton Councill is not accordant with our rules of appellate procedure. Being unsupported by exception or appeal, her brief will be stricken from the file.

The case will be remanded for such further proceedings as the law directs and the rights of the parties require.

Remanded.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1958

ARTHUR M. DEBRUHL AND WIFE, JANIE W. DEBRUHL, PETITIONERS,
v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION,
RESPONDENT.

(Filed 26 February, 1958.)

1. **Eminent Domain § 1—**

Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation.

2. **Eminent Domain § 2—**

In taking private property by eminent domain by the State or a State agency it is required that just compensation therefor be paid under "the law of the land" clause of the State Constitution, Article I, Section 17, and under the "due process" clause of the 14th Amendment to the Federal Constitution.

3. **Eminent Domain § 8—**

Just compensation for the taking of private property under the power of eminent domain is the fair market value of the property condemned, determined as of the date of the taking, unaffected by any subsequent change in the condition of the property.

4. **Eminent Domain § 13—**

In a proceeding under G.S. 136-19 to recover just compensation for the taking of private property for highway purposes, petitioners ordinarily are entitled, as a matter of strict legal right, to have the jury award them, in addition to the sum the jury finds to be the fair market value of the property on the taking date, interest on such sum at the rate of 6 per cent from the date petitioners were physically dispossessed to the date of verdict, as an element of just compensation.

5. Eminent Domain § 9—

Where land is condemned for highway purposes, the value of the perpetual easement acquired by the condemnor is virtually the same as the value of the land, and the court should charge that petitioners are entitled to be awarded compensation in the fair market value of their property at the time of the taking. However, the instruction that petitioners were entitled to have the full equivalent of the value of the use rather than the value of the property as of the time of the taking, was not prejudicial under the facts of this case.

6. Eminent Domain § 18e—

In a proceeding to assess compensation for lands taken for highway purposes, an instruction charging the jury that petitioners are entitled to recover, in addition to the fair market value of the land on the date of taking, some additional amount to compensate for the delay in the payment of compensation, must be held for prejudicial error when the court fails to give the jury any standard or guide for the assessment of such additional sum.

7. Damages § 13a—

In charging upon the issue of damages, the court of its own motion and without request must charge the jury as to the rule they should follow in assessing each element of the damages. G.S. 1-180.

APPEAL by respondent from *Campbell, J.*, March-April 1957 Civil Term of BUNCOMBE as No. 98 at Fall Term 1957, carried over to Spring Term 1958.

Condemnation proceeding by the State Highway and Public Works Commission authorized by G.S. 136-19.

One issue, to the submission of which there is no exception by either party, was submitted to the jury. That issue is: "What amount are petitioners entitled to recover of respondent for the land, including that portion of the house and other improvements situate thereon, condemned by the respondent for highway purposes on the 7th day of May, 1952?" The jury answered the issue: $9,675.00.

From judgment in accord with the verdict respondent appeals.

George B. Patton, Attorney General, and R. Brookes Peters, Assistant Attorney General, and McLean, Gudger, Elmore & Martin, Associate Counsel for respondent, appellant.

Sanford W. Brown for petitioners, appellees.

PARKER, J. For the six years prior to 1948 petitioners were the owners of a lot on the south side of Druid Drive in the City of Asheville, fifty feet wide and about one hundred and forty-eight feet deep. Situate on the lot was a brick veneer house in which petitioners lived. Work for relocating and reconstructing U. S. Highways 19-23 through a section of West Asheville

was begun under Project 9075 for the first lane by respondent in 1948. For this purpose respondent in 1949 purchased from petitioners for $4,700.00 a right of way across the back portion of their lot and the back part of their house on the right of way.

Petitioners continued to live in their house. In March 1952 respondent began work for widening U. S. Highways 19-23 to dual lane highways under Project 9086. To do this it was necessary for respondent to acquire all the remaining part of petitioners' lot and all the remaining part of their house thereon. On 7 May 1952 the respondent in the exercise of its power of eminent domain appropriated all this remaining property of petitioners by going thereon and delivering to petitioners a copy of the letter and notice of condemnation, and erected a sign thereon reading: "This lot appropriated for highway purposes. SH&PWC, May 7, 1952." Petitioners continued to live in the house, until they were ejected therefrom and from the lot, under a court judgment in a proceeding brought by respondent for that purpose. In June or July 1952 respondent completely demolished the house. It would seem, though the evidence is not entirely clear, that the back portion of the house purchased by respondent in 1949, which was fifteen feet on the west side, and eleven feet on the east side, was not torn down until after 7 May 1952.

Petitioners and respondent being unable to agree upon the compensation justly owing to the petitioners for the taking under the power of eminent domain of their property by respondent, the petitioners on 24 November 1952 instituted a proceeding under the provisions of Ch. 40 of the General Statutes to recover just compensation. G.S. 136-19; *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479. In their petition, petitioners alleged that they were entitled to recover $22,800.00. Respondent in its answer denied that petitioners are entitled to recover that amount, but do not allege what amount they should recover.

Commissioners appointed by the Clerk of the Superior Court of Buncombe County reported to the court in August 1953 that compensation in the amount of $4,750.00 ought justly to be made to petitioners. Exceptions to the report were filed by respondent in August 1953, and by petitioners in September 1953. Pursuant to notice and motion, the Clerk on 30 September 1953 overruled the exceptions, and entered judgment confirming the report of the commissioners, and ordering that petitioners have and recover from respondent the sum of $4,750.00. Respondent in open court gave notice of appeal from the judgment, and demanded a jury trial. On 5 October 1953 the Clerk transferred the proceeding to the civil issue docket of Buncombe County.

At the 4 October 1954 Civil Term of the Superior Court of Buncombe County, Judge Dan K. Moore at a pre-trial conference ordered this one issue to be submitted to the jury: "What amount are petitioners entitled to recover of respondent for the land, excluding the house thereon, condemned for highway purposes on the 7th day of May 1952?" Petitioners excepted to the order, and appealed to the Supreme Court. In this Court the appeal was dismissed as premature, but without prejudice (1) to petitioners' exception to the order, or (2) to their rights in accordance with law and procedure in such cases. *DeBruhl v. Highway Commission,* 241 N.C. 616, 86 S.E. 2d 200.

The proceeding came on to be heard at the March Term 1956 of Buncombe County Superior Court before Judge P. C. Froneberger and a jury. At a pre-trial conference Judge Froneberger held that the issue settled by Judge Moore was correct. This issue was submitted to the jury, and it was answered by them $12,500.00. Judgment was entered on the verdict, and the respondent excepted, and appealed to the Supreme Court.

The appeal is reported in 245 N.C. 139, 95 S.E. 2d 553. Rodman, J., in concluding the opinion for the Court, said:

> "Since defendant did not acquire, in 1948 and 1949, any portion of the building or land lying outside the right of way conveyed to it, it follows that plaintiffs are entitled to be fairly compensated for the part of the house as well as the land taken by the Highway Commission. The amount to be paid must be determined upon an appropriate issue submitted at a time when both plaintiffs and defendant have an opportunity to submit evidence as to the value of the property so taken."

A new trial was ordered.

After the second appeal respondent by leave of court filed an amended answer, and an amended further answer, admitting, as held in the opinion, that it did not acquire in 1949 any portion of the house or lot lying outside the right of way it purchased from petitioners.

At the trial at the March-April 1957 Civil Term of the Buncombe County Superior Court, petitioners and respondent offered evidence tending to show the fair market value of the property when it was condemned by respondent on 7 May 1952.

Respondent assigns as error the part of the charge quoted below, which is in parentheses:

> "Now, the Court charges you that the respondent, that is the Highway Commission, had a right under the law to acquire this property, but in doing so the law forbids and prohibits the respondent, that is the Highway Commission, taking

the property of the petitioners other than by the law of the land, and pursuant thereto the Highway Commission is forbidden to take private property except upon paying just compensation for it, that is, paying the fair market value for the property, (the theory of such a case being that the obligation of the Highway Commission is to put the owners of the property in as good position pecuniarily, that is from a monetary standpoint, as if the use of their property had not been taken, so that the petitioners, the owners of the property, are entitled to have the full equivalent of the value of such use at the time of the taking, and to have that paid contemporaneously with the taking, so that the Court charges you) that while interest on the money is not involved, and the petitioners are not entitled to recover any interest on their property, (nevertheless you should take into consideration, and the Court charges you that you will take into consideration, the intervening delay since June, 1952, when the petitioners were deprived of their property; you will consider that delay up till this time, that is the time when the award is allowed, and you will affix your award accordingly, so that the petitioners will be made whole and will be compensated fully for their property which has been taken, based upon the fair market value of that property on May 7, 1952, when it was taken, together with the delay in actually awarding that money to them)."

"Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation." *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129.

Article I, Section 17, of the North Carolina Constitution states that no person ought to be in any manner deprived of his property, but by the law of the land. "The law of the land and due process of law are interchangeable terms." *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717.

Practically every State in the Union, North Carolina excepted, contains an express constitutional provision against the taking of private property for public use without the payment of just compensation. Jahr, Eminent Domain, Sec. 36. However, North Carolina recognizes this fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of the State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of

Article I, Section 17, of the State Constitution. *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *Proctor v. Highway Commission, supra; Sanders v. R. R.,* 216 N.C. 312, 4 S.E. 2d 902; *Ivester v. City of Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88.

Under the due process clause of the 14th Amendment to the United States Constitution no State can deprive an individual of his property without just compensation. *Delaware, L., & W. R. Co. v. Morristown,* 276 U.S. 182, 72 L. Ed. 523, 56 A.L.R. 756; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L. Ed. 322, 28 A.L.R. 1321. This amendment is a limitation on the powers of the States. *Sale v. Highway Commission, supra; Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563. It adds nothing to the rights of one citizen against another. It simply furnishes a guaranty against any encroachment by the State on the fundamental rights belonging to every citizen. *U. S. v. Cruikshank,* 92 U.S. 542, 554, 23 L. Ed. 588, 592. "The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of it exercise." *Long Island Water Supply Co. v. Brooklyn,* 166 U.S. 685, 41 L. Ed. 1165.

Thus, the payment of just compensation to petitioners for the taking of their property for public use by the respondent State Highway and Public Works Commission, an agency of the State government, is protected by Article I, Section 17, of the North Carolina Constitution, as we have interpreted it, and by the 14th Amendment to the Constitution of the United States.

The fundamental principle that private property cannot be taken by eminent domain without just compensation requires that the fair market value of the property condemned shall be determined as of the date of the taking, and unaffected by any subsequent change in the condition of the property. *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *Power Co. v. Hayes,* 193 N.C. 104, 136 S.E. 353; *United States v. Chandler-Dunbar W. P. Co.,* 229 U.S. 53, 57 L. Ed 1063; 29 C.J.S., Eminent Domain, Sec. 185.

A question presented by respondent's assignments of error Numbers 31 and 32 to the charge quoted above is this: Are the petitioners, whose property was taken for public use on 7 May 1952 by the respondent, an agency of the State government, and who in June 1952 were physically dispossessed and ejected therefrom by a court order procured by respondent, entitled to have the jury at the March-April 1957 Civil Term of Court award them compensation not only for the bare fair market value of their property taken by respondent to be determined as of the date of the taking, but also to have the jury award them some additional sum for the substantial delay in the payment of the fair market value of their property so taken, as an element of

the just compensation guaranteed by Article I, Section 17, of the North Carolina Constitution, as we have construed it, and by the 14th Amendment to the United States Constitution, when there is nothing in the record to show that the cause of the delay was petitioners' fault, the parties apparently being content to have just compensation for the taking of the property determined in appropriate legal proceedings? This question is squarely raised by respondent's assignments of error Numbers 31 and 32. The answer to the question is, Yes.

The view of the United States Supreme Court is illustrated by *Kieselbach v. Commissioner of Int. Revenue,* 317 U.S. 399, 87 L. Ed. 358; *Brooks-Scanlon Corp. v. United States,* 265 U.S. 106, 68 L. Ed. 934; and *Seaboard Air Line R. Co. v. United States,* 261 U.S. 299, 67 L. Ed 664. The Fifth Amendment to the United States Constitution, which is a limitation upon the federal government, and not upon the States, *Brown v. New Jersey,* 175 U.S. 172, 44 L. Ed 119, provides that private property shall not be taken for public use without just compensation. Article I, Section 17, of the North Carolina Constitution uses language of similar import.

In *Kieselbach v. Commissioner of Int. Revenue, supra,* the Court said:

> "From the premises that the value at time of the taking plus compensation for delay in payment equals just compensation, *United States v. Klamath & M. Tribes,* 304 U.S. 119, 123, 82 L. Ed. 1219, 1222, 58 S. Ct. 799, and that a good measure of the necessary additional amount is interest 'at a proper rate,' *Seaboard Air Line R. Co. v. United States,* 261 U.S. 299, 306, 67 L. Ed. 664, 669, 43 S. Ct. 354, petitioner contends that as just compensation requires the payment of these sums for delay in settlement, they are a part of the damages awarded for the property. But these payments are indemnification for delay, not a part of the sale price. While without their payment just compensation would not be received by the vendor, it does not follow that the additional payments are a part of the sale price under Section 117(a). The just compensation constitutionally required is not the same thing as the sale price of a capital asset."

In *Brooks-Scanlon Corp. v. United States, supra,* the Court said:

> "It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. Citing numerous cases. And, if the taking precedes the payment of compensation, the owner is entitled

to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. Citing numerous cases."

In *Seaboard Air Line R. Co. v. United States, supra,* the Court said:

"The rule is that, in the absence of a stipulation to pay interest, or a statute allowing it, none can be recovered against the United States upon unpaid accounts of claims. Citing cases. Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. . . . The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. Citing authority. It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. Citing cases. . . . Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain; namely, of making "just compensation" for the land as it stands, at the time of taking.' Citing authority."

See also *Bailey v. Anderson, State Highway Commissioner of Virginia,* 326 U.S. 203, 90 L. Ed. 3.

In *Clark v. Cox,* 134 Conn. 226, 56 A. 2d 512 (3 December 1947), one question to be decided on appeal was whether, where the defendant, Highway Commissioner, has condemned and taken plaintiffs' land for highway purposes pursuant to Section 1528 of the Connecticut General Statutes, as amended, they are entitled to receive interest from the date of taking until the date of judgment as an element of the just compensation guaranteed by Article First, Section 11, of the Connecticut Constitution and the 14th Amendment to the United States Constitution. Article First, Section 11, of the Connecticut Constitution

reads: "The property of no person shall be taken for public use, without just compensation therefor." The Court said:

> "Since this taking was an exercise of the state's power of eminent domain, the plaintiffs' constitutional guaranties entitle them to just compensation as of the time of the taking. 'Where land is taken by eminent domain, the principal sum becomes due and payable when the land is taken.' *Woodward v. City of New Haven,* 107 Conn. 439, 441, 140 A. 814, 815. It is the value of the land as of that time which constitutes the basis of just compensation. In consequence of the delay in the payment of that sum to the plaintiffs and the termination of their right of possession by the filing of the assessment, they had, from July 14, 1944, until January 17, 1947, neither the legal right to the possession or use of their property nor the use of the money to which they were entitled for its taking. Just compensation must necessarily include compensation for the loss so sustained during this interval, for, as we have said, 'It matters not whether the property . . . taken be regarded as the land condemned or the amount of assessed damages withheld for the condemnor's use . . . In either aspect of the matter and in either event, the result will be the appropriation of private property without just compensation.' *Reiley v. City of Waterbury,* 95 Conn. 226, 230, 111 A. 188, 189. The loss suffered during the interval referred to is as much an element of just compensation as is the value of the land itself as of the date of the taking."

The Court held that plaintiffs are not limited to the value of their property taken by eminent domain for highway purposes by the Highway Commissioner, but they are entitled by the guaranties of Article First, Section 11, of the Connecticut Constitution and of the 14th Amendment to the United States Constitution to such addition as will produce a full equivalent of that value paid contemporaneously with the taking, and interest at a proper rate is a good measure by which to ascertain the amount so to be added.

Gitlin v. Pennsylvania Turnpike Commission, 384 Pa. 326, 121 A. 2d 79 (13 March 1956), was a proceeding to determine the damages due the plaintiffs for the appropriation of their property for highway purposes by the defendant, an instrumentality of the Commonwealth of Pennsylvania. On plaintiffs' petition the court below appointed a board of view for the ascertainment of the damages due the plaintiffs for the appropriation of their property. The viewers appraised the value of the property taken, and awarded the value of the property taken, and damages for

delay in payment of the value of the property taken at the rate of four per cent per annum. The judge below confirmed the viewers' report and award. Article I, Section 10, of the Pennsylvania Constitution reads: ". . . . nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." On appeal the defendant contended that it is not liable for damages for delay in payment of the sum due for property which it appropriates by condemnation, and bottomed its contention upon the assertion that the Commonwealth of Pennsylvania is not liable in damages for delay in payment for property condemned by it and that, since the Turnpike Commission is an instrumentality of the Commonwealth, it is likewise free from liability in such regard. The Supreme Court of Pennsylvania in affirming the order of the court below said:

"The fallacy in the argument is twofold: (1) the major premise is erroneous and (2) the Commission is not the Commonwealth. And, even if it were entitled to the sovereign's immunity from liability for interest, it would still be answerable in damages for delay in payment for property condemned. In *Fidelity-Philadelphia Trust Co. v. Commonwealth*, 352 Pa. 143, 145, 42 A. 2d 585, the principal question for decision was 'whether an owner of property appropriated by or in behalf of the Commonwealth of Pennsylvania through condemnation is entitled to damages for delay in payment of the sum ascertained to be reasonable compensation for the property so taken.' We unequivocally answered that question in the affirmative. Nor could the rule be otherwise without palpably violating the State Constitution. . . . *Culver v. Commonwealth*, 348 Pa. 472, 35 A. 2d 64, upon which the appellant heavily relies, is not in point as even a cursory reading of the opinion should at once disclose. The rationale of the decision in the Culver case is that the Commonwealth is not liable to pay interest on its debts unless bound so to do by statute or by contract of its executive officers. In that case, the damages recoverable for the property taken by condemnation had been reduced to a judgment entered on a jury's verdict after a trial of the issue of damages in the court of common pleas upon an appeal thereto from an award of viewers. The verdict concluded all elements of damages to which the owner was entitled, including compensation for delay in payment. The one question involved in the Culver case, *supra*, was whether the Commonwealth was liable for interest on the judgment. As we endeavored to explain in distinguishing the Culver case in *Fidelity-Philadelphia Trust Co. v. Commonwealth*,

supra, until a binding judgment is entered against the Commonwealth in a land condemnation proceeding, either by way of an award of viewers or a jury's verdict, there is no debt and, consequently, no question of interest. Damage for delay in payment of the property value is not interest. While measured by a rate per cent, it is recoverable as damages and not as interest: *Whitcomb v. City of Philadelphia,* 264 Pa. 277, 284, 107 A. 765. In the instant case, there is as yet no binding judgment against the Commonwealth which concludes the *quantum* of the damages due the plaintiffs; hence, no question of liability for interest is in any way involved."

In *State v. Deal,* 191 Oregon 661, 233 P. 2d 242 (27 June 1951), the plaintiff, State of Oregon, through its State Highway Commission, appealed from a judgment based on the verdict of a jury in a condemnation action. In reversing the judgment below and remanding the cause to the Circuit Court for further proceedings, the Court deeming it expedient, for the guidance of the court below and counsel in this and future cases expressed their unanimous views on the point we are discussing, which was similar to what this Court did on another point in the former appeal of this case in 245 N.C. 139, 95 S.E. 2d 553. The Court after stating that Article I, Section 18, of the Oregon Constitution provides in part: "Private property shall not be taken for public use . . . without just compensation," and that the Fifth Amendment to the United States Constitution contains substantially the same provision, and citing many cases of the United States Supreme Court construing the language of the Fifth Amendment to the United States Constitution—among them two of the cases we have quoted from above—said:

"We adopt the construction of the words 'just compensation' in our Constitution which has been placed upon the same words in the Federal Constitution by the highest court in the land, and hold as matter of law that the defendants are entitled to interest at the rate of 6% per annum from the day of the taking on whatever sum the jury may find to be the fair market value of the property, such interest to be deemed a part of the damages suffered by the defendants as a result of the appropriation."

In *Flemming v. Board of Com'rs.,* 119 Kan. 598, 240 P. 591, the jury found the actual damages for location of the road to be $251.50, having been specifically instructed by the court not to include any interest in reaching their verdict. In a special question submitted by the court the jury found that the amount of interest at six per cent on the damages from the time of the lo-

cation of the road until the time of the trial was $105.63. In entering judgment the court added this amount to the general verdict and rendered judgment for $357.13. Appellants contended this was error because the county was not liable for interest on its obligations unless specially made so by statute. The Court said:

> "The rule there announced has no application to compensation for property taken for public use under the power of eminent domain, where the requirement is that full compensation for property taken, should be paid. The general rule in such proceedings is that where there is a substantial lapse of time between the actual taking of the property and the payment, interest on the damages for the taking of the property from the time of taking until the time of final payment, or, what amounts to the same thing, damages in the nature of interest for delay in payment of compensation, is properly allowed. Citing numerous cases."

The court affirmed the lower court, with a slight modification, reducing the judgment by $11.50 with interest.

The principle of law we are discussing, in many of its ramifications, has been thoroughly considered in *Arkansas-Missouri Power Co. v. Hamlin, Mo.* App., 288 S.W. 2d 14 (2 March 1956). In that scholarly opinion many of the cases, annotations and texts are collected. The learned Judge Ruark said in the opinion:

> "Interest as so allowed by the weight of authority is not interest *eo nomine,* that is, interest as such and in the commonly accepted sense, but a substitute or means of measuring the value of the deprivation of the use of the property, and because it is a part and element of the just compensation required by constitutional provisions, which are self-enforcing, entirely independent of statute; for when no other method is at hand to determine the landowner's loss for the interim period, its allowance as an element of the just compensation is held necessary to preserve the constitutionality of statutory procedures which do not of themselves provide a way for compensating the owner for the period he is kept out of owner's possession without full payment. Citing many cases. Some law writers say it is compensation for 'delay in payment.' Others say that interest as a part of the just compensation and interest as and for delay in payment are one and the same thing. Citing authorities."

In Jahr, Eminent Domain, Sec. 176, it is said:

"When the right of eminent domain is exercised, just compensation must be paid to the owner whose property is acquired. The obligation to pay rests on constitutional guarantees. When compensation is not paid coincidentally with the taking, it must include some sum in addition to the bare value of the property on the taking date, for delay in making payment, so that compensation may be just. Without the addition of some sum, the requirement of just compensation constitutionally guaranteed would not be met. In the absence of evidence as to what such additional sum should be, interest, as the legal requirement meets this obligation. Where, however, no fixed rate of interest is specified in the statute, the legal rate of interest is applicable. Interest therefore forms part of the award."

Many cases are cited to support the text.

In 29 C.J.S., Eminent Domain, Sec. 176(a), it is said:

"Where payment of compensation does not accompany the taking of property for public use but is postponed to a later date, the owner of the property ordinarily is entitled to the award of an additional sum which will compensate for the delay, or which will, in other words, produce the full equivalent of the value of the property paid contemporaneously with the taking. According to the weight of authority, the owner is in such circumstances entitled to interest, or, what is similar, to damages in the nature of interest for delay in payment. The right to such interest or damages is not dependent on statutory provision or a special agreement."

Many cases are cited to support the text.

In Orgel on Valuation under Eminent Domain, Second Ed., Vol. I, Sec. 5, it is written:

"When property is acquired by eminent domain, there is an interval between the appropriation of the property and the payment of compensation during which the owner is deprived of the use of his property. The constitutional provision of just compensation as interpreted by the courts requires that the owner be indemnified for the damages arising out of the delay in paying him the cash equivalent of the property taken."

A very comprehensive annotation setting forth the bulk of the case law on the subject can be found in 36 A.L.R. 2d beginning on page 413, under the title VIII. Eminent Domain in sec-

tions 46, 47, 48, 49, 50 and 51. See earlier annotations in 111 A.L.R., page 1304, VIII. Eminent Domain, and 96 A.L.R., page 150, VIII. Eminent Domain. See also Nichols on Eminent Domain, Third Ed., Vol. 3, Sec. 8.63, where cases are cited from most of the States and from many United States Courts, and Lewis, Eminent Domain, 3rd Ed., Vol. 2, Sec. 742.

Yancey v. Highway Commission, 221 N.C. 185, 19 S.E. 2d 489, was a special proceeding to recover compensation for lands taken and easements imposed in areas of the Blue Ridge Parkway. The petitioners were permitted to harvest crops on the lands for the years 1937 and 1938, and the actual deprivation of possession was delayed beyond the date of appropriation. Petitioners contended that they were entitled to interest on the verdict fixing compensation from the date of the original appropriation as a matter of law. The Court held that upon the present record the petitioners were not entitled to add interest to the verdict. Stacy, C. J., in writing the Court's opinion used this significant language:

> "Let us test it in another way. Supposing the jury had been instructed that although interest was not allowable as such, nevertheless they should take into consideration the intervening delay and fix the award accordingly. Obviously, under such a charge the court would not be justified in adding interest to the award."

Manifestly, this case is no authority upon the question we are discussing.

Thereafter in the trial court petitioners entered a motion in the cause, denominated a petition for *mandamus,* to compel the payment of interest on the judgment from the date of its rendition to the time of payment. Respondent demurred *ore tenus* to the petition and motion. The demurrer was sustained, and petitioners appealed, *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256. The decision of the lower court was affirmed. Devin, J., in writing the Court's opinion, after referring to decisions of the United States Supreme Court, which hold that just compensation is provided by the Fifth Amendment to the United States Constitution and "where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking" (*Seaboard Air Line R. Co. v. United States, supra*), used this language:

> "However, that principle does not aid us under the facts of this case. Here the amount of compensation justly due the

> petitioners has been judicially determined by verdict and judgment as of the time of the trial. . . . They now ask the court to add an additional amount to the judgment as interest on the judgment. It is a somewhat different matter from adding interest from the date of taking to the value of the property as part of the compensation, to adding interest to the judgment by which the full amount has already been fixed, from and after its rendition, as damages for delay in payment."

Obviously, this case does not decide the question we have for decision, nor does *Highway Commission v. Privett,* 246 N.C. 501, 99 S.E. 2d 61.

Miller v. Asheville, 112 N.C. 759, 16 S.E. 762, was an appeal from an assessment of damages in condemnation proceedings instituted by the City of Asheville for widening a street. The court instructed the jury in part "that they should allow interest upon such sum as they assessed as damages to the property, if they assessed any." The Court held this was proper. See the fifth headnote to this case in our Reports. The State reprint in 1922 of the original volume of our Reports containing this case omits over five pages of the statement of facts, including the court's charge we have quoted.

We are advertent to *Abernathy v. R. R.,* 159 N.C. 340, 74 S.E. 890, and *R. R. v. Manufacturing Co.,* 166 N.C. 168, 82 S.E. 5, L.R.A. 1916A 1079. As to these cases see Annotation 36 A.L.R. 2d p. 435. These two cases did not involve the State's taking of private property for public use, and therefore the 14th Amendment to the United States Constitution, which guarantees against any encroachment by the State on the fundamental rights belonging to every citizen, did not apply, and further, the precise question we are considering was not presented for decision in those two cases.

In the instant case petitioners' property was condemned for public use by respondent, an agency of the State government, who in June 1952 physically dispossessed and ejected petitioners from their property, totally demolished their house, and have been using the property since for highway use. Under the facts of this case to hold that petitioners do not have a strict legal right to have the jury award them some additional sum for the delay in the payment of the value of their property on the taking date as an element of just compensation would plainly violate the fundamental rights guaranteed to petitioners by the 14th Amendment to the United States Constitution, as that amendment has been construed by the United States Supreme Court, and also guaranteed to them by Article I, Section 17, of the North Carolina Constitution, as we have interpreted it. To hold

that petitioners are entitled to recover as a legal right such additional sum for delay in payment as an element of just compensation under the 14th Amendment to the United States Constitution, and to hold that under Article I, Section 17, of the State Constitution such additional sum may be allowed in the discretion of the jury, and not as a matter of legal right, would be a strange holding, and would not benefit respondent.

It is clear that the part of the court's charge set forth above in the first parenthesis, which is challenged by respondent's assignment of error Number 31, is taken in a large part verbatim from the language of the United States Supreme Court in *Seaboard Air Line R. Co. v. United States,* which we have quoted above. The court in this challenged part of the charge after saying in effect the respondent had taken the use of petitioners' property, charged: "So that the petitioners, the owners of the property, are entitled to have the full equivalent of the value of *such use* at the time of the taking, and to have that paid contemporaneously with the taking." The court should have charged that the petitioners are entitled to have the fair market value *of their property* at the time of the taking, etc. Ervin, J., said for the Court in *Highway Commission v. Black, supra:* "Since the condemner acquires the complete right to occupy and use the entire surface of the part of the land covered by the perpetual easement for all time to the exclusion of the landowner, the bare fee remaining in the landowner is, for all practical purposes, of no value, and the value of the perpetual easement acquired by the condemner is virtually the same as the value of the land embraced by it." In charging as it did, the court committed technical error, but it would seem that it was not harmful to respondent. The trial court, however, in the part of its charge set forth above in the second parenthesis, which is challenged by respondent's assignment of error Number 32, committed error prejudicial to respondent, when, after instructing the jury "you should take into consideration, . . . the intervening delay since June 1952, when the petitioners were deprived of their property; you will consider that delay up till this time, that is the time when the award is allowed, and you will affix your award accordingly," it did not go further and instruct the jury as to the rule they should follow to ascertain the additional sum to award the petitioners for the delay in the payment of the value of their property on the taking date. A reading of the charge in its entirety shows that nowhere in it did the trial court give the jury any criterion, rule, method or standard to guide them in this respect.

It is the duty of the trial court of its own motion and without request to instruct the jury correctly as to the proper rule they

should follow to ascertain the additional sum to award the petitioners for the delay in the payment of the fair market value of their property on the taking date, as an element of the just compensation guaranteed to them by the provisions of the United States and the North Carolina Constitutions. G.S. 1-180; *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332; *Wilson v. Wilson*, 190 N.C. 819, 130 S.E. 834; *Brewington v. Loughran*, 183 N.C. 558, 112 S.E. 257; *Cherry v. Upton*, 180 N.C. 1, 103 S.E. 912; *Coles v. Lumber Co.*, 150 N.C. 183, 63 S.E. 736.

In an annotation in 36 A.L.R. 2d pp. 418-420 is given a number of cases which contain express statements to the effect that interest is not awarded as such, but that the equivalent of interest is given as damages for the detention of the compensation. In the same annotation pp. 420-421 is given a list of other cases which contain statements to the effect that something in the nature of interest must be included in the award in order to produce the full equivalent of the value of an award paid contemporaneously with the taking. It would seem that the above distinction is one of words rather than of substance, and that both views in essence mean that the additional sum awarded for delay in payment of the value of the property taken is not interest *eo nomine*, but interest is a fair means for measuring the amount to be arrived at of such additional sum.

Ordinarily, the legal rate of interest, where the condemned property is located, upon the original sum fixed as compensation for the fair market value of the property on the taking date, is considered a fair measure of the amount to compensate the owner for the delay in paying the award, so as to make just compensation. *Miller v. Asheville, supra; Seaboard Air Line R. Co. v. United States, supra; In re New York*, 179 N.Y. 496, 72 N.E. 522; *State v. Deal, supra;* 29 C.J.S., Eminent Domain, p. 1055; Orgel on Valuation under Eminent Domain, Second Ed., Vol. I, p. 27; Annotation 36 A.L.R. 2d p. 436; Jahr, Eminent Domain, Sec. 176. See Nichols on Eminent Domain, Third Ed., Vol. 3, Sec. 8.63(3).

In the absence of statutory authority, compound interest should not be awarded. 29 C.J.S., Eminent Domain, p. 1056; Nichols, *ibid.*

The North Carolina Constitution contains no provision as to rates of interest. The rate of interest in this State is statutory. *Moore v. Beaman*, 112 N.C. 558, 17 S.E. 676. The legal rate of interest in this State is six per cent. G.S. 24-1.

On the facts before us, we hold as a matter of law that petitioners are entitled to have the jury award them interest at the rate of six per cent from the day of the taking of their property by respondent on whatever sum they may find to be the

fair market value of their property on the taking date, such interest to be deemed an additional sum awarded to petitioners for respondent's delay in payment of their property taken, as an element of the just compensation guaranteed to them by Article I, Section 17, of the North Carolina Constitution, and by the 14th Amendment to the United States Constitution.

For error in the charge, we are required to order a

New trial.

JAMES S. CORDELL v. GROVE STONE AND SAND COMPANY, A CORPORATION.

(Filed 26 February, 1958.)

1. **Evidence § 42d: Principal and Agent § 7a—**

Evidence that an agent of a stone and sand company directed the employees of the company with respect to their work and hired and paid them off, is insufficient predicate for the admission of testimony as to a declaration of the agent that the company had abandoned its mineral leasehold estate in that part of the land in controversy, since, in the absence of evidence to the contrary, such agent has no express or implied authority to affect title to realty of the company.

2. **Abandonment of Property—**

In order to constitute an abandonment of mineral rights, there must be acts and conduct positive, unequivocal, and inconsistent with the claim of the leasehold estate, and mere lapse of time and the failure to list and pay taxes thereon are insufficient to amount to a waiver or abandonment.

3. **Landlord and Tenant § 1—**

A leasehold interest for a term of years is a chattel real.

4. **Taxation § 26½—**

Where the contract between the parties does not require the lessee to list the leasehold estate for taxes, the whole of the land may be listed in the name of the owner of the fee, G.S. 105-301, subsection (8), and the whole of the land is assessable against him.

APPEAL by plaintiff from *Farthing, J.*, November Term 1957 of BUNCOMBE.

This is a civil action instituted in the Superior Court of Buncombe County, North Carolina, on 18 May 1955, to recover damages from the defendant for the alleged unlawful taking of sand, gravel and rock from the premises of the plaintiff during the years 1953 and 1954.

In 1924, E. W. Grove leased to the defendant ten tracts of land located in Buncombe County, North Carolina, consisting of

several hundred acres. The plaintiff now owns 33 acres of land situate in Swannanoa Township in Buncombe County, North Carolina, being a part of Tract 3 included in said lease agreement which originally consisted of 75 acres.

By the terms of the lease the defendant was given the "right of entering in and upon the land * * * described for the purpose of searching for and locating sand, stone and gravel, and the quarrying, removing and preparing for market any and all such sand, stone, gravel or rock which may be found on said premises and to manufacture therefrom such products as it may desire * * * during the period of 50 years from the date hereof, and to mine, quarry, manufacture, remove, sell and dispose of the same; said term to begin from the 1st day of February, 1924 and to end on the 31st day of January, 1974."

The lease was duly recorded in the office of the Register of Deeds for Buncombe County on 7 May 1924, in Book 284, page 437.

On 16 September 1935, the trustees of the E. W. Grove estate conveyed to W. C. Hunnicutt, for a consideration of $245.00, the land contained in Tract 3 as described in the lease agreement.

On 12 November 1935, W. C. Hunnicutt and wife conveyed this identical land to James T. Ellis and wife, Lizzie O. Ellis, the parents of Lillie May Cordell, wife of the plaintiff.

On 15 November 1935, James T. Ellis and wife conveyed the property to James S. Cordell and wife, Lillie May Cordell as tenants by the entirety. This was a deed of gift.

Each one of the foregoing deeds was made subject to the lease executed by E. W. Grove to the defendant and duly recorded.

Later, James S. Cordell and wife separated and agreed upon a division of the land referred to herein. The plaintiff obtained a deed from his wife, dated 12 December 1953, for 33 acres, which is the subject of this action. No reference is made to the E. W. Grove lease in the conveyance from Lillie May Cordell to the plaintiff.

It is stipulated by the parties "that the defendant has never at any time listed or paid taxes on the gravel rights, mineral rights, and other rights in and to the lands described in the complaint at any time prior to removal."

It is further stipulated "that plaintiff has each and every year since the year 1935 listed the lands described in the complaint for taxes, and paid the taxes thereon as assessed against the same."

The defendant in its answer alleged that the lands of plaintiff are subject to its lease. The plaintiff in his reply alleged that the defendant had abandoned the lease as to Tract 3, described therein.

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

Don C. Young for plaintiff appellant.
Lee & Lee for defendant appellee.

DENNY, J. The plaintiff challenges the correctness of the ruling of the court below in sustaining the defendant's motion for judgment as of nonsuit. He contends that defendant abandoned the E. W. Grove lease with respect to Tract 3, containing 75 acres, the 33 acres involved herein being a part thereof. He further contends that such abandonment occurred prior to 12 November 1935, the date of the deed from W. C. Hunnicutt and wife to James T. Ellis and wife, Lizzie O. Ellis, parents of plaintiff's wife, Lillie May Cordell.

The plaintiff's assignments of error Nos. 1 through 7 are based on exceptions to the refusal of the court below to admit in evidence the testimony of plaintiff as to the contents of an oral conversation he had with one Ernest Jones, who is referred to as the general manager of the defendant corporation by one of plaintiff's witnesses. It is in evidence, without objection, that Mr. Jones directed the employees of the defendant with respect to their work, and that he hired and paid them off. The plaintiff was employed by Mr. Jones to work for the defendant for approximately two months in the Fall of 1935, and while so employed he went to the office of the defendant and talked to Mr. Jones about the property involved herein. Upon objection the plaintiff was not permitted to answer the following question: "* * * what did you say to Mr. Jones about this property and what did he say to you?" If the plaintiff had been permitted to answer he would have testified as follows: "Well, I told him that I was thinking of buying some property to build a house on, and I told him that I understood that Grovestone had a lease on this property and I wanted to know what chance there was that they would ever bother it. * * * And he asked me where the property was located, and I told him it was down below the State Farm property, and he said, 'Well, that property down there has been abandoned * * * we have never run any tests for any stone, we are not interested in whether there is any stone there or not, that our purpose for the lease to start with was to keep anybody from coming in and giving us competition.' " Q. "Mr. Cordell, pursuant to this conversation that you had with the general manager, Mr. Jones, of the defendant, did you purchase this property?" Defendant's objection sustained. Exception No. 2. The answer, if permitted to answer, would have been, "Yes, I bought the property after that."

The additional excluded evidence was similar to that quoted above and related to the same conversation.

Conceding that Mr. Jones made the statement as plaintiff contends, the question is whether the statement is admissible against the defendant.

In the case of *Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716, Johnson, J., speaking for the Court, said: "While proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent (*Jones v. Light Co.,* 206 N.C. 862, 175 S.E. 167), nevertheless it is well established that, as against the principal, evidence of declarations or statements of an alleged agent made out of court is not admissible either to prove the fact of agency or its nature and extent. *West v. Grocery Co.,* 138 N.C. 166, 50 S.E. 565; *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817; 1 Meacham on Agency, 2d Ed., Sec. 285.

"And in applying this rule, ordinarily the extra-judicial statement or declaration of the alleged agent may not be given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent, or (3) as to persons dealing with the agent, within the apparent authority of the agent," citing numerous authorities.

There is no evidence in this record which tends to show that Ernest Jones had any authority, as the agent of the defendant, other than to perform the duties incident to the actual operations of the Grove Stone and Sand Company in removing sand, gravel and rock from its leased premises. Moreover, it does not appear that such duties would ordinarily or customarily include the authority to bind his principal with respect to real estate transactions.

In the case of *Tuttle v. Building Corp.,* 228 N.C. 507, 46 S.E. 2d 313, Barnhill, J., later C. J., quoted with approval from 2 Fletcher, Cyc. Corporation, 508, Section 605, the following: "The president of a corporation has no implied or inherent authority, merely by virtue of his office or as incident thereto, to sell and convey or to contract to sell the real or personal property of the corporations, without authority so to do from the board of directors, even though he is both president and general manager, and over a period of years is left with the entire management and control of the affairs of the corporation. * * *" The foregoing rule, however, is not inflexible. Where a corporation is created for the primary purpose of buying and selling real estate in which its officers are actively engaged, with the silent approval or acquiescence of the board of directors, authority to do so will be implied. *Tuttle v. Building Corp., supra; Brimmer*

v. Brimmer, 174 N.C. 435, 93 S.E. 984; *Watson v. Manufacturing Co.,* 147 N.C. 469, 61 S.E. 273.

In *R. R. v. Smitherman,* 178 N.C. 595, 101 S.E. 208, the Railroad Company had built a new depot, and the owner of the fee claimed that the property on which the old depot was located had reverted to him as owner of the fee by reason of nonuser for general railroad purposes. The defendant's witness, W. I. Myrick, was permitted to testify that plaintiff's local passenger and freight agent, S. T. Brown, had made a statement to the effect that the property no longer belonged to the Railroad Company, and it would have nothing more to do with it, as it was the property of Mr. Smitherman. The agent delivered the key to the old depot to the witness at that time. Plaintiff's objection to the admission of this evidence was overruled. This Court said: "The witness, S. T. Brown, * * * had no authority, express or implied, to surrender possession of the old building to the defendant, or to any one under his direction, nor was any declaration made by him to Myrick, as to what the plaintiff had done about that building, and to the effect that it had been surrendered to the defendant and belonged to him, admissible against the plaintiff, who was his principal. He had no real or apparent authority to give up his principal's property, so far as this record shows, and certainly none to declare what the principal had done in the past respecting it. * * *

"But, however, the fact may be as to the authority of the agent to surrender the property, his declaration to Myrick, if made, was incompetent to prove it. We have seen that he cannot enlarge his authority by his own declarations and this Court has recently stated that 'the authorities in this State are all to the effect that declarations of an agent made after the event, and as mere narrative of a past occurrence, are not competent against the principal.' *Johnson v. Ins. Co.,* 172 N.C. 142, citing *Smith v. R. R.,* 68 N.C. 115; *Rumbough v. Improvement Co.,* 112 N.C. 751; *Morgan v. Benefit Society,* 167 N.C. 265."

In the case of *Smith v. R. R.,* 68 N.C. 107, Rodman, J., speaking for the Court, said: "The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company."

The ruling of the court below, in excluding the evidence upon which the appellant bases his assignments of error Nos. 1 through 7, will be upheld.

This Court held in *Banks v. Banks,* 77 N.C. 186, "To constitute an abandonment or renunciation of claim there must be acts and conduct positive, unequivocal, and inconsistent with his claim

of title. Nor will mere lapse of time or other delay in asserting his claim, unaccompanied by acts clearly inconsistent with his rights, amount to a waiver or abandonment." *Furniture Co. v. Cole,* 207 N.C. 840, 178 S.E. 579; *Miller v. Teer,* 220 N.C. 605, 18 S.E. 2d 173.

The evidence on this record is not sufficient to take the case to the jury on the question of abandonment. Moreover, the question as to the right to terminate the E. W. Grove lease by reason of nonuser with respect to the various tracts included in the lease, was decided in favor of this defendant in the case of *Alexander v. Sand Co.,* 237 N.C. 251, 74 S.E. 2d 538, in which case, Devin, C. J., said: "* * * the failure to list for taxation may not be regarded as conclusive on the question of the right of the defendant to enter upon the land of the plaintiffs or as determinative of the rights of the parties under the lease. 1 A.J., 12."

Furthermore, it is provided in G.S. 105-301, subsection (1), "Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same. * * *" Subsection (8) provides, "When land is owned by one party and improvements thereon or mineral, timber, quarry, water power, or similar rights therein are owned by another party, the parties may list their interests separately or may, in accordance with contractural relations between them, have the entire property listed in the name of the owner of the land."

The defendant is not required under the terms of the E. W. Grove lease to list and pay the taxes on the leased premises, as was the case in *Investment Co. v. Cumberland County,* 245 N.C. 492, 96 S.E. 2d 341. Moreover, it seems to be the general rule that a leasehold interest for a term of years is a chattel real, and for the purposes of taxation, in the absence of a provision in the lease to the contrary, the whole of the land is assessable against the owner of the fee. Anno.—Tax—Leasehold Interest, 59 A.L.R. 702.

The judgment of the court below is

Affirmed.

JOE WILLIE WALSTON, ADMINISTRATOR OF THE ESTATE OF ALLEN LEON WALSTON, DECEASED, v. RICHARD GREENE AND J. C. SPENCE, GUARDIAN AD LITEM.

(Filed 26 February, 1958.)

Negligence § 12—

As a matter of law, a child under seven years of age is incapable of contributory negligence.

RODMAN, J., dissenting.

WINBORNE, C. J., concurs in dissent.

APPEAL by plaintiff from *Moore, Clifton L., J.*, October Term 1957 of PASQUOTANK.

Civil action to recover damages for the wrongful death of plaintiff's intestate allegedly caused by defendant's act, neglect or default.

Plaintiff's intestate, Allen Leon Walston, was killed on 5 May 1956, when he was struck by an automobile driven by the defendant. Allen Leon Walston was born 6 August 1949, and his education, intelligence, experience and capacity were average for a child of his age.

Defendant pleaded contributory negligence of Allen Leon Walston as a defense.

Both parties introduced evidence. At the close of the evidence plaintiff tendered two issues for submission to the jury: negligence and damages. The court refused to submit these issues, and plaintiff excepted. The court submitted to the jury three issues: negligence, contributory negligence of plaintiff's intestate, and damages. Plaintiff excepted to the submission of the second issue of contributory negligence. The jury answered the issue of negligence, Yes, and the issue of contributory negligence, Yes, and did not reach the third issue of damages.

From a judgment that the plaintiff recover nothing, and taxing him with the costs, plaintiff appeals.

Frank B. Aycock, Jr. and Forrest V. Dunstan for plaintiff, appellant.

LeRoy & Goodwin for defendant, appellee.

PARKER, J. This is the second appeal of this case to the Supreme Court. At a trial of this case during the February Term 1957 of Pasquotank Superior Court the jury found that the death of plaintiff's intestate was not caused by the actionable negligence of defendant. Upon motion of plaintiff, the trial judge, in his discretion, set the verdict aside. Defendant's appeal was dismissed by this Court, 246 N.C. 617, 99 S.E. 2d 805.

Plaintiff assigns as error the submission to the jury of the issue of contributory negligence of his intestate, who was a boy six years and nine months old at the time he was killed.

Caudle v. R. R., 202 N.C. 404, 163 S.E. 122, was an action to recover damages for the wrongful death of plaintiff's intestate, a boy about twelve years of age. Defendant demurred to the complaint, and one ground of the demurrer was that it appeared from the allegations of the complaint that plaintiff's intestate by his own negligence contributed to his injury. The trial court overruled the demurrer, and this Court affirmed. In its opinion this Court said: "*Prima facie* presumption exists that an infant

between ages of 7 and 14 is incapable of contributory negligence, but presumption may be overcome." This Court cited as one of the authorities to support its statement *Chitwood v. Chitwood,* 159 S.C. 109, 156 S.E. 179. In that case the Supreme Court of South Carolina said: "Confusion sometimes arises in cases of this kind between the rule as to capacity and that as to due care. As to capacity, it is held in this state, by analogy to the criminal law, that an infant under 7 years of age is conclusively presumed to be incapable of contributory negligence (citing cases); that between the ages of 7 and 14 there is a *prima facie* presumption of such incapacity, which, however, may be overcome by evidence showing capacity . . . ."

In *S. v. Smith,* 213 N.C. 299, 195 S.E. 819, the Court said in reference to *S. v. Yeargan,* 117 N.C. 706, 23 S.E. 153: "In this case Faircloth, C. J., states the rule which prevails in this jurisdiction as follows: 'An infant under seven years of age cannot be indicted and punished for any offense, because of the irrebuttable presumption that he is *doli incapax.* . . . Between 7 and 14 years of age an infant is presumed to be innocent and incapable of committing crime, but that presumption in certain cases may be rebutted. . . .' "

In *Morris v. Sprott,* 207 N.C. 358, 177 S.E. 13, this Court held that it was error for the trial court to hold as a matter of law that a boy 7 years of age at the time of his injury could not be guilty of contributory negligence. Such holding is consistent with what was said in *Caudle v. R. R., supra.*

We have held as a matter of law that children of the following ages are incapable of contributory negligence: *Bottoms v. R. R. Co.,* 114 N.C. 699, 19 S.E. 730, 25 L.R.A. 784, 41 Am. St. Rep. 799—22 months of age; *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 388—a bright little boy 5 years of age; *Campbell v. Laundry,* 190 N.C. 649, 130 S.E. 638—4 years of age; *Bevan v. Carter,* 210 N.C. 291, 186 S.E. 321—4 years of age; *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664—4½ years of age; *Reid v. Coach Co.,* 215 N.C. 469, 2 S.E. 2d 578, 123 A.L.R. 140—4½ years of age; *Green v. Bowers,* 230 N.C. 651, 55 S.E. 2d 192—4 years of age. See *Arnett v. Yeago, ante* 356, 100 S.E. 2d 855—a three-year-old lad.

In *Ashby v. R. R.,* 172 N.C. 98, 89 S.E. 1059, plaintiff was a child eight years of age, and the last sentence of the opinion reads: "Contributory negligence cannot be attributed to a child of the age of the plaintiff at the time of this injury." This Court in *Morris v. Sprott, supra,* said in reference to the last sentence of the opinion in the Ashby case: "However, this Court has recently distinguished, if not overruled, the above-quoted utterance in the case of *Brown v. R. R.,* 195 N.C., 699. Certainly,

if the sentence quoted is read without strict reference to the facts of the case *it is in conflict with the universal holding of this Court in other cases where contributory negligence has been pleaded as a bar to recovery by infants of seven years of age and upward.*" Emphasis added.

The age of a child is of significance primarily as a mark or sign of his mental capacity to understand and appreciate the perils that may threaten his safe being. In all the jurisdictions the courts definitely recognize that at least at some point during the early stages of infancy a child is incapable of contributory negligence as a matter of law, but there is a wide diversity of judicial opinion as to a definite or fixed age that is sufficient to constitute a child *sui juris*, so as to charge it with contributory negligence. 38 Am. Jur., Negligence, Sec. 205; 65 C.J.S., Negligence, Sec. 145; exhaustive annotations in 107 A.L.R., pp. 71-142, III. Age at which doctrine of contributory negligence may be applied to child, and in 174 A.L.R., pp. 1103-1147, III. Age at which doctrine of contributory negligence may be applied to child; exhaustive annotation in L.R.A. 1917F, pp. 42-73, III. Age at which doctrine of contributory negligence may be applied to child.

This Court said in *Caudle v. R. R., supra*, that a "*prima facie* presumption exists that an infant between ages of 7 and 14 is incapable of contributory negligence, but presumption may be overcome." In saying this we assume that the Court stated precisely what it considered to be correct law, and that it did not consider such law to be applicable to children under 7 years of age. However that may be, we consider, and so hold, that as a matter of law a child under 7 years of age is incapable of contributory negligence, not especially because of analogy to the criminal law that a child under that age is not capable of committing a crime, though this reason is frequently given, but because a child under 7 years of age lacks the discretion, judgment and mental capacity to discern and appreciate circumstances of danger that threaten its safety. This rule has been applied in the following jurisdictions: *Mobile Light & R. Co. v. Nicholas*, 232 Ala. 213, 167 So. 298; *Romine v. City of Watseka*, 341 Ill. App. 370, 91 N.E. 2d 76; *Moser v. East St. Louis & Interurban Water Co.*, 326 Ill. App. 542, 62 N.E. 2d 558; *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N.E. 577; *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E. 2d 670; *Ward v. Music*, (Ky.), 257 S.W. 2d 516; *United Fuel Gas Co. v. Friend's Adm'x*, (Ky.), 270 S.W. 2d 946; *Gilligan v. Butte*, 118 Mont. 350, 166 P. 2d 797; *Sexton v. Noll Construction Co.*, 108 S.C. 516, 95 S.E. 129. See *McDermott v. Severe*, 202 U.S. 600, 50 L. Ed. 1162, which is cited in *Campbell v. Laundry, supra*, p. 652 in our Reports, and p. 639 in the S. E.

Reporter. Other courts take a contrary view, *e.g.*, *DeGroot v. Van Akkeren*, 225 Wis. 105, 273 N.W. 725.

In *Morris v. Peyton*, 148 Va. 812, 139 S.E. 500, the Court said in respect to the capacity of a child to commit an act of negligence: "In Virginia the settled doctrine in this respect is that a child under 7 years of age cannot be guilty of negligence, and that as to children between 7 and 14 years of age the presumption is they are incapable of exercising care and prudence and this presumption prevails unless rebutted by sufficient proof to the contrary." In Louisiana the view prevails that a child 7 years old is considered as incapable of contributory negligence in the absence of a showing of extraordinary conditions. *Jackson v. Jones*, 224 La. 403, 69 So. 2d 729; *Bodin v. Texas Co.*, La. App., 186 So. 390; *Borman v. Lafargue*, La. App., 183 So. 548.

In an annotation in 107 A.L.R., beginning on page 107, is given a long list of decisions from many jurisdictions, which the annotation states supports the rule that a five-year-old child is incapable of contributory negligence. The annotation says this would seem to be the correct rule. Later cases to the same effect are cited in an annotation in 174 A.L.R., p. 1123, and on pp. 1123 and 1124, cases are cited, which take a contrary view. See also annotation in L.R.A. 1917F, pp. 57-60.

In the annotation in 107 A.L.R., p. 114 *et seq.*, is given a list of numerous cases from many jurisdictions, which support the rule that a six-year-old child is incapable of contributory negligence. Later decisions to the same effect are given in the annotation in 174 A.L.R., p. 1125. See also annotation in L.R.A. 1917F, p. 60 *et seq.* These annotations also cite numerous cases from many jurisdictions, which take a contrary view.

Defendant relies upon *Alexander v. Statesville*, 165 N.C. 527, 81 S.E. 763. In that case the jury answered the first issue No, and what the Court said in its opinion as to contributory negligence of a child was not essential to the determination of the appeal. Anything therein said, that can be, or might be, construed to the effect that in North Carolina a child under 7 years of age is capable of contributory negligence, is disapproved.

The trial court committed prejudicial error in submitting to the jury the second issue of contributory negligence of plaintiff's intestate, which entitles plaintiff to a

New trial.

RODMAN, J., dissenting: I dissent because I am unable to agree with the conclusion reached by the majority that a child who has passed his sixth but has not reached his seventh birthday is so lacking in mental capacity and judgment that under no circumstances can he be held responsible for his conduct. I think the conclusion reached is contrary to common experience.

The fallacy of the conclusion is, I think, illustrated in our public schools. By constitutional mandate we provide a public school system for children when they reach the age of six. Enrollment in the first grades in North Carolina approximates 110,000. These children travel to and from school 180 days a year. They travel as pedestrians, by buses operated by the schools, and by public utilities. They travel in all kinds of traffic. The paucity of casualties resulting therefrom demonstrates, I think, these children have more intelligence and judgment than the decision in this case accords them.

The question now presented has not heretofore been decided by this Court. Appellate courts of sister States are divided on the question. Uniformity is not always true in the decisions of a particular State. I think the correct rule of law was stated by this Court in *Alexander v. Statesville*, 165 N.C. 527, 81 S.E. 763. The opinion in that case gives plaintiff's age as "about seven years old." The record discloses he lacked 36 days of reaching the age of seven. The rule there stated is epitomized in the quotation which Justice Walker makes from *Rolin v. Tobacco Co.* 141 N.C. 300: " 'It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity . . .' "

It is true that the rule as to the responsibility of a child under seven declared in the Alexander case was not essential to a decision of that case and for that reason is entitled only to that weight which logic and reason justify. That is likewise true of the language used in *Caudle v. R. R.*, 202 N.C. 404, 163 S.E. 122, cited and relied upon by the majority. There damages were sought for the death of a twelve-year-old boy. Defendant demurred to the complaint for that on its face it showed that plaintiff's intestate was guilty of contributory negligence. Contributory negligence is an affirmative defense which must be pleaded. G.S. 1-139. It cannot be raised by demurrer to the complaint.

It is to be noted that the Court which decided the Caudle case held in *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720, that a boy eleven years, seven months of age was guilty of contributory negligence as a matter of law, saying: "The doctrine is settled that a child is not chargeable with the same degree of care as an experienced adult and that the standard of conduct varies with his age, capacity and experience; but he must exercise care and prudence equal to his capacity. *Alexander v. Statesville,* 165 N.C. 527."

Conceding, as the majority states, that the holding in *Morris v. Sprott,* 207 N.C. 358, 177 S.E. 13, is consistent with the result reached in *Caudle v. R. R.*, it must, I think, also be conceded that the Court did not intend to disapprove the rule enunciated in *Alexander v. Statesville* which it cites and relies on as the basis for its opinion.

As the majority point out, we have several decisions to the effect that children under school age cannot be, as a matter of law, guilty of contributory negligence. No decision has been discovered by this Court determinative of the question as it relates to a child six years of age. I think the reasons given in the cases cited support the position taken by Judge Moore and require, upon appropriate facts, the submission of the issue to a jury. If children of an age compelled to attend school are to be relieved of all responsibility for their acts, I think it should be done by legislative action rather than by judicial decision.

WINBORNE, C. J., concurs in dissent.

EAST CAROLINA LUMBER COMPANY, INCORPORATED, v. TULLIE MITCHELL WEST, GEORGE B. RIDDLE, JR., TRUSTEE; CRAVEN COUNTY, A BODY POLITIC AND CORPORATE; B. O. JONES, TRUSTEE; T. D. WARREN, JR., RECEIVER, AND FIRST-CITIZENS BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF J. M. WEST, DECEASED.

(Filed 26 February, 1958.)

1. **Judgments §§ 27c, 27d—**

An erroneous judgment can be corrected only by appeal; an irregular judgment can be corrected by motion in the cause. Both an erroneous and an irregular judgment bind the parties until corrected in the proper manner in the exercise of due diligence.

2. **Judgments § 27b—**

If the court has no jurisdiction of the cause of action or the parties, judgment rendered in the action is a nullity, and its invalidity may be asserted at any time some benefit or right is asserted thereunder.

3. Process § 4½—

Where an act authorizes the appointment of a special officer for limited and specified purposes, but further provides that such officer should receive the same fees for serving both criminal and civil writs as allowed by law to the constable of the township, which constable is authorized to serve process, the act authorizes such special officer to serve summons. Chapter 590, Public Local Laws of 1923.

4. Same—

A deputy sheriff has authority to serve summons. G.S. 162-14.

5. Appearance §§ 1, 2—

Recitals in several successive orders for continuances that they were entered by consent imply that both parties consented thereto, and such recitals would be irregular if one of the parties was not subject to the jurisdiction of the court, and therefore, under the presumption of the regularity of proceedings in courts of general jurisdiction, such recitals are sufficient to show a general appearance waiving any defect in the service of process.

6. Judgments § 27d—

Where the court rendering judgment has jurisdiction of both the cause of action and the parties, the judgment cannot be collaterally attacked, nor may an attack be treated as a motion in the cause when the parties to that judgment are not before the court in the action attacking the judgment, since such parties are entitled to notice. G.S. 1-581.

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

APPEAL by plaintiff from *Bone, J.*, November 1957 Term of CRAVEN.

Hugh Wilcox, R. C. McClelland, and Jones, Reed & Griffin for plaintiff appellant.

R. E. Whitehurst, Ward & Tucker, R. A. Nunn, Barden, Stith & McCotter, Bernard B. Hollowell, Norman & Rodman, and Rodman & Rodman for defendant appellees.

RODMAN, J. The parties here are designated as appellant and appellees. This is an action to remove an asserted cloud from appellant's title to a tract of four acres in James City, Craven County. The cloud is claimed to originate in a deed made by T. D. Warren, Jr. as receiver of East Carolina Lumber Company. The pleadings in the present case make the validity of the deed from Warren, receiver, depend on the court's jurisdiction over the defendant, a North Carolina corporation, when in 1929 Edna Basnight and others brought an action in the Superior Court of Craven County against East Carolina Lumber Company. The parties to that action will hereafter be designated as plaintiffs and defendant.

When this cause was called for trial, appellees moved to dismiss the action as a collateral attack on the receivership proceeding. As determinative of appellant's right to proceed in this action the parties tendered to Judge Bone the judgment roll in the action begun in 1929 by Basnight and others against East Carolina Lumber Company. He ruled that the receivership action was not subject to collateral attack and for that reason dismissed this action. The appeal presents only the correctness of that ruling.

The correct method of attacking a judgment is dependent on the character of the asserted defect. Errors in law can only be rectified by an appellate court on proceedings properly taken in the action in which the judgment was rendered. Irregularity due to an inadvertence of the court in rendering an improper judgment can be corrected by motion made in the action in which the judgment was rendered. An erroneous or irregular judgment binds the parties thereto until corrected in a proper manner. Diligence is necessary to obtain relief. A void judgment, however, binds no one. Its invalidity may be asserted at any time and in any action where some benefit or right is asserted thereunder. A judgment is void if the court rendering it does not have jurisdiction either of the asserted cause of action or of the parties. *Moore v. Humphrey,* 247 N.C. 423; *Mills v. Richardson,* 240 N.C. 187; *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26; *Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 802; *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20; *Carter v. Rountree,* 109 N.C. 29.

The Superior Court has jurisdiction of actions for the appointment of receivers, G.S. 1-501, with authority to direct the sale of the property of a corporate defendant for equitable distribution among its creditors. G.S. 55-148.

The invalidity presently asserted is that the summons which issued in 1929 for East Carolina Lumber Company was "not served upon the said defendant by a process officer authorized by law to serve such summons and process; and the said plaintiff is further advised, believes and so alleges that such service as was had upon the said defendant in the said action was and is illegal and void . . ."

The record discloses Edna Basnight and others, on 1 March 1929, filed a complaint in the Superior Court of Craven County alleging insolvency of East Carolina Lumber Company, a North Carolina corporation; that plaintiffs were creditors of the corporation; the necessity for the appointment of a receiver to preserve and distribute the corporation's assets. Summons issued on the filing of the complaint for East Carolina Lumber

Company directed to the sheriff of Craven County. It bears this notation:

"Received March 2, 1929

"Served March 2, 1929 by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: H. B. Turner, Agent, East Carolina Lbr. Co.

"Sheriff ..... County

"BY: F. G. MITCHELL, D. S.

S. T. O."

On the same date summons issued from the Superior Court of Craven County directed to the sheriff of Wake County for the defendant. That summons bears a notation that it was received 5 March 1929 and served 5 March 1929 by delivering a copy to J. A. Hartness, Secretary of State. On 1 March, 1929 Judge Nunn signed an order appointing temporary receivers. The order directed the defendant to appear before Judge Daniels, judge holding the courts in the Fifth Judicial District at Beaufort, on 15 March 1929, and show cause, if any it had, why the appointment should not be made permanent.

Appellant contends that the letters "S. T. O." written under the name of F. G. Mitchell, appearing on the summons of 1 March 1929, stand for and mean Special Traffic Officer, appointed pursuant to the provisions of Ch. 590, P.L.L. 1923, and that the court should take judicial notice of the fact that said letters have that meaning, and that this Special Traffic Officer has only such powers as are there granted.

That Act empowers the commissioners of Craven County to appoint a special officer with power and authority of a deputy sheriff of Craven County or constable of Number Eight Township or any other township of Craven County to enforce the prohibition, speed, and road laws and all other laws applicable to or in force in Craven County in the same manner and with the same power and authority as the sheriff of Craven County. It further provides: ". . . and the said special officer so appointed by said board of commissioners of said Craven County, North Carolina, shall receive the same fees for serving both criminal and civil writs in all service as is now allowed by law or shall hereafter be allowed by law to the constable of Number Eight (8) Township of Craven County."

True that Act does not expressly authorize the special officer to serve process, but since it authorizes him to collect the same fees for service of process as the constable of Number Eight Township is entitled to receive, it would seem necessarily to imply that he would have the same authority to serve process as

the constable of Number Eight Township of Craven County has. The constable of Number Eight Township of Craven County is, by Ch. 148, P.L.L. Ex. Sess. 1921 "authorized to serve anywhere within the county of Craven any and all process, summons, writs . . . made or issued by or from any of the several justices of the peace of the said Number Eight Township, by the county court of Craven County, and by the Superior Court of Craven County . . ." for the same fees the sheriff is allowed for such service. It would seem to follow that if the letters "S. T. O." have the meaning which appellant ascribes to them, the officer appointed by the commissioners of Craven County was by legislative act vested with power to serve summons issuing from the Superior Court of Craven County. If, however, the summons was served by Mr. Mitchell as deputy sheriff of Craven County, he had the authority to serve the summons. G.S. 162-14.

The authority of the officer to serve process is not, however, necessary to a decision of this case. The question is: Did the court, when it appointed the receiver, have jurisdiction over the defendant East Carolina Lumber Company? Service of process is not necessary to give a court jurisdiction of a person. It is merely to give him notice so that he may appear and protect his rights. He may, of course, waive this notice and voluntarily appear. "A voluntary appearance of a defendant is equivalent to personal service of the summons upon him." G.S. 1-103; *Waters v. McBee,* 244 N.C. 540, 94 S.E. 2d 640; *Brittain v. Blankenship,* 244 N.C. 518, 94 S.E. 2d 489; *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *Moseley v. Deans,* 222 N.C. 731, 24 S.E. 2d 630; *Buncombe County v. Penland,* 206 N.C. 299, 173 S.E. 609; *Barnhardt v. Drug Company,* 180 N.C. 436, 104 S.E. 890; *Wooten v. Cunningham,* 171 N.C. 123, 88 S.E. 1; 6 C.J.S. 36-7.

The record, we think, suffices to show that East Carolina Lumber Company was properly before the court in 1929. It is not now asserted that process was not in fact served on it; the allegation is that it was served, but by one without authority to serve. If it made an appearance and requested favors from the court, it is bound. The record discloses that the receivership proceeding begun in 1929 was finally closed by order entered 27 November 1940. Judge Nunn's order appointing temporary receivers directed the defendant to appear before Judge Daniels at Beaufort on 15 March 1929. On the date fixed for the hearing Judge Daniels at Beaufort entered an order reading in part: "It is by consent ordered and adjudged that the hearing on this matter be continued to be heard before the undersigned Judge at Greenville, N. C., on March 20, 1929." There appears in the record a consent order dated 20 March 1929 reading: "By consent it is ordered and adjudged that this case be continued for hearing

from Greenville, N. C. to New Bern, N. C., and that it be set for hearing on Monday, April 8th, 1929." That order was signed by Judge Daniels, and following his signature is: "By consent:

"WARREN & WARREN
"ABERNETHY & ABERNETHY
"A. D. WARD
"WHITEHURST & BARDEN."

Warren & Warren and Abernethy & Abernethy were the attorneys for plaintiffs. On 12 April 1929 Judge Daniels signed an order reciting that he held a hearing on 11 April, heard argument of counsel and had taken the cause under advisement. He directed that the temporary receivership be continued without prejudice until 13 May. On 13 May 1929 Judge Daniels signed an order reciting that the cause had been continued from time to time, that one of the temporary receivers had requested that he not be appointed permanent receiver; thereupon the court appointed T. D. Warren, Jr. as receiver and directed him to take possession of the assets of defendant. The record discloses numerous sales over a period of several years of properties of defendant. All of its real and personal properties were disposed of. The receiver answered on behalf of the lumber company a complaint filed by Craven County against it prior to March 1929 wherein Craven County sought to foreclose its tax liens. The record discloses that Whitehurst & Barden, attorneys who signed the consent order of 20 March 1929, filed a claim with the receivers for professional services rendered defendant. Ward & Ward were, as the record discloses, attorneys for Citizens Trust Company, trustee in a deed of trust covering the lumber company's real estate.

The statement in the orders that they were made by consent must, we think, necessarily mean that plaintiffs *and defendant* agreed to the continuances. Of course defendant could not consent unless before the court in person or by attorney. To recite that a party had consented when not subject to the jurisdiction of the court would indeed be irregular and contrary to the record of Judge Daniels, who, for twenty-five years served with marked ability as a judge of the Superior Court. It would not accord with the presumption that proceedings in courts of general jurisdiction are regular. *Williams v. Trammell,* 230 N.C. 575, 55 S.E. 2d 81; *Starnes v. Thompson,* 173 N.C. 466, 92 S.E. 259; *Settle v. Settle,* 141 N.C. 553; *Bernhardt v. Brown,* 118 N.C. 700; 49 C.J.S. 838-9.

The reason for defendant's appearance and consent to the continuance is, of course, immaterial. It may have appeared in response to the service made by Mitchell, or it may have ap-

peared because of notice from the Secretary of State as a result of the service of summons on him, or it may have appeared because it wanted to oppose the appointment of a receiver or wanted to participate in the selection of a receiver. The only matter of importance is the fact that the record supports the conclusion that defendant was before the court on a general appearance. Since the record shows the appearance of defendant, the orders entered cannot now be collaterally attacked. *Adams v. Cleve,* 218 N.C. 302, 10 S.E. 2d 911; *Downing v. White,* 211 N.C. 40, 188 S.E. 815; *Caviness v. Hunt,* 180 N.C. 384, 104 S.E. 763; *Smathers v. Sprouse,* 144 N.C. 637.

Appellant, relying on *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124, and *Craddock v. Brinkley,* 177 N.C. 125, 98 S.E. 280, contends that the action should have been treated as a motion in the cause. That may be done when the action is brought in the same court in which the original judgment was rendered and the identical parties are then before the court. In this case the parties who instituted the receivership proceeding in 1929 are not now before the court. They have had no notice of the motion. They are entitled to notice. G.S. 1-581; *Bank v. Alexander,* 201 N.C. 453, 160 S.E. 462. In the absence of necessary parties the court could not treat this action as a motion in the cause. *Buncombe County v. Penland, supra; Davis v. Brigman,* 204 N.C. 680, 169 S.E. 421.

The record discloses notice to creditors published in 1929.

Affirmed.

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

CORA D. CLARK, ADMINISTRATRIX OF THE ESTATE OF HENRY CLARK, DECEASED, PLAINTIFF APPELLEE v. PILOT FREIGHT CARRIERS, INC., AND LEO W. FORD, ORIGINAL DEFENDANTS, APPELLANTS

and

BURLINGTON ENGINEERING COMPANY, INC., ADDITIONAL DEFENDANT APPELLEE.

(Filed 26 February, 1958.)

1. **Appeal and Error §§ 16, 21—**

Allowance of *certiorari* under Rule 4 (a) will be treated as an exception to the order or orders which petitioner seeks to have reviewed, and even though appellants fail to group and separately number the exceptions relied upon by them as required by Rule 19, Section 3, the appeal will not be dismissed, since an exception to the judgment is sufficient to present the question whether the pleadings and admitted facts on which the trial court ruled support the orders entered, and whether any error of law appears on the face of the record.

2. Negligence § 10½—

The doctrine of assumption of risk is not available as a defense when there is no contractual relationship between the parties.

3. Master and Servant § 41: Torts § 6—

Where the third person *tort-feasor* is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint *tort-feasor* under G.S. 1-240, nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability.

4. Same: Carriers § 7—

Where a carrier is sued as a third person *tort-feasor* for the wrongful death of an employee of the shipper, occurring during the loading of machinery on the carrier's tractor-trailer, whether the carrier is entitled to have the shipper joined upon an alleged implied contract to indemnify the carrier under the rule of the Interstate Commerce Commission requiring the shipper to load the tractor-trailer, is addressed to the discretion of the trial court, the shipper not being a necessary party to a complete determination of the action by the employee's personal representative against the carrier.

5. Automobiles § 54a: Carriers § 3—

A carrier operating under franchise issued by the Interstate Commerce Commission is responsible for the operation of its trucks pursuant to such franchise insofar as third parties are concerned.

6. Parties § 10—

It is within the discretion of the trial judge to allow or deny motion to make a party who is not a necessary party to an action a party plaintiff or defendant, and the order entered is not reviewable.

7. Pleadings § 10—

Ordinarily, a defendant will not be permitted to litigate a cross-action against another party who is joined as an additional party defendant when the determination of such cross-action is not necessary to a complete determination of the cause of action alleged by the plaintiff.

CERTIORARI allowed upon petition of the original defendants to review the order of *Craven, Special Judge,* May Term 1957 of ALAMANCE, sustaining plaintiff's demurrer to that part of the original defendants' further answer and first defense entitled Section 3 thereof in which they plead assumption of risk as a bar to plaintiff's right to recover; and allowing the motion of plaintiff to strike said Section 3 in its entirety and certain other allegations in the pleadings of the original defendants, including the cross-action against the additional defendant and certain parts of their prayer for relief; and a motion of Burlington Engineering Company, Inc. (hereinafter called Burlington), additional party defendant, to vacate the *ex parte* order making it an additional party defendant, and to strike the cross-action of

the original defendant, Pilot Freight Carriers, Inc. (hereinafter called Pilot), against the additional party defendant.

This action was instituted on 27 February 1957 by Cora D. Clark, the duly appointed and acting administratrix of the estate of her husband, Henry Clark, deceased, who died on 24 May 1956, to recover damages for his wrongful death.

The plaintiff alleges that the death of her intestate was the result of the negligence of Leo W. Ford, who, at the time of the injury and death of plaintiff's intestate, was operating a tractor-trailer, owned by his co-defendant, Pilot, in the course and scope of his employment and in the discharge of his duties as such agent, servant and employee.

It is alleged in the answer of the original defendants that at the time of his injury plaintiff's intestate was an employee of Burlington and both he and his employer had accepted the provisions of the North Carolina Workmen's Compensation Act. That the defendants are informed and believe that the employer of plaintiff's intestate or its insurance carrier has paid or has admitted liability for compensation as provided in said Workmen's Compensation Act. G.S. 97-10.

The defendant Pilot attempted to place a cross-action against Burlington, employer of plaintiff's intestate, on the ground that Burlington was legally bound under an implied indemnity agreement to indemnify Pilot against any damages for injuries or death of any of the employees of Burlington which occurred while the cargo of Burlington was being loaded on Pilot's tractor-trailer.

Pilot alleges in its answer that it had entered into a written contract with Burlington that it would accept shipments from Burlington subject to classifications and tariffs then in effect, and that the unit of machinery being shipped by Burlington on this occasion weighed approximately 4,200 pounds; that under the regulations of the Interstate Commerce Commission such shipments had to be loaded and unloaded by the shipper or the consignee, as the case may be.

According to plaintiff's pleadings, the machine had been loaded on 22 May 1956, and Leo W. Ford, the driver of Pilot's tractor-trailer, had been directed to pull the tractor-trailer away from the loading platform or pit, but, instead, he carelessly, recklessly, negligently, and without warning, drove the tractor-trailer backwards and struck plaintiff's intestate, who had been helping load the tractor-trailer, and crushed him against the rear wall of the loading platform, inflicting such injuries that he died as a result thereof on 24 May 1956.

Pilot, upon filing its answer and purported cross-action against Burlington, secured an *ex parte* order from the Clerk

of the Superior Court of Alamance County, making Burlington, plaintiff's employer, an additional party defendant.

We allowed *certiorari* in order that it might be determined whether or not the court below committed error in sustaining plaintiff's demurrer and in allowing the motions of plaintiff and the additional defendant as hereinabove set out. The court entered separate orders sustaining plaintiff's demurrer and allowing the respective motions of plaintiff and the additional defendant.

Sanders & Holt, Long, Ridge, Harris & Walker for plaintiff appellee.

Cooper, Latham & Cooper, Robert E. Long for original defendant appellants.

Sapp & Sapp for additional defendant appellee.

DENNY, J. The additional defendant filed a motion in this Court to dismiss the appeal of the original defendants on the ground that the appellants have failed to group and separately number the exceptions relied upon by them, as required by Rule 19, Section 3 of the Rules of Practice in the Supreme Court, 221 N.C. 554, *et seq.*

In considering whether or not the court below committed error in sustaining plaintiff's demurrer and in striking allegations in the pleadings, and in vacating an *ex parte* order making an additional party defendant, when such matters are brought before us pursuant to petition for writ of *certiorari*, as provided in Rule 4 (a) of the Rules of Practice in the Supreme Court, 242 N.C. 766, G.S. 1957 Cumulative Supplement, page 21, and exceptions are not set out as required by Rule 19, Section 3 of the Rules of Practice in the Supreme Court, *supra*, G.S. Appendix I, page 171, we will treat the record filed pursuant to the terms of the allowed writ as an exception to the order or orders which petitioner seeks to have reviewed. Consequently, we hold that nothing is presented for decision on the record before us except the question as to whether the pleadings and admitted facts on which the trial judge ruled support the orders entered, and whether or not any error of law appears on the face of the record. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118; *Surratt v. Insurance Agency*, 244 N.C. 121, 93 S.E. 2d 72; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *Bond v. Bond*, 235 N.C. 754, 71 S.E. 2d 53. The motion to dismiss is denied.

The determinative question on this appeal is whether or not the court below committed error in allowing the motion of the additional defendant to strike Pilot's cross-action and to vacate the *ex parte* order making Burlington an additional party de-

fendant. If the ruling on this motion is upheld, we do not understand that the original defendants seriously challenge the ruling on the plaintiff's motion to strike certain pleadings.

There being no allegation in the pleadings tending to show any contractual relationship between the plaintiff and the original defendants, the doctrine of assumption of risk is not available as a defense. *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Broughton v. Oil Co.,* 201 N.C. 282, 159 S.E. 321. Therefore, the demurrer to the plea of assumption of risk as a bar to plaintiff's right of recovery was properly sustained.

The appealing defendants admit that since Burlington and the plaintiff's intestate were subject to the provisions of the North Carolina Workmen's Compensation Act, Pilot is not entitled to have Burlington retained as an additional party defendant under the provisions of G.S. 1-240 and the decisions of this Court. *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886; *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768; *Johnson v. Catlett,* 246 N.C. 341, 98 S.E. 2d 458, and cited cases. They likewise admit that Pilot is not entitled to relief against Burlington under the doctrine of primary and secondary liability. *Hannah v. House, ante* 573; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118.

The appellants apparently are relying solely on their contention that, since the character of the shipment by Burlington was such that the rules of the Interstate Commerce Commission required Burlington to load the unit of machinery on the tractor-trailer of Pilot, the common carrier, there is an implied obligation on the part of Burlington to indemnify Pilot against any damages growing out of the injury and death of plaintiff's intestate, an employee of Burlington, which occurred while the shipment of Burlington was being loaded on Pilot's tractor-trailer or immediately after the work of loading was completed.

We do not construe the pleadings to allege any contract between Burlington and Pilot other than an agreement that shipments by Burlington would be accepted by Pilot, subject to classifications and tariffs in effect at the time Burlington shipments were tendered to Pilot.

Conceding, but not deciding, that an implied contract existed as alleged by Pilot, it was discretionary with the trial judge as to whether or not Pilot would be permitted to litigate its claim under the implied contract of indemnity against Burlington in this action. Burlington is certainly not a necessary party to a complete determination of the matters alleged in the complaint as between the plaintiff and the original defendants. Moreover, a carrier operating under a license, or franchise,

granted by public authority and subject to certain obligations or liabilities imposed by such authority, is responsible for the operation of its trucks pursuant to such franchise insofar as third parties are concerned. 57 C.J.S., Master and Servant, Section 591, page 368; *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732; *Motor Lines v. Johnson*, 231 N.C. 367, 57 S.E. 2d 388; *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71.

In the case of *Gaither Corp v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659, the owner of a building sued his contractor for breach of contract on the ground that the roof of the building was defective and leaked. Defendant contractor sought to have his sub-contractor joined as an additional party defendant upon allegations to the effect that if the roof were defective, the sub-contractor had failed to erect it in accord with the specifications and that in such event the sub-contractor was responsible to the plaintiff and the contractor, with prayer that if the plaintiff should recover damages against him that he should be permitted to recover judgment over against his sub-contractor. This Court upheld the ruling of the court below in denying the motion to make the sub-contractor an additional party defendant. In speaking for the Court, Devin, C. J., said: "The plaintiff has elected to pursue his action against the contractor with whom he contracted in order to recover damages for an alleged breach of that contract, and plaintiff should be permitted to do so without having contested litigation between the contractor and his sub-contractor projected into the plaintiff's lawsuit. *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397."

It is within the discretion of a trial judge to allow or deny a motion to make a party who is not a necessary party to an action a party plaintiff or defendant and the order entered is not reviewable. *Hannah v. House, supra; Kimsey v. Reaves*, 242 N.C. 721, 89 S.E. 2d 386; *Gaither Corp. v. Skinner, supra; Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859; *Aiken v. Manufacturing Co.*, 141 N.C. 339, 53 S.E. 867.

It is said in *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397, "A cause of action arising between defendants not founded upon or necessarily connected with the subject matter and purpose of the plaintiff's action should not be engrafted upon the action which plaintiff has instituted. * * * Section 602 of the Consolidated Statutes (now G.S. 1-222) provides that 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves.' This permits the determination of the questions of primary and secondary liability between joint *tort-feasors*, but it may not be understood to authorize the consid-

eration of cross-actions between defendants as to matters not connected with the subject of the plaintiff's action." The plaintiff in this action is not a party to or bound by any contract of indemnity that may exist between Pilot and Burlington.

Ordinarily, a defendant should not be permitted to bring in an additional party defendant whose presence is not necessary to a complete determination of the cause of action alleged by the plaintiff and compel the plaintiff to stand by while the defendants litigate their differences in his suit. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413.

The ruling of the court below will be upheld.

Affirmed.

E. L. BIVINS AND WIFE, IMOGENE BIVINS, v. SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 26 February, 1958.)

1. **Railroads § 7: Principal and Agent § 13d—**

Admissions and proof that chemicals poisonous to certain types of vegetation were sprayed by a crew operating from a train moving slowly over defendant's tracks, make out a *prima facie* case that the crew operating the sprayers were agents or employees of the railroad company. If such persons were unauthorized, this fact would be peculiarly within the knowledge of the railroad company, and it would be under obligation to so allege and prove.

2. **Railroads § 15: Easements § 5—**

A right of way for railroad does not deprive the owner or his tenant of the use of the land for any purpose not inconsistent with its use for railroad purposes.

3. **Railroads § 7—**

Where plaintiff's testimony is positive that at least some of the crops damaged by chemicals sprayed from defendant's right of way were on land rented by him, the fact that there is some conflict in his testimony as to whether all the damage was outside the right of way, cannot justify nonsuit.

4. **Same: Trial § 31b—**

Where a railroad company alone is sued for the negligent use of poisonous spray on its right of way, and plaintiff makes out a *prima facie* case of liability by showing that the crew doing the spraying operated from a train moving along defendant's tracks, the court is not required to charge that the burden is on plaintiff to show that the persons operating the sprayers were agents or servants of the railroad company, since if such persons were unauthorized, lack of authority should be alleged and proved by the railroad company.

5. Appeal and Error § 1—

A party cannot contest the case on one theory and later upset the trial by switching to another theory on the appeal.

APPEAL by defendant from *Campbell, J.*, September-October, 1957 Term, MCDOWELL Superior Court.

Civil action for damages to plaintiffs' garden, fruit trees, and pasture alleged to have resulted from the negligent use of poisonous chemicals by the defendant in clearing its right of way, in that:

"(a) It loosed a dangerous, poisonous and noxious chemical into the air knowing that said chemical would kill or injure vegetation with which it came in contact.

"(c) It loosed said chemical into the air at a time when a breeze caused said chemicals to be blown and carried from defendant's railroad tracks over onto the plaintiffs' land and onto the plaintiffs' vegetation and trees."

The defendant, by answer, admitted its corporate existence and, in addition, the following: ". . . the defendant admits it operates a railroad over a right of way . . . from Old Fort . . . to Asheville . . . the defendant admits that the plaintiffs reside upon certain lands . . . adjacent to defendant's right of way and that they carry on upon said lands certain farming and gardening operations . . ., the defendant admits that the chemicals which were sprayed along its right of way, at or about the time mentioned in the plaintiffs' complaint, will kill certain types of vegetation upon contact . . . the defendant admits that the chemical solution which was sprayed along its right of way was intended to kill certain vegetation growing upon said right of way."

Other material allegations of the complaint were denied.

The plaintiff, E. L. Bivins, testified: "The Southern Railroad Company track passes somewhere close to my home. I have got 79 acres rented and the most of my damage is on the right of way. The Southern Railroad track runs along the south part of the boundary . . . No, I did not plant my crops without knowing for sure whether they were on the right of way. I know they are not on the right of way. . . . I rent it for a two-year period. My last period of occupancy ran from this summer to the last of next winter. . . . My family has been there since 1942. . . . I have had a similar arrangement all of the time I have been there. * * *

"I was on my place on the 3rd of August, 1956, and I saw a train come along the Southern Railroad tracks. It came along around noon and was spraying along the north side of the track. They had tank cars which were pulled by a railroad engine . . . an engine and four tank cars. . . . About the train, I

observed these men with hose and nozzles were spraying along the railroad right of way, and we had a tremendous amount of wind, and the stuff just kept going, the spray, that is, just kept drifting, and it was flying everywhere . . . I couldn't say definitely how many men there were . . . Some men were squirting on different trees. Those nozzles are kind of like a fire engine, you can cut them down to a solid stream or just a wide stream. Some were spraying wide and some straight . . . and the stuff was hitting me in the face. . . . I was standing approximately 300 feet from the railroad tracks . . . The reasonable market value of the crops was around $3,000 . . . after the spraying they were not worth anything, you couldn't consume the fruits for food, . . ."

The defendant offered evidence as to the damage to the plaintiffs' crops. It also offered Section 29 of Chapter 228, Private Laws of 1854-1855 (the charter of the Western North Carolina Railroad Company) which provided: ". . . in the absence of any contract . . . in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with 100 feet on each side thereof, was granted by the owner or owners to the company, . . . to have, hold, and enjoy the same so long as it shall be used for the purposes of said road and no longer." The defendant offered a deed made under court order, conveying the rights of the Western North Carolina Railroad in all railroad property to the defendant.

The defendant made timely motions for nonsuit and excepted to the court's refusal to grant them. The jury answered the issues of negligence and damages in favor of the plaintiff and, from judgment on the verdict, the defendant appealed.

E. C. Carnes for plaintiffs appellees.

W. T. Joyner and Proctor & Dameron for defendant appellant.

HIGGINS, J. The defendant's appeal presents two questions: (1) Was the evidence sufficient to repel the motion for nonsuit? (2) Did the court commit error by failing to explain "the legal doctrine of respondeat superior?" The answer to the first question will provide at least a partial answer to the second.

The defendant urgently contends "there is no evidence the men doing the spraying were agents or servants of the defendant," and that the court should have sustained the demurrer to the evidence on that ground, or at least should have charged that the burden was on the plaintiff to satisfy the jury the spraying (which caused the damage) was carried on by the agents of the defendant.

Paragraph six of the complaint alleges "That on the 3rd day of August, 1956, defendant's agents and employees sprayed a dangerous, poisonous, and noxious chemical . . . along the defendant's right of way which passes by the land on which plaintiffs reside." Notwithstanding the categorical denial of the paragraph, other parts of the defendant's answer contain the following: ". . . the defendant admits that it operates a railroad over a right of way from . . . Old Fort in McDowell County . . . to Asheville in Buncombe County, . . . and that plaintiffs reside on certain lands . . . adjacent to the said right of way . . . and that they carry on upon said lands certain farming and gardening operations. . . . the defendant admits that the chemicals *which were sprayed along its right of way, at about the time mentioned in the plaintiffs' complaint, will kill certain types of vegetation on contact . . . and that the solution . . . was intended to kill certain vegetation growing upon said right of way.*" (emphasis added)

The allegations and admissions in the pleadings, together with the undisputed evidence in the case, disclosed the following: On August 3, 1956, a train consisting of a locomotive and four tank cars moved slowly over the defendant's track near Old Fort, North Carolina. A number of men from the train sprayed chemicals along the defendant's right of way for the purpose of killing vegetation thereon. The spray was carried by the wind to plaintiffs' crops, causing the damage complained of.

May the defendant successfully contend the plaintiffs' case must be dismissed because the men who did the spraying from the tank cars were not shown to be the defendant's agents? The defendant was under the duty of maintaining its right of way. *Gainey v. R. R.*, 235 N.C. 114, 68 S.E. 2d 780; *Betts v. R. R.*, 230 N. C. 609, 55 S.E. 2d 76. Ostensibly, this duty was being performed by spraying chemicals from a train operated over defendant's line. Proof that damage resulted from the negligent operation of a train over defendant's track entitles the plaintiffs to go to the jury. The rule is stated in 22 Am. Jur., Sec. 80, p. 646: "But a more accurate expression of the rule, in the light of the authorities, is believed to be that when the plaintiff proves that sparks from a railroad locomotive set fire to his property, a *prima facie* case is presented, and it then devolves upon the railroad to rebut such *prima facie* case, and unless it does rebut the plaintiff's case, the plaintiff is entitled to recover without further proof." To the same effect is *Fleming v. R. R.* 236 N.C. 568, 73 S.E. 2d 544.

Justice Allen stated the rule: "It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control

at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable. 1 Sherm. & Redf., Negligence, 71. Any other rule, especially where persons are dealing with corporations, which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery." *Sutton v. Lyons,* 156 N.C. 3, 72 S.E. 4.

"It has never been held, to our knowledge, otherwise than that, if an engine and cars are being used on the road of a company, the presumption is that they are being controlled by such company. We believe it universally understood that a railroad company that is in control and operating a particular railroad is controlling and operating it to the exclusion of all other railroads or persons. . . . There was no pretense but what the defendant was in the exclusive possession of the railroad in question, and the presumption would necessarily follow that an engine and cars found passing over its tracks were under its operation and control." *Brooks v. Missouri Pac. Ry. Co.,* 71 S.W. (Mos) 1083.

"It has also been held that where it is admitted that a certain company owns a railroad the presumption arises, in the absence of anything to the contrary, that it is operated by such company. . . ." Elliott on Railroads, 3rd Ed., Sec. 2712, p. 660, citing numerous cases.

Manifestly, if the spraying operations complained of in this case were carried on by persons without the defendant's authority, such would be within the knowledge of the defendant, and it would be under obligation so to allege and to prove. "If there is anything, then, that relieves the defendant of this liability, it is, under the ordinary rule of law, incumbent upon it to so allege and prove, as this is entirely defensive matter." *Embler v. Lumber Co.,* 167 N.C. 457, 83 S.E. 740.

In the recent case of *Alexander v. Seaboard Railway,* 221 S.C. 477, 71 S.E. 2d 299, the Supreme Court of South Carolina had before it a case not unlike this. The plaintiff claimed damage caused by deadly chemicals used by the railroad in clearing its right of way. After entering a general denial, the defendant set up the further defense that the spraying was done by an independent contractor. The court held that the evidence was sufficient to go to the jury and to sustain the verdict; and, further, that "Liability cannot be evaded by employing an independent contractor to do work which is inherently . . . dangerous unless proper precautions are taken."

It may be noted that the liability of an independent contractor is neither presented nor decided here. The case is cited on the question of the sufficiency of the evidence to go to the jury.

The controversial matters in the trial of this case below involved (1) the issue of actionable negligence, and (2) the amount of plaintiffs' damage.

The plaintiff, E. L. Bivins, testified the damaged crops were upon land he occupied and cultivated as a tenant for a cash rental. There was some conflict in his testimony as to whether all the damage was outside the right of way.

The defendant contended its right of way extended 100 feet on either side of the track and offered as proof Section 29 of Chapter 228, Private Laws of 1854-55 (the charter of the Western North Carolina Railroad). It also offered evidence that the present defendant had succeeded to the rights of the Western North Carolina. The charter provided, among other things, that in the absence of contract, deed, or condemnation, the right of way should be presumed to extend 100 feet on either side of the track. However, this right of way was an easement for railroad purposes and did not deprive the owner or his tenant of the use of the right of way for purposes not inconsistent with its use for railroad purposes. *Railroad v. Mfg. Co.*, 229 N.C. 695, 51 S.E. 2d 301; *Railroad v. Lissenbee*, 219 N.C. 318, 13 S.E. 2d 561; *Tighe v. R. R.*, 176 N.C. 239, 97 S.E. 164; *Bridgers v. Dill*, 97 N.C. 222, 1 S.E. 767. In the absence of a showing that the crops cultivated by the plaintiffs in some way interfered with the use of the right of way for railroad purposes, the plaintiffs would perhaps be entitled to recover for them. However, the court charged the jury that the plaintiffs could recover only such damage as the jury found by the greater weight of the evidence had been caused to the crops outside and beyond the right of way by the actionable negligence of the defendant. The court squarely placed upon the plaintiffs the obligation of showing actionable negligence on the part of the defendant and the resulting damage to plaintiffs' crops beyond the railroad right of way. In its charge the court recited the contentions of the parties with respect to the right of way, negligence of the defendant, proximate cause, and measure of damages.

The defendant's assignment of error No. 4 raises the question whether the court committed error in failing to charge that the burden was on the plaintiffs to show the men spraying the chemicals from the railroad cars were the agents and servants of the defendant. The defendant relies on the case of *Robinson v. Transportation Co.*, 214 N.C. 489, 199 S.E. 725, as authority for its position. In the Robinson case, both Thomas, the driver, and the transportation company, the owner, were sued.

The owner denied that Thomas, at the time of the accident, was its agent or was engaged in its business. This Court held for error the failure to charge that the burden was on the plaintiff to show both that Thomas was negligent and that at the time of the negligent act he was acting as the agent and servant of the transportation company.

In the instant case, the railroad company alone is sued for damages caused by the negligent use of poisonous spray on its right of way. The company would be liable if any of its agents negligently caused damage. The defendant's admission that the spraying was intended to kill vegetation on its right of way, and the undisputed evidence that the poisonous spray came from a train on its tracks, placed on the defendant the burden of showing the men on the tank cars with spraying apparatus in their hands were not, in fact, its employees. Otherwise the plaintiffs' cause would fail unless they could run down, and identify, and prove the agency of the men who did the spraying. If unauthorized persons were operating a train over the defendant's track and spraying its right of way, the facts would be within the peculiar knowledge of the railroad. If conduct so unusual and contrary to experience is relied on as a defense, it should be alleged and proved. Elliott on Railroads, *supra; Brooks v. Railroad, supra;* Sherman and Redfern on Negligence, *supra; Fleming v. R. R., supra; Sutton v. Lyons, supra; Embler v. Lumber Co., supra.*

The theory on which the case was tried as shown by the pleadings, the evidence, the contentions of the parties, gathered from the court's charge, to which there was no objection, shows the identity of the men who did the spraying and their agency were not issuable facts in the trial. The defendant cannot contest the case on one theory and later upset the trial by switching to another theory on the appeal. *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Crowell v. Air Lines,* 240 N.C. 20, 81 S.E. 2d 178; *Parrish v. Bryant,* 237 N.C. 256, 74 S.E. 2d 726.

The evidence was sufficient to go to the jury and to sustain the verdict. The charge properly placed upon the plaintiffs the burden of showing the defendant's actionable negligence and resulting damage. Nothing more was required. Cause to disturb the verdict and judgment does not appear.

No error.

MARY GRACE STEGALL v. JOHN WAYLAND SLEDGE, ADMINISTRATOR OF THE ESTATE OF ROBERT CLIFFORD JONES, SR., DECEASED.

(Filed 26 February, 1958.)

1. **Automobiles § 37: Evidence § 32—**

In an action against the personal representative of the deceased owner to recover for injuries received in an automobile accident, plaintiff may not testify that intestate was driving the car at the time of the accident or that she had requested him to slow down.

2. **Automobiles § 41p—**

The identity of the person driving at the time of an accident may not rest on conjecture and surmise, but plaintiff must offer evidence tending to establish the identity of the driver as a legitimate inference from the established facts.

3. **Same—**

The identity of the driver of a car at the time of the accident in suit may be established by circumstantial evidence.

4. **Same—Circumstantial evidence that intestate was driving at the time of the accident held sufficient to be submitted to the jury.**

Plaintiff's evidence tended to show that the car involved in the accident was owned by intestate, that a driver's license had been applied for in his name, that plaintiff did not know how to drive, had no driver's license, and that only plaintiff and intestate were in the car at the time of the accident in suit. Plaintiff's evidence further tended to show that from the physical facts at the scene the car was being driven recklessly at excessive speed, that the car turned completely over on the highway, leaving marks on the highway and shoulders for some 580 feet, and that intestate was thrown therefrom and was found some 50 feet to the right of and parallel with the automobile, and plaintiff was found lying almost under the right front door with her head toward the front of the car. *Held:* The evidence is sufficient to permit, but not to compel, a jury to draw the legitimate inference from the established facts that defendant's intestate was driving at the time of the wreck, irrespective of the position in which the bodies were found, it being a legitimate inference from the facts here that the occupants were thrown around in the car before they were thrown out of it.

5. **Automobiles § 41a—**

The physical facts at the scene of the accident in this case *held* to warrant a reasonable inference that the operator of the car was driving it at an excessive speed in violation of G.S. 20-141(b) 4, and was driving it recklessly in violation of G.S. 20-140, so as to take the issue of negligence to the jury.

6. **Automobiles § 6—**

A violation of G.S. 20-140 is negligence *per se.*

APPEAL by plaintiff from *Bone, J.,* September Term 1957 of CRAVEN.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant's intestate, Sergeant Robert Clifford Jones, Sr.

The defendant's answer is a general denial of the complaint's allegations.

From a judgment of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals.

Owens & Langley for plaintiff, appellant.

Whitaker & Jeffress and Dunn & Dunn for defendant, appellee.

PARKER, J. This is a summary of plaintiff's evidence: On the night of 5 November 1956 State Highway Patrolmen P. M. Herring, Jr. and H. W. Pridgeon went to the scene of an automobile wreck on Highway No. 70 some seven miles east of the City of New Bern. They and an ambulance arrived at the same time. The highway at the scene makes a curve, described by Patrolman Herring as an "S" curve. When the patrolmen arrived, they saw a Ford Ranch Wagon standing on its wheels in a pasture 20 or 25 feet from the highway on its west side. At another place in the Record the evidence is the automobile was on the east side of the highway. Appellee's brief states the automobile was 20 to 25 feet from the western edge of the paved highway. The tires on the automobile had a good tread, and were standing up. The automobile was a 1956 model, bearing North Carolina License No. ZP-5781, and its motor number was M6NR-142343.

The top of the automobile had been ripped up and folded back, and on the right-hand corner of the top where it had been torn loose from the post was blood, and what appeared to be flesh. Both sides of the automobile and the top were bent in. It was a two-door car. Both doors were open, and "torn down completely, crumpled." To some extent the front end was damaged. The windshield and windows were torn out. The Ranch Wagon was a complete wreck. It was torn up from all angles.

Patrolman Herring testified as follows in respect to tracks or marks leading away from the automobile: "There were tracks or marks leading away from the automobile. Beginning from the Ranch Wagon which was over off the highway in a pasture, leading back east towards the highway, beginning here with scuff marks; the dirt was torn up, small saplings were torn down and going on further back a barb wire fence near the highway was torn down. The fence more or less came around here, posts, several of those posts were torn down between the fence and the highway which is more or less a drain ditch or gully with fresh scuff marks, dirt thrown up and portions of

chrome and glass lying in this vicinity along here; getting back on the highway there were scuff marks on the highway and paint. The color of the paint on the highway was blue, I believe, and the color of the car was blue. And after the scuff marks from the highway leading back to the shoulder was more scuff marks of a—more or less dirt thrown back to the east side of the highway, which is on the opposite side from which the car was. Then the tracks go further on up the highway and then finally straightened out more or less to a straight tire mark to the point where it entered the highway further on back. I measured the length of these marks from the place the automobile was sitting to the place the marks began as they came off the northeast side of the highway, and those marks were 580 feet long."

This is Patrolman Pridgeon's testimony as to the marks: "There were marks leading away from the station wagon. The ground between the station wagon and the road was dug out in holes; the dirt was torn up in different spots; the wire fence was wrapped around the station wagon, part of the wire from the fence and there was several holes gouged out in the ditch or little drain beside of the highway there, between it and the road. The car had come to rest on the inside of the curve, when I got there. Continuing with my description of the marks, from the highway ditch or drain back up on the highway there was several scuff marks and the shoulder of the road was torn by, like dug out holes and across the highway there was skid marks, four sets of marks, four marks going back across the highway and two down the other side of the road where the shoulder, the grass had been torn on the shoulder. I had an opportunity to measure the length of these marks that I found from the place the station wagon was sitting to their end, and I found them to be 580 feet according to the tape. They were 580 feet from the station wagon back up on the road, across the highway and down the other shoulder to where they came off the highway. As to the condition of the road and the weather on this night, the night of November 5, 1956, it was dry. That was a black top highway."

Patrolman Herring testified this was a two-door car. He further testified that almost under the right front door, which was torn loose and crumpled down, plaintiff was lying more or less parallel, with the automobile with her head toward its front. She was seriously injured.

The body of defendant's intestate, Sergeant Robert Clifford Jones, Sr., was lying about 50 feet from the Ranch Wagon with his head in the same direction it was headed. His body was lying in line with the automobile and its marks. Both bodies were

on the right-hand side of the Ranch Wagon when the patrolmen arrived at the scene. Sergeant Jones was lying on his back. He had no cuts on his face. He was foaming at the mouth and nose. Patrolman Herring testified, "his shoes were off, one of them I believe." He died that night.

About 11:00 o'clock p.m. the same night Dr. Joseph F. Patterson, Jr. saw plaintiff in St. Luke's Hospital in New Bern.

Plaintiff testified she lives in Kinston, she met Sergeant Jones in the middle of September 1956, and on 5 November 1956 he was at her home about 7:30 or 7:45 o'clock.

The mother of plaintiff testified that her daughter prior to 5 November 1956 had never owned an automobile, had never had an operator's license, and could not drive an automobile.

The step-father of plaintiff testified that to his knowledge plaintiff could not drive an automobile.

Plaintiff testified that prior to 5 November 1956 she had never driven an automobile.

Plaintiff offered in evidence from the North Carolina Department of Motor Vehicles, Registration Department, a duly certified copy of an application by defendant's intestate for the issuance of a certificate of title to him for a Ford Ranch Wagon, Motor Number M6NR-142343—the same Ford Ranch Wagon the patrolmen saw at the scene wrecked. This application was sworn to and subscribed by Robert Clifford Jones, Sr., before a Notary Public in Kinston on 31 October 1956, and in it he stated that he purchased the car new from Paul Motor Company, Charleston, South Carolina, in March 1956, and is now the owner of it. The department issued to him a certificate of title on this automobile on 6 November 1956, the day following his death.

Plaintiff assigns as error that the trial court, upon objection of the defendant, refused to permit plaintiff to testify as to who was driving the automobile at the time of its wreck, as to the speed of the automobile just prior to its wreck, as to whether she said anything to the driver as to the speed of the automobile. The witness whispered her replies to the court reporter. If she had been permitted to answer, she would have testified, that defendant's intestate was driving the automobile at the critical moment at a speed of 85 miles an hour, that she was looking at the speedometer, and that she asked him to slow down. The trial court properly excluded this testimony by authority of *Boyd v. Williams*, 207 N.C. 30, 175 S.E. 832; and *Davis v. Pearson*, 220 N.C. 163, 16 S.E. 2d 655. Appellant's counsel in their brief very frankly concede that the trial court's rulings were in accordance with these decisions, but they request us to overrule these two cases. Such a request we decline to grant.

A crucial question is whether the physical facts at the scene of the wreck, and the attendant facts and circumstances, which are circumstantial in nature, when considered in the light most favorable to the plaintiff, permit the legitimate and reasonable inference that defendant's intestate, Sergeant Jones, was driving the automobile at the time of the wreck.

Inferences as to who was driving the automobile at the time of the wreck cannot rest on conjecture and surmise. *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. The inferences permitted by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879. To make out this phase of the case plaintiff must offer evidence sufficient to take the question of whether defendant's intestate was driving the automobile at the critical moment out of the realm of conjecture and into the field of legitimate inference from established facts. *Parker v. Wilson, supra.*

Plaintiff did not offer any direct evidence showing that defendant's intestate was driving the automobile at the time of the wreck. She is not required to do so. Circumstantial evidence alone is sufficient to establish this crucial fact. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492, and cases there cited.

Plaintiff's evidence shows that Sergeant Jones was the owner of the Ford Ranch Wagon, and her evidence permits the legitimate inference that he and plaintiff were the only persons in it at the time of the fatal wreck. However, proof of Sergeant Jones' ownership of the automobile and the inference from the evidence that he was riding in it at the time of the fatal wreck, standing alone, do not cause a rebuttable presumption or inference to arise that he was driving his automobile at the time of the wreck. *Parker v. Wilson, supra.*

Plaintiff's evidence shows these facts: Sergeant Jones purchased this Ford Ranch Wagon new in March 1956, and was its owner at the time of the wreck. This permits a reasonable inference that he knew how to drive it. Plaintiff had never had an operator's license to drive an automobile, and cannot drive one. The automobile stopped in a pasture 20 or 25 feet from the highway. The length of the marks from the place the automobile was sitting to the place the marks began as they came off the northeast side of the highway was 580 feet by measurement. The automobile was a complete wreck: torn up from all angles. Its top had been ripped up and folded back. Both its sides and the top were bent in. The windshield and windows were torn out. Both doors were open, and "torn down completely, crumpled." The automobile's color was blue, and there

was blue paint on the highway. Patrolman Herring testified that when he arrived at the scene the Ranch Wagon was standing up on its wheels, "all of the tires on the automobile were standing up, none of them were flat, and they had good tread on them."

The facts in evidence permit the legitimate inference that the automobile was being driven at tremendous speed, and that it turned over on the highway, then righted itself, and travelled some 580 feet off the highway before coming to rest on its wheels. The completely wrecked condition of the automobile, the blue paint on the highway, and the marks behind the automobile at the scene permit the fair inference that Sergeant Jones and plaintiff were thrown around in the automobile before they were thrown out of it.

Considering in the light most favorable to the plaintiff, the physical facts at the scene, all the attendant facts and circumstances, the evidence that plaintiff cannot drive an automobile, and that only the bodies of plaintiff and Sergeant Jones were seen at or near the wrecked automobile, it is our opinion, notwithstanding the position in which the patrolmen saw the bodies of plaintiff and Sergeant Jones when they arrived, that plaintiff has offered sufficient evidence to permit, but not to compel, a jury to draw the legitimate inference from established facts that defendant's intestate was driving the Ford Ranch Wagon at the time of the fatal wreck. The facts in *Parker v. Wilson, supra,* are readily distinguishable.

The completely wrecked condition of the Ranch Wagon and the physical facts at the scene of its wreck warrant a reasonable inference by a jury that the operator of it was driving it at an excessive speed in violation of G.S. 20-141(b) 4, and was driving it recklessly in violation of G.S. 20-140. *Aldridge v. Hasty,* 240 N.C. 353, 364, 82 S.E. 2d 331, 341; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. A violation of G.S. 20-141 (b) 4 is negligence *per se. Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143; *Albritton v. Hill,* 190 N.C. 429, 130 S.E. 5. A violation of G. S. 20-140 is negligence *per se. Crotts v. Transportation Co.,* 246 N.C. 420, 98 S.E. 2d 502. The inference that the wreck of the Ranch Wagon resulted from the want of due care is reasonable, and is more than mere speculation or conjecture.

It is for a jury, not a court, to draw inferences of negligence. We think that plaintiff's evidence will permit, but not compel, a jury to draw legitimate inferences that defendant's intestate was driving the Ford Ranch Wagon at the time of the wreck at a speed in excess of the maximum speed limit authorized by

G.S. 20-141(b) 4, and recklessly in violation of G.S. 20-140, that such operation of the Ranch Wagon was negligence *per se*, and the proximate cause of plaintiff's injuries. That makes it a case for the jury. The twelve will say how it is.

Reversed.

AUTO FINANCE COMPANY OF NORTH CAROLINA, INC., v. WASH SIMMONS AND WEEKS MOTORS, INC.

(Filed 26 February, 1958.)

1. **Courts § 14—**

In an action instituted in a court inferior to the Superior Court, the fact that the defendant files a counterclaim in excess of the jurisdictional limitation of such court does not oust that court's jurisdiction to try plaintiff's claim in the absence of statutory provision to the contrary. G.S. 7-351 through 7-383.

2. **Courts § 7—**

Defendant filed a counterclaim in excess of the jurisdictional limit of the trial court and moved to remove to the Superior Court. The motion to remove was denied and defendant appealed. *Held:* In the absence of statutory provision for removal in such instance, it was error for the Superior Court to order removal, and its rulings on other motions in the cause will be stricken without prejudice.

3. **Appeal and Error § 1—**

The sole question presented upon appeal from an order of a lower court is the correctness of the order, and, upon remand, the reasons given by the lower court as the basis of the order should be stricken so that neither side will be prejudiced.

4. **Bills and Notes § 17: Chattel Mortgages and Conditional Sales § 16—**

Allegations by the purchaser of a car that if he signed a conditional sale contract therefor he was induced to do so by trick or fraud of the seller, are averments of fraud in the *factum*, and such plea is valid not only against the seller but also against the assignee of the conditional sale contract.

5. **Usury § 7—**

Allegations in an action on a purchase money note that the seller and the assignee of the conditional sale contract conspired and, by common plan and design between them, charged and were attempting to collect interest in excess of the rate allowed by law, state a cause of action against both the seller and the assignee for forfeiture of all interest, G.S. 24-2, but the purchaser may not demand, in addition to the penalty prescribed by statute, damages alleged to have been suffered as a result of embarrassment and loss of his automobile as the result of the charge of interest at usurious rates.

6. Pleadings § 3a: Conspiracy § 2—

Allegations that the seller and the assignee of the conditional sale contract conspired together to charge the purchaser usurious interest, and that as a result thereof the purchaser was embarrassed and caused to lose his automobile to his damage in a specified amount and that the seller and assignee acted with malice entitling the purchaser to punitive damages in a specified sum, are insufficient to state an independent cause of action based on conspiracy, since the allegations, apart from the cause of action for usury, are mere conclusions of the pleader.

7. Pleadings § 19c—

Legal conclusions of the pleader are to be disregarded upon demurrer.

8. Pleadings § 10—

A counterclaim within the meaning of G.S. 1-137 includes pleas operating by way of recoupment, setoff, or cross-demand.

9. Pleadings §§ 10, 19c—

Where a counterclaim contains unchallenged counts which are good, a written demurrer *ore tenus* thereto on the ground that other counts contained therein were based on matters which did not accrue until after the institution of the action, must be overruled, since if a pleading is good to any extent a general demurrer thereto cannot be sustained.

10. 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 plaintiff from *Williams, J.*, Regular Judge holding the Courts of the Fourteenth Judicial District, at Chambers in the City of DURHAM, 27 June, 1957. From DURHAM.

Daniel K. Edwards for plaintiff appellant.
C. Horton Poe, Jr. for defendant Wash Simmons, appellee.

JOHNSON, J. This is a civil action instituted in the Durham County Civil Court to recover the sum of $300 on a conditional sale contract covering the defendant Simmons' 1949 Lincoln automobile. As an ancillary remedy in the action, the plaintiff sued out a writ of claim and delivery to recover possession of the automobile.

The Durham County Civil Court was organized under Article 35 of Chapter 7 of the North Carolina General Statutes, with jurisdiction limited to $1,500.

The defendant Simmons filed answer denying the material allegations of the complaint, and by way of counterclaim alleged a series of transactions against the plaintiff and Weeks

Motors, Inc. The relief claimed by the defendant Simmons in his counterclaim is in excess of the jurisdictional limit of the County Court. On this ground, he moved the Court that the case be removed to the Superior Court for trial.

The Judge of the Durham County Civil Court, on motion of the defendant Simmons, entered an order bringing Weeks Motors, Inc., in as a party defendant.

Thereafter, the plaintiff and Weeks Motors, Inc., by separate motions, moved to strike all the defendant's further answer and counterclaim on these grounds: (1) irrelevancy and redundancy under G.S. 1-153, (2) failure to state facts constituting either a defense or counterclaim, and (3) that the "purported counterclaim asserted is in an amount in excess of the jurisdiction" of the County Court.

The motions to strike were not heard in the County Court. The Judge of that Court first took up for consideration the motion made by the defendant Simmons to remove the action to the Superior Court. The motion was denied on the grounds that Simmons by filing answer and moving to make a new party had submitted to the jurisdiction of the court. He excepted and appealed to the Superior Court.

On appeal, the presiding Judge held that the counterclaim set up by Simmons in excess of the jurisdiction of the County Court entitled him to have the entire case removed to the Superior Court. The order entered in the Superior Court by Judge Williams decrees: (1) that the order of the County Court denying removal be reversed, and that the case be placed on the civil issue docket of the Superior Court; (2) that the order naming Weeks Motors, Inc., as an additional party be affirmed; and (3) that the motion of the plaintiff to strike the counterclaim be disallowed. From the order so entered, the plaintiff appealed.

The crucial question presented by the appeal is this: Did the filing of the counterclaim by the defendant Simmons in which he claims relief in excess of $1,500 oust the jurisdiction of the Durham County Civil Court over the plaintiff's claim and entitle Simmons to a removal of the whole case to the Superior Court for trial? We think not. There is no provision to that effect in the statutes under which the Court was organized. G.S. 7-351 through 7-383. And the general rule is that in the absence of such provision, the filing of a counterclaim in excess of a lower trial court's limited jurisdiction does not oust the court of jurisdiction of the plaintiff's claim, and the court should proceed to hear and determine that claim. 14 Am. Jur., Courts, Sec. 221; Anno: 37 L.R.A. (N.S.) 607. Cf. *Leonard v. Coble,* 222 N.C. 552, 23 S.E. 2d 841; *Cheese Co. v. Pipkin,* 155 N.C. 394, 71 S.E. 442.

It necessarily follows that the order of removal entered in the Superior Court must be held for error. The case should have remained in the Durham County Civil Court for trial of the plaintiff's cause of action. This being so, the rulings made in the Superior Court on the plaintiff's motion to strike the counterclaim and on the question whether Weeks Motors, Inc., should be retained as a party defendant will be treated as stricken out without prejudice to either side, to the end that these motions may be heard and determined in the first instance in the County Court. The ruling of the County Court denying removal of the cause will be sustained. Since the reasons given for the ruling are unimportant, they will be treated as stricken out, so that neither side will be prejudiced when the motions to strike, and any other motions, are heard. The appeal from the County Court presented for review the single question whether the ruling was correct, and not whether the reasons given therefor or the grounds on which it was based are sound or tenable. *Hayes v. Wilmington,* 243 N.C. 525 (tenth headnote), 91 S.E. 2d 673 (twelfth headnote). See also *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314.

In the Supreme Court the plaintiff demurred *ore tenus* to the counterclaim, for failure to state a cause of action. This brings into focus the series of events alleged by the defendant Simmons by way of further defense and counterclaim. The events alleged are not stated as separate causes of action, but rather as though they were a connected story. We glean from the pleading allegations which may be restated in separate counts as follows:

1. That the defendant Simmons never intentionally executed the conditional sale contract sued on in the main action; that he obtained the Lincoln automobile described in the conditional sale contract in an exchange of cars with Weeks Motors, Inc., and agreed to pay $50 to boot, and that this sum was then paid cash in closing the deal; that he is a man of limited education and cannot read; that if he signed the conditional sale contract, it was signed by trick or fraud of Weeks Motors, Inc., under representation that he was signing title papers. In this count it appears that Simmons has alleged a cause of action for rescission, based on fraud allegedly perpetrated by Weeks Motors, Inc. And, since the allegations charge fraud in the *factum,* the plea is valid not only against Weeks Motors, Inc., but also against the plaintiff, assignee of the conditional sale contract. *Finance Corp v. Rinehardt,* 216 N.C. 380, 5 S.E. 2d 138; *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40.

2. That, if the defendant Simmons executed the conditional sale contract to Weeks Motors, Inc., he received nothing therefor and it was therefore without consideration; that in the event

of a recovery against him by the plaintiff, he should have judgment over against Weeks Motors, Inc., for the full amount of the recovery.

3. That the plaintiff Finance Company and Weeks Motors, Inc., conspired and, by common plan and design between them, charged and have attempted to collect from Simmons interest in excess of the rate allowed by law, the excessive charges being "$263.00 upon one occasion and $300.00 upon another occasion." Here Simmons alleges, or attempts to allege, one or more cause of action in usury for "charging a greater rate of interest than six per centum," for which he demands forfeiture of all interest. G.S. 24-2. The allegations that the usurious interest charges were made by common plan and design of the plaintiff and Weeks Motors, Inc., make the usury count good against both of these parties. Aside from this, however, the rule is that a note tainted with usury retains the taint in the hands of a subsequent holder. *Faison v. Grandy*, 126 N.C. 827, 36 S.E. 276; *Ward v. Sugg*, 113 N.C. 489, 18 S.E. 717.

4. That as a result of the foregoing conspiracy and common plan and design of the plaintiff and Weeks Motors, Inc., to charge Simmons interest at usurious rates, he (Simmons) "has been embarrassed, harassed, and otherwise mentally disturbed; and has been caused to lose his automobile, . . . all to his great damage in the amount of $5,000.00." And, further, that the conspiracy was perpetrated with malice on the part of both corporations, thus entitling Simmons to punitive damages in the sum of $5,000. Here it appears the defendant Simmons attempts to superadd to his usury counts claims for damages in excess of the penalties fixed by statute. This he may not do. "Penalties for the exaction of usury exist only as provided by statute, and must be enforced in accordance with the terms of the statute." *Smith v. Building & Loan Assn.*, 119 N.C. 249, 26 S.E. 41. See also 91 C.J.S., Usury, Sec. 153, p. 757; 55 Am. Jur., Usury, Sec. 114, p. 403. Nor may this count be treated as an independent cause of action based on conspiracy, separate and apart from the count based on statutory usury. This is so for the reason that the allegations, apart from those relating to the statutory penalty for usury, are mere conclusions of the pleader, to be disregarded on demurrer. *Thomas & Howard Co. v. Ins. Co.*, 241 N.C. 109, 84 S.E. 2d 337; *Griggs v. Griggs*, 213 N.C. 624, 197 S.E. 165. See also *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193.

Here, then, it appears that Simmons by further answer has set up, or attempted to set up, several different pleas operating by way of recoupment, setoff, or cross-demand. A counterclaim, within the meaning of the statute (G.S. 1-137), includes all

these pleas. In *Etheridge v. Wescott,* 244 N.C. 637, 644, 94 S.E. 2d 846, 851, it is said, quoting from an earlier decision: " 'Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of the defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him in the same state of facts.' " The plaintiff's demurrer *ore tenus,* submitted in writing as required by the Rules, challenges the counterclaim for failure to state a cause of action on the ground that the cause of action declared on arose "out of the taking of the defendant Wash Simmons Lincoln automobile by claim and delivery proceedings" and that "this action and the . . . taking and the damages alleged . . . did not accrue prior to the institution of the present action." It thus appears that the demurrer, though general in form and addressed to the counterclaim as a whole, assigns a ground which limits the challenge to the counts summarized in numbered paragraph four above, wherein Simmons seeks to recover (1) compensatory damages of $5,000 as penalties for usury and as damages for the seizure of his car, and (2) punitive damages of $5,000. For reasons previously stated, these counts allege no cause of action or defense. Decision as to the demurrer *ore tenus* is controlled by the rule stated in *Griffin v. Baker,* 192 N.C. 297, 298, 134 S.E. 651, as follows: "The rule is well established that where a general demurrer is filed to a petition as a whole, if any count of the pleading is good and states a cause of action, a demurrer should be overruled, and the same rule governs as to demurrers to defenses." For further explanation of the rule that a plea will not be overruled by general demurrer if it is good in any respect or to any extent, see *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711, and *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547.

Since the counterclaim contains unchallenged counts which are good, the demurrer must be overruled. It is so ordered, without prejudice to the plaintiff's right to challenge the imperfect counts in the counterclaim by motion to strike in the County Court. It would serve no useful purpose for us to discuss the question whether Simmons' imperfect count respecting claim for damages, compensatory and punitive, for seizure of the automobile is also defective because the cause of action attempted to be stated did not accrue before the present action was instituted. It is unnecessary for an appellate court, after having determined the merits of a case, to examine questions

not affecting decision reached. *Todd v. White,* 246 N.C. 59, 97 S.E. 2d 439; *Painter v. Finance Co.,* 245 N.C. 576, 96 S.E. 2d 731. See, however, McIntosh, North Carolina Practice and Procedure, Second Edition, Sec. 1242; 16 North Carolina Digest, Set-off and Counterclaim, Sec. 24.

The judgment is vacated. The cause will be remanded for proceedings in accordance with this opinion.

Error and remanded.

GRACE O. HARROFF, EXECUTRIX UNDER THE WILL OF FRED F. HARROFF, DECEASED v. DON F. HARROFF, ROBERT A. HARROFF, WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FRED F. HARROFF, DECEASED, AND DEVERE C. LENTZ, JR., GUARDIAN AD LITEM.

(Filed 26 February, 1958.)

1. **Wills § 31—**

In the construction of a will, the intent of the testator as gathered from the four corners of the instrument should be given effect unless contrary to some rule of law or at variance with public policy.

2. **Wills § 34e—Under terms of this will, trusts should be set up in residuary estate unaffected by specific bequests or nonprobate property.**

The will in suit, after specific bequests to testator's widow, provided for the division of the residue of the estate of every kind and nature into two parts, one to include assets of a value of one-half of the "estate," to be held in trust for the widow, and the balance in trust for testator's sons, with further provision that all inheritance taxes be paid from funds of the second trust. The widow received property of substantial value from insurance, testator's pension fund and real estate held by the entireties. *Held:* The estate to be divided into the trust funds is the probate estate remaining after the payment of the specific bequests, without taking into consideration the nonprobate property passing to the widow by contract or by operation of law, but the second trust fund should be charged with all State and Federal inheritance taxes on the gross estate.

APPEAL by petitioner and defendants Don F. Harroff and Robert A. Harroff from *Nettles, J.,* at Chambers in Asheville, North Carolina, 11 January 1958. From BUNCOMBE.

Fred F. Harroff, a resident of Buncombe County, North Carolina, died on 27 March 1955, leaving a last will and testament wherein he appointed his wife, Grace O. Harroff, executrix of his will, and the Wachovia Bank and Trust Company trustee of all the property and assets allocated to Trust A and Trust B, pursuant to the provisions of said will.

This proceeding was instituted by the excutrix in her official capacity to obtain the advice and instruction of the court with respect to the following: (1) Does the word "estate" as used in the second sentence of Item IV of the will of Fred F. Harroff mean "probate estate," as held by the Superior Court; or (2) "residuary estate"; or (3) does it mean "gross estate," including property that passed under Item II of the will, as well as the property that passed to the petitioner under contract and by operation of law?

The parts of the last will and testament of Fred F. Harroff, deceased, essential to an interpretation of the question posed, read as follows:

"ITEM 1. I direct my Executrix hereinafter named, to pay all of the debts of my estate out of the first moneys thereof coming into her hands, but in this connection, I direct that all estate, succession or inheritance taxes assessable against my estate or against any property taxable in connection therewith, or against the interest of any beneficiary of this will be paid out of my residuary estate and charged to Trust "B" as hereinafter provided, without any right or duty on my Executrix to seek or obtain contributions or reimbursement from any person or property.

"ITEM II. I give, and bequeath to my wife, Grace O. Harroff, if living at the time of my death, all of the furniture, furnishings, fixtures, and equipment contained in our residence in Asheville, North Carolina, or used in connection therewith; also all of my tangible personal effects, such as clothing, jewelry, and the like, and any automobiles that I may own at the time of my death. * * *

"ITEM IV. All of the rest and residue of my estate, of every kind and nature and wherever situated, I direct my Executrix to divide into two parts, to be known as 'Trust A' and 'Trust B.' Trust A shall include assets of a value of one-half of my estate undiminished by estate and inheritance taxes paid or to be paid, or by reason of property passing to my wife, or which has passed to my wife under other provisions of this will or otherwise than by the terms of this will. All property not passing to my wife under the foregoing shall be designated as Trust B."

Item V of the will places the assets of Trust A in a trust with Wachovia Bank and Trust Company as trustee, which item further provides that in addition to paying the income from the trust to the testator's wife for life, the trustee shall also pay to the wife such sums from the principal as she may request. In addition thereto she is given the right to dispose of the re-

mainder in the trust at the time of her death by her last will and testament.

Item VI establishes a trust with regard to the assets designated as Trust B for the benefit of the testator's two sons, Don F. Harroff and Robert A. Harroff (stepsons of the petitioner), share and share alike.

DeVere C. Lentz, Jr., was duly appointed guardian *ad litem* for persons not in *esse,* who might have an interest in the assets of Trust B in the event of the death of Don F. Harroff or Robert A. Harroff, defendants, during the existence of Trust B, established by the terms of the last will and testament of the deceased. Answer was filed in behalf of Don F. Harroff and Robert A. Harroff, and the guardian *ad litem.*

There is no controversy between the parties as to the facts

and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *Coffield v. Peele,* 246 N.C. 661, 100 S.E. 2d 45; *Trust Co. v. Taliaferro,* 246 N.C. 121, 97 S.E. 2d 776; *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; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

As stated by Parker, J., in *Coffield v. Peele, supra,* "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."

In *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17, Stacy, C. J., speaking for the Court, said: "The intention of the testatrix is her will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. In interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention." *Hubbard v. Wiggins,* 240 N.C. 197, 81 S.E. 2d 630; *Efird v. Efird,* 234 N.C. 607, 68 S.E. 2d 279; *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777.

It is set forth in the record that life insurance in the sum of $90,000.00, benefits under the testator's General Electric Pension Plan in the sum of $11,640.76, and real estate held by the entireties valued at $23,500.00, or a total of $125,140.76 in property and cash, passed to the petitioner upon the death of the testator by contract or operation of law and not under the provisions of the will. It is further admitted that the tangible personal property bequeathed to the petitioner in Item II of the will had a value of $6,778.00.

The petitioner on her appeal contends that, under the provisions of Item IV of the will hereinabove set out, there should be added to the residuary estate the amount of Federal estate and North Carolina inheritance taxes which have been paid, all the property that passed to the petitioner by contract, operation of law, and under the provisions of Item II of the will of the decedent, and that she is entitled to a sum out of the residue of

the estate, free from estate and inheritance taxes, equal to one-half of the entire estate, including the residuary estate, personal effects, and the nonprobate assets. This would give the petitioner altogether approximately eighty-eight per cent of the entire estate of $490,879.69, or $377,358.61, and the two sons of the testator approximately six per cent each of the estate, after paying the Federal estate and North Carolina inheritance taxes out of Trust B as required by Item I of the will, or $29,562.44 each.

We do not concur in this view. The nonprobate estate and the tangible personal property that passed to the petitioner under Item II of the will constitute no part of the residuary estate. However, since Trust B is to bear the whole cost of Federal estate and North Carolina inheritance taxes, in order to ascertain the one-half of the residuary estate to be allocated to Trust A it is necessary to add to the value of the residuary estate the amount of the above taxes which have been paid in the sum of $54,396.20. All parties to this proceeding concur in this view with respect to such taxes.

Therefore, in our opinion, it was the intent and purpose of the testator to have his residuary estate divided into two equal parts, to be known as Trust A and Trust B, Trust A to include one-half of the residuary estate free from Federal estate and North Carolina inheritance taxes, and that the one-half of the residuary estate allocated to Trust A was not to be diminished by reason of bequests under the will or by reason of other property having passed to his wife by contract or operation of law and not under the will, and we so hold.

All parties concede that Trust B is to be charged with payment of all the Federal estate and North Carolina inheritance taxes on the adjusted gross estate as defined by Section 2056, Title 26, of the United States Code Annotated.

We concur in the ruling of the Superior Court insofar as it instructed the petitioner that the nonprobate assets are not to be included in the estate for the purpose of the division of assets required by Item IV of the will. We hold, however, that the division of assets under Item IV of the will apply only to a division of the residuary estate and that it was error to authorize the inclusion of the value of the tangible personal property received by the petitioner under Item II of the will as a part of such estate. To this extent the judgment of the Superior Court is modified, and, as so modified, it is affirmed.

Let the costs be paid by the executrix out of the residuary estate before division.

Modified and affirmed.

L. T. CARROW v. ELIZABETH C. WESTON, ADMINISTRATRIX OF THE ESTATE OF F. E. WESTON, DECEASED.

(Filed 26 February, 1958.)

1. **Sales §§ 20, 21—**

Where the seller accepts the purchaser's check in payment of a cash sale and the check is thereafter dishonored, the seller has his election to treat the sale as void and recover the chattel or the specific funds in the hands of the purchaser derived from resale, or he may elect to ratify the sale and seek to recover the contract price.

2. **Waiver § 1—**

A person *sui juris* may waive practically any right he has unless forbidden by law or public policy.

3. **Election of Remedies § 1—**

Where a person has a choice of two remedies which are irreconcilable so that the assertion of one must exclude the other, he is put to his election.

4. **Executors and Administrators § 15h—**

Claimant accepted checks in payment of cash sale of logs which, upon delivery, were commingled with other logs of the purchaser or manufactured into lumber. The checks were not paid. Upon the death of the purchaser, plaintiff asserted a preferred claim against the estate for the amount of the purchase price. *Held:* Since plaintiff could not identify the logs or any specific sum in the hands of the administratrix derived from the sale thereof, the claim is a general claim, regardless of whether it be considered an action to recover the purchase price on the contract of sale or as a claim in tort for the wrongful conversion of the property by the purchaser.

APPEAL by defendant from *Parker, J.*, November Term, 1957, of MARTIN.

Civil action to determine status of plaintiff's claim against the *insolvent* estate of F. E. Weston, heard below on an agreed statement of facts.

Prior to his death on June 21, 1956, Weston was "engaged in the business of buying and selling logs and lumber, and operating a sawmill."

On June 15, 1956, plaintiff, also one Godard, in separate transactions, sold and delivered logs to Weston. These were cash transactions. As purchase price, Weston agreed to pay $389.50 to plaintiff and $82.47 to Godard. These amounts represented the fair market value of the logs. Weston gave a separate check to each seller for the amount due; and each seller accepted Weston's check in good faith. However, upon presentation, each check was dishonored by the drawee bank because of insufficient funds and neither the check nor the purchase price has been paid. Thereafter, Godard sold and assigned all his rights to plaintiff.

Upon delivery to Weston, the logs "were commingled with other logs on the mill yard of said F. E. Weston or manufactured into lumber, so that same could not be identified and recovered."

Plaintiff alleges that he has a claim for $471.97 with interest from June 15, 1956; that it is "preferred . . . to all other debts against said estate"; and he prays that it be so adjudged, also "for such other and further relief," etc. He alleges also that he filed with defendant, the administratrix, "an itemized and verified claim representing the sale of said logs and said worthless checks," and demanded that it be accepted "as a preferred claim to all other debts against said estate"; but that defendant refused to allow plaintiff's claim as a preferred claim, having notified plaintiff, in accordance with the position now taken in defendant's answer, that plaintiff would be "treated only as an unsecured creditor."

The court awarded judgment in plaintiff's favor for $471.97 and adjudged that said amount "be paid to plaintiff out of the funds now in the hands of said administratrix, prior to the payment by her of any unsecured debt *or costs* of administration," and that defendant pay the costs. (Our italics)

Defendant excepted and appealed, assigning as error the said judgment and each of the three separately stated conclusions of law upon which it was based.

R. L. Coburn for plaintiff, appellee.
Peel & Peel for defendant, appellant.

BOBBITT, J. In his complaint, also in the "itemized and verified claim" theretofore filed with the administratrix, plaintiff asserted a right to recover the total of the two worthless checks, to wit, $471.97, being the amount Weston agreed to pay as purchase price for the logs; and plaintiff's action is to establish that his claim for $471.97 is *a preferred claim against the estate.*

The court's legal conclusions were: (1) that "no title passed to . . . Weston by reason of the delivery of the logs to him . . ."; (2) that "*the value of said logs* in the possession of . . . Weston or his administratrix . . . constitutes a trust fund" for the benefit of plaintiff and "is now so held by said Administratrix"; and (3) that "said fund is not a part of the estate of . . . Weston, in that it is not subject to the payment of debts and costs of administration." (Our italics)

The court held, in effect, that plaintiff had no claim against the estate; but that the administratrix had in her possession a fund of $471.97 that belonged to plaintiff, not to the estate.

In this jurisdiction, ". . . where the seller *contracts* to sell a chattel to the buyer for cash, and the seller accepts a check from the buyer as a means of payment of the cash and delivers the chattel to the buyer in the belief that the check is good and will be paid on presentation, no title whatever passes from the seller to the buyer until the check is paid; and the seller *may* reclaim the chattel from the buyer in case the check is not paid on due presentation." *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908, and cases cited. (Our italics) The rule, as stated, is applicable where the seller elects to reclaim the chattel, *Weddington v. Boshamer*, 237 N.C. 556, 75 S.E. 2d 530, or to recover a specific fund in the hands of the buyer's administrator identified as derived solely from an unauthorized sale of the chattel, *Parker v. Trust Co.*, 229 N.C. 527, 50 S.E. 2d 304. In reaching its said first conclusion of law, perhaps the court had this rule in mind.

But a seller, who accepts a check as a cash payment, need not elect to treat the sale as void if the check is dishonored. "A person *sui juris* may waive practically any right he has unless forbidden by law or public policy." Seawell, J., in *Clement v. Clement*, 230 N.C. 636, 55 S.E. 2d 459. The contractual obligation of the buyer to pay cash is a provision solely for the benefit of the seller. If he elects to do so, the seller may waive this provision and ratify the sale. *Wilson v. Finance Co., supra.* Moreover, he may do so after he has knowledge that the check, originally accepted as conditional payment, has been dishonored. If he so elects, the remedy then available to the seller is to recover on the contract, *i.e.*, the debt due him as agreed purchase price for the chattel. If the rule were otherwise, a dissatisfied buyer could avoid his obligation to pay the agreed purchase price simply by giving a worthless check therefor or by stopping payment on his check, leaving the seller no remedy except to reclaim a chattel he did not want.

"The doctrine of election is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions." Adams, J., in *Irvin v. Harris*, 182 N.C. 647, 653, 109 S.E. 867. Where a sale is voidable, because induced by fraud, the applicable rule is well stated by Dillard, J., in *Wilson v. White*, 80 N.C. 280, as follows: "If a vendor of goods is drawn in to part with his property by fraudulent misrepresentation or concealment of a fact material to the contract and operating as an inducement thereto, and such as a man of ordinary sagacity might reasonably rely on and be influenced by, the sale is voidable, and the vendor has the option

to affirm the sale and sue for the price, or hold it null and sue for the goods in specie, as against the purchaser or a stranger holding without valuable consideration or with notice of the fraud. Benj. Sales, 342; Story Sales, Sec. 165; Bigelow Fraud, Sec. 2." See, also, *Joyner v. Early,* 139 N.C. 49, 51 S.E. 778, and cases cited. The rule as stated applies equally when, as here, the seller may treat the sale void or may waive the provision for cash payment and ratify the sale.

Here plaintiff was required to elect as between two available but inconsistent remedies. As succinctly stated in 78 C.J.S., Sales Sec. 597: "If the seller sues to recover the debt, he looks to the debtor and not to the property; and if he retakes the property, he looks to the property and not to the debtor."

It follows that, if plaintiff ratified the contracts of sale, his remedy is to recover *on contract* the agreed purchase price. In such event, he is a general creditor for $471.97; and his claim is payable out of the assets of the estate.

On the other hand, if the plaintiff elected to treat the sale as void, nothing else appearing, he is entitled to assert a claim against the estate for the fair market value of the logs when wrongfully converted by Weston to his own use. It is stipulated that such fair market value was $471.97. A tort claim so asserted would be a general claim, payable out of the assets of the estate. Under the agreed facts, the result would be a general claim for the identical amount, whether asserted as a contract claim or as a tort claim.

We pass, without decision, the question as to whether plaintiff, by filing his claim as aforesaid and by alleging his cause of action as aforesaid, has elected to ratify the sales and by doing so is estopped to proceed otherwise than as a general creditor; for the agreed facts do not support the judgment on the theory on which it was rendered.

If we assume that plaintiff has elected or may elect to treat the sales as void, before he can establish that he, not the estate, is the owner of funds now in the hands of the administratrix, he must trace and identify such funds as derived from the logs or from lumber manufactured therefrom. The court was in error in its second conclusion of law, namely, "that *the value of said logs* . . . constitutes a trust fund." (Our italics) Plaintiff must establish that the administratrix actually has in her hands funds derived from the disposition of the logs and the amount of such funds. On this theory of the case, it is necessary to keep in mind that we are concerned with plaintiff's ownership of specific funds now in the hands of the administratrix, not with a claim by plaintiff against the estate.

Did the logs remain in that status or were they used in the manufacture of lumber? Were they sold, or otherwise disposed of, by Weston in his lifetime? If sold, for what amount? What became of the money, if any was collected? Did these logs, or lumber manufactured therefrom, or any part thereof, or any logs or lumber, ever come into the possession of the administratrix? What funds does the administratrix have in hand? What part thereof, if any, was obtained from her sale of these logs or lumber manufactured therefrom, or from the sale of any logs or lumber? The agreed facts afford no answers. Nothing is established as to what became of these logs or any logs or lumber manufactured therefrom or as to the source from which such funds as the administratrix may have were derived. In this connection, it is noted that, even if it were shown that these logs, as such, actually came into the possession of the administratrix, and that she sold them, plaintiff's recovery on this theory of the case would be the actual amount she received from such sale (not the price Weston had agreed to pay therefor), that is, if plaintiff elected to ratify her sale rather than seek to recover the actual logs from the person then in unlawful possession thereof. *Parker v. Trust Co., supra.*

If no title passed to Weston, no title passed from Weston to the administratrix. She "stands in the shoes" of her intestate. *McBrayer v. Harrill,* 152 N.C. 712, 68 S.E. 204; *Parker v. Trust Co., supra; Sales Co. v. Weston,* 245 N.C. 621, 97 S.E. 2d 267. If we were to assume that the logs came into her possession as the result of Weston's wrongful conversion thereof, the question would arise as to whether technically either Weston or the administratrix would be deemed a constructive trustee. Ordinarily, a constructive trustee has *legal* title as well as possession. See Restatement, Restitution Sec. 160(j); Scott on Trusts, Sec. 508.1, p. 3255. Be that as it may, to establish ownership of any funds now in the hands of the administratrix, plaintiff must identify such funds as traceable to and derived from the logs with the same degree of certainty as is required to trace and identify trust property or funds. See *Trust Co. v. Barrett,* 238 N.C. 579, 78 S.E. 2d 730, and cases cited.

The agreed facts establish that plaintiff has a general claim against the estate for $471.97, nothing more, which defendant admits. Hence, there is error in the judgment. Accordingly, the cause is remanded for modification of the judgment so as to strike therefrom the provisions that purport to give plaintiff's claim for $471.97 a status other than that of a general claim against the estate. It is so ordered.

Error and remanded.

STATE v. BESSIE CARPENTER HELMS.

(Filed 26 February, 1958.)

1. **Narcotics § 2—**

Each of the four acts of obtaining a narcotic drug, attempting to obtain a narcotic drug, procuring the administration of a narcotic drug, and attempting to procure the administration of a narcotic drug, are made criminal offenses by G.S. 90-106 only when they are done by fraud, misrepresentation, deceit, or by forgery of a prescription or written order, or by giving a false name or address.

2. **Indictment and Warrant § 9—**

An indictment may not charge separate offenses disjunctively.

3. **Same—**

An indictment for a statutory offense which follows the language of the statute is sufficient if it charges the offense in a plain, intelligible and explicit manner, but if the statute characterizes the offense in mere general or generic terms or does not sufficiently define the crime and set forth all its essentials, the statutory words must be supplemented by language charging the specific offense and identifying the particular transaction so as to enable defendant to prepare his defense or plead his conviction or acquittal as a bar to a subsequent prosecution for the same offense.

4. **Same—**

A bill of particulars cannot supply an averment essential to the indictment. G.S. 15-143.

5. **Criminal Law § 13—**

A valid bill of indictment is an essential of jurisdiction.

6. **Criminal Law § 121: Narcotics § 2—**

The statute making the obtaining or attempt to obtain narcotic drugs and the procuring or attempt to procure the administration of such drugs criminal offenses when done by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or of a written order, or by the concealment of a material fact or by the use of a false name or the giving of a false address, uses general and generic terms in defining the means or manner constituting the acts criminal offenses, and therefore an indictment which fails to contain any factual averments in regard to the means or manner is fatally defective, and judgment thereon will be arrested by the Supreme Court *ex mero motu.*

7. **Criminal Law § 26—**

Arrest of judgment for fatally defective indictment does not preclude further prosecution if the solicitor deems advisable.

APPEAL by defendant from *Farthing, J.*, October Term, 1957, of BUNCOMBE.

Criminal prosecution on a bill of indictment, viz:

"The Jurors for the State upon their oath present: That Bessie Carpenter Helms late of Buncombe County, on the 16th day of July, 1957 with force and arms, at and in said County, did unlawfully, wilfully and feloniously obtain or attempt to obtain a narcotic drug or procure or attempt to procure the administration of a narcotic drug by fraud, deceit, misrepresentation and subterfuge and by the forgery or alteration of a prescription or of any written order and by the concealment of a material fact and by the use of a false name and the giving of a false address, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

The jury returned a verdict of "guilty as charged." Judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

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

McLean, Gudger, Elmore & Martin for defendant, appellant.

BOBBITT, J. The bill of indictment is based on G.S. 90-106, which, in pertinent part, provides: "Fraudulent attempts to obtain drugs prohibited.—No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of false name or the giving of a false address."

The quoted statutory provisions create and define four separate criminal offenses: (1) obtaining a narcotic drug, (2) attempting to obtain a narcotic drug, (3) procuring the administration of a narcotic drug, and (4) attempting to procure the administration of a narcotic drug, *by the means and in the manner* set forth in (a), (b), (c) and (d).

In *S. v. Williams*, 210 N.C. 159, 185 S.E. 661, a similar indictment, based on G.S. 90-88, charging in one count, *in the disjunctive*, several separate and distinct criminal offenses, was held void for uncertainty. It was decided that the defendant's motion to quash, aptly made, should have been allowed. In the present case, defendant did not move to quash the bill of indictment.

In *S. v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381, the warrant, in a single count, charged alternatively, that is, *in the disjunctive*,

several separate and distinct violations of G.S. 14-291.1; and the jury found the defendant "guilty of lottery as charged in the warrant." The defendant did not move to quash the warrant or in arrest of judgment. The decision was that *the verdict* was void for uncertainty, *i.e.*, "not sufficiently definite and specific to identify the crime of which the defendant is convicted." Based on defendant's exception to the overruling of his motion to set aside the verdict and his exception to the judgment, the verdict and judgment were set aside and the cause remanded "for further proceedings conforming to law."

While not the basis of decision on this appeal, we deem it appropriate to call attention again to this rule of pleading in criminal cases: "The general rule is well settled that an indictment or information must not charge a person disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. Two offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term 'and' and not with the word 'or'." 42 C.J.S., Indictments and Information Sec. 101; *S. v. Albarty, supra;* see also *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129.

Decision on this appeal is based on the ground that the bill of indictment is fatally defective.

A bill of indictment that charges "in a plain, intelligible and explicit manner," G.S. 15-153, the criminal offense the accused is "put to answer," affords the protection guaranteed by Art. I, Secs. 11 and 12, Constitution of North Carolina.

The *essentials* of a valid bill of indictment and the underlying reasons therefor are fully stated by Parker, J., in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, and by Winborne, J. (now C. J.), in *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413, where many prior decisions of this Court are cited and discussed. This distinction is clearly drawn: A bill of indictment for a statutory offense, following substantially the language of the statute, is sufficient if it charges the essential elements of the offense in a plain, intelligible and explicit manner. But this rule is inapplicable "where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, *as where the statute characterizes the offense in mere general or generic terms,* or does not sufficiently define the crime

or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *S. v. Cox, supra.* (Our italics)

It is noted that G.S. 15-143, concerning bills of particulars, relates expressly to "further information not required to be set out" in the bill of indictment.

Under G.S. 90-106, it is not a crime either to obtain or to attempt to obtain a narcotic drug; and it is not a crime either to procure or to attempt to procure the administration of a narcotic drug. To do so by the means and in the manner set forth in (a), (b), (c) or (d) constitutes the criminal offense. Thus, the means and manner are essentials of the crime.

It is apparent that the indictment alleges no facts tending to identify any particular transaction or the means and manner employed by the accused except in the "mere general or generic terms" of G.S. 90-106. There are no factual averments as to the nature of the alleged "fraud, deceit, misrepresentation, or subterfuge"; or as to the identity or contents of a prescription or other written order alleged to have been forged or altered; or as to what material fact is alleged to have been concealed; or as to what false name was used or what false address was given.

Whether by forgery or alteration of a prescription or other written order, or by concealment of a material fact, or by using a false name or giving a false address, the gist of all is "fraud, deceit, misrepresentation, or subterfuge." In this connection, it is noted that even in civil actions "A pleading setting up fraud must allege the facts relied upon to constitute fraud . . ." *Calloway v. Wyatt,* 246 N.C. 129, 133, 97 S.E. 2d 881, and cases cited.

It is noted further that in an indictment for forgery, the instrument alleged to be forged must be set forth, *S. v. Lytle,* 64 N.C. 255; and, if lost, the substance thereof must be charged, *S. v. Peterson,* 129 N.C. 556, 40 S.E. 9. In an indictment for obtaining money under false pretenses, "*the facts and circumstances* which constitute the offense (must be stated) with such certainty and precision that the defendant may be enabled to see whether they constitute an indictable offense." *S. v. Carlson,* 171 N.C. 818, 827, 89 S.E. 30. (Our italics) In a prosecution under the statute now codified as G.S. 14-114, bearing the caption "Fraudulent disposal of mortgaged personal property," the bill of indictment must allege the facts and circumstances so as to identify the transaction and point with reasonable certainty to the offense charged. *S. v. Pickens,* 79 N.C. 652; *S. v. Woods,* 104 N.C. 898, 10 S.E. 555.

In *S. v. Farmer*, 104 N.C. 887, 10 S.E. 563, which bears close resemblance to the present case, the bill of indictment was quashed on the ground that it was fatally defective. The defendant was a physician; and the prosecution was based on that portion of Sec. 4, Ch. 215, Laws of 1887, which provided that "any physician or other person who shall give, procure or aid in procuring any false or fraudulent prescription for any spirituous, vinous or malt liquors in violation of the provisions of this act shall be guilty of a misdemeanor, . . ." The bill of indictment contained three separate counts, each relating to a separate transaction. All counts were in the form of the first count, the material portion of which was as follows: "That D. H. Farmer, on 1 April, 1889, with force and arms, in Transylvania County, unlawfully and willfully did give to one G. H. a false and fraudulent prescription for spirituous liquors, he, the said D. H. Farmer, being then and there a practicing physician, contrary to the form of the statute," etc.

The basis of decision is set forth in this excerpt from the opinion of Avery, J.:

"The transaction on which the indictment was founded should also be sufficiently identified by its terms to insure to the accused the benefit of a plea of former acquittal or conviction, if indicted a second time for the same offense. *S. v. Pickens*, 79 N.C. 652; *S. v. Burns*, 80 N.C. 376; *S. v. Stamey*, 71 N.C. 202; *S. v. Watkins*, 101 N.C. 702. We think, therefore, that all of the counts of the indictment were fatally defective in not charging that the prescription was false and fraudulent.

"It is of the essence of the offense created by the law (Sec. 4, Ch. 215, Laws 1887) that the prescription should be false or fraudulent. The indictment should set out distinctly not only that the prescription was either false or fraudulent, but in what the falsehood or fraud consisted, as that the prescription was intended to convey and did convey the idea that in the opinion of the defendant the person to whom the prescription was given was sick and was in need of the liquors prescribed as a medicine; whereas, in fact and in truth, the said person (prescribed for) was not sick and did not need the spirituous liquor as a medicine."

In *S. v. Cole*, 202 N.C. 592, 596, 163 S.E. 594, q.v., where a demurrer to the bill of indictment was sustained, Adams, J., cites *S. v. Farmer, supra*, and quotes with approval a portion of the foregoing excerpt from the opinion of Avery, J.

It is noted that, in the present case, we are concerned with a total absence of factual averments, not with the sufficiency or insufficiency of factual averments.

A valid bill of indictment is an essential of jurisdiction. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

Hence, the record disclosing that the bill of indictment is fatally defective, this Court, of its own motion, arrests the judgment. *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497; *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401, and cases cited; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774, and cases cited. As held in these cases, this does not bar further prosecution of defendant for violations of G.S. 90-106 if the solicitor deems it advisable to proceed on a new bill.

Judgment arrested.

STATE v. ANDERSON BANKS AND ROBERT ALLEN

(Filed 26 February, 1958.)

1. **Indictment and Warrant § 9—**

An indictment for a statutory offense which follows the language of the statute is sufficient if it charges the offense in a plain, intelligible and explicit manner, but if the statute characterizes the offense in mere general or generic terms or does not sufficiently define the crime and set forth all its essentials, the statutory words must be supplemented by language charging the specific offense and identifying the particular transaction so as to enable defendant to prepare his defense or plead his conviction or acquittal as a bar to a subsequent prosecution for the same offense.

2. **Arson § 2—**

An indictment for arson must identify the structure burned so as to show that it comes within the class designated in the statute and also to enable defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. Allegation of ownership or of possession of a named person suffices to meet the requirements of identity.

3. **Criminal Law §§ 26, 121—**

Where an indictment for arson is fatally defective in failing to identify the structure burned, defendant's motion in arrest of judgment must be allowed. However, prosecution under void warrant does not preclude prosecution upon a valid warrant for the offense, if the solicitor is so advised.

APPEAL by defendants Anderson Banks and Robert Allen from *Farthing, J.,* and a jury, at September Term, 1957, of BUNCOMBE.

Criminal prosecution tried upon a bill of indictment charging: "That Ulysses Nelson, Anderson Banks and Robert Allen, late of Buncombe County, on the 31st day of May, 1957, with force

and arms, at and in said County, did unlawfully, willfully and feloniously and wantonly set fire to, and burn and cause to be burned and did aid and abet, counsel and procure the burning of a warehouse, office, shop, building used in carrying on the trade as a filling station and restaurant in violation of Chapter 14, Section 62 of the General Statutes of North Carolina, . . ."

The jury returned a verdict of guilty as to each defendant. The defendants Anderson Banks and Robert Allen each moved the court that judgment be arrested, and assigned as grounds therefor, "that the bill of indictment is insufficient to charge a violation of law and to support the pronouncement of judgment on which a plea of former jeopardy could rest." Motions denied. Each defendant excepted. Judgments imposing prison sentences, were pronounced, from which the defendants Anderson Banks and Robert Allen appealed.

Attorney General Patton and Assistant Attorney General Moody for the State.

Redden, Redden & Redden for defendant Anderson Banks.

I. C. Crawford for defendant Robert Allen.

JOHNSON, J. In the bill of indictment the State attempts to charge the defendants with burning a building in violation of G.S. 14-62. The bill merely charges the offense in the language of the statute. As to this, the rules are well stated in *S. v. Cox*, 244 N.C. 57, 59, 92 S.E. 2d 413, 415: ". . . while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." See also S. *v. Helms, ante* 740.

In a statutory arson case like this one, it is necessary to aver what building was burned by descriptive allegation showing not only that the structure comes within the class designated in the statute, but also fixing its identity with reasonable particularity so as to enable the defendant to prepare his defense and plead

his conviction or acquittal as a bar to further prosecution for the same offense. See 6 C.J.S., Arson, Sec. 20.

In *S. v. McKeithan,* 203 N.C. 494, 166 S.E. 336, the defendant was tried and convicted under a two-count indictment, reading in part as follows: First count: ". . . the defendant did on 5 March, 1932, feloniously aid, counsel and procure one Curtis Smith feloniously to burn a dwelling-house, the property of said defendant and one Campbell as tenants in common, contrary to the provisions of C.S. 4175 (now G.S. 14-5)." Second count: ". . . the defendant, being tenant in common with one Campbell of a dwelling-house, then insured against loss, did on 5 March 1932, feloniously procure one Curtis Smith to burn said dwelling-house in violation of C.S. 4245 (now G.S. 14-65)." The defendant requested the court to direct a verdict of not guilty, on the ground that the property was not described in the indictment with sufficient definiteness. He also demurred to the bill and moved to quash. Overruled; exception. On appeal to this Court it was held: "The form of the indictment would seem sufficient. (Citation of authority). The ownership of the house is properly laid in the defendant and Campbell as tenants in common. (Citation of authority). The fact that these same parties own other houses in like capacity, is not grounds for demurrer or *quashal.* (Citation of authority). Sufficient matter appears on the face of the indictment to enable the court to proceed to judgment. (Citation of authority). And the defendant could not be tried again for the same offense. (Citation of authority). His plea of former conviction would easily avail in case of a second prosecution."

In *S. v. Sprouse,* 150 N.C. 860, 64 S.E. 900, the indictment was in two counts. One charged the felonious burning of a stable and granary, "then and there the property and in possession of William Sexton." The second count charged a felonious attempt to burn the barn and stable "of William Sexton." The evidence revealed that title to the stable was in one Sprouse, who had rented to Sexton. This Court held that the indictment was not defective, and said: "This is not a civil action for possession. Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy."

In *S. v. Daniel,* 121 N.C. 574, 28 S.E. 255, the indictment was as follows: ". . . that Lockett Daniel . . . at and in the county aforesaid, a certain building, to wit: a stable, then and there situate, the property of Elizabeth F. Satterwhite and others, wantonly, wilfully, and feloniously did set fire to and burn, . . ." As to the sufficiency of the bill of indictment, this Court said: "The prisoner is indicted for setting fire to a stable in Granville County, then and there situate, etc., 'the property of Elizabeth F. Satterwhite and others.' He moved in arrest of judgment, be-

cause it was not charged, instead, that the stable was 'in possession of' some person named. The offence is set out in *Code* . . . and it is not made a requisite thereby that the building set fire to shall be either 'the property of' or 'in possession of' any one. The constituent element of the offence is 'the wilful and wanton' setting fire to any building of the kind therein named. The allegation of its being 'the property of' A. is for purposes of identification only. . . . to give the prisoner sufficient notice to prepare his defence, and enable him to plead former conviction or former acquittal to a second indictment for the same offence. An allegation that the stable was 'in possession of' A. would have been sufficient, or so might other apt words, sufficient for identification of the building charged to have been set fire to. In statutory offences for burning, the property may be described as 'belonging to,' 'the property of,' 'owned by,' 'in possession of,' or simply 'of,' a person named. 1 McClain, Cr. Law, Sec. 529."

In *S. v. Long,* 243 N.C. 393, 90 S.E. 2d 739, the bill of indictment charged that the defendant unlawfully, wilfully and feloniously set fire to and burned the dwelling house of Mrs. Dan Wheatley, the same being unoccupied at the time of the burning. *Held:* "In our opinion, the bill of indictment properly charges the burning of an 'uninhabited house' . . ."

From the foregoing decisions it appears that an allegation of ownership or of possession suffices to meet the requirements of identity. In the instant case there is no allegation of ownership or of possession, or any other descriptive language tending to give the building a fixed location; and no doubt there are hundreds of buildings in Buncombe County which answer to the general description of the building mentioned in the indictment. The bill fails to meet minimum requirements as to identity of the offense attempted to be charged. It is fatally defective. The defendants' motions in arrest of judgment should have been allowed. Decision here reached does not bar prosecution of the defendants under G.S. 14-62. The solicitor, if so advised, may proceed under a new bill of indictment.

Judgment arrested.

PALMER HARRILL AND CLAUDE HARRILL, PETITIONERS v. A. C. TAYLOR AND WIFE, FRANCES B. TAYLOR, AND WILLIAM H. WILKINS; F. A. WILKIE AND WIFE, OCIE WILKIE, AND EULA LEE MAYFIELD, DEFENDANTS.

(Filed 26 February, 1958.)

1. **Boundaries § 7—**

An action between owners of adjoining land to determine the location of the dividing line, in which action the parties stipulate that title is not in dispute, is a processioning proceeding.

2. Boundaries § 14: Judgments: § 27c—

Judgment in a processioning proceeding adopting the referee's findings and conclusions and directing the surveyor to go upon the land and mark the line according to the report, is a final judgment, reviewable only by appeal, G.S. 1-277, the provision for marking the line as judicially determined being only a direction for the performance of a ministerial duty in no way affecting the finality of the determination of how the line should be run. G.S. 38-3(3).

3. Boundaries § 14: Appeal and Error § 49—

Where a judgment is entered confirming the surveyor's report upon the court's finding that the surveyor had run the line in compliance with direction in the judgment establishing the dividing line, G.S. 38-3(3), exception to the judgment confirming the surveyor's report does not question this finding, and the judgment must be affirmed.

APPEAL by plaintiffs from *Campbell, J.*, September 1957 Term of RUTHERFORD.

The amended complaint alleges plaintiffs and defendants are the owners of adjoining lands. They seek judicial determination of the location of the lines dividing the properties in accord with their contentions. Defendants admit they are abutting owners, assert a different location of the dividing line and title by possession to the line claimed by them. The parties stipulated the only question for determination was the location of the common boundary. A court survey and reference was ordered. The referee, upon notice, heard the parties and filed a report containing findings of fact and conclusions of law. The report fixed the location of the dividing lines and how they should be run.

Plaintiffs, in due time, filed exceptions to the referee's findings and conclusions. The cause came on for hearing on the exceptions so filed before Froneberger, J., presiding over the September 1956 Term of Rutherford. He adjudged: "that the Exceptions of the Plaintiffs be denied and that the Report of the Referee be confirmed and that Marvin Packard be, and he is hereby authorized to go upon the premises and survey and mark the line between the parties hereto according to the report of the Referee."

Plaintiffs excepted to this judgment and gave notice of appeal. No exception was taken to the ruling on any finding or conclusion. The judgment was entered 20 September 1956. The appeal was entered 21 September 1956. On 3 October 1956 counsel for plaintiffs and defendants stipulated that plaintiffs "shall have until November 5, 1956, within which time to make up and serve the case on appeal." No case on appeal was served, and the appeal was not perfected.

Packard, acting under the judgment entered September 1956, surveyed and marked the line and filed a map showing his sur-

vey. He failed, however, to file a report. At the January Term 1957, Clarkson, J., entered an order directing the surveyor to file a report. Acting in conformity with the order, Packard filed his report in which he certified that in the presence of the referee he had run and marked the line in accordance with the directions set out in the report of the referee. Thereafter plaintiffs filed exceptions to the report of the surveyor. In substance these exceptions are a reiteration of the exceptions to the report of the referee which were heard by Judge Froneberger.

The cause was heard by Judge Campbell at the September Term 1957 on the exceptions filed to the report of surveyor Packard. Judge Campbell, after hearing the evidence, found as a fact that "the Surveyor complied in every respect with the Report of the Referee." He thereupon approved the report of the surveyor. Plaintiffs excepted and appealed.

Hamrick & Hamrick, J. Nat Hamrick, T. J. Moss, and R. S. Eaves for plaintiff, appellant.

M. Leonard Lowe for defendant, appellees.

RODMAN, J. The controversy, by stipulation of the parties that boundary only was involved, became in effect a processioning proceeding, *Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630; *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246, and was properly referred. G.S. 1-189(3).

The judgment in September 1956 adopting the referee's findings and conclusions was a final judgment. *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633; *Parker v. Taylor,* 133 N.C. 103. As such, it was only reviewable by appeal to this Court. G.S. 1-277. The provision of the judgment for marking, as provided by G.S. 38-3(3), the line as judicially determined was a mere direction for the performance of a ministerial duty which in no way affected the finality of the determination of how the line should be run.

The only matter open for hearing by Judge Campbell was: Did the surveyor act in conformity with the directions given him? The court, upon the evidence adduced, found that he did. The exception to the judgment does not question this factual finding. *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94. The judgment is a correct declaration of the law on the facts judicially determined.

Affirmed.

STATE v. TOM SIMS.

(Filed 26 February, 1958.)

Property § 3—

A warrant charging defendant with destruction of personal property charges no offense, since the destruction of personal property is not a crime unless it is done wantonly and wilfully. G.S. 14-160.

APPEAL by defendant from *Campbell, J.*, November, 1957 Term, RUTHERFORD Superior Court.

This criminal prosecution originated in the Recorder's Court of Rutherford County upon a warrant containing two counts: (1) The defendant did unlawfully, wilfully and feloniously assault affiant (Harris) with a deadly weapon, to-wit: a knife, with intent to kill, etc. (2) "Did destroy personal property valued at approximately $300.00 contrary to the form of the statute," etc.

At the hearing the recorder found (1) probable cause and bound the defendant to the Superior Court on the first count, and (2) a verdict of guilty and imposed a prison sentence on the second count, from which the defendant appealed to the Superior Court.

In the Superior Court the grand jury returned a bill of indictment on the charge of felonious assault. Upon pleas of not guilty, the charge in the indictment and in the second count in the warrant were tried together. The jury returned the following verdict: "Guilty of simple assault and destruction of personal property." On the assault charge the defendant was given a jail sentence of 30 days. On the charge of destroying personal property, the defendant made a motion in arrest of judgment on the ground that the warrant failed to charge and the jury failed to find that the destruction was wanton and wilful. The court overruled the motion, imposed a prison sentence, to which the defendant excepted and from which he appealed.

George B. Patton, Attorney General and Claude L. Love, Assistant Attorney General for the State

Hamrick & Hamrick, By: J. Nat Hamrick for defendant appellant.

PER CURIAM: Destruction of personal property is not a crime. It becomes so only when the injury is wanton and wilful. G.S. 14-160. The Attorney General concedes error. Judgment on the second count in the warrant is arrested and the defendant is discharged on that count. The record fails to disclose any reason why the judgment on the assault charge should be disturbed.

Judgment on the second count in the warrant is
Arrested.

In the judgment on the assault charge there is
No error.

STATE v. "SIMP" COLLINS.

(Filed 26 February, 1958.)

Criminal Law § 26—

Where defendant appeals from conviction in a recorder's court of possession of nontax-paid whiskey and possession of whiskey for the purpose of sale, and upon appeal to the Superior Court, he is tried upon an indictment charging the same offenses, conviction in the county court does not preclude affirmance of the conviction in the Superior Court when there is no evidence in the record tending to show that the offenses referred to in the warrant and the bill of indictment are the same.

APPEAL by defendant from *Bone, J.*, August Mixed Term 1957 of PITT County.

The defendant was tried and convicted in the Municipal Recorder's Court of Ayden, North Carolina, upon a warrant charging that on 10 May 1957 the defendant did have "in his possession a quantity of nontax-paid whiskey, not bearing the stamp of the Pitt County A.B.C. Board, or any other A.B.C. Board of the State of North Carolina, and did have said whiskey in his possession for the purpose of sale * * *" The defendant appealed to the Superior Court where he was tried upon a bill of indictment containing two counts, the first count charging the defendant with having in his possession on 10 May 1957 alcoholic beverages upon which the taxes imposed by the laws of the Congress of the United States and by the laws of the State of North Carolina had not been paid, etc.; the second count charging the defendant with having in his possession on 10 May 1957 said alcoholic beverages for the purpose of sale.

The jury returned a verdict of "guilty as charged." The defendant was sentenced to twelve months in the common jail of Pitt County, to be assigned to work under the supervision of the State Prison Department.

The defendant appeals, assigning error.

Attorney General Patton, Assistant Attorney General McGalliard for the State.

L. T. Grantham, Charles L. Abernethy, Jr., for defendant.

PER CURIAM. In the trial below the defendant made no motion to quash the bill of indictment, entered no plea in abatement, nor a plea of double jeopardy, nor was any motion interposed in arrest of judgment.

Present counsel for the defendant admit in their brief that apparently no appeal entries were entered at the time the judgment was imposed in the Superior Court, and that they have been unable to secure an agreement with the Solicitor by which a case on appeal, containing the evidence, could be brought to this Court. Hence, they have only brought up the record proper. *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66.

Since the Municipal Recorder's Court of Ayden and the Superior Court of Pitt County have concurrent jurisdiction of misdemeanors (G.S. 7-64), and there being no evidence in the record tending to show that the offenses referred to in the warrant and the bill of indictment are the same, the judgment will be upheld on authority of *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623.

Affirmed.

ROLLIN DOCKERY AND WIFE, CORA DOCKERY v. OLIVER DOCKERY AND WIFE, BESSIE DOCKERY.

(Filed 26 February, 1958.)

APPEAL by plaintiffs from *Clarkson, J.,* November 1957 Term of CHEROKEE.

F. O. Christopher and McKeever & Edwards for plaintiff appellants.

C. E. Hyde for defendant appellees.

PER CURIAM. This is an action of trespass to try title. By amendments to the pleadings, plaintiffs' ownership was made to depend on possession without color for the twenty-year statutory period, and the area in dispute was reduced to approximately one-eighth of an acre in the form of a triangle, one side being 23 feet and another 566 feet. Plaintiffs' evidence tended to establish their possession from 1923 to 1957. Defendants' evidence negatived plaintiffs' asserted possession and tended to establish possession in defendants for many years.

We have carefully examined each assignment of error. We reach the conclusion that prejudicial error has not been made to appear. No new principle of law is involved. If it be conceded

that plaintiffs' exceptions to questions asked on cross-examination were well founded, it is apparent the answers negative any prejudice. The charge, when examined as a whole, did not, we think, leave the jury in any doubt that continuous possession of the land in dispute for twenty years sufficed to vest title in plaintiffs and to require an affirmative answer to the issue of ownership. The jury resolved the question of fact adverse to plaintiffs.

No error.

STATE v. ALFRED KNIGHT.

(Filed 5 March, 1958.)

1. **Criminal Law § 53—**

It is proper for a medical expert witness to testify upon proper hypothetical questions, or from his own personal examination of the body of the deceased, as to the cause of death.

2. **Same: Criminal Law § 155—If part of answer is unresponsive to question motion must be made to strike unresponsive part.**

The evidence tended to show that the body of deceased was found shortly after an altercation and scuffle between the deceased and defendant. There was medical expert testimony to the effect that no injury was found on the body of deceased sufficient to have caused death. A medical expert was permitted to testify over objection upon proper hypothetical questions and from his own knowledge gained from a complete autopsy that the cause of death was the cessation of heartbeat resulting from fear, anger and severe exertion during the fight. *Held:* It was competent for the medical expert to testify as to the cause of death, and if part of the answers to the hypothetical questions were incompetent for the reason that the witness drew an inference from the assumed facts that deceased experienced fear and anger and used severe exertion during the fight, the absence of motion to strike such part in one instance waived any ground of objection and rendered harmless the failure to strike such portions of the other answers upon motion duly made.

3. **Criminal Law § 159—**

An assignment of error not set out in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

4. **Criminal Law § 162—**

The exclusion of testimony on cross-examination cannot be held prejudicial when the record fails to show what the witness would have testified if permitted to answer.

5. **Homicide § 3—**

If a person dies as a result of shock or fright directly resulting from an unlawful battery committed by defendant, defendant is guilty of

criminal homicide even though the injuries inflicted would not of themselves have produced death.

6. **Homicide § 25—Evidence held sufficient to raise reasonable inference that death resulted from shock or fright caused by assault.**

Evidence to the effect that defendant was the aggressor and unlawfully and violently assaulted deceased, that deceased died shortly thereafter from cessation of heartbeat, and that he was in good health prior to the assault, is sufficient to be submitted to the jury in a homicide prosecution and sustain conviction of defendant of involuntary manslaughter, even though there is evidence that there was no traumatic injury upon the body of deceased which could have caused death, since upon the evidence the jury could reasonably draw an inference that deceased's death from cessation of heartbeat was directly caused by shock or fright or exertion attendant defendant's violent and unjustifiable battery upon him, and that deceased would not have died except for such unlawful assault and battery.

APPEAL by defendant from *Huskins, J.*, November Criminal Term 1957 of GASTON.

Criminal prosecution on a bill of indictment charging the defendant with murder in the first degree of Ronnie Leonard Ramsey.

When the case was called for trial the Solicitor for the State announced that he would not seek a conviction for first degree murder, but the defendant would be tried for second degree murder or manslaughter, as the evidence would justify.

The defendant pleaded Not Guilty. The jury returned a verdict of guilty of involuntary manslaughter.

From a judgment of imprisonment, the defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

William N. Puett for defendant, appellant.

PARKER, J. The defendant has eight assignments of error: six as to the admission of evidence, one as to the rejection of evidence, and another as to the failure of the court to allow defendant's motion for judgment of nonsuit made at the close of the State's evidence. The defendant offered no evidence.

About 10:30 p.m. on 3 November 1957 Ronnie Leonard Ramsey, a 16-year-old boy, and Victor Davis, a 14-year-old boy, left a moving picture show, and went to Bum's Corner in the City of Gastonia to thumb a ride home. Some ten minutes later Alfred Knight, the defendant, James Ertzberger, a 16-year-old boy and Olin Rushton, a 13-year-old boy, came to the same corner to thumb a ride.

This in substance is the testimony of Victor Davis as to what occurred there: After the defendant, James Ertzberger and Olin

Rushton were there a few minutes, Olin Rushton threw three or four rocks at Ronnie Leonard Ramsey and Victor Davis. Ramsey said to Rushton, "you'd better not hit us." Whereupon, Knight, Ertzberger and Rushton came up to Ramsey and Davis, and asked Ramsey what he had said. Ramsey replied, "you'd better not hit us" and "I'm not afraid of any of you." The defendant said, "I'll make you afraid of me," grabbed Ramsey, and gave him a shove. Then Ramsey hit the defendant in the face. There was a scuffle, and Ramsey and the defendant fell to the ground, with Ramsey landing on his stomach, and the defendant on top and straddle him. While they were in that position, the defendant hit Ramsey twice on the back of his head. Davis at that time left to seek the police. When he returned some ten minutes later, Ramsey was lying doubled up in a ditch. The defendant and his two companions were gone. A crowd had gathered.

This is the substance of James Ertzberger's testimony: The defendant told Rushton to throw a rock at Ramsey, which he did. Before this Ramsey had said nothing to the defendant. Rushton threw other rocks. Ramsey told them to stop throwing rocks at him. Rushton said to the defendant, "let's go up there." All three did. Ramsey again told them to stop throwing rocks at him, and he was not afraid of any of them. The defendant said to Ramsey, "I can make you afraid of me." Ramsey smiled, and turned away. The defendant pushed Ramsey, who hit him in the mouth. The defendant then knocked Ramsey down, and got on top of him. Ramsey was lying on his stomach with the defendant straddle of him. The defendant held the knuckles of his hands in Ramsey's temples, and then hit Ramsey three licks behind his head with his right hand. Ertzberger said to the defendant, "let's go." The defendant got up, kicked Ramsey twice on the top of his head, called him a s. o. b., and then he and his two companions ran off.

The testimony of Olin Rushton is substantially similar to that of James Ertzberger. Rushton testified that just before the defendant assaulted Ramsey by pushing him, Ramsey said, "I'm not scared of nary one of you," and the defendant replied, "I'll teach you to be scared of me."

About 10:45 p.m. on the same night William R. Caldwell, a policeman of the City of Gastonia, went to Bum's Corner in answer to a call for help from Victor Davis. He saw Ronnie Leonard Ramsey lying on his stomach in a ditch with his head to one side. The officer saw three bubbles come out of his mouth. The policeman examined him for a pulse, and found none. His body was carried to a hospital in an ambulance. Ramsey never spoke in the officer's presence.

About 11:20 or 11:30 p.m. on this night Dr. Harry Riddle, an admitted medical expert, saw Ronnie Leonard Ramsey at the Gaston Memorial Hospital. He examined him, and made some X-Rays of him. In his opinion he was dead the first time he saw him. He had a small amount of blood in one nostril, a tiny scratch in that nostril, a small amount of blood in the right ear, and a small scratch at the base of that ear. In the doctor's opinion his skull was not fractured, and he saw no sign that Ramsey had been kicked with a shoe on the head. In Dr. Riddle's opinion he saw no injury on Ramsey which would have been fatal.

Dr. G. W. Belk, an admitted medical expert, testified that he examined Ronnie Leonard Ramsey on 22 October 1957 for an insurance company, and found him in good physical condition.

On 4 November 1957 Dr. William B. Kingsley, an admitted medical expert specializing in pathology, performed, in his words a "very meticulous and complete autopsy" of the dead body of Ronnie Leonard Ramsey. In response to a hypothetical question asked him by the Solicitor for the State, which question contained a full and fair recital of all relevant and material facts already in evidence, and which was properly framed, as to whether he had an opinion satisfactory to himself as to the cause of Ronnie Leonard Ramsey's death, Dr. Kingsley replied that he did. He was then asked what was his opinion. Dr. Kingsley replied as follows: "In my opinion, the severe exertion, the fear, and the anger which the — — Ronnie Ramsey had during the fight caused his heart to stop beating and resulted in his death." Dr. Kingsley was then asked, that if the jury should find the facts to be as stated in the first hypothetical question, did he have an opinion as to whether or not Ramsey's heart would have stopped beating had he not been subjected to that type of exertion, fear, anger and so forth. He replied that he had an opinion. In reply to the question as to what his opinion was, he said: "It would have, in my opinion, taken a situation like this, or similar to this, to have caused the circumstances which resulted in the cessation of heartbeat." This in substance is Dr. Kingsley's testimony on cross-examination: In his post-mortem examination of Ramsey's body he found no abnormalities about this boy's health and condition. However, his lungs were congested. In his opinion there was no traumatic injury sufficient to cause death: no bone fractures and a few small skin lacerations. In his opinion Ramsey's death was not a probable or natural consequence, nor did his death result from blows struck by the defendant. It is a fact that there is no affirmative finding that you can make after death to determine that cessation of heartbeat was the cause of death, unless you are examining the person while dying. He reached his conclusion as to the cause of

death of Ramsey by eliminating all other known causes of death. He had personally examined three deaths of this nature in the past ten years. Fear, exertion and anger are not the only causes, or motivating causes, for cessation of heartbeat. Death can result from cessation of heartbeat where these things are not present. He did not know of his own knowledge, nor did he have any medical method for determining, that Ramsey suffered from fear, fright, anger or exertion on this occasion. He was then asked this question by defendant's counsel: "Doctor, if there is no absolute, positive scientific or medical method for determining that the cause of death is cessation of heartbeat, how can you be so sure that such was the cause of death?" The doctor answered: "Because my very meticulous and complete autopsy revealed no other cause of death." The doctor further testified: "I do not contend that science and medicine know all causes of death at the present time. I do not eliminate the possibility of unknown causes of cessation of heartbeat, or other unknown causes of death. In view of the fact that my findings in this cause of death are negative, there is a possibility of error in it." On redirect examination the doctor testified that, in his opinion, the congestion in Ramsey's lungs found in his examination occurred at the time of his death.

The father of Ramsey testified that he did not know of any illness or sickness of his son prior to his death, nor did he know of any physical disability of his son. He saw his son's dead body that night at the hospital. He had some blood in both nostrils, a little blood in one ear, and seemed to have a bruise on the left side of his face.

The defendant has six assignments of error as to the admission of evidence, all relating to the testimony of Dr. William B. Kingsley. The doctor was asked two hypothetical questions. In reply to each hypothetical question he said that he had an opinion satisfactory to himself, and then he was asked what that opinion was. Four of defendant's assignments of error relate to these two questions: first to the hypothetical questions, and then to the questions as to what his opinion was. A fifth assignment of error is to the failure of the court to strike out one of his answers to one of these questions as to what his opinion was. A sixth assignment of error is to this question asked the doctor by the Solicitor for the State on redirect examination: "Doctor Kingsley, were you able to find anything in the case—Ronnie Ramsey's case that in your opinion caused the cessation of heartbeat other than the fear, fright, exertion and excitement?" Over the defendant's objection and exception, the witness was permitted to answer, and said, "I was not."

Dr. Kingsley was an admitted medical expert specializing in pathology. He testified as an expert witness on the assumption that the jury would find the facts to be as set forth in the hypothetical questions, and also as to matters within his direct, personal knowledge learned by his "very meticulous and complete autopsy" of the dead body of Ronnie Ramsey.

It seems that a jury could draw a reasonable inference from the evidence as to the fight between Ramsey and the defendant, and all the facts in evidence in respect to the fight, that Ramsey had fear and anger, and engaged in severe exertion during the fight. Even though Ramsey said before the fight to the defendant and his two companions, "I'm not scared of nary one of you," that does not necessarily mean that he had no fear after the defendant knocked him down, and was straddle of him, and beating him.

We held in *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72, that a medical expert is competent to testify upon proper hypothetical questions as to the cause of death.

In *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494, which was a prosecution for murder, Dr. J. F. Foster examined the body of the deceased and being asked his opinion as to the cause of death he replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages." The Court said: "Foundation was laid for the question which elicited this response. Expert testimony as to the cause of death was competent. Frequently it is the only available means of proving that fact. The question was proper and there was no objection to the answer or motion to strike the part thereof which undertook to give the means used. Defendant waived any grounds for objection to so much of the answer as may not be responsive to the question."

This Court said in *S. v. Bowman,* 78 N.C. 509: An expert's "evidence is competent only when founded on facts within the personal knowledge and observation of the expert, or upon the hypothesis of the finding of the jury." See also *Summerlin v. R. R.,* 133 N.C. 550, 45 S.E. 898.

Even if it be conceded that Dr. Kingsley's answers to the hypothetical questions were incompetent for the reason that he drew an inference from the assumed facts that Ramsey had fear and anger and used severe exertion during the fight with the defendant, yet the admission of such evidence would seem to be harmless, because Dr. Kingsley testified that in his opinion, based on facts within his own personal knowledge disclosed by his "very meticulous and complete autopsy" of the dead body of Ramsey, his death was caused by a cessation of heartbeat caused by fear, anger and severe exertion during the fight. It was

proper for the doctor to give his opinion as to the cause of death from the autopsy he performed, and, as in the May Case, there was no objection to the answer given by the doctor as to his opinion of the cause of death based on his autopsy, or motion to strike the part thereof as to fear, anger and severe exertion.

Dr. Kingsley's testimony as to his opinion of the cause of death based on his autopsy related to matters requiring expert knowledge in the medical field about which a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert testimony from one learned in the medical field. All defendant's assignments of error as to the admission of evidence, and as to the failure to strike out an answer of Dr. Kingsley to a hypothetical question, are overruled.

Defendant's assignment of error as to the rejection of evidence—which is number six in the Record—is taken as abandoned for the reason that it is not set out in his brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 563; *Beasley v. McLamb*, 247 N.C. 179, 100 S.E. 2d 387. Further, the exception to the refusal of the court to permit Dr. Kingsley to answer the question asked by defendant's counsel on cross-examination cannot be sustained, for the reason that the Record fails to show what Dr. Kingsley would have testified, if permitted to answer. *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342.

Defendant's assignment of error to the denial by the court of his motion for judgment of nonsuit challenges the sufficiency of the evidence to carry the case to the jury.

In *Snowden v. State*, 133 Md. 624, 106 A. 5, a conviction for homicide was upheld where the medical testimony was to the effect that the victim, a woman, had died of shock as the result of the injuries inflicted on her by the defendant's assault. These wounds consisted of various surface scratches and lacerations, in addition to a blow on the forehead and some evidence of strangulation.

In *Fisher v. State*, 148 Tex. Crim. 133, 185 S.W. 2d 567, a murder conviction was sustained, where the defendant had shot the victim, although the state's medical testimony was to the effect that the slight wounds in the neck, which were the only injuries to the victim, had not gone deep enough to produce death, and that the victim might have died from shock.

In *Barron v. State*, 29 Ala. App. 137, 193 So. 190, one of the medical witnesses testified that the knife wounds inflicted by the defendant on the victim would not have produced death, but the fight and the stabbing had produced shock, and in the witness's opinion the death was due either to the shock or heart trouble. The murder conviction was upheld, since in either case the de-

fendant was responsible for the death, and it made no difference whether the death had resulted from the cutting of a vital vein or organ, or from shock superinduced by the wound and the fight, or from other natural causes set in motion by the defendant's wrongful act.

In *Cox v. People*, 80 N.Y. 500, the Court said: "It was not necessary in order to convict the prisoner that it should appear that his actual personal violence was the sole and immediate cause of the death of the deceased. If this violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner's act was in law the cause of her death."

This Court said in *S. v. Minton*, 234 N.C. 716, 68 S.E. 2d 844: ". . . the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of his criminal act."

It seems to be the general rule, certainly in the modern decisions, that where the fatal shock or fright was directly caused by an unlawful battery committed by the defendant upon the victim inflicting injuries, which in and of themselves would not or might not have produced death, that the defendant is guilty of criminal homicide. Anno. 47 A.L.R. 2d p. 1072, *et seq.*, entitled "Homicide by Fright or Shock"; Anno. Ann. Cases 1912A p. 142, *et seq.*, entitled "Causing Death by Fright as Homicide"; Anno. 16 L.R.A. (N.S.) p. 327, *et seq.*, entitled "Is One Causing Fright by Unlawful Act Guilty of Homicide because Death Follows Fright?"; 40 C.J.S., Homicide, pp. 852-853.

This Court said in *S. v. Hovis*, 233 N.C. 359, 64 S.E. 2d 564: "Involuntary manslaughter has been defined to be, 'where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.' "

All the evidence shows that the defendant was the aggressor, that he unlawfully and violently assaulted Ronnie Ramsey, and that Ronnie Ramsey was dead a short time after the assault. Although the State offered the evidence of Dr. Harry Riddle that he saw no injury upon Ramsey's body which would have been fatal, yet it offered the testimony of Dr. William B. Kingsley, who performed a "very meticulous and complete autopsy" of Ramsey's dead body, that in his opinion the cause of Ramsey's death was a cessation of heartbeat. The jury could draw a permissible and reasonable inference from the evidence that Ramsey's death resulted not from the injuries themselves inflicted upon him in the unlawful battery, but from a cessation of heartbeat directly caused by shock or fright or exertion, by reason of the defendant's violent and unjustifiable assault and

battery upon him, and that Ramsey would not have died but for the defendant's unlawful assault and battery upon him. The State's evidence was sufficient to carry the case to the jury for it to say how it was. The motion for judgment of nonsuit was properly overruled.

No error.

RANLO SUPPLY COMPANY v.
HENRY L. CLARK AND WIFE, NANCY CLARK.

(Filed 5 March, 1958.)

1. **Laborers' and Materialmen's Liens § 2—**

Where plaintiff's evidence establishes that the contractor agreed with the owner or his agent to construct a house for a fixed sum, and that plaintiff furnished materials for the construction of the house in dealings solely with the contractor, plaintiff may not assert a lien under G.S. 44-1, since such lien must be based upon a contract between the parties establishing the relationship of debtor and creditor.

2. **Same: Quaisi-Contracts § 1—**

Where there is an express contract between the owner and contractor for the construction of a house at a fixed price as a turnkey job, there can be no implied contract between the owner and a person furnishing material for the construction of the house under an agreement solely with the contractor, since there can be no implied contract where there is an express contract between the parties in reference to the subject matter.

3. **Laborers' and Materialmen's Liens § 3—**

Where a party seeks to enforce a lien under G.S. 44-1, he is estopped from asserting any lien as a sub-contractor under G.S. 44-6, 44-8 and 44-9.

4. **Laborers' and Materialmen's Liens § 5—**

Where a materialman makes no demand on the owner for payment prior to payment by the owner to the contractor of the full amount due the contractor, such materialman cannot assert a lien under G.S. 44-6.

5. **Laborers' and Materialmen's Liens § 2—**

Where a house is constructed under a contract for a turnkey job at fixed price, the fact that a check from the loan company is made payable to the owner, contractor and material furnisher, and endorsed by the owner and contractor to the material furnisher, is insufficient alone to establish a contract between the owner and the material furnisher.

APPEAL by plaintiff from *Huskins, J.*, October Term 1957 of GASTON.

This is a civil action to establish a materialmen's lien on a house and the land upon which it was constructed.

The plaintiff alleges in its complaint that on or about the 20th day of December 1954 the defendants entered into a contract with the plaintiff whereby the plaintiff was to furnish certain building materials to be used in the construction of a building upon a 4-acre tract of land belonging to the defendants. That plaintiff furnished such materials for which the defendants agreed to pay the sum of $2,186.54, as per itemized statement attached as an exhibit to the complaint. That such materials were furnished to the defendants between 20 December 1954 and 15 February 1955. It is further alleged that there is now due the plaintiff by the defendants the sum of $1,186.54, with interest from 15 February 1955 until paid.

The defendants denied the material allegations of the complaint and for a further answer and defense allege that Floyd Clark, a son of the defendants, contracted with one John F. Smith, a contractor, to build a dwelling house on the land described in the complaint. The terms of the contract were that the contractor was to furnish all labor and materials used in the construction of said house, and for which Floyd Clark agreed to pay the sum of $5,500. Payments were to be made when the house reached certain stages of completion. That prior to the completion of said contract, Smith abandoned the contract and the house remains uncompleted; that to complete the house would require approximately $1,500.

The plaintiff's evidence tends to establish these facts: John F. Smith made a contract with Floyd Clark to construct a house on the land described in the complaint, which land was owned by the defendants as tenants by the entirety. Smith agreed to obtain the materials, furnish the labor, and complete the house for the sum of $5,500. The original contract called for asbestos siding which was changed to brick veneer by Floyd Clark after the house was under construction. The materials in question were delivered and used by Smith in the construction of the house. Smith never talked with the defendants about the construction of the house; his contract was with Floyd Clark. Neither did these defendants nor Floyd Clark order any materials from the plaintiff, nor did they have any agreement with the plaintiff with respect thereto. Neither did these defendants nor Floyd Clark designate from whom the contractor should purchase the materials to be used in the construction of the house, and the materials were ordered either by Mr. Smith, the contractor, or by one of his employees. According to the testimony of Floyd Clark, who was offered as a witness by plaintiff, the house was not finished by the contractor. It lacked the

mantel, screens were not installed, the basement was not finished, the heating plant was not put in, and numerous other small things left uncompleted.

The defendants did execute a deed of trust on the 4-acre tract of land on which they live, and on which the Floyd Clark house was constructed, to secure a loan from the Home Building and Loan Association of Kings Mountain, North Carolina, to finance the construction of the Floyd Clark house. It was stipulated that notice of the lien was filed by the plaintiff in the office of the Clerk of the Superior Court of Gaston County on 12 August 1955, together with a list of the materials, and duly recorded in Lien Book 4, page 270.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit and the motion was sustained. Plaintiff appeals, assigning error.

Berlin H. Carpenter, Jr., and Whitener & Mitchem for plaintiff appellant.

Carpenter & Webb, and John G. Golding for defendants appellee.

DENNY, J. The plaintiff contends that under the facts and circumstances revealed on this record, it has an implied contract with the defendants to pay for the materials it furnished to Smith to build the Floyd Clark house on the premises of the defendants.

It would seem that the judgment entered below must be sustained for several reasons.

The evidence, in our opinion, is insufficient to support the plaintiff's contention that it has an implied contract with the defendants to pay for the materials furnished by it for the construction of the house in question. It is clear from the evidence that the plaintiff never entered into any agreement with these defendants to pay for the materials furnished or discussed the subject with them until after the materials were purchased by Smith and used by him in the construction of the house.

In the case of *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828, this Court, speaking through Parker, J., said: "A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist. *Brown v. Ward*, 221 N.C. 344, 20 S.E. 2d 324. In that case it is said: 'Mere knowledge that work is being done or material furnished on one's property does not enable the person furnishing the labor or material to obtain a lien.' " *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680; *Honeycutt v. Kenilworth Development*

Co., 199 N.C. 373, 154 S.E. 628; *Foundry Co. v. Aluminum Co.*, 172 N.C. 704, 90 S.E. 923; *Weathers v. Cox*, 159 N.C. 575, 76 S.E. 7; *Boone v. Chatfield*, 118 N.C. 916, 24 S.E. 745; *Wilkie v. Bray*, 71 N.C. 205.

The evidence unequivocally establishes the fact that there was a contract between John F. Smith and Floyd Clark whereby Smith was to furnish the labor and materials necessary to construct the house for a fixed sum. The plaintiff's evidence clearly establishes this fact. Moreover, whatever contract was made with the plaintiff with respect to the purchase of these materials was made with Smith and not with the owners of the property.

This Court, in the case of *Manufacturing Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418, Ann. Cas. 1916A, 763, said: "* * * it is a well recognized principle that there can be no implied contract where there is an express contract between the parties in reference to the same subject-matter." *Lawrence v. Hester*, 93 N.C. 79.

Here the plaintiff alleges a contractual relationship with the defendants in both the lien notice and in its complaint, and seeks to enforce its alleged lien pursuant to the provisions of G.S. 44-1. Such being the case, the plaintiff would be estopped from asserting any lien as a sub-contractor pursuant to the provisions of G.S. 44-6, G.S. 44-8, and G.S. 44-9. *Economy Pumps, Inc. v. Woolworth Co.*, 220 N.C. 499, 17 S.E. 2d 639; *Lumber Co. v. Perry*, 212 N.C. 713, 194 S.E. 475. Moreover, there is no evidence in this record to the effect that plaintiff made any demand on these defendants for payment of the balance now claimed to be due and unpaid, until after the original contract price for the house had been paid to the contractor out of funds provided by these defendants through a loan secured by a deed of trust on the premises involved. *Building Supplies Co. v. Hospital Co.*, 176 N.C. 87, 97 S.E. 146; *Foundry Co. v. Aluminum Co., supra; Lumber Co. v. Hotel*, 109 N.C. 658, 14 S.E. 35.

Furthermore, the fact that the Building and Loan Association, which made the loan to finance the construction of the house, issued one of its vouchers payable to Henry Clark, J. F. Smith, and the plaintiff, in the sum of $1,000, on 7 January 1955, which voucher was endorsed by Henry Clark and J. F. Smith and delivered to the plaintiff, is not sufficient to establish a contract between these defendants and the plaintiff where the building was being constructed by one of the payees under a contract for a turnkey job at a fixed price.

In our opinion, the ruling of the court below should be upheld, and it is so ordered.

Affirmed.

Abandonment — Of wife as ground for divorce, *Pruett v. Pruett*, 13.

Abandonment of Property — Mineral interests, *Cordell v. Sand Co.*, 688.

Abatement — Failure to make plea in abatement before verdict waives irregularity in issuance of warrent, *S. v. Johnson*, 240.

Abatement and Revival — Negligent injuries not causing death. *Inman v. Meares*, 661; actions relating to realty, *Everett v. Yopp*, 38.

Abuse of Process — See Process.

Accidental Means — As used in insurance policy, *Fallins v. Insurance Co.*, 72; *Allred v. Ins. Co.*, 105.

Accord and Satisfaction — *Bizzell v. Bizzell*, 590.

Accounting — Plea of accord and satisfaction as bar to action for accounting, *Bizzell v. Bizzell*, 590.

Actions — Death of party and substitution of personal representative, *Everett v. Yopp*, 38; to test validity of taxing statute, *Duke v. Shaw, Commissioner of Revenue*, 236; for waste, *Parrish v. Parrish*, 584.

Administration — See Executors and Administrators.

Administrative Law — Review, *Duke v. Shaw*, 236.

Admissions — Testimony of admission by defendant is competent, *S. v. Moore*, 368; under circumstances, admission of defendant that he was driving too fast held not an admission of unlawful speed, *S. v. Tingen*, 384; in pleadings, *Moore v. Humphrey*, 423.

Adultry — Where wife defends in good faith, she is entitled to alimony pendente lite, notwithstanding absence of cross-action, *Branon v. Branon*, 77.

Adverse Possession — Among tenants in common, *Johnson v. McLamb*, 534; color of title, *Johnson v. McLamb*, 534.

Advisory Opinion — Declaratory Judgment Act does not authorize, *Greensboro v. Wall*, 516.

Agency — See Principal and Agent.

Alimony — See Divorce and Alimony.

Allegata — Variance between allegation and proof, *Smith v. Winston-Salem*, 349; *Ins. Co. v. Gas Co.*, 471; *Poultry Co. v. Equipment Co.*, 570.

Amendment — Warrant may not be amended upon appeal to superior court, *S. v. Cofield*, 185; *S. v. Moore*, 368; to pleadings, *Litaker v. Bost*, 298; complaint cannot be amended upon inquiry to charge additional damages without opportunity to defendant to contest the amount, *Pruitt v. Taylor*, 380.

Ancillary Administrator — In re Will of *Brauff*, 92.

Anticipation of Negligence — Party is not required to anticipate negligence, *Simmons v. Rogers*, 340.

Appeal and Error — Appeal in criminal cases see Criminal Law; review in habeas corpus proceedings see Habeas Corpus; appeal and review in contempt proceedings see Contempt of Court; nature and grounds of appellate jurisdiction, *Greensboro v. Wall*, 516; *Adams v. College*, 648; *Finance Co. v. Simmons*, 724; *Bivens v. R. R.*, 711; supervisory jurisdiction of Supreme Court, In re *Renfrow*, 55; *Adams v. College*, 648; judgments appealable, *Tucker v. Highway Com.*, 171; *Hooks v. Flowers*, 558; *Bizzell v. Bizzell*, 590; death and substitution of parties, *Simmons v. Rogers*, 340; moot questions and advisory opinions, *Greensboro v. Wall*, 516; *Edwards v. Jenkins*, 565; demurrers in Supreme Court, *Bailey v. McGill*, 286; *Stamey v. Membership Corp.*, 640; *Adams v. College*, 648; appeal entry, *Aycock v. Richardson*, 233; jurisdiction of lower court after appeal, *Bizzell v. Bizzell*, 590; certiorari, *Clark v. Freight Carriers*, 705; objections, exceptions and assignments of error, *Beasley v. McLamb*, 179; *Fallins v. Ins. Co.*, 72; *Lookabill v. Regan*, 199; *Hodgin v. Implement Co.*, 578; *Raleigh v. Morand*, 363; *Amusement Co. v. Tarkington*, 444; *Andrews v. Lovejoy*, 554; *Clark v. Freight Carriers*, 705; *Pruett v. Pruett*, 13; *Hayes v. Bon Marche*, 124; record, *Moore v. Humphrey*, 423; briefs, *Beasley v. McLamb*, 179; *Speights v. Carro-*

way,, 220; *Frazier v. Gas Co.*, 256; burden of showing error, *Litaker v. Bost*, 298; *Bizzell v. Bizzell*, 590; harmless and prejudicial error, *Lookabill v. Regan*, 199; *Inman v. Meares*, 661; *Beasley v. McLamb*, 179; *Litaker v. Bost*, 298; *Solon Lodge v. Ionic Lodge*, 310; review of findings or of judgments on findings, *Pruett v. Pruett*, 13; *Pruitt v. Taylor*, 380; *Tucker v. Highway Com.*, 171; In re *Gibbons*, 273; *Davis v. Construction Co.*, 332; *Raleigh v. Morand*, 363; *Jackson v. McCoury*, 502; *In re Bane*, 562; *Bizzell v. Bizzell*, 590; *Harrill v. Taylor*, 748; review of injunction proceedings, *Aircraft Co. v. Union*, 620; review of judgments on motions to nonsuit, *Durham v. Trucking Co.*, 204; *Frazier v. Gas Co.*, 256;*Bell v. Simmons*, 488; remand, *Morganton v. Bourbonnais Co.*, 666.

Appearance — *Lumber Co. v. West*, 699.

Arrest — Of defendant in regular use of process in civil action cannot be made basis of counterclaim for abuse of process, *Edwards v. Jenkins*, 565; right of officer to arrest without warrant, *Perry v. Gibson*, 212; right to bail, *In re Renfrow*, 55.

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ANALYTICAL INDEX

ABANDONMENT OF PROPERTY

In order to constitute an abandonment of mineral rights, there must be acts and conduct positive, unequivocal, and inconsistent with the claim of the leasehold estate, and mere lapse of time and the failure to pay taxes thereon are insufficient to amount to a waiver or abandonment. *Cordell v. Sand Co.*, 688.

ABATEMENT AND REVIVAL

§ 11. Actions for Negligent Injury Not Causing Death.

Claim for disability benefits under Workmen's Compensation Act does not abate as to payments accrued upon death of employee from a subsequent compensable accident unconnected with the first. *Inman v. Meares*, 661.

§ 18. Death of Party and Survival of Actions — Actions Relating to Realty.

Where, pending an action to recover damages for trespass and for injunctive relief against further trespass, plaintiff dies, the court has authority to permit plaintiff's heirs to become parties on a motion at any time within one year after plaintiff's death, or afterward on a supplemental complaint. *Everett v. Yopp*, 38.

ACCORD AND SATISFACTION.

§ 1. Nature and Essentials of Agreement.

An accord and satisfaction is composed of two elements: the accord which is the agreement and the satisfaction which is the execution or performance of such agreement. *Bizzell v. Bizzell*, 590.

Where it is plain from a contract of accord and satisfaction that only the performance of the agreement should bar action on the original controversy, proof of such performance is necessary for final judgment sustaining the plea in bar. *Ibid.*

Any new and valuable consideration is sufficient to support an agreement of accord and satisfaction, and therefore evidence tending to show that plaintiff was entitled to receive, under the agreement, an interest in realty free of any claim by defendant for a large sum of money furnished by defendant for the enlargement and modernization of the building thereon, is sufficient to support the finding by the court that the agreement was supported by valuable consideration regardless of evidence relating to other considerations furnished by defendant. *Ibid.*

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari and Review.

Provision for judicial review of an administrative ruling, G.S. 143-306, contemplates the review of an administrative order entered in a quasi-judicial hearing in which the parties are permitted an opportunity to offer evidence and a decision is rendered applicable to a specific factual situation, and the statute does not authorize the filing of a petition in the superior court seeking an advisory opinion on the correctness of an administrative interpretation of a statute. *Duke v. Shaw*, 236.

ADVERSE POSSESSION.

§ 7. Adverse Possession Among Tenants in Common.

The rule that deed of one tenant in common purporting to convey the entire

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tract does not constitute color of title will be strictly applied, and will not be extended to a commissioner's deed in tax foreclosure against a single tenant. *Johnson v. McLamb*, 534.

§ 15. What Constitutes Color of Title.

Ordinarily any instrument constitutes color of title if it purports to convey title but is defective or void for matters *dehors* the record, or even if the defects are discoverable from the record. *Johnson v. McLamb*, 534.

The rule that deed of one tenant in common purporting to convey the entire tract does not constitute color of title as against the co-tenants is to be strictly confined to deeds executed by a tenant in common, and will not be extended to judicial sales for partition or to tax foreclosures instituted against a single tenant. *Ibid.*

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

The constitutionality of a statute will not be determined unless the judicial power is properly invoked and it is necessary to determine the question in order to protect the constitutional rights of a party to the action. *Greensboro v. Wall*, 516.

Where the judgment of the lower court is correct, it will be affirmed inrespective of the grounds upon which the judgment was entered. *Adams v. College*, 648.

The sole question presented upon appeal from an order of a lower court is the correctness of the order, and, upon remand, the reasons given by the lower court as the basis of the order should be stricken so that neither side will be prejudiced. *Finance Co., v. Simmons*, 724.

A party cannot contest the case on one theory and later upset the trial by switching to another theory on the appeal. *Bivins v. R. R.*, 711.

It is not necessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached. *Finance Co. v. Simmons*, 724.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court may treat a purported appeal from a judgment rendered on return to a writ of *habeas corpus* as a petition for *certiorari* in order to clarify an important question of practice presented by the record. *In re Renfrow*, 55.

The Supreme Court may take cognizance of the failure of the complaint to state a cause of action *ex mero motu*. *Adams v. College*, 648.

§ 3. Judgments Appealable.

Judgment of the superior court remanding proceedings under the Tort Claims Act to the Industrial Commission is not a final judgment, but nevertheless an appeal will lie from such judgment when it deprives appellant of some substantial right which might be lost if the order is not reviewed before final judgment. *Tucker v. Highway Com.*, 171.

An order entered in a proceeding to abate a public nuisance directing the making of an inventory of the contents of defendant's safe found in the padlocked building, without any showing that the contents of the safe were relevant to that proceeding, is an order affecting a substantial right of defendant, from which appeal lies. *Hooks v. Flowers*, 558.

An interlocutory judgment is not appealable unless it affects some substantial

APPEAL and ERROR — *continued.*

right which will be lost if not corrected prior to final judgment. *Bizzell v. Bizzell*, 590.

Where, in an action for an accounting, the defendant pleads an accord and satisfaction in bar of the action, judgment holding that there was an accord and continuing the cause to a subsequent term to determine whether defendant is able to and does fully perform the contract on his part, is an interlocutory judgment which does not affect any substantial right, and is not appealable. *Ibid.*

§ 5. Death and Substitution of Parties.

Where it is made to appear that a party defendant has died, motion to substitute the personal representative of the deceased defendant will be allowed in the Supreme Court. Rule of Practice in the Supreme Court No. 37. *Simmons v. Rogers*, 340.

§ 6. Moot Questions and Advisory Opinions.

The Declaratory Judgment Act does not authorize the courts to give advisory opinions. *Greensboro v. Wall*, 516.

Where demurrer to counterclaim is sustained, defendants appeal from judgment allowing motion to strike certain allegations therefrom becomes academic. *Edwards v. Jenkins*, 565.

§ 7. Demurrer and Motions in Supreme Court.

Where the complaint constitutes a statement of a defective cause of action as against certain of the parties, the demurrer *ore tenus* of such parties in the Supreme Court will be allowed and the cause dismissed as to them. *Bailey v. McGill*, 286.

An appealing defendant may file in the Supreme Court a demurrer *ore tenus* on ground that plaintiff's pleading fails to state facts sufficient to constitute a cause of action. *Stamey v. Membership Corp.*, 640; *Adams v. College*, 648.

§ 11. Appeal and Appeal Entries.

G.S. 1-279 requiring that an appeal from judgment rendered in term be taken within ten days after its rendition unless appeal is taken at the trial, and G.S. 1-280 which requires that appellant shall cause his appeal to be entered by the clerk on the judgment docket and notice thereof be given the adverse party, are jurisdictional, and when not complied with the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it. *Aycock v. Richardson*, 233.

§ 12. Jurisdiction and Powers of Lower Court After Appeal.

An attempted appeal from a nonappealable interlocutory order continuing the cause to a subsequent term does not deprive the superior court of jurisdiction to hear the cause at the later term. *Bizzell v. Bizzell*, 590.

§ 16. Certiorari as Method for Review.

Allowance of *certiorari* under Rule 4 (a) will be treated as an exception to the order or orders which petitioner seeks to have reviewed, and even though appellants fail to group and separately number the exceptions relied upon by them as required by Rule 19, Section 3, the appeal will not be dismissed, since an exception to the judgment is sufficient to present the question whether the pleadings and admitted facts on which the trial court ruled support the orders

APPEAL and ERROR — *continued.*

entered, and whether any error of law appears on the face of the record. *Clark v. Freight Carriers*, 705.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error to the issues submitted, which assignment of error is not supported by an exception or the tender of other issues, will be disregarded by the Supreme Court on appeal *ex mero motu*. *Beasley v. McLamb*, 179.

§ 20 Parties Entitled to Object and Take Exception.

A party may not complain of an asserted error in the charge which is favorable to him. *Fallins v. Ins. Co.*, 72.

Appellant may not object to a portion of the charge relating to an issue answered in his own favor. *Lookabill v. Regan*, 199.

A party may not complain of alleged error relative to an issue answered in his favor. *Hodgin v. Implement Co.*, 578.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An exception to the signing of judgment presents the questions whether the facts found support the conclusions of law and the judgment entered thereon and whether any error appears on the face of the record. *Raleigh v. Morand*, 363; *Amusement Co. v. Tarkington*, 444.

An exception to the judgment cannot be sustained when no error appears on the face of the record. *Andrews v. Lovejoy*, 554.

Allowance of petition for certiorari will be treated as an exception to the orders sustaining demurrers and granting motions to strike, presenting question of whether the orders entered are supported by the facts. *Clark v. Freight Carriers*, 705.

§ 21a. Exceptions and Assignments of Error To Rulings on Motions to Nonsuit

Where the court hears the cause by agreement of the parties, an exception to the refusal of motion for nonsuit presents no question for review when there is no exception to the findings of fact or conclusions of law. *Raleigh v. Morand*, 363.

§ 22. Objections Exceptions and Assignments of Error to Findings of Fact.

An exceptive assignment of error that the court erred in finding the facts as contained in the judgment is broadside. *Pruett v. Pruett*, 13.

Where there are no exceptions to the admission of evidence or to the findings of fact, the findings are presumed to be supported by competent evidence and are binding upon appeal. *Raleigh v. Morand*, 363.

§ 22a. Exceptions and Assignments of Error Relating to Pleadings.

An exception to the refusal of the court to strike designated sub-paragraphs of a pleading is a broadside exception and must fail if the paragraphs challenged contain any proper factual allegations. *Hayes v. Bon Marche*, 124.

§ 35. Conclusiveness and Effect of Record and Presumptions in Regard to Matters Omitted.

Where the charge of the court is not in the record, it will be presumed that

APPEAL and ERROR — *Continued.*

the court correctly instructed the jury on every principle of law applicable to the facts. *Moore v. Humphrey*, 423.

§ 38. Exceptions not Discussed in the Brief, Form and Stipulations.

Assignments of error not discussed in the brief are deemed abandoned. *Beasley v. McLamb*, 179; *Speights v. Carraway*, 220.

Where the brief stipulates that appellant is not seeking a new trial but is appealing solely on the correctness of the court's denial of motion to nonsuit, all other assignments of error are eliminated. *Frazier v. Gas Co.*, 256.

§ 39. Presumptions and Burden of Showing Error.

The presumption is in favor of the correctness of the judgment in the lower court, and the burden is on appellant to show a denial of some substantial right. *Litaker v. Bost*, 298; *Bizzell v. Bizzell*, 590.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Any error in the admission of testimony over objection is rendered harmless by the later admission of testimony of the same witness to the same effect without objection. *Lookabill v. Regan*, 199.

Where evidence excluded does not appear of record, its exclusion cannot be held prejudicial. *Inman v. Meares*, 661.

§ 42. Harmless and Prejudicial Error in Instructions.

Where the court's statement of a contention is fully supported by the evidence and appellant makes no objection thereto prior to the retirement of the jury, an assignment of error to the statement of the contention cannot be sustained. *Beasley v. McLamb*, 179.

Where the court gives equal stress to the respective contentions of the parties, the charge will not be held objectional on the ground that the court necessarily consumed more time in stating the contentions of the one party than it did of the other. *Lookabill v. Regan*, 199.

Where the charge of the court is not included in the record, it will be presumed that the jury was correctly instructed on every principle of law applicable to the facts. *Litaker v. Bost*, 298.

§ 45. Error Cured by Verdict.

Where the jury answers the issue as to the bar of the three-year statute of limitations in plaintiff's favor, the submission of the further issue of the ten-year statute cannot be harmful. *Solon Lodge v. Ionic Lodge*, 310.

§ 47. Review of Orders Relating to Pleadings.

Exception to the refusal of motion to strike certain allegations of a pleading cannot be sustained when appellant fails to show prejudice. *Bizzell v. Bizzell*, 590.

§ 49. Review of Findings or of Judgments on Findings.

Where appellant makes no contention that the evidence was insufficient to support the findings of fact or any of them, the facts as set forth by the lower court will be accepted as established. *Pruett v. Pruett*, 13.

In the absence of findings, it will be presumed that the lower court found the predicate facts upon supporting evidence. *Pruitt v. Taylor*, 380.

APPEAL and ERROR — *Continued.*

Where findings are made under misapprehension of applicable law, the cause will be remanded. *Tucker v. Highway Com.*, 171; *In re Gibbons*, 273; *Davis v. Construction Co.*, 332.

Where in one instance the findings of fact refer to an inapposite statute, but in all other places the applicable statute is referred to, the erroneous reference will be treated as a typographical error and not fatal. *Raleigh v. Morand*, 363.

In an action within the purview of the Small Claims Act, where neither party aptly demands a jury trial, the findings of fact made by the presiding judge have the force and effect of a jury verdict and are binding on appeal if supported by competent evidence. *Jackson v. McCoury*, 502.

Where a judgment is not supported by a finding of fact on the crucial question of jurisdiction involved in the proceeding, the judgment must be vacated and the cause remanded. *In re Bane*, 562.

Findings of fact which are supported by competent evidence are conclusive on appeal. *Bizzell v. Bizzell*, 590.

Where there is sufficient competent evidence to support the court's findings of fact, and such findings are sufficient to support the court's conclusions of law, the court's interlocutory and final judgments entered in the cause will be affirmed, notwithstanding appellant's contention that the court also heard incompetent evidence, there being a rebuttable presumption that the court disregarded any incompetent evidence, and there being nothing in the record to rebut such presumption. *Ibid.*

Where a judgment is entered confirming the surveyor's report upon the court's finding that the surveyor had run the line in compliance with direction in the judgment establishing the dividing line, G.S. 38-3 (3), exception to the judgment confirming the surveyor's report does not question this finding, and the judgment must be affirmed. *Harrill v. Taylor*, 748.

§ 50. Review of Injunction Proceedings.

In injunction proceedings, the finding of fact made by the trial judge are not conclusive, but such findings are nevertheless presumed correct and will be so treated in the absence of a showing to the contrary. *Aircraft Co.v. Union*, 620.

§ 51. Review of Judgments on Motions to Nonsuit.

On appeal from involuntary nonsuit, evidence offered by plaintiff and not challenged by defendant must be treated as being before the jury and considered in determining the question of the sufficiency of the evidence. *Durham v. Trucking Co.*, 204.

In passing upon exception to the court's refusal to nonsuit, both properly and improperly admitted evidence must be considered. *Frazier v. Gas Co.*, 256; *Bell v. Simmons*, 488.

§ 55. Remand.

Where cause cannot be determined without joinder of necessary party, the cause will be remanded. *Morganton v. Bourbonnais Co.*, 666.

APPEARANCE

Recitals in several successive orders for continuances that they were entered by consent imply that both parties consented thereto, and such recitals would be irregular if one of the parties was not subject to the jurisdiction of the court, and therefore, under the presumption of the regularity of proceedings in

APPEARANCE — *continued.*

courts of general jurisdiction, such recitals are sufficient to show a general appearance waiving any defect in the service of process. *Lumber Co. v. West*, 699.

ARREST AND BAIL

§ 3. Right of Officer to Arrest without Warrant.

Jury and not officer is judge of reasonableness of grounds of officer's belief that defendant had committed misdemeanor. *Perry v. Gibson*, 212.

§ 8. Right to Bail.

The fact that a defendant has made a motion for a new trial on the ground of newly discovered evidence upon certification of the decision of the Supreme Court affirming final judgment of conviction, does not affect the provisions of G.S. 15-18 or entitle defendant to bond as a matter of right pending hearing upon his motion. *In re Renfrow*, 55.

ARSON

§ 2. Prosecutions.

An indictment for arson must identify the structure burned so as to show that it comes within the class designated in the statute and also to enable defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. Allegation of ownership or of possession of a named person suffices to meet the requirements of identity. *S. v. Banks*, 745.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault.

Arrest of defendant in action alleging wilful and malicious assault cannot be made basis of counterclaim. *Edwards v. Jenkins*, 565.

§ 15. Instructions.

Instruction on defendant's plea of self-defense in this prosecution for assault with a deadly weapon *held* prejudicial on authority of *S. v. Warren*, 242 N.C. 581. *S. v. Muscat*, 266.

ASSIGNMENTS

§ 4. Operation and Effect of Assignment.

The assignee of non-negotiable chose in action takes same subject to any set-off or counterclaim existing at the time of, or before notice of, the assignment, though such counterclaim may be used only to the extent of defeating the assignee's claim and not for affirmative relief. *Amusement Co. v. Tarkington*, 444.

ASSOCIATIONS

§ 4. Property and Conveyances.

A fraternal association conveyed property to a corporation in trust for itself. Thereafter, officers of the corporation who were also members of the association, sought to cancel the trust by issuing its stock to members of the association in good standing, and charged rent to the association. Held: The property of the association could not be diverted from the purposes of the trust without the unanimous consent of its members, nor will the association be

ASSOCIATIONS — *continued.*

charged with notice of the transactions, since its members having notice acted in their own interest and against the interest of the association. *Solon Lodge v. Ionic Lodge*, 310.

ATTORNEY AND CLIENT

§ 3. Scope of Authority of Attorney.

Where plaintiff's complaint is sufficient to state a particular cause of action only, a statement of plaintiff's counsel that they did not rely upon such cause of action is not binding upon plaintiff in the absence of express authority to the attorney, since ordinarily an attorney has no power by stipulation or agreement to waive or surrender a substantial legal right of his client. *Bailey v. McGill*, 286.

AUTOMOBILES

§ 3. Driving Without License or After Revocation of License.

Stipulations, admissions and evidence held sufficient to support conviction of operating a motor vehicle on a public highway after permanent revocation of license. *S. v. Wood*, 125.

In a prosecution for driving after permanent revocation of license, certified copy of the record of the Department of Motor Vehicles, signed by a proper official and bearing the seal of the Department, and disclosing such revocation, is competent. *S. v. Moore*, 368.

Where defendant admits he was driving his automobile on a highway of the State at the time in question, which time was subsequent to the date his license had been permanently revoked as disclosed by certified record of the Department of Motor Vehicles introduced in evidence, the evidence is sufficient to make out a *prima facie* case and overrule nonsuit in a prosecution for driving after revocation of license, it not being incumbent on the State to show that a new license had not been granted, this being a matter of defense. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

Unless the statute itself provides to the contrary, the violation of a motor vehicle traffic regulation is negligence *per se*, and the statute itself prescribes the standard so that the common law rule of ordinary care does not apply. *Arnett v. Yeago*, 356.

A violation of G.S. 20-140 is negligence *per se Stegall v. Sledge*, 718.

§ 7. Attention to Road, Look-out and Due Care in General.

The operator of a motor vehicle is not under duty to anticipate negligence on the part of others, but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume and act on the assumption that others will exercise due care for their own safety. *Simmons v. Rogers*, 340.

§ 8. Turning and Turning Signals.

The giving of the statutory signal for turning from a direct line does not constitute full compliance with G.S. 20-154 (a), but the operator of a vehicle is required in addition first to ascertain that such movement can be made in safety and to exercise due care in other respects. *Simmons v. Rogers*, 340.

The violation of G.S. 20-153 (a), requiring a motorist turning left on a multiple lane highway to travel on the lane nearest the center of the highway before making the turn, is negligence *per se* and is actionable if the proximate cause of injury. *Ibid.*

AUTOMOBILES — Continued.

§ 9. Stopping, Parking, Signals and Lights.

The leaving of a motor vehicle on a highway unattended without first setting the hand brake and turning the front wheels toward the curb or side of the highway is negligence *per se*, and is actionable if the proximate cause of injury. *Arnett v. Yeago*, 356.

§ 13. Skidding.

While the mere skidding of a motor vehicle does not imply negligence, skidding which is the result of the negligent operation of the vehicle, may be the basis of recovery. *Durham v. Trucking Co.*, 204.

It is not negligence *per se to* drive an automobile on a highway covered with snow or ice, but the driver of a vehicle under such conditions must exercise care commensurate with the danger to keep his vehicle under control so as not to cause injury to another vehicle or an occupant thereof by skidding into it. *Wise v. Lodge*, 250.

While the skidding of an automobile is not in itself evidence of negligence, if it is made to appear that the skidding was caused by the failure of the driver to exercise reasonable precaution under conditions and at a time when skidding of the car is probable in the absence of such precaution, such skidding may be evidence of negligence. *Ibid.*

The mere skidding of a motor vehicle does not imply negligence. *Jackson v. McCoury*, 502.

§ 14. Passing Vehicles Traveling in Same Direction.

The driver of an automobile traveling in the second or passing lane of a four-lane highway is under no obligation to slow down in passing a slower moving vehicle traveling in the right lane in the absence of any indication or warning that the driver of the vehicle in the right lane is preparing to turn left or enter the second or passing lane of traffic. *Simmons v. Rogers*, 340.

§ 17. Right of Way at Intersections.

A stipulation of the parties that there was a stop sign erected on the east side of a street before its intersection with another street is sufficient to raise the inference that such sign was erected pursuant to competent authority. *Jackson v. McCoury*, 502.

The failure of a driver along a servient street or highway to stop in obedience to a stop sign before entering an intersection with a dominant street or highway is not negligence or contributory negligence *per se*, but is only evidence thereof to be considered with other facts in the case upon the appropriate issue. *Ibid.*

The driver of a vehicle along a servient street or highway, who is required to stop by sign duly erected before entering an intersection with a dominant street or highway, should not only stop but should not proceed into the intersection until, in the exercise of due care, he can ascertain that he can do so with reasonable assurance of safety. *Ibid.*

The driver of a vehicle along a dominant street or highway is not under duty to anticipate that the operator of a vehicle approaching the intersection along the servient highway will fail to stop as required by statute, but may assume, in the absence of anything which gives or should give notice to the contrary, even to the last moment, that the operator of a vehicle traveling along the servient street or highway will stop before entering the intersection *Ibid.*

AUTOMOBILES — *Continued.*

Even though the driver of the vehicle along a dominant street or highway has the right to assume that motorists approaching the intersection along the servient highway will yield him the right of way, the driver along the dominant highway is nevertheless required to exercise due care, to keep a reasonably careful lookout, to drive at a speed that is no greater than is reasonable and prudent under conditions then existing, to keep his vehicle under control, and to take such action as an ordinarily prudent person to avoid collision when danger of a collision is discovered or should be discovered in the exercise of ordinary care. *Ibid.*

§ 19. Sudden Emergencies.

The operator of a motor vehicle confronted with a sudden emergency is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made. *Simmons v. Rogers*, 340.

§ 21. Brakes and Defects in Vehicles.

Where the owner has no knowledge, actual or constructive, of cracked tongue of trailer, he is not liable to passenger injured when tongue broke on highway. *Webster v. Webster*, 588.

§ 24. Loading and Protruding Objects.

In this action to recover for injuries sustained when plaintiff pedestrian ran into the end of a steel beam protruding from a truck which had been parked on the school grounds for five to ten minutes, nonsuit was properly allowed. *Epting v. Stewart*, 268.

§ 25. Speed in General.

The fact that an automobile is being operated at less than the statutory maximum does not relieve the operator of the duty to reduce speed when special hazards exist with respect to pedestrians, traffic or weather conditions, G.S. 20-141 (a), (c), and a speed of 35 to 40 miles per hour on a highway covered with ice and snow may be excessive under the conditions. *Wise v. Lodge*, 250.

§ 33. Pedestrians.

While a motorist, in the exercise of his duty to maintain a proper lookout, is required to anticipate that other travelers, including pedestrians will be using the highway, he is not required to anticipate that a person will be lying prone on the highway. *Barnes v. Horney*, 495.

The fact that a pedestrian attempts to cross a highway at night-time at a place not an intersection or crosswalk, is not negligence or contributory negligence *per se*, but such pedestrian is required to yield the right of way to traffic and, in the exercise of ordinary care for his own safety, to see that he can cross the highway without danger from approaching vehicles. *Hodgin v. Implement Co.*, 578.

§ 34. Children

A person must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, and that children near a highway are entitled to a care in proportion to their incapacity to foresee and avoid peril. *Arnett v. Yeago*, 356.

AUTOMOBILES — *continued.*

§ 36. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact that an accident has occurred. *Barnes v. Horney*, 495.

§ 37. Relevancy and Competency of Evidence in General.

In an action against the personal representative of the deceased owner to recover for injuries received in an automobile accident, plaintiff may not testify that intestate was driving the car at the time of the accident or that she had requested him to slow down. *Stegall v. Sledge*, 718.

§ 38. Opinion Evidence as to Speed and Other Facts.

Any person of ordinary intelligence, who has an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile. *Lookabill v. Regan*, 199.

Testimony of a witness, who observed the physical facts, that he "supposed" defendant's car was 250 or 300 or 400 feet distant when he saw it and was coming "at a high rate of speed," will not be held incompetent as being merely deductive conclusions of the witness, and certainly cannot be held prejudicial when the witness thereafter testifies without objection as to the high rate of speed the car was traveling. *Ibid.*

A question asked the witness as to which side of the road a person indicated his car was on cannot be held prejudicial as inviting the witness to give a deductive conclusion when the answer of the witness obviates any error in the question by explicitly stating that the car in question was on the east side of the road at the time. *Ibid.*

§ 40. Declarations and Admissions.

When all the physical facts at the scene tend to show that defendant was driving at a lawful speed, his statement after the accident, "I reckon that I was going a little too fast," considered in the light of the attendant circumstances, can mean nothing more than that defendant did not have enough time and distance after apprehending the danger to avoid the accident. *S. v. Tingen*, 384.

§ 41a. Sufficiency of Evidence and Nonsuit in General.

The physical facts at the scene of the accident in this case *held* to warrant a reasonable inference that the operator of the car was driving it at an excessive speed in violation of G. S. 20-141 (b) 4, and was driving it recklessly in violation of G. S. 20-140, so as to take the issue of negligence to the jury. *Stegall v. Sledge*, 718.

§ 41g. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Failing to Yield Right of Way at Intersections.

Plaintiff's evidence to the effect that defendant, driving along a servient street, failed to stop in obedience to a stop sign before entering the intersection with the dominant street and that his car was struck on its right side by the vehicle driven by plaintiff along the dominant street and entering the intersection from defendant's right, renders the issue of defendant's negligence a jury question, and supports an affirmative conclusion thereon in a trial by the court where right to trial by jury is not preserved. *Jackson v. Barnes*, 502.

§ 41j. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Turning.

Evidence *held* sufficient to support finding that additional defendant was

negligent in that he made a left turn in the original defendant's line of travel without ascertaining the movement could be made in safety and that such negligence was one of the proximate causes of the accident and resulting injury to the passenger in the additional defendant's vehicle. *Hunter v. Fisher*, 226.

Evidence of negligence in swerving from the right-hand lane to the passing lane of highway held sufficient for jury. *Simmons v. Rogers*, 340.

§ 41j. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Skidding.

Evidence that skidding resulted from negligent operation of the vehicle held to take issue to jury. *Durham v. Trucking Co.*, 204; *Wise v. Lodge*, 250.

§ 41p. Sufficiency of Evidence of Identity of Car or Driver of Car.

G.S. 70-1.1 raises no presumption that the owner of an automobile was the driver thereof at the time of a wreck. *Parker v. Wilson*, 47.

Whether there should be such presumption is a matter for the General Assembly. *Ibid.*

Where plaintiff must rely on the physical facts and other evidence of a circumstantial nature to establish which of the two occupants of a car was the driver thereof at the time of the fatal accident, plaintiff must establish attendant facts and circumstances which reasonably warrant his asserted inference, and such inference cannot rest on conjecture or surmise. *Ibid.*

Physical facts held insufficient to go to jury on question of whether defendant's testate was driving the car. *Ibid.*

Circumstantial evidence that intestate was driving at the time of the accident held sufficient to be submitted to the jury. *Stegall v. Sledge*, 718.

§ 41q. Sufficiency of Evidence of Negligence in Parking Without Setting Brakes or Turning Wheels to Curb.

Evidence that defendant left car unattended without setting brakes so that it was put in motion by a young child held to take issue of negligence to jury. *Arnett v. Yeago*, 356.

§ 41r. Sufficiency of Evidence of Negligence in Operating Defective Vehicle.

Plaintiff was injured when the tongue of a trailer, upon which he was riding, broke. There was no evidence tending to show that the manner in which the defendant drove the car towing the trailer contributed to the injuries or that defendant had any knowledge that the tongue was cracked, except that sometime prior thereto both parties, while using the vehicle, heard a noise which might have been the cracking of the tongue, but made no inspection and did not discover any defect. *Held*: Nonsuit was proper. *Webster v. Webster*, 588.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that plaintiff was blinded by the lights of a vehicle traveling in the opposite direction, that just after he passed this vehicle he hit defendant's car, which had been parked without lights and left unattended with the two left-hand wheels about two feet on the hard surface, *held* not to warrant nonsuit. *Wilson v. Webster*, 393.

§ 42e. Nonsuit for Contributory Negligence in Passing Vehicles Traveling in Same Direction.

Evidence tending to show that the operator of a vehicle in the second or

AUTOMOBILES — *Continued.*

passing lane of a four-lane highway, overtaking and preparing to pass a slower moving vehicle traveling in the same direction in the right lane, sounded his horn but failed to reduce speed and struck the other vehicle when it, without warning or signal, suddenly turned left from the right lane across the second lane at a place where there was no intersecting highway, is *held* not to show contributory negligence as a matter of law, since plaintiff is not required to anticipate such negligent operation of the other car in violation of statute. *Simmons v. Rogers*, 340.

Evidence tending to show that the operator of a vehicle in the second or passing lane of a four-lane highway, overtaking and preparing to pass a slower moving vehicle traveling in the same direction in the right lane, sounded his horn but failed to reduce speed and struck the other vehicle when it, without warning or signal, suddenly turned left from the right lane across the second lane at a place where there was no intersecting highway, *is held* not to show contributory negligence on the part of plaintiff as a matter of law in failing in the emergency to avail himself of the opportunity of passing the other car to its right. *Ibid.*

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence held to show contributory negligence as matter of law in failing to yield right of way at intersection. *Edens v. Freight Carriers*, 391.

Evidence tending to show that plaintiff was driving along the dominant street, that he did not see defendant's vehicle, which was approaching the intersection along the servient street from plaintiff's left, until plaintiff was some 45 to 50 feet away from the intersection, that defendant's vehicle was then in the street, and that plaintiff applied his brakes and skidded his car some 34 feet before the left front of plaintiff's car struck the right side of defendant's car, *is held* to raise the question of plaintiff's contributory negligence for the determination of the jury, but not to establish contributory negligence as a matter of law. *Jackson v. McCoury*, 502.

§ 42j. Contributory Negligence as Affected by Doctrine of Rescue.

After a car had stalled on railroad tracks at a grade crossing and plaintiff, another passenger and defendant driver alighted, plaintiff realized that the fourth passenger was still in the car, frozen with fright, went back and got her out of the car and pushed her to a place of safety, but was himself hurt when the engine struck the car and knocked it against him. *Held*: Plaintiff will not be held guilty of contributory negligence as a matter of law in leaving a place of safety and going to a place of known danger in rescuing the passenger. *Bumgarner v. R. R.*, 374.

§ 42k. Contributory Negligence of Pedestrians.

Evidence tending to show that a pedestrian, who had been without sleep for two days and nights, sat down by the side of a narrow dirt and gravel road and went to sleep, and that he was lying parallel with and between the ruts in the road when run over by defendant's car, is *held* to disclose contributory negligence as a matter of law on the part of the pedestrian. *Barnes v. Horney*, 495.

§421. Contributory Negligence of Minors.

A three-year old child is incapable of negligence, primary or contributory. *Arnett v. Yeago*, 356.

AUTOMOBILES — *continued.*

§ 42m. Doctrine of Last Clear Chance as Precluding Nonsuit for Contributory Negligence.

Evidence that plaintiff was lying prone, parallel with the ruts of a sandy dirt road, that defendant was driving his automobile with the lights on low beam and could have seen plaintiff for a distance of some 200 feet, and that defendant did see an object in the road, which he mistook for an old box or trash, but didn't recognize the object as a body until too late to avoid injury, *is held* insufficient to show that defendant had opportunity to avoid the injury after he discovered or should have discovered plaintiff's perilous position, and therefore the doctrine of last clear chance does not apply to preclude nonsuit. *Barnes v. Horney*, 495.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Plaintiff's evidence disclosing that she was traveling on the servient highway and entered the intersection when the vehicle traveling on the dominant highway, approaching from her right, was not more than 28 feet from her line of travel, shows as a matter of law contributory negligence constituting a proximate cause of the collision, fails to show that the operator of the other vehicle, after he saw or by the exercise of due care should have seen that plaintiff was not going to stop and yield the right of way, then had sufficient time, in the exercise of due care, to stop and avoid the collision and therefore the doctrine of last clear chance is not applicable. *Edens v. Freight Carriers*, 391.

The doctrine of last clear chance is not predicated on the original negligence of defendant, but upon his failure, after negligence and contributory negligence have canceled each other, to avoid the injury, and the doctrine cannot apply unless defendant has sufficient opportunity, in the exercise of ordinary care, to discover and appreciate plaintiff's perilous position in time to avoid injuring him. *Barnes v. Horney*, 495.

§ 46. Instructions in Auto Accident Cases.

Where the court in stating abstract rules of law charges that the violation of certain motor vehicle statutes constitutes negligence or contributory negligence, without relating such violations to the question of proximate cause, but in each instance in which the law is applied to the evidence correctly instructs the jury upon the element of proximate cause, and the charge is clear and understandable when read contextually, it will not be held for error. *Lookabill v. Regan*, 199.

An instruction to the effect that the jury must find that defendant's negligence was "the" instead of "a" proximate cause of the accident in order to answer the issue of negligence in the affirmative is prejudicial. *Pugh v. Smith*, 264.

§ 47. Liability of Driver to Guests or Passengers.

Evidence that the driver of a car drove it upon a railroad track, became excited when he heard the whistle of an approaching train and slammed on the brakes, stalling the car, when time remained to have continued to a place of safety, is sufficient to be submitted to the jury on the question of the driver's negligence in an action by a passenger in the car to recover for injuries received in the accident. *Bumgarner v. R. R.*, 374.

§ 48. Action by Guests or Passengers — Parties.

Where a passenger in a car sues the driver and owner of the other car in-

AUTOMOBILES — *continued.*

volved in the collision, such defendants are not entitled as a matter of right to have the driver of the car in which the plaintiff was riding joined as additional defendant upon allegations that such additional defendant's negligence was the sole proximate cause of the accident, there being no claim of liability as a joint tort-feasor, G.S. 1-240, or contention of primary and secondary liability. Such additional party is not necessary to the determination of the issue involved in plaintiff's action. *Hannah v. House*, 573.

§ 49. Contributory Negligence of Guest or Passenger.

Where there is conflict in the evidence as to whether the car in which intestate was riding was engaged in racing during the afternoon before the fatal trip so as to give intestate notice of the driver's recklessness or incompetence, and there is evidence tending to show that intestate was helped into the car for the fatal trip and was too intoxicated to be aware that the automobile was being driven at excessive speed and in a reckless manner in participating in races on the highway, the evidence, although sufficient to support a finding that intestate was aware of what was happening and was contributorily negligent in continuing to ride in the car under the circumstances, is insufficient to establish contributory negligence in this respect as a matter of law. *Litaker v. Bost*, 298.

§ 52. Liability of Owner for Driver's Negligence in General.

The owner of an automobile, merely because he leaves the keys in the ignition switch when he parks the car in a lawful manner, may not be held liable for injuries inflicted by the negligent operation of the vehicle by a thief who steals the car. *Williams v. Mickens*, 262.

Evidence that the owner of the automobile was a passenger therein and that the driver negligently operated the vehicle under the direction and control of the owner, resulting in the death of another passenger in the vehicle, is sufficient to overrule nonsuit in an action for wrongful death against the owner-passenger. *Litaker v. Bost*, 298.

Where the owner is an occupant in the car at the time of its negligent operation by another, the owner's liability for such negligent operation is not dependent upon the relationship of principal and agent in the ordinary sense, but upon the fact that he knowingly permits or directs the negligent operation of his car by another. *Ibid.*

§ 54a. Who Are Agents and Employees Within Doctrine of Respondeat Superior.

A carrier operating under franchise issued by the Interstate Commerce Commission is responsible for the operation of its trucks pursuant to such franchise insofar as third parties are concerned. *Clark v. Freight Carriers*, 705.

§ 54h. Issues and Verdict in Actions Against Owner.

Verdict that plaintiff was injured by negligence of owner — passenger in failing to control operation of car by driver but that defendant specified as the driver was not liable held not contradictory when construed with the evidence leaving it in conjecture as to which guest — passenger was driving. *Litaker v. Bost*, 398.

§ 55. Family Purpose Doctrine.

Testimony of a minor that his mother owned the car and that he was driving it on the occasion in question with her consent and that it was understood he could drive the car whenever he came home, is sufficient to be submitted to the

AUTOMOBILES — *Continued.*

jury on the issue of liability under the family car doctrine. *Bumgarner v. R. R.*, 374.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence held insufficient to show causal connection between driver's drunkenness and fatal accident. *S. v. Tingen*, 384.

§ 65. Prosecutions for Reckless Driving.

Evidence that defendant drove his automobile around a curve with his left wheels in the ditch on his left side of the highway, and struck a truck, traveling in the opposite direction on its right side of the road, resulting in damages and injuries, is sufficient to take the case to the jury and support a conviction of reckless driving. *S. v. Moore*, 368.

§ 71. Competency of Evidence in Prosecutions for Drunken Driving.

A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which the witness observed him, and in a prosecution for driving while under the influence of an intoxicant, the action of the court in sustaining an objection to testimony of defendant's witness to the effect that he had an opinion as to whether defendant on the occasion in question was under the influence of any intoxicant and that the witness thought the defendant was perfectly normal, must be held for prejudicial error. *S. v. Flinchem*, 118.

Testimony of an officer that when he apprehended defendant some 45 minutes after the accident in question defendant was in a sordid drunken condition, and testimony of an expert, based upon a bloodtest taken while defendant was still in the custody of the officer, that defendant was intoxicated, *held* not to remote in point of time and was competent. *S. v. Collins*, 244.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecution for Drunken Driving.

The stipulations between counsel for defendant and the solicitor, together with defendant's admissions and the State's evidence, considered in the light most favorable to the State, *held* sufficient to support conviction of defendant of driving on a public highway while under the influence of intoxicating liquor and operating a motor vehicle on a public highway after permanent revocation of driver's license. *S. v. Wood*, 125.

Evidence tending to show that defendant drove his automobile on the left side of the highway, crashing into a vehicle being operated in the opposite direction, which had two wheels off the highway on its right side of the road, together with testimony that defendant was in a sordid and drunken condition when apprehended by the officer some 45 minutes after the collision, together with other evidence in the case, considered in the light most favorable to the State, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for driving upon a public highway while under the influence of intoxicating liquor. *S. v. Collins*, 244.

Evidence in this prosecution for operating a motor vehicle on a public highway while under the influence of intoxicating liquor *held* sufficient to overrule defendant's motion to nonsuit. *S. v. Bridges*, 267; *S. v. Tingen*, 384.

§ 75. Punishment for Drunken Driving.

G.S. 20-179 fixes no maximum period of imprisonment as punishment for the first offense of a violation of G.S. 20-138, and therefore judgment of imprisonment for not less than 18 months nor more than 24 months is within the limi-

AUTOMOBILES — *Continued.*

tation authorized by statute and therefore cannot be held cruel or unusual in the constitutional sense. *S. v. Lee*, 230.

BILLS AND NOTES

§ 16. Parties.

While ordinarily only the personal representative of a deceased payee may maintain an action on a note maturing prior to the payee's death, this rule does not apply when the personal representative by valid sale or pledge or by distribution of the note to the legatee in accordance with the will, vests title to the note in the purchaser or legatee. *Darden v. Boyette*, 26.

§ 17. Defenses and Competency of Parol Evidence.

Allegations that the purchaser was induced to sign the note by trick or fraud sets up the defense of fraud in the *factum*, which is a defense not only against the maker but against a holder in due course as well. *Finance Co., v. Simmons*, 724.

BOUNDARIES

§ 7. Nature and Essentials of Processioning Proceeding.

An action between owners of adjoining land to determine the location of the dividing line, in which action the parties stipulate that title is not in dispute, is a processioning proceeding. *Harrill v. Taylor*, 748.

§ 14. Verdict and Judgment.

Judgment in processioning proceeding adopting the referee's findings and conclusions and directing that surveyor go upon the land and mark the line in accordance with the report, is a final judgment, and when no appeal is taken therefrom, an appeal from the judgment of the court confirming the surveyor's report can present only whether the court's finding that the surveyor had run the line as directed was correct. *Harrill v. Taylor*, 748.

BURGLARY

§ 1. Elements and Essentials of Burglary.

The opening of a window which is closed, although not fastened, but held in place by its own weight, or pulley weights, is a sufficient "breaking" within the meaning of that term as used with reference to burglary in the first degree. *S. v. McAfee*, 98.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence taken in the light most favorable to the State and giving it the benefit of every reasonable inference therefrom, *held* to point unerringly to the guilt of defendant and to be of sufficient probative value to support verdict of guilty of felonious breaking and entry and larceny of goods of the value of more than $100. *S. v. Ballenger*, 260.

§ 6. Verdict and Instructions as to Possible Verdicts.

Where all the evidence tends to show the offense of burglary in the first degree, and there is no evidence that the dwelling was unoccupied at the time, the court should not submit to the jury the question of defendant's guilt of burglary in the second degree. G. S. 15-171 was repealed by Ch. 100, Session Laws of 1953. *S. v. McAfee*, 98.

The court's charge on the unrestrained discretionary right of the jury to recommend life imprisonment if the jury should convict the defendant of the

crime of burglary in the first degree, *held* without error, and the verdict of the jury finding the defendant guilty of burglary in the first degree without recommendation of life imprisonment is *upheld*, there being no error of law in the trial. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 5. Cancellation and Rescission for Breach of Condition.

In order for breach of contract to justify cancellation and rescission the breach must be so material as in effect to defeat the very terms of the contract. *Childress v. Trading Post*, 150.

§ 8. Pleadings and Issues.

Where plaintiffs assert the material breach by defendant of its contract to construct a dwelling, including breach of workmanship in that the foundation had cracked across one entire side so that there was danger of the house collapsing, etc., defendant is entitled to have submitted to the jury an issue as to the substantiality of the breaches as ground for rescission. *Childress v. Trading Post*, 150.

§ 11. Verdict and Judgment.

If breaches of a contract are of sufficient magnitude as to justify rescission, the injured parties are entitled to be restored to the condition they occupied on the day the contract was entered into, viz. the return of consideration, or if the properties given as consideration cannot be returned, then the fair market value of such properties, including, if the jury should allow it, interest on their value ascertained from the date possession was delivered to defendant. *Childress v. Trading Post*, 150.

CARRIERS

§ 7. Loading, Unloading and Facilities.

Where a carrier is sued as a third person *tort-feasor* for the wrongful death of an employee of the shipper, occurring during the loading of machinery on the carrier's tractor-trailer, whether the carrier is entitled to have the shipper joined upon an alleged implied contract to indemnify the carrier under the rule of the Interstate Commerce Commission requiring the shipper to load the tractor-trailer, is addressed to the discretion of the trial court, the shipper not being a necessary party to a complete determination of the action by the employee's personal representative against the carrier. *Clark v. Freight Carriers*, 705.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 12. Liens and Priorities.

The only lien that takes precedence over a duly recorded chattel mortgage is a mechanic' possessory lien, which does not include any lien created or subsisting by any contractural agreement of the mortgagor. *Finance Co. v. Thompson*, 143.

§ 15. Right to Possession and Foreclosure.

Nothing else appearing, the mortgagee in a duly registered instrument is, upon default, entitled to possession, and the burden is upon one claiming right to possession under mechanic's lien to prove his lien and that it has priority over the lien of the chattel mortgage. Therefore, nonsuit is correctly denied in

CHATTEL MORTGAGES and CONDITIONAL SALES — *Continued.*

the mortgagee's action to enforce his lien with ancillary claim and delivery proceedings. *Finance Co. v. Thompson*, 143.

§ 16. Actions to Repossess and Sell.

Allegations by the purchaser of a car that if he signed a conditional sales contract therefor he was induced to do so by trick or fraud of the seller, are averments of fraud in the *factum*, and such plea is valid not only against the seller but also against the assignee of the conditional sales contract. *Finance Co. v. Simmons*, 724.

CLAIM AND DELIVERY

§ 5. Judgment for Defendant and Liabilities on Plaintiff's Undertaking.

The sureties on plaintiff's undertaking in claim and delivery are parties of record, and a defendant who recovers judgment against the plaintiff is entitled to summary judgment against plaintiff's sureties in accordance with the statute and the terms of the bond. *Moore v. Humphrey*, 423.

While ordinarily judgment for defendant in claim and delivery should provide first for the return of the property with damages for its deterioration and detention, where the parties stipulate that the property cannot be returned, such provision is neither necessary nor appropriate *Ibid.*

The sureties in plaintiff's undertaking in claim and delivery are bound by stipulations entered into between plaintiff and defendant and by admissions in the pleadings in that action, there being no contention that plaintiff's attorneys were not authorized to make stipulations and admissions. *Ibid.*

When property cannot be returned plaintiff's sureties are liable for its value at time of wrongful seizure, this being less than plaintiff's damages resulting from the wrongful seizure and detention of the property. *Ibid.*

COLLEGES

§ 2. Control and Management.

Where title to the property of a college is vested in the educational corporation, but the Presbyteries of the denomination are the beneficial owners thereof and control the college through trustees elected by them, the officers or the trustees of the corporation have no legal rights they may assert against the owning and controlling Presbyteries. *Adams v. College*, 648.

Where the Presbyteries of a denomination are the beneficial owners of the property of an educational corporation and in control thereof through trustees elected by them, the resolution of the Synod of the denomination directing the merger of the college with two other educational institutions is recommendatory only and in itself cannot constitute the basis of an action to enjoin such merger. *Ibid.*

Where Presbyteries of a denomination direct three denominational colleges to merge, members of the board of trustees of one of such educational institutions cannot maintain an action to enjoin the merger on the ground that it was conditioned upon the merger of all three institutions and that one of such institutions had refused to join the merger, there being no allegation of any action undertaken or threatened towards the consummation of a merger which did not include all three institutions. *Ibid.*

Whether denominational colleges should be maintained separately or should be merged is a question for the religious organizations owning and controlling such colleges and not for the courts. *Ibid.*

COMPROMISE AND SETTLEMENT

Where there is evidence that the owners of land by operation of a resulting trust accepted from the trustor a deed to part of the land, with an executory agreement in regard to the balance, but without agreement that the conveyance of part should settle all claims and differences between the parties, the finding of the jury adverse to defendant determines the issue of settlement or estoppel. *Hoffman v. Mozeley*, 121.

CONSPIRACY

§ 2. Actions for Civil Conspiracy.

Allegations that the seller and assignee of the conditional sales contract conspired together to charge the purchaser usurious interest, and that as a result thereof the purchaser was embarrassed and lost his car, resulting in damage in a specified sum, and the seller and assignee acted maliciously, entitling the purchaser to punitive damages, *held* not to state cause of action apart from cause for usury. *Finance Co. v. Simmons*, 724.

§ 5. Relevancy and Competency of Evidence.

Where parties enter into a conspiracy to commit a felony, each is deemed a party to the acts and declarations of each conspirator done or uttered in furtherance of the common, illegal design. *S. v. Maynard*, 462.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution.

Although the United States and the individual states each have areas in which they may exercise supreme legislative authority, Congress may permit state action in any area in which the Federal authority is supreme. *Aircraft Co. v. Union*, 620.

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

A party who is not personally injured by a statute is not permitted to assail its constitutionality. *Greensboro v. Wall*, 516.

The threatened enforcement of a statute may be enjoined when necessary to protect constitutional rights of person or property against injuries otherwise irremediable. *Speedway v. Clayton*, 528.

§ 7. Delegation of Power by General Assembly.

The statutory provisions in regard to award for serious disfigurement are not invalid on the ground that the statute fails to provide an intelligible guide or standard for the Commission. *Davis v. Construction Co.*, 332.

§ 10. Judicial Powers.

Where the owner of an automobile is an occupant therein at the time of an accident, whether such owner should be presumed to have been the driver of the car at the crucial time is a matter for the General Assembly and not the courts. *Parker v. Wilson*, 47.

§ 11. Police Power in General.

The State, in the exercise of a governmental function pursuant to the police power, has authority to regulate and establish rates to be charged by intrastate utilities, which power it may exercise directly or by delegation to ad-

CONSTITUTIONAL LAW — *Continued.*

ministrative agencies under prescribed rules and standards. The General Assembly has not given the Utilities Commission authority to establish rates for municipally owned utilities. *Candler v. Asheville*, 398.

§ 20. Equal Protection, Application and Enforcement of Laws and Discrimination.

The Fourteenth Amendment to the Constitution of the United States creates no new privileges, but merely prohibits the abridgment of existing privileges by state action and does not proscribe the right of an operator of a private enterprise to select the clientele he will serve and base such selection on race if he so desires. *S. v. Clyburn*, 455.

The fact that the proprietor of a private enterprise pays a license or privilege tax, and that persons he has refused to serve and whom he has requested to leave are charged with trespass in a warrant signed by an officer, does not render the proprietor's discrimination on account of race action on the part of the State. *Ibid.*

§ 21. Right to Security in Person and Property.

Order for inspection and inventory of private safe without showing that contents were relevant to inquiry held to invade property rights without due process. *Hooks v. Flowers*, 588.

§ 24. Essentials of Due Process.

Fundamental to an adjudication of liability is notice of a demand and an opportunity to contest. *Pruitt v. Taylor*, 380.

§ 27. Interstate Commerce.

Problems growing out of labor-management relations which affect interstate commerce are governed by Federal law, and a state court may not issue an order at variance with Federal legislation as interpreted by the Supreme Court of the United States. *Aircraft Co. v. Union*, 620.

§ 36. Cruel and Unusual Punishment.

Sentence of from 18 to 24 months where statute prescribes no maximum is within limits and cannot be cruel or unusual in constitutional sense. *S. v. Lee*, 230.

The 8th Amendment to the Federal Constitution prohibiting the infliction of cruel and unusual punishment is a limitation upon the Federal Government, and not upon the States. *Ibid.*

CONTEMPT OF COURT

§ 3. Civil Contempt — Refusal to Obey Lawful Order of Court.

A decree of court entered in divorce proceedings that the husband, pursuant to the agreement of the parties, should pay a stipulated sum monthly for the support of the child of the marriage in the custody of the mother, is sufficient in form to be enforced by attachment for contempt, G.S. 50-13, since even though the payments were fixed by consent they were decreed by the court to be fulfilled by the husband. *Smith v. Smith*, 223.

Court must find that disobedience of decree was wilful in order to impose punishment for contempt. *Ibid.*

§ 7. Punishment for Contempt.

Punishment in this case for contempt not committed in the presence of the

CONTEMPT of COURT — *Continued.*

court *held* not to exceed that provided by law. *Wood Turning Co. v. Wiggins*, 115.

§ 8. Appeal and Review.

An appeal lies from judgment holding respondents in contempt for disobedience of the court's order when the contempt is not committed in the immediate presence of the court. *Wood Turning Co. v. Wiggins*, 115.

On appeal from judgment holding respondents in contempt for wilful disobedience of the court's order restraining unlawful picketing, the findings of fact by the judge are conclusive and not reviewable if supported by any competent evidence. *Ibid.*

CONTRACTS

§ 2. Offer and Acceptance and Mutuality.

Evidence held insufficient to show agreement by vendor to sell at a price which would avoid loss to purchaser of amounts expended prior to purchaser's inability to perform his agreement to buy. *Scott v. Foppe*, 67.

§ 4. Consideration.

Evidence held insufficient to show consideration to vendor to support his alleged agreement to sell at a price which would avoid loss to purchaser unable to perform his agreement to buy. *Scott v. Foppe*, 67.

§ 10. Contracts Limiting Liability for Negligence.

Ordinarily, as a matter of public policy, corporations may not exempt themselves from liability for negligence in the performance of public services. *Smith v. Winston-Salem*, 349.

By statute, municipalities have authority to limit their liability for negligence in operation of sewer systems. *Ibid.*

§ 12. Construction and Operation of Contracts in General.

Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written, and the courts may not disregard the plainly expressed meaning of its language, and by construction substitute a new contract for the one made by the parties. *Barham v. Davenport*, 575.

§ 16. Conditions and Time of Performance.

Ordinarily time for completion of a dwelling is not a substantial or vital element of a contract for its construction, and delay in completion may ordinarily be compensated for in damages and does not warrant termination of the contract. *Childress v. Trading Post*, 150.

§ 18. Modification, Rescission and Abandonment.

A contract to purchase a lot upon which the vendor should erect a residence according to specifications set out in the contract must be in writing in regard to the agreement to buy and sell realty but in regard to the specifications and the time of completion of the dwelling may be modified by parol agreement of the parties, notwithstanding provision of the contract that in order to be binding, any substantial variations of its terms should be in writing and signed by the parties. *Childress v. Trading Post*, 150.

CONTRACTS —*Continued.*

§ 25. Pleadings and Issues.

Where plaintiff alleges material breach of contract for construction of dwelling, defendant is entitled to have submitted to the jury an issue as to the substantiality of the breaches as grounds for rescission in addition to the issues arising on plaintiff's action for damages for breach. *Childress v. Trading Post*, 150.

§ 28. Instructions in Actions on Contract.

Plaintiffs contracted to purchase a lot from defendant upon which defendant agreed to construct a dwelling according to plans and specifications, and to complete the dwelling by a certain date. Plaintiffs asserted breach of contract by defendant in failing to use the brick and mortar, color of tile, etc., as specified, and also breach by defendant in failing to complete the dwelling by the date designated. Defendant asserted that the contract in these particulars had been modified by agreement of the parties. *Held*: An instruction to the effect that the parties' right to modify the written agreement was limited to those that were not substantial, must be held for prejudicial error. *Childress v. Trading Post*, 150.

§ 29. Measure of Damages for Breach.

Plaintiffs, in an action for breach of contract, are entitled to fair compensation in money for the loss sustained by them as the result of defaults of defendant as established by the jury. *Childress v. Trading Post*, 150.

CONVERSION

§ 1. Doctrine of Conversion.

As a general rule where real estate of a lunatic is sold under statute, or by order of court, the proceeds remain realty for the purpose of devolution on his death intestate while still a lunatic. *Brown v. Cowper*, 1.

CORPORATIONS

§ 32. Merger of Corporations.

Upon the merger of corporations, one corporation survives and the corporate existence of the other parties to the merger ceases, and the surviving corporation becomes vested with all the rights which each party to the merger could exercise, but the merger does not create new or additional rights. *Distributors v. Shaw*, 157.

COUNTIES

§ 4. County Officers.

The findings of fact were to the effect that the sheriff of a county was the tax collector thereof, G.S. 105-374, upon a 2 per cent commission, that the county commissioners appointed no prepayment tax collector, that upon being sworn into office the sheriff was advised that the county auditor would receive prepayments on taxes for him and that he would sign the receipts, that the county auditor did receive and account for all prepayments of taxes, that the auditor turned over the tax books to the sheriff after receipt of all prepayments of taxes, and that the sheriff settled each year with the county for the entire tax levies, which settlement included commissions on prepayments of taxes as well as taxes collected by the sheriff, and which settlement was duly audited and found to be correct by the county auditor and tax supervisor. *Held*: The county

COUNTIES — *Continued.*

is not entitled to recover of the sheriff the commissions paid him on prepayments of taxes, since the county commissioners could have appointed him collector of prepayments of taxes and by their actions ratified him in that position. *Barbour v. Goodman*, 656.

COURTS

§ 6. Appeals to Superior Court from Clerk.

Where plaintiffs in apt time take a voluntary nonsuit as to some of defendants and no appeal is taken therefrom, the action is no longer pending as to such defendants, and it is error for the court to set aside the judgments of nonsuit and abate the action as to them. *Everett v. Yopp*, 38.

§ 7. Appeals and Transfer of Causes from Inferior Court to Superior Court.

Where a defendant in a civil action in a municipal-county court files a cross-action in which a sum in excess of the jurisdiction of that court is demanded, which, under the applicable statute entitles defendant to have the cause transferred to the Superior Court, Ch. 971, Session Laws of 1955, Sec. 4, Rule 25, (*c*), (4), the cause is properly transferred upon motion, and what is a proper counterclaim under this section is to be determined by the provisions of G.S. 1-137. *Amusement Co. v. Tarkington*, 444.

Upon proper transfer of a cause from a municipal-county court, the municipal-county court is divested of jurisdiction and the Superior Court acquires judisdiction to hear and determine motions in the cause originally made in the municipal-county court. Ibid.

The General Assembly has the power to prescribe by statute the procedure and grounds for the removal of causes to the Superior Court from courts inferior to the Superior Court. Constitution of North Carolina, Art. IV, Sec. 12. *Ibid.*

Defendant filed a counterclaim in excess of the jurisdictional limitation of the trial court and moved to remove to the Superior Court. The motion to remove was denied and defendant appealed. *Held*: In the absence of statutory provision for removal in such instances, it was error for the Superior Court to order removal, and its rulings on other motions in the cause will be stricken without prejudice. *Finance Co. v. Simmons*, 724.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge.

Where, in an action for divorce, the complaint is properly verified and the court has jurisdiction of the parties and the subject matter, any error of the court in submitting an issue of abandonment when such ground for divorce is not supported by allegation, is an error of law, which may be corrected only by appeal, and another Superior Court judge may not set aside the judgment for such error at a subsequent term. *Pruett v. Pruett*, 13.

Where decree of divorce a mensa is entered on the wife's cross- action for divorce, such decree terminates the action and the court at a subsequent term has no jurisdiction to enter a decree for divorce in the husband's action based on two years separation. *Ibid.*

§ 10. Terms of Superior Court.

Construing G.S. 7-70 and G.S. 7-73 *in pari materia*, it is *held* that no criminal business, including a hearing on any motion which, if allowed, would set aside

COURTS — *Continued.*

a verdict and judgment on the criminal docket, such as a motion for new trial on the ground of newly discovered evidence, may be determined at a term of court expressly restricted by statute for the trial of civil cases only. *In re Renfrow*, 55.

§ 11. Establishment of Courts Inferior to Superior Court.

Eliminating county from those excluded from general court act is not special act relating to establishment of court. *S. v. Ballenger*, 216.

§ 14. Jurisdiction of Courts Inferior to Superior Court.

Where a municipality establishes a recorder's court under G.S. 7-190 with exclusive original jurisdiction of offenses below the grade of felony, the statute empowers the municipality to extend the court's jurisdiction not only to such offenses committed within the municipality, but also to such offenses committed within a radius of five miles thereof. *S. v. Ballenger*, 216.

In an action instituted in a court inferior to the Superior Court the fact that the defendant files a counterclaim in excess of the jurisdictional limitation of such court does not oust the court's jurisdiction to try plaintiff's claim in the absence of statutory provision to the contrary. G.S. 7-351 through 7-383. *Finance Co. v. Simmons*, 724.

§ 18. Conflict of Laws — State and Federal Courts.

The National Labor Relations Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce which is prohibited by the Federal Labor Management Act, and no authority is given any state board or court in regard thereto, nor does the failure of the Board to act invest the courts with power to act in the premises. *Aircraft Co. v. Union*, 620.

Congress has expressly permitted action by the States, in the exercise of their discretion, to outlaw union or closed shop agreements in industries affecting commerce which are not governed by the Railway Labor Act. *Ibid.*

The National Labor Relations Board has no authority to enforce the laws of this State, even though such laws are enacted pursuant to congressional authority and relate to matters over which Congress could exercise control. *Ibid.*

Where orderly and peaceful picketing is for the unlawful purpose of forcing an employer to breach our right to work law, G.S. 95-79, and also constitutes an unfair labor practice within the purview of the Federal Labor Management Relations Act, our State courts have no authority to issue a restraining order enjoining such picketing, since under the Federal decisions the Federal law exclusively pre-empts the field and removes the matter from the jurisdiction of the State courts. *Ibid.*

CRIMINAL LAW

§ 13. Jurisdiction in General.

A valid bill of indictment is essential to jurisdiction. *S. v. Helms*, 740.

§ 16. Jurisdiction — Degree of Crime.

Where courts have concurrent jurisdiction of offense, court first taking cognizance thereof has jurisdiction. *S. v. Cofield*, 185.

Municipal recorder's court may be given exclusive original jurisdiction of misdemeanors within radius of five miles of city limits *S. v. Ballenger*, 216.

CRIMINAL LAW — *Continued.*

§ 18. Appeals to Superior Court from Inferior Courts.

Upon appeal from conviction in the recorder's court of possession of illicit liquor for the purpose of sale, the superior court is without jurisdiction to amend the warrant so as to charge defendant also with possession of liquor upon which the Federal and State taxes had not been paid. *S. v. Cofield*, 185.

But an amendment which does not change the nature of the offense charged may be allowed in the Superior Court. *S. v. Moore*, 368.

§ 26. Plea of Former Jeopardy.

Where verdict establishing defendant's guilt of a specified offense is properly set aside by the court for want of jurisdiction, such verdict will not support a plea of former jeopardy. *S. v. Cofield*, 185.

Suspension of the hearing of a case before the jury has been impaneled will not support a plea of former jeopardy. *S. v. Allen*, 235.

Arrest of judgment for fatally defective indictment does not preclude further prosecution if the solicitor deems advisable. *S. v. Helms*, 740; *S. v. Jordan*, 253. *S. v. Banks*, 745.

Where defendant appeals from conviction in a recorder's court of possession of nontax-paid whiskey and possession of whiskey for the purpose of sale, and upon appeal to the Superior Court, he is tried upon an indictment charging the same offenses, conviction in the county court does not preclude affirmance of the conviction in the Superior Court when there is no evidence in the record tending to show that the offenses referred to in the wararnt and bill of indictment are the same. *S. v. Collins*, 752.

§ 27. Pleas in Abatement.

A warrant charging every essential element of the offense was issued by a municipal recorder's court, and upon the hearing the cause was transferred to the county recorder's court upon defendant's plea in abatement to the jurisdiction of the municipal recorder's court. Defendant was tried in the county recorder's court and in the superior court on appeal upon the original warrant. *Held*: Defendant, by making no plea in abatement or objection to the jurisdiction in either the county recorder's court or the superior court, waives the right to object to any irregularity in the issuance of the warrant, and his plea in abatement in the Supreme Court on further appeal cannot be sustained. *S. v. Johnson*, 240.

§ 31. Judicial Notice.

Our courts will not take judicial notice of municipal ordinances, but they must be proved as provided by statute. *S. v. Clyburn*, 455.

§ 38. Evidence of Like Facts and Transactions.

Testimony of an officer that when he apprehended defendant some 45 minutes after the accident in question defendant was in a sordid, drunken condition, and testimony of an expert, based upon a bloodtest taken while defendant was still in the custody of the offiicer, that defendant was intoxicated, *held* not too remote in point of time and was competent. *S. v. Collins*, 244.

§ 53. Medical Expert Testimony.

It is proper for a medical expert witness to testify upon proper hypothetical questions, or from his own personal examination of the body of the deceased, as to cause of death. *S. v. Knight*, 754.

CRIMINAL LAW — *Continued.*

§ 63. Evidence as to Intoxication.

A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which the witness observed him, and in a prosecution for driving while under the influence of an intoxicant, the action of the court in sustaining an objection to testimony of defendant's witness to the effect that he had an opinion as to whether defendant on the occasion in question was under the influence of any intoxicant and that the witness thought the defendant was perfectly normal, must be held for prejudicial erorr. *S. v. Flinchem*, 118.

§ 72. Admissions and Declarations.

Testimony of an admission by defendant is competent, and where a witness has detailed a conversation had by him with defendant containing a virtual admission that defendant was operating the vehicle at the time in question, the State may ask the witness to state whether defendant admitted he was operating the vehicle at the time, and objection that it was a leading question is untenable. *S. v. Moore*, 368.

§ 74. Acts and Declarations of Conspirators.

The acts and declarations of each conspirator in furtherance of the common design is competent against all. *S. v. Maynard*, 462.

§ 83. Cross-Examination.

The trial court may properly exclude testimony on cross-examination which is merely repetitious, and on this record it is *held* the trial court did not unduly restrict the examination or cross-examination of witnesses by defendants. *S. v. Maynard*, 462.

Where a witness testifies on cross-examination as to the versions given by defendant on four separate occasions, whether such versions are contradictory or repugnant is for the jury to determine, and the court properly sustains objections to questions on cross-examination as to whether the defendant had told the witness four different versions of the occurrences. *Ibid.*

Where a witness testifies as to statements made by one defendant, cross-examination as to what another defendant told the witness is properly excluded as tending to draw out a self-serving declaration. *Ibid.*

The exclusion of cross-examination of a witness as to his religious beliefs *held* not prejudicial. *Ibid.*

§ 90. Admission of Evidence Competent for Restricted Purpose.

Where the court properly limits testimony competent against one defendant to such defendant's guilt, the fact that the court instructs the jury that it might be considered on the question of the innocence of the other defendants is not prejudicial. *S. v. Maynard*, 462.

§ 108. Expression of Opinion by Court on Evidence.

Where the court gives equal stress to the contentions of the defendant and the State, the fact that the court necessarily consumes more time in stating the State's contentions is not ground for objection. *S. v. Maynard*, 462.

§ 109. Instructions on Less Degrees of Crime and Possible Verdicts.

In prosecution for burglary, court properly refrains from submitting question of defendant's guilt of burglary in second degree when all the evidence shows that dwelling was occupied at the time. *S. v. McAfee*, 98.

CRIMINAL LAW —*Continued.*

§ 111. Charge on Character Evidence.

In this case it *is held* the court correctly instructed the jury that defendant's evidence of good character should be considered as substantive evidence on the question of guilt or innocence. *S. v. Bunton*, 510.

§ 114. Instructions on Right of Jury to Recommend Life Imprisonment.

The charge of the court upon the jury's right to recommend life imprisonment if they should find defendant guilty of murder in the first degree *held* without error. *S. v. Bunton*, 510.

§ 118. Sufficiency and Effect of Verdict in General.

Where the court withdraws one charge, a general verdict of guilty will be interpreted in the light of the record to relate solely to the other count. *S. v. Brown*, 539.

§ 121. Arrest of Judgment.

Where the indictment is fatally defective, the Supreme Court will arrest the judgment *ex mero motu*. *S. v. Jordan*, 253; *S. v. Helms*, 740; *S. v. Banks*, 745.

Arrest of judgment for fatal defect in the indictment does not bar further prosecution if the solicitor deems it advisable. *Ibid.*

§ 125. New Trial for Newly Discovered Evidence.

Motion for new trial for newly discovered evidence, made at term of criminal court during which certificate of Supreme Court is received, is made in apt time, but the motion may be determined only at a criminal term. *In re Renfrow*, 55. Defendant is not entitled to bond as matter of right pending determination of such motion. *Ibid.*

§ 126½. Effect of Setting Aside Verdict.

Where the court sets aside the verdict for want of jurisdiction but through inadvertence fails to vacate the judgment imposed on such verdict, the vacation of such judgment will be directed on appeal. *S. v. Cofield*, 185.

§ 127. Form and Requisites of Judgments in General.

Upon plea of guilty to a charge of public drunkenness, G. S. 14-335, sentence of defendant "to the roads for a term of 30 days" is not in compliance with G.S. 148-30 or G.S. 148-32, and upon appeal the judgment must be vacated and cause remanded for a new and proper judgment. *S. v. Stephenson*, 231.

§ 131. Severity of Sentence.

Where statute fixes no maximum period of imprisonment judgment of imprisonment for not less than 18 months nor more than 24 months is within limits. *S. v. Lee*, 230.

§ 132. Sentence to Maximum and Minimum Terms.

Sentence upon conviction of violating G.S. 20-138 that defendant be imprisoned for not less than 18 months nor more than 24 months is an indeterminate sentence authorized by G.S. 148-42. *S. v. Lee*, 230.

§ 135. Suspended Sentences and Judgments.

Judgment that defendant pay a fine and that he not be convicted of a similar offense for a period of a year is not a suspended sentence but a final judgment. *S. v. St. Clair*, 228.

Upon conviction of defendant for driving on a public highway while under

the influence of intoxicating liquor, suspension of execution on condition that defendant not be convicted of a similar offense for a period of three years, is not unreasonable or for an unreasonable length of time. *S. v. Collins*, 248.

§ 136. Revocation or Suspension of Sentence or Judgment.

Order putting into effect a suspended sentence for condition broken is punishment for the offense of which defendant had been convicted, and not for his breach of conditions of suspension. *S. v. Collins*, 248.

Order activating a suspended sentence, when supported by proof that the terms of suspension had been violated, is proper. *S. v. Tingen*, 384.

§ 143. Right of Defendant to Appeal.

A judgment that defendant pay a fine in a stipulated amount and costs is a final judgment, and further provision in the judgment that defendant not be convicted of a similar offense for a period of twelve months is merely surplusage. *S. v. St. Clair*, 228.

Where the defendant accepts conditions under which sentence is suspended and undertakes to comply with such conditions, he cannot, after his breach of the conditions, challenge their validity. *S. v. Collins*, 248.

Where defendant evidences his consent to a suspended judgment by making payments into court in accordance with the terms of suspension, he waives his right of appeal. *S. v. Hairston*, 395.

§ 155. Objections, Exceptions and Assignments of Error to Evidence and Motions to Strike.

If part of answer is unresponsive to question motion must be made to strike unresponsive part. *S. v. Knight*, 754.

§ 156. Exceptions and Assignments of Error to the Charge.

Ordinarily, any misstatement in reciting the contentions of the parties must be brought to the court's attention in time to afford opportunity for correction, or an exception thereto is deemed waived. *S. v. Moore*, 368.

§ 159. The Brief.

The courts will not take judicial notice of municipal ordinances, but such ordinances must be proved as prescribed by G. S. 160-272, G.S. 8-5, and where the record does not indicate that a municipal ordinance was offered in evidence or called to the attention of the court, if such ordinance was then in effect, reference to such ordinance in the brief will be disregarded. *S. v. Clyburn*, 455.

Assignments of error not brought forward in the brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. *S. v. Bunton*, 510; *S. v. Knight*, 754.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exception to the exclusion of testimony cannot be sustained when the record fails to show what the answer of the witness would have been had he been permitted to answer. *S. v. Ballenger*, 260.

Where the record does not show what the witness would have testified if he had been permitted to answer questions objected to, the exclusion of the testimony is not shown to be prejudicial. The rule applies also to questions asked on cross-examination. *S. v. Maynard*, 462; *S. v. Knight*, 754.

CRIMINAL LAW — *Continued.*

§163. Harmless and Prejudicial Error in Instructions.

Where the court properly instructs the jury that testimony competent against one defendant alone was admitted solely against such defendant and should not be considered against the others, a further statement of the court that the testimony could be considered as bearing upon the innocence of the other defendants, while technically incorrect, is not prejudicial. *S. v. Maynard*, 462.

§165. Whether Error is Cured by Verdict.

Where there is sufficient evidence of defendant's guilt of larceny but not of his guilt of receiving stolen property, a general verdict of guilty on a warrant charging both larceny and receiving stolen property necessitates a new trial, since defendant cannot be guilty of both larceny and of receiving the same stolen property, and it is impossible to determine to which count the verdict relates. *S. v. Brown*, 539.

§ 168. Review of Judgments on Motions to Nonsuit.

In passing upon defendant's exception to the refusal of his motion to nonsuit, evidence offered by the State without objection must be treated as being before the jury and considered in determining the question of the sufficiency of the evidence. *S. v. Lucas*, 208.

§ 169. Determination and Disposition of Cause and Subsequent Proceedings.

Upon receipt of certificate of the Supreme Court affirming a final judgment of conviction for an offense less than a capital felony, the clerk of the superior court properly issues commitment to the sheriff and the sheriff properly proceeds to execute the sentence which was appealed from, G.S. 15-186, and the fact that the court allows motion of the solicitor for capias and commitment prior to the issuance of the commitment by the clerk adds nothing to the authority vested in the clerk by the statute, nor does the fact that the solicitor had theretofore advised the defendant to appear in court to be taken into custody on a date subsequent to the solicitor's motion for capias and commitment affect the validity of the commitment when defendant is not taken into custody until the date specified. *In re Renfrow*, 55.

Where it appears that on a prior appeal, there was no error in the trial, but through inadvertence the cause was remanded for final judgment when in fact the judgment entered in the superior court, as distinguished from that entered in the recorder's court, was a final judgment, upon subsequent appeal from the judgment entered after remand, that judgment will be stricken and the original judgment of the superior court declared in effect. *S. v. St. Clair*, 228.

DAMAGES

§ 5. Interest.

While in tort actions for conversion, interest ordinarily is allowable in the discretion of the jury, where the parties in waiving jury trial stipulate the amount of recovery upon *quantum meruit* in a specified sum, the stipulation is in the nature of a formal judicial admission in respect to the question of damages, precluding the court from allowing interest from the date of the filing of the complaint. However, when the case is erroneously nonsuited and the nonsuit reversed on appeal, plaintiffs are entitled to interest from the first day of the term at which the nonsuit was erroneously entered. *Jackson v. Gastonia*, 88.

DAMAGES — *Continued.*

§ 6. Mitigation of Damages.

The failure of a party to mitigate damages cannot be made the basis of an action by the other party, since the doctrine is proper only in diminution of damages when the party asserting the doctrine is sued. *Scott v. Foppe*, 67.

§ 13a. Instructions.

Instruction in this case on the measure of damages for personal injury, including medical expenses, loss of time, suffering, both past and prospective, *held* without prejudicial error. *Hunter v. Fisher*, 226.

Where there are numerous elements of damages based upon separate acts of nonfeasance or malfeasance, it is error for the court to fail to state the measure of damages or state the evidence as to each element of damage and apply the law to the evidence in regard to each. *Poindexter v. Bank*, 606.

In charging upon the issue of damages, the court of its own motion and without request must charge the jury as to the rule they should follow in assessing each element of the damages. *DeBruhl v. Highway Com.*, 671.

§ 3 Parties.

Where it is not clear whether defendant owned the entire tract or only an individual interest in the land, such other party must be joined in an action under the declaratory judgment act to determine whether plaintiff had acquired the fee or only an easement by condemnation. *Morganton v. Bourbonnais Co.*, 666.

DEATH

§ 3. Nature and Grounds of Cause of Action.

An action for wrongful death may be based upon fatal wound in a scuffle with a police officer attempting to make arrest without lawful authority. *Perry v. Gibson*, 212.

Right of action for wrongful death did not exist at common law, but is purely statutory, and our statute does not provide for the recovery of punitive damages or nominal damages, but limits recovery to the pecuniary loss resulting from the death. *Rrmentrout v. Hughes*, 631.

§ 8. Expectancy of Life and Damages.

Where, in an action for wrongful death, defendant admits he wrongfully killed deceased, and the sole issue submitted is the issue of damages, plaintiff's contention that he is entitled to nominal damages at least which would entitle him to costs, G.S. 6-1, is untenable, and the court's charge limiting recovery to the pecuniary loss resulting from the death is without error. *Armentrout v. Hughes*, 631.

In an action for wrongful death, the court properly excludes evidence which might excite the allowance of punitive damages, but which has no relevancy to the question of any pecuniary loss resulting from intestate's death. Ibid.

The inventory of the estate of the decedent is not competent in an action for wrongful death when the inventory does not tend to establish any earning capacity of decedent at the time of his death. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 2. Causes Justiciable Under the Act.

Jurisdiction under the Declaratory Judgment Act may be invoked only when there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Greensboro v. Wall*, 516.

DECLARATORY JUDGMENT ACT — *Continued.*

The Declaratory Judgment Act does not authorize the courts to give a purely advisory opinion. *Ibid.*

The validity of a statute may be determined in an action under the Declaratory Judgment Act only when its validity is directly and necessarily involved and specific provisions thereof are challenged by a person who is directly and adversely affected thereby. *Ibid.*

Plaintiff municipal corporations and the members of its boards instituted this action to test the validity of the Urban Redevelopment Law, G. S. 160-454 *et seq.* Defendant, a citizen and taxpayer, admitted all facts alleged and made a general denial of plaintiffs' legal conclusions as to the constitutionality of the Act, without challenging any specific actions or proposed actions of plaintiffs as violative of any particular constitutional or statutory rights of defendant. *Held*: The pleadings present no controversy justiciable under the Declaratory Judgment Act, and the action must be dismissed. *Ibid.*

§ 3. Parties.

Where it is not clear whether defendant owned the entire tract or only an undivided interest in the land, such other party must be joined in an action under the declaratory judgment act to determine whether plaintiff had acquired the fee or only an easement by condemnation. *Morganton v. Bourbonnais Co.*, 666.

§ 5. Hearing and Trial.

In a proceeding under the Declaratory Judgment Act, where the facts are established by defendant's unequivocal admissions, the court must determine the controversy upon the facts admitted, and has no authority to consider evidence and find additional facts, and findings incorporated in the judgment different from or in addition to facts established by the pleadings will not be considered on appeal. *Greensboro v. Wall*, 516.

DEEDS

§ 11. General Rules of Construction.

The fact that a deed is written by insertions in a deed form is without significance. *McCotter v. Barnes*, 480.

§13a. Estates and interests created by Construction of the Instrument.

Where the granting clause, *habendum* and warranties of a deed are plain and unambiguous as to the quality of the estate conveyed, there is no room for construction to ascertain the intent. *McCotter v. Barnes*, 480.

A conveyance will be construed to be in fee simple unless an intent to convey an estate of less dignity is apparent from the plain and express language of the instrument. G. S. 39-1. *Ibid.*

Where the granting clause purports to convey the fee and the *habendum* and warranties are in harmony therewith, a clause in the description that the conveyance was for a railroad right of way does not limit the conveyance to an easement. *Ibid.*

§ 16b. Restrictive Covenants.

A clause in the description of a fee simple deed that "there shall be no building other than for railroad use" is at most a personal, restrictive covenant, which does not run with the land, and therefore, after the death of grantors and the transfer of the property after its use for railroad purposes had ceased, the clause is without force and effect, since its purposes and objects no longer exist. *McCotter v. Barnes*, 480.

DESCENT AND DISTRIBUTION

§ 2. Distinction Between Descent and Purchase.

A grandchild who is devised lands by his maternal grandparent and whose mother is living at the time of the death of testator takes the land by purchase and not by descent within the meaning of G.S. 29-1, Rule 4, and upon the grandchild's death intestate, the lands descend to the grandchild's cousins and issue of deceased cousins on his father's side as well as those on the side of his mother. *Brown v. Cowper*, 1.

§ 2½. Distinction between Realty and Personalty.

As a general rule where real estate of a lunatic is sold the proceeds of sale remain realty for the purpose of devolution. *Brown v. Cowper*, 1.

Upon the death of a person his personal property vests in his executor or administrator, and his real property vests in his devisees, or descends to his heirs. *Darden v. Boyette*, 26.

§ 10d. Collateral Heirs of Blood of Ancestor.

Where mother is living at time of grandfather's death, devise by grandfather to grandchild creates estate by purchase and not descent within purview of G. S. 29-1; property acquired by guardian of insane person in exchange for incompetent's lands retains its character as realty for purpose of devolution; where guardian takes purchase money deed of trust in selling incompetent's lands and repurchases at foreclosure, transaction does not break line of descent. *Brown v. Cowper*, 1.

DIVORCE AND ALIMONY

§ 1b. Grounds for Divorce — Abandonment.

Wilful failure to support is not essential element of abandonment as grounds for divorce. *Pruett v. Pruett*, 13.

§ 2a. Grounds for Divorce — Separation.

A husband is not entitled to a decree of absolute divorce on the ground of two years separation within two years from the entry of a decree of divorce *a mensa* in favor of the wife on the ground of abandonment, since the decree in her favor establishes that the separation was caused by the husband's wilful abandonment, precluding his right to absolute divorce on the ground of such separation. But the decree of divorce *a mensa* legalizes the separation, and after the expiration of two years from the rendition of such decree, the husband may maintain an action for absolute divorce. *Pruett v. Pruett*, 13.

§ 5a. Pleadings in Actions for Divorce in General.

While the 1951 amendment to G.S. 50-8 eliminated the requirement that jurisdictional affidavit be filed with the complaint, it is required that the complaint, in addition to stating grounds for divorce, allege as constituent elements of the cause of action that complainant has been a resident of the State for at least six months next preceding filing of the pleading and, except where the action is based on two years separation, that the facts set forth as ground for divorce have existed to complainant's knowledge for at least six months prior to the filing of the pleading and such facts must be established by verdict of jury. G.S. 50-10. *Pruett v. Pruett*, 13.

Allegations held sufficient averment that ground for divorce had existed to complainant's knowledge for six months prior to filing of pleading. *Ibid.*

DIVORCE and ALIMONY — *Continued.*

§ 5c. Pleadings in Action for Divorce on Ground of Abandonment.

Where the wife's pleading in her cross-action for divorce *a mensa* alleges gross mistreatment of her by him culminating in his locking her out of her home and ordering her away, the facts alleged are sufficient to constitute a wilful abandonment as a matter of law, and the pleading will be held sufficient on this aspect even though her pleading does not use the word "abandonment" or the word "wilful." *Pruett v. Pruett*, 13.

It is not required that the wife's pleading in her cross-action for divorce *a mensa* on the ground of abandonment allege that his failure to provide her adequate support had existed to her knowledge for at least six months prior to the filing of her pleading, since failure to provide adequate support is not an essential element of abandonment. *Ibid.*

Where the wife's allegations in her cross-action for divorce *a mensa* are sufficient to establish wilful abandonment as a matter of law, G.S. 50-7, G.S. 50-7 (1), G.S. 50-7 (3), the court properly submits such issue upon supporting evidence, and it is immaterial that her pleading purported to state a cause of action for divorce *a mensa* under G.S. 50-7 (3), or that her allegations were insufficient to allege cause of action for divorce on that ground, since she is required by law to establish only one of the grounds for divorce *a mensa* specified in G.S. 50-7. *Ibid.*

§ 12. Alimony and Subsistence Pendente Lite.

In the husband's action for absolute divorce on the ground of adultery, the wife is entitled to alimony *pendente lite* under the common law unless she answers and defends in bad faith, notwithstanding that she files no cross-action. *Brannon v. Brannon*, 77.

In the husband's action for absolute divorce on the ground of adultery, the finding of the court, after hearing evidence of the parties, that her answer properly verified and denying the alleged adultery, was made in good faith, is sufficient without any specific finding on the question of adultery. *Ibid.*

While provision for the wife *pendente lite* in her husband's action for absolute divorce on the ground of adultery, defended by her in good faith, is proper only when she does not have sufficient independent means for subsistence and for defending the action, the finding in this case, supported by evidence, is sufficient predicate for the court's order that he pay her subsistence and counsel fees *pendente lite*. *Ibid.*

Findings, supported by evidence, to the effect that defendant had obtained an absolute divorce in another State prior to the institution of plaintiff's action for alimony without divorce, and that such foreign judgment was binding in this State under the Full Faith and Credit Clause of the Federal Constitution, *held* to support the court's order denying plaintiff's motion for alimony *pendente lite* and counsel fees. *Anderson v. Anderson*, 269.

§ 20. Enforcing Payment of Alimony and Support.

Agreement for payment of stipulated sum monthly for support of child will support punishment for contempt for failure to make payments when decree of court has been entered directing the payments as agreed. *Smith v. Smith*, 223.

Where, upon the hearing of an order to show cause why the husband should not be attached for contempt for failure to make payments for the support of his child as decreed by the court in accordance with an agreement between husband and wife, the husband offers evidence that he reduced the amount of the monthly payments for the support of the child because the mother had

DIVORCE and ALIMONY —*Continued.*

breached the agreement between the parties, not incorporated in the decree, that the husband should take the child as a dependent for income tax deduction, and that he was unable to make payments in excess of the smaller sum, it is error for the court to adjudge the husband in contempt without a finding that his failure to comply with the terms of the decree was wilful. *Ibid.*

§22. Effect, Validity and Attack of Domestic Decrees.

Where verdict of jury establishes sufficient facts to support wife's decree for divorce *a mense* on ground of abandonment, such decree is not subject to collateral attack and precludes absolute divorce in favor of husband on ground of separation. *Pruett v. Pruett*, 13.

EASEMENTS

§ 1. Creation of Easements by Deed.

Where deed expressly conveys easement across lands retained, grantee is entitled to the easement by purchase under the deed and upon judgment establishing his right it is error to remand cause for ascertainment of damages, *Andrews v. Lovejoy*, 554.

Suit to establish such easement does not involve establishment of cartway or an easement by necessity, and therefore the existence of other means of ingress and egress is immaterial. *Ibid.*

§ 5. Nature and Extent of Rights Acquired.

A right of way for railroad purposes does not deprive the owner or his tenant of the use of the land subject to the easement for any purpose not inconsistent with its use for railroad purposes. *Bivens v. R. R.*, 711.

ELECTION OF REMEDIES

§ 1. When Election Must Be Made.

Where a person has a choice of two remedies which are irreconcilable so that the assertion of one must exclude the other, he is put to his election *Carrow v. Weston*, 735.

§ 2. Between Rescission of Instrument and Action for Damages.

A party must either rescind what has been done as a result of fraud, or affirm what has been done and sue for damages caused by the fraud. *Amusement Co. v. Tarkington*, 444.

ELECTRICITY

§ 7. Condition of Wires, Poles and Equipment.

This action was instituted to recover for the death of an employee of an independent contractor engaged in the stringing of wires under a contract with defendant electric company. The complaint alleged that while intestate was on a pole engaged in assisting with the stringing of a nonenergized line, one of the nonenergized wires came into contact with defendant's highly charged power line, resulting in intestate's death. *Held*: In the absence of allegations of fact as to how the nonenergized wire came into contact with the energized wire, the complaint is insufficient to establish that alleged acts of negligence on the part of defendant were the proximate cause or one of the proximate causes of intestate's death, and demurrer *ore tenus* is allowed in the Supreme Court. *Stamey v. Membership Corp.*, 640.

EMINENT DOMAIN

§ 1. Nature and Extent of Right in General.

Land in use by railroad company for railroad purposes cannot, in the absence of statutory authority, express or necessarily implied, be condemned for streets or highway in such manner as to impair or destroy its use for railroad purposes. *R. R. v. Greensboro*, 321.

Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation. *DeBruhl v. Highway Com.*, 671.

§ 2. Necessity for Compensation.

In taking private property by eminent domain it is required that just compensation therefor be paid under "the law of the land" clause of the State Constitution, Article I, Section 17, and under the "due process" clause of the 14th Amendment to the Federal Constitution. *DeBruhl v. Highway Com.*, 671.

§ 8. Amount of Compensation in General.

Just compensation for the taking of private property under the power of eminent domain is the fair market value of the property condemned, determined as of the date of the taking, uneffected by any subsequent change in the condition of the property. *DeBruhl v. Highway Com.*, 671.

§ 9. Nature of Damages for Lands Taken.

Where land is condemned for highway purposes, the value of the perpetual easement acquired by the condemnor is virtually the same as the value of the land, and the court should charge that petitioners are entitled to be awarded compensation in the fair market value of their property at the time of the taking. However, the instruction that petitioners were entitled to have the full equivalent of the value of the use rather than the value of the property as of the time of the taking, was not prejudicial under the facts of this case. *DeBruhl v. Highway Com.*, 671.

§ 13. Interest as Element of Compensation.

In a proceeding under G. S. 136-19 to recover just compensation for the taking of private property for highway purposes, petitioners are entitled as a matter of strict legal right, to have the jury award them, in addition to the sum the jury finds to be the fair market value of the property on the taking date, interest on such sum at the rate of 6 per cent from the date petitioners were physically dispossessed to the date of verdict, as an element of just compensation. *DeBruhl v. Highway Com.*, 671.

§ 14. Proceedings to Take Land and Assess Compensation.

More is required in the proper exercise of the power of eminent domain than good faith and notice; before property is finally taken the owner must be given opportunity to question the right of the condemnor to take the property. *R. R. v. Greensboro*, 321.

§ 18c. Instructions.

In a proceeding to assess compensation for lands taken for highway purposes, an instruction charging the jury that petitioners are entitled to recover, in addition to the fair market value of the land on the date of taking, some additional amount to compensate for the delay in the payment of compensation, must

EMINENT DOMAIN — *Continued.*

be held for prejudicial error when the court fails to give the jury any standard or guide for the assessment of such additional sum. *DeBruhl v. Highway Com.*, 671.

ESCAPE

§ 2. Criminal Liability of Prisoner for Escape.

An indictment for escape or attempted escape must specify whether defendant was serving a sentence for a misdemeanor or a felony at the time, regardless of whether the escape is alleged to be a first or second offense, G. S. 148-45, and must allege, *inter alia*, the lawfulness of the custody of the defendant or facts from which the lawfulness of the custody appears. *S. v. Jordan*, 253.

§ 4. Criminal Liability of Persons Aiding Escape.

Evidence *held* sufficient to be submitted to the jury in this prosecution of defendant for aiding and assisting a prisoner to escape with knowledge that the prisoner had escaped from the prison to which he was lawfully assigned. *S. v. Allen*, 235.

ESTATES

§ 9c. Life Estates and Remainders — Actions for Waste.

In an action by remaindermen agaist life tenant for waste, G.S. 1-533, judgment must be in accord with G.S. 1-538, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid the life tenant, the relief provided in G.S. 41-11 being available only in a special proceeding begun before the clerk and having no application in an action for waste. *Parrish v. Parrish*, 584.

ESTOPPEL

§ 10. Estoppel of Sovereign.

A municipality cannot be estopped from enforcing a valid ordinance or from contesting the validity of an act it deems unconstitutional. *Candler v. Asheville*, 398.

EVIDENCE

§ 29. Evidence at Former Trial or Proceedings.

Objection that the court permitted defendant's counsel to read the record of the cross-examination of defendant taken at a former trial, instead of the court reading the record itself, *is held* without merit. *Lookabill v. Regan*, 199.

An acquittal in a criminal prosecution does not constitute evidence of innocence in a subsequent civil action based on the criminal act. *Edwards v. Jenkins*, 566.

§ 32. Transactions or Communications With Decedent.

In an action to recover upon *quantum meruit* for personal services rendered deceased, testimony by the executor to the effect that he performed practically all the personal services which plaintiff claimed she had performed, as testified to by other witnesses, "opens the door" and renders competent, for the purpose of rebuttal, testimony by plaintiff as to the personal services rendered by her. *Highfill v. Parrish*, 389.

EVIDENCE — *Continued*

In an action against the personal representative of the deceased owner to recover for injuries received in an automobile accident, plaintiff may not testify that intestate was driving the car at the time of the accident or that she had requested him to slow down. *Stegall v. Sledge*, 718.

§ 42d. Admissions and Declarations of Agent.

Testimony of a declaration of an agent in respect to the subject of the action is incompetent against the principal unless there is evidence that the declaration was made within the apparent scope of the agent's authority, at least. *Cordell v. Sand Co.*, 688.

§ 45. Expert and Opinion Evidence in General.

Testimony of person who observed car as to its speed held not merely deductive conclusion because he prefaced his opinion with word "supposed"; and question as to which side of road a person "indicated" his car was on *held* harmless when answer explicitly states the car was on the east side of road. *Lookabill v. Regan*, 199.

EXECUTORS AND ADMINISTRATORS

§ 2a. Jurisdiction to Appoint.

Where motion is made by the widow of decedent to vacate letters of administration issued by the clerk on the ground that decedent, at the time of his death, was not a resident of this State, but a resident of another state in which the widow had been appointed and qualified as administratrix, the proceeding is not one to remove an administrator under G. S. 28-32, but is an attack of the letters entered here on the ground of want of jurisdiction, and when neither the clerk nor the judge makes any finding as to the jurisdictional fact of residence, judgment denying the motion must be set aside and the cause remanded. *In re Bane*, 562.

§ 2d. Ancillary Administrators.

Where a will has been probated in another state, the clerk of the superior court of a county of this State has jurisdiction, upon his finding that decedent was seized of property in the clerk's county, to grant letters testamentary to an ancillary administrator c.t.a. *In re Will of Brauff*, 92.

§ 3. Removal and Revocation of Letters.

Where a will is probated in another state and the executrix under the will qualifies in such other state, and the clerk of the superior court of a county of this State in which property of the decedent is situate, issues letters testamentary to her upon her application here, without the appointment of a resident process agent as required by G.S. 28-186, the subsequent failure and refusal of the executrix to appoint a process agent in compliance with subsequent order of the clerk is sufficient ground for the revocation of the letters issued here. G. S. 28-32. *In re Will of Brauff*, 92.

§ 4. Administrators C. T. A.

An administrator *c.t.a.* has no greater rights and powers and is not subject to greater duties than the executor named in the will. *Darden v. Boyette*, 26.

§ 8. Title and Right to Possession of Assets.

Upon death of a person his personal property vests in his executor or administrator, and his real property vests in his devisees or descends to his heirs. *Darden v. Boyette*, 26.

EXECUTORS and ADMINISTRATORS — *Continued.*

But the personal representative has no title or right to possession of personalty upon the death of the life tenant therein when the remainder vests in the remaindermen by operation of law. *Ibid.*

§ 9. Collection of Assets.

Where remainder in personalty, including notes, vests in remaindermen by operation of law upon death of life tenant, personal representative of testator may not maintain action therefor against administrator of life tenant. *Darden v. Boyette*, 26.

§ 15d. Claims for Personal Services Rendered Deceased.

Allegations and evidence to the effect that testate asked his niece and her husband to live with him so that she could look after him, that testate promised that he would see that they were well paid for such services, that in reliance thereon the niece performed menial services, often of an onerous nature, for testate for a period of over a year, that testate repeatedly stated to others that he wished her to be well paid, that thereafter testate offered to give his niece and her husband a deed to testate's farm if they would stay with him and look after him until his death, that they stated they would accept the offer unless it stirred up controversy among his relatives, in which event they would deed the farm back and leave, that testate executed the deed and upon controversy the niece and her husband reconveyed the property and left testate's home, *held* sufficient to overrule nonsuit in the niece's action to recover the value of the services rendered, and further, the charge of the court in this action was without error. *Beasley v. McLamb*, 179.

When one person performs personal services for another in expectation of payment and in reliance upon such other's promise to pay, the person performing the services may recover the reasonable value of such services under the contract, and the express promise to pay will overcome any implication that the services were intended to be gratuitous, even when the person rendering the services is kin to the promissor. *Ibid.*

Allegations and evidence to the effect that plaintiff performed personal services and advanced funds for the care of defendant's intestate in reliance upon intestate's promise to pay for same by willing to plaintiff all of the intestate's property, and that intestate breached the agreement by failing to will plaintiff any property, are sufficient to overrule nonsuit in plaintiff's action against the estate to recover the reasonable value of the services and the funds advanced. *Speights v. Carraway*, 220.

Action for value of personal services rendered in reliance upon agreement to devise or bequeath property does not arise until death of promisor. *Ibid.*

In an action to recover upon *quantum meruit* for personal services rendered deceased, testimony by the executor to the effect that he performed practically all the personal services which plaintiff claimed she had performed, as testified to by other witnesses, "opens the door" and renders competent, for the purpose of rebuttal, testimony by plaintiff as to the personal services rendered by her. *Highfill v. Parrish*, 389.

§ 15h. Claims Against the Estate — Priorities.

Claimant accepted check in payment of cash sale of logs which, upon delivery, were commingled with other logs of the purchaser or manufactured into lumber. The check was dishonored. Upon the death of the purchaser, plaintiff asserted a preferred claim against the estate for the amount of the purchase price. *Held*: Since plaintiff could not identify the logs or any specific sum in the

EXECUTORS and ADMINISTRATORS — *Continued.*

hands of the administratrix derived from the sale thereof, the claim is a general claim, regardless of whether it be considered an action to recover the purchase price on the contract of sale or as a claim in tort for the wrongful conversion of the property by the purchaser. *Carrow v. Weston*, 735.

§ 20. Distribution of Estate.

Where the personal representative has paid decedent's debts, the cost of administration and all charges against the estate, the balance remaining in his hands shall be delivered and paid to the person or persons to whom the same may be due by law or the will. *Darden v. Boyette*, 26.

§ 26. Final Account and Settlement.

Where personal representative has paid all debts and has distributed personalty to life tenant, personal representative is *functus officio in regard to* estate. *Darden v. Boyette*, 26.

§ 30. Personal Liability of Personal Representative.

In an action against the administrator for wrongfully or negligently administering the estate, based upon allegations of numerous separate acts of malfeasance or nonfeasance, including failure to collect from the principal a note upon which the deceased was endorser, failure to collect the salary due decedent at his death, and unauthorized and negligent acts in carrying on the business of decedent, *held*, exception to the charge in submitting the questions under the single issue whether defendant wrongfully or negligently administered the estate, without differentiating between the numerous items of damage and instructing the jury as to each of them so that the jury could clearly apply the law to the facts and contentions of the parties, is sustained. *Poindexter v. Bank*, 606.

Where, in a special proceeding by an administrator to sell lands to make assets to pay debts, respondents, heirs and distributees, by verified answer admit the allegations of the verified petition that a particular note constituted a liability of the estate, and judgment is rendered therein directing the sale of the lands, *held*, the heirs and distributees, in their later action against the administrator for wrongful or negligent administration of the estate, are estopped to allege any negligent or wrongful conduct of the administrator in connection with the note. *Ibid.*

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Cause of Action.

Allegations that physicians, in making affidavits pursuant to G. S. 122-43 at the direction of the clerk in lunacy proceeedings, were guilty of gross negligence amounting to legal malice, without allegations that they were motivated by an ulterior or wrongful purpose or conspired with another in his ulterior and wrongful purpose, fail to state a case for malicious prosecution, or for false imprisonment, or for abuse of process. *Bailey v. McGill*, 286.

FRAUDS, STATUTE OF

§ 3. Pleading the Statute.

The denial of the beneficiaries named in the will of their asserted agreement to devise and bequeath the remainder in the property to testator's nieces and nephews invokes the statute of frauds as effectively as if the statute had been expressly pleaded. *Humphrey v. Faison*, 127.

§ 9. Application of Statute to Contracts Affecting Realty.

FRAUDS, STATUTE OF — *Continued.*

The statute of frauds has no application to a resulting trust. *Hoffman v. Mozeley*, 121.

A contract to devise and bequeath property comes within the statute of frauds, G.S. 22-2, and is unenforceable, even in regard to the personalty when the contract is indivisible. *Humphrey v. Faison*, 127.

GAS

§ 1. Degree of Care Required.

A gas company is charged with notice of the nature of its product, the danger incident to its use and that precautions are necessary to minimize that danger. *Frazier v. Gas Co.*, 256.

Liquified petroleum gas is a highly dangerous substance and the distributor of such gas is required to use that degree of care to prevent the escape of such gas from its tanks, pipes and containers which is commensurate to the dangers to be reasonably anticipated by a prudent man, and is liable for the damages resulting from the negligent breach of this duty when the person suffering the injury is free from contributory negligence. *Ins. Co. v. Gas Co.*, 471.

§ 2. Installation, Service and Delivery.

Evidence favorable to plaintiff tending to show that he purchased a gas heating system in reliance on defendant's agreement to maintain periodic inspection, that defendant failed to maintain such inspection, together with expert opinion evidence that the fire which destroyed plaintiff's building resulted either from leaking pipes or soot in the burners, either of which defects would have been disclosed by adequate inspection, *is held* sufficient to overrule defendant's motion to nonsuit. *Frazier v. Gas Co.*, 256.

Evidence held sufficient for jury on issue of negligence of petroleum gas company in filling customer's tank. *Ins. Co. v. Gas Co.*, 471.

HABEAS CORPUS

§ 2. To Obtain Freedom from Unlawful Restraint.

The sole question for determination upon *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty. *In re Renfrow*, 55.

Where, upon return of a writ of *habeas corpus*, it appears that defendant had been taken into custody under G. S. 15-186 upon certification of decision of the Supreme Court affirming final judgment of conviction, and that defendant had aptly made a motion in the trial court for a new trial on the ground of newly discovered evidence, whether defendant should be released under bond conditioned upon his appearance at the next term for the trial of criminal cases for final hearing on his motion rests in the sound discretion of the judge, and the court's order discharging the writ and ordering the petitioner into custody is not reviewable. *Ibid.*

§6. Issuance and Return of Writ.

Habeas corpus is a high prerogative writ to be made returnable at a certain time and place specified therein, and the particular judge before whom it is returnable need not be either the resident or the presiding judge of a particular judicial district or the presiding judge at any particular term of court. *In re Renfrow*, 55.

HABEAS CORPUS — *Continued.*

§ 8. Appeal, Certiorari and Review.

Except in cases involving the custody of minor children, no appeal lies from a judgment rendered on return to a writ of *habeas corpus*, the remedy, if any being by petition for a writ of *certiorari* addressed to the sound discretion of the Supreme Court. *In re Renfrow*, 55.

HIGHWAYS

§ 15. Cartways and Ways of Necessity.

A suit to establish an easement created by deed is not a suit to establish a cartway, and judgment declaring plaintiff's right to the easement should not remand the case for assessment of damages. *Andrews v. Lovejoy*, 554.

HOMICIDE

§ 1a. Homicide in General.

If a person dies as a result of shock or fright directly resulting from an unlawful battery committed by defendant, defendant is guilty of criminal homicide even though the injuries inflicted would not of themselves have produced death. *S. v. Knight*, 754.

§ 2. Parties and Offenses.

If one defendant kills a human being in the attempted perpetration of a robbery committed in the execution of a conspiracy participated in by all the defendants, each defendant is guilty of murder in the first degree. *S. v. Maynard*, 462.

§ 3. Murder in the First Degree.

A murder committed in the perpetration of or attempt to perpetrate a robbery from the person is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *S. v. Maynard*, 462.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to raise reasonable inference that death resulted from shock or fright caused by assault. *S. v. Knight*, 754.

§ 27g. Charge on Parties and Offenses.

In this prosecution for a homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery, and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, *is held* without error and not to contain an expression of opinion on the evidence in violation of G. S. 1-180. *S v. Maynard*, 462.

§ 27h. Charge on Less Degrees of Crime.

Where the State's evidence establishes murder committed in the perpetration of a robbery from the person, the offense is murder in the first degree, irrespective of premeditation or deliberation, and therefore in such prosecution the court is not required to submit the question of defendant's guilt of murder in the second degree upon defendant's contention that he was too intoxicated at

HOMICIDE — *Continued.*

the time to premeditate and deliberate. Further, the evidence in this case is not sufficient to make available to defendant the defense of intoxication. *S. v. Bunton*, 510.

HUSBAND AND WIFE

§ 6. Wife's Separate Estate.

Earnings of a married woman by virtue of a contract for her personal services are her sole and separate property, and she may sue to recover under such contract alone. *Beasley v. McLamb*, 179.

INDICTMENT AND WARRANT

§ 9. Charge of Crime.

An indictment for a statutory offense which follows the language of the statute is sufficient only when the language of the statute charges each essential element of the offense, and if the statute fails to do this, the indictment must supplement the language of the statute by other allegations which explicitly and accurately set forth every essential element. *S. v. Jordan*, 253; *S. v. Helms*, 740; *S. v. Banks*, 745.

An indictment for a statutory offense which follows the language of the statute and charges each essential element of the offense is sufficient. *S. v. Ballenger*, 260.

An indictment may not charge separate offenses disjunctively. *S. v. Helms*, 740.

A bill of particulars cannot supply an averment essential to the indictment. G. S. 15-143. *Ibid.*

§ 11. Duplicity and Definiteness.

An indictment charging defendants with feloniously breaking and entering a building with intent to steal merchandise, and in a second count charging that defendants did feloniously steal and carry away merchandise of the named owner, does not charge the offenses in the alternative. *S. v. Ballenger*, 260.

§ 12. Time of Making Motion to Quash.

Where motion to quash the bill of indictment is not made until after plea of not guilty, it is addressed to the discretion of the trial court and its denial of motion is not reviewable on appeal. *S. v. Ballenger*, 260; *S. v. Johnson*, 240; *S. v. Clyburn*, 455.

§ 15. Amendment.

Upon appeal to the superior court from conviction in a municipal court upon a warrant charging operation of a motor vehicle by defendant after his operator's permit had been permanently revoked, an amendment adding the allegation that the revocation was by the Department of Motor Vehicles by reason of a prior conviction of defendant in the municipal court *held*, not to change the nature of the offense charged in the original warrant, G. S. 7-149, Rule 12, and the defendant's exception to the allowance of the amendment and his motion in arrest of judgment are overruled. *S. v. Moore*, 368.

INFANTS

§ 12. Guardians Ad Litem.

Where the guardian *ad litem* dies after filing answer, but the infant becomes of age prior to the trial, the appointment of a new guardian *ad litem* is not necessary. *Simmons v. Rogers*, 340.

§ 22. Right to Custody.

While parents have a strict legal right to custody of their children as against strangers, the parents' right to custody must yield when the circumstances are such that the custody of the parent will imperil the infant's personal safety, morals or health so that the best interest of the child will be served by awarding its custody to another. *In re Gibbons*, 273.

In determining right to custody as between surviving parent and persons to whom parent voluntarily gave custody of child, the best interest of the child is the paramount consideration. *Ibid.*

INJUNCTIONS

§ 1a. Nature and Grounds of Restraining Orders in General.

Injunction will not lie to restrain a particular course of conduct which has neither been undertaken nor threatened. *Adams v. College*, 648.

§ 4g. Enjoining Violation of Criminal Statute or Ordinance.

A municipality may enjoin the violation of its zoning ordinance. *Raleigh v. Morand*, 363.

A threatened enforcement of a statute may be enjoined when necessary to enforce constitutional rights. *Speedway v. Clayton*, 528.

Injunction will lie to inhibit a criminal act when the act invades civil and property rights and no other adequate remedy is available, nothwithstanding that the commission of the act would subject the perpetrator to criminal prosecution or make him liable for damages in an action in tort. *Aircraft Co. v. Union*, 620.

§ 8. Continuance or Dissolution of Temporary Orders.

Upon the hearing of an order to show cause why temporary restraining order entered in an action to recover damages for trespass and to restrain further trespass should not be continued to the hearing, the refusal of the court to find that plaintiffs' description was not sufficiently definite to permit oral testimony to locate the land and the order continuing the injunction to the final hearing will not be disturbed on appeal, nor will a demurrer *ore tenus* in the Supreme Court be sustained, in the absence of showing of prejudicial error, since the continuance of the temporary order relates to procedural matters and not to the merits of the case. *Everett v. Yopp*, 38.

Where plaintiff alleges an unlawful entry and trespass upon its right of way by a municipality and the municipal contractor pursuant to a plan to construct numerous grade crossings at acute angles, without legislative authority and in such manner as to impede or prevent the railroad company from continuing its railroad operations and services required of it by law, the defendant upon appropriate terms should be restrained from proceeding further with its plans pending the hearing upon the merits. *R. R. v. Greensboro*, 321.

Upon the preliminary hearing of petitions for mandatory injunctions, fixed

INJUNCTIONS — *Continued.*

at the request of petitioners, motion of respondent, who seek no affirmative relief, to dismiss the petitions may be heard even though petitioners are not given ten days notice of the motion, G. S. 1-581 having no application. *In re Application for Reassignment*, 413.

Where, upon the hearing of petitions for mandatory injunctions, petitioners allege no invasion of any legal right, injunctive relief is correctly denied. *Ibid.*

Where the complaint, in an action for a restraining order, contains a defective statement of a good cause of action, judgment sustaining demurrer should not dismiss the action, but should dissolve the temporary restraining order. *Adams v. College*, 648.

INSANE PERSONS

§ 1. Lunacy Proceedings.

The hearing by the clerk under G.S. 122-46 after certification by two physicians that the person in question should be committed to a State Hospital for observation and admission, G. S. 122-43, is a judicial proceeding and the clerk has the right and duty to subject witnesses to examination and to accept or reject evidence, and, if the person in question is detained and committed, it is preforce by order of the clerk. *Bailey v. McGill*, 286.

INSURANCE

§ 25b. Property Insurance — Payment and Subrogation.

An insurance company which has paid the entire claim for damages to insured's home by fire and explosion is subrogated to the rights of insured and properly brings suit in its own name against the tort-feasor whose alleged negligence caused the damage. *Ins. Co. v. Gas Co.*, 471.

§ 34a. Disability Clauses.

Total and permanent disability as used in a disability clause of an insurance policy cannot logically be construed to mean partial disability or disability to a limited degree. *Fair v. Assurance Society*, 135.

Evidence that employee was discharged for puting metal bolt in bundle of tobacco in processing plant and that she had been mentally disturbed for sometime prior thereto, but that she was able to perform and did perform every day the duties of her employment up to and including the day of her discharge, *held* not to show total and permanent disability. *Ibid.*

§ 38. Construction of Accident and Health Policies in General.

Death is "effected by accidental means" if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. The unintended acts of the insured are deemed accidental, as well as the acts of another person, when done without the consent of insured unless they are provoked and should have been expected by insured. *Fallins v. Ins. Co.*, 72.

In an action on a policy to recover for the permanent loss of the entire sight of one of insured's eyes from bodily injury resulting solely through external, violent and accidental means, insured's evidence that his left eye was injured in a fall from a truck and that as a result of such injury he became permanently blind in the injured eye to the extent that he cannot distinguish objects or colors or tell the difference between day and night, though he can preceive some movement to the side and discover there is a little light when the sun is shining,

INSURANCE — *Continued.*

is sufficient to be submitted to the jury upon the determinative issue. *Brinson v. Ins. Co.*, 85.

In order to recover on a double indemnity clause in a policy of life insurance for death effected through external, violent and accidental means, death of insured must not only be accidental but must be produced by accidental means and if death, although unexpected, flows from an ordinary act in which insured voluntarily engages, such death is not deemed to have been produced by accidental means. *Allred v. Ins. Co.*, 105.

Evidence tending to show that insured's death resulted from being struck by an automobile after he had voluntarily lain prone in the center of the highway, discloses that the death flowed directly from the voluntary act of insured, and therefore nonsuit is proper in an action under the double indemnity clause of a policy predicated upon the death of insured by accidental means. *Ibid.*

§ 41. Actions on Accident and Health Policies.

In an action on an accidental death policy, the burden is on plaintiff to prove that insured met his death by bodily injury effected directly through external, violent and accidental means, within the coverage of the policy, and, upon such a showing, the burden is upon insurer to prove defenses under the exclusion clauses, such as that insured's death resulted directly or indirectly from insured's participation in, or attempt to commit an assault or a felony, or violence intentionally inflicted by another. *Fallins v. Ins. Co.*, 72.

Plaintiff's evidence tending to show that insured was engaged in a fight with another boy when the uncle of the other boy shot in their direction for the purpose of frightening them into stopping their fight, and that insured was hit and mortally wounded by the shot, is sufficient to go to the jury and support its finding that the death of insured was affected by external, violent and accidental means. *Ibid.*

Evidence held not to warrant nonsuit on defense that insured's death resulted from his participation in assault. *Ibid.*

The evidence disclosed that insured and another boy were fighting. The uncle of the other boy testified that he shot in their direction for the purpose of frightening them into stopping their fight, but that he did not intend to injure either of them. *Held*: The evidence does not warrant nonsuit under the exclusion clause of the policy on the ground that insured's death resulted from violence intentionally inflicted by another, since under the testimony the uncle, although he intentionally fired the shot, did not intend to inflict any injury. *Ibid.*

INTOXICATING LIQUOR

§ 2. Construction and Operation of Control Statutes.

The possession of illicit liquor for the purpose of sale, G.S. 18-50, and the possession of whiskey upon which the Federal and State taxes have not been paid, G.S. 18-48, are separate offenses, and the one is not included in the other. *S. v. Cofield*, 185.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence that officers found in defendant's house less than a gallon of whiskey in containers not bearing Federal and State tax stamps, is sufficient to overrule nonsuit in a prosecution under G.S. 18-48, since the possession on nontax-paid whiskey in any quantity anywhere in this State is unlawful. *S. v. Cofield*, 185.

JUDGMENTS

§ 10. Judgments by Default Final.

Judgment by default final may be rendered in an action to recover for personal services rendered upon an express contract to pay sums of money fixed by the terms of the contract and thus capable of being ascertained by computation. *McGuire v. Sammonds*, 396.

§ 11. Judgments by Default and Inquiry.

Judgments upon inquiry after default cannot exceed the amount demanded in the complaint, G.S. 1-226, and while upon the inquiry the court may allow plaintiff to amend to allege damages in a larger amount to make allegations conform to the proof, G.S. 1-163, the entry of judgment for the greater amount without notice and opportunity to defendant to controvert the amount is irregular, and the verdict and judgment must be set aside on motion so that each party may offer evidence in support of their contentions as to the amount of damage. *Pruitt v. Taylor*, 380.

§ 17d. Interpretation and Effect of Judgment.

When a judgment has been entered, based on a verdict which determines all issues raised by the pleadings, the cause has been fully determined, and the court at a subsequent term has no jurisdiction to proceed further with reference to the issuable facts therein determined. *Pruitt v. Pruitt*, 13.

§ 19. Time and Place of Rendition.

Where the judge holding a term of court in another district by consent hears an action in which no issues of fact are raised, all parties being present in person or by counsel, contention that judgment therein was void because rendered out of the district is untenable. *Humphrey v. Faison*, 127.

§ 27a. Attack and Setting Aside Default Judgments.

On motion to set aside a judgment under G.S. 1-220 on the ground of mistake, inadvertence, surprise and excusable neglect, the trial court's finding, upon supporting evidence, that the neglect was not excusable, is binding, notwithstanding contrary averments in affidavit offered by defendant, the court not being obligated to accept as true each and every statement of fact set forth therein. *Franks v. Jenkins*, 586.

On motion to set aside judgment for surprise and excusable neglect under G.S. 1-220, the neglect of defendant's liability insurance carrier is relevant only to the extent it may be imputed to defendant, and the findings of fact relating thereto are not determinative of the rights and liabilities of defendant and his insurance carrier *inter se*. *Ibid.*

Service on a nonresident automobile owner under G.S. 1-105 has the same legal force as personal service, and a defendant so served is not entitled to have a default judgment against him set aside and to defend the action on its merits under G.S. 1-108. *Ibid.*

An erroneous judgment can be corrected only by appeal; an irregular judgment only by motion in the cause; a void judgment is a nullity and its invalidity may be asserted at any time some benefit or right is asserted thereunder. *Lumber Co. v. West*, 699.

Where the court rendering judgment has jurisdiction of both the cause of action and the parties, the judgment cannot be collaterally attacked, nor may an attack be treated as a motion in the cause when the parties to that judg-

JUDGMENTS — *Continued.*

ment are not before the court in the action attacking the judgment, since such parties are entitled to notice. *Ibid.*

§ 27b. Attack of Void Judgments.

A void judgment is one lacking some essential element such as jurisdiction, and may be ignored or treated as a nullity at any time. *Moore v. Humphrey*, 423; *Lumber Co. v. West*, 699.

§ 27c. Attack for Error of Law.

Where, in an action for divorce, the complaint is properly verified and the court has jurisdiction of the parties and the subject matter, any error of the court in submitting an issue of abandonment when such ground for divorce is not supported by allegation, is an error of law, which may be corrected only by appeal, and another Superior Court judge may not set aside the judgment for such error at a subsequent term. *Pruett v. Pruett*, 13.

An erroneous judgment may be corrected solely by appeal. *Moore v. Humphrey*, 423; *Lumber Co. v. West*, 699; *Harrill v. Taylor*, 748.

§ 27d. Attack of Irregular Judgments.

An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside by motion in the cause. *Pruitt v. Taylor*, 380; *Moore v. Humphrey*, 423.

§ 32. Judgment as Bar to Subsequent Action.

Where the passenger in one car sues the driver of the other car involved in the collision, and the driver of the other car has the owner and driver of the passenger's car joined for contribution, in which action it is determined by verdict of the jury that the owner and driver of the car in which the passenger was riding was not guilty of negligence constituting a proximate cause of the accident, and judgment is entered that the defendant therein recover nothing on the cross-action for contribution, such judgment is conclusive as to the issues therein determined and precludes the defendant therein from thereafter instituting action against the owner and driver of the other car to recover for alleged negligence proximately causing the same accident. *Jenkins v. Fowler*, 111.

A final judgment rendered in an action to construe a will, from which no appeal is perfected, is binding on the parties thereto with respect to the construction of the will and the rights of the parties thereunder. *Humphrey v. Faison*, 127.

The efficacy of a judgment as *res judicata* is not affected by an asserted agreement of the parties not to prosecute the action when there is nothing to suggest that the action was not prosecuted and defended in good faith or that any pertinent fact was withheld from the court at the hearing. *Ibid.*

Where a material fact is in issue and decision of such matter is necessary to the rendition of the judgment, such matter becomes *res judicata* and may not be again litigated in a subsequent action between the same parties, regardless of the form the issue may take in the subsequent action. *Poindexter v. Bank*, 606.

§ 35. Plea of Bar, Hearings and Determination.

It is the duty of the court to allow motion for judgment as of nonsuit when all the evidence fails to establish a right of action on the part of plaintiff, and also when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover, and therefore where the defendant's affirma-

JUDGMENTS — *Continued*

tive proof discloses that plaintiff's cause of action is barred under the doctrine of *res judicata*, nonsuit is proper. *Jenkins v. Fowler*, 111.

LABORERS' AND MATERIALMEN'S LIENS

§ 2. Contractors and Materialmen Dealing Direct With Owner.

Where plaintiff's evidence establishes that the contractor agreed with the owner or his agent to construct a house for a fixed sum, and that plaintiff furnished materials for the construction of the house in dealing solely with the contractor, plaintiff may not assert a lien under G.S. 44-1, since such lien must be based upon a contract between the parties establishing the relationship of debtor and creditor. *Supply Co. v. Clark*, 762.

Where there is an express contract between the owner and contractor for the construction of a house at a fixed price as a turnkey job, there can be no implied contract between the owner and a person furnishing material for the construction of the house under an agreement solely with the contractor, since there can be no implied contract where there is an express contract between the parties in reference to the subject matter. *Ibid.*

Where a house is constructer under a contract for a turnkey job at a fixed price, the fact that a check from the loan company is made payable to the owner, contractor and material furnisher, and endorsed by the owner and contractor to the material furnisher, is insufficient alone to establish a contract between the owner and the material furnisher. *Ibid.*

§ 3. Laborers, Subcontractors and Materialmen.

Where a party seeks to enforce a lien under G.S. 44-1, he is estopped from asserting any lien as a sub-contractor under G.S. 44-6, 44-8 and 44-9. *Supply Co. v. Clark*, 762.

§ 5. Notice, Demand and Filing of Claim.

Where a materialman makes no demand on the owner for payment prior to payment by the owner to the contractor of the full amount due the contractor, such materialman cannot assert a lien under G.S. 44-6. *Supply Co. v. Clark*, 762.

LANDLORD AND TENANT

§ 1. Creation and Nature of Leasehold Estates.

A leasehold estate for a term of years is a chattel real. *Cordell v. Sand Co.*, 688.

§ 15. Rights and Liabilities of Parties Upon Assignment or Subletting.

Lessees holding over after the expiration of their term are not relieved of liability for rent by turning over the premises to a corporation formed by them, later becoming insolvent, when the lessor does not agree to relieve lessees of their obligation to pay rent or accept the corporation as substitute tenant, and mere notice to lessor of the circumstances is insufficient. *Williams v. King*, 581.

LARCENY

§ 7. Sufficience of Evidence and Nonsuit.

Circumstantial evidence taken in the light most favorable to the State and giving it the benefit of every reasonable inference therefrom, *held* to point unerringly to the guilt of defendant and to be of sufficient probative value to support verdict of guilty of felonious breaking and entry and larceny of goods of the value of more than $100. *S. v. Ballenger*, 260.

LARCENY —*Continued.*

§ 9. Verdict.

Where defendants are tried upon warrants charging larceny and receiving, and the evidence is sufficient to sustain the count of larceny only, but as to one defendant the court withdraws the count of larceny, a general verdict of guilty will be interpreted in the light of the record and will be upheld as to such defendant. However, as to the other defendant a new trial must be awarded since it is impossible to determine as to which count the verdict related. *S. v. Brown*, 539.

LIBEL AND SLANDER

§ 1. Nature and Essentials of Cause of Action in General.

Good faith is no defense to the recovery of compensatory damages for libel. *Bell v. Simmons*, 488.

A person giving verbal statements to reporters for the purpose of having the statements published in a newspaper is liable to the extent that libelous matter contained in the article is predicated in sense and substance on such statements. *Ibid.*

§ 4. Words Susceptible to Two Interpretations.

It is for the court to determine whether a communication is capable of a defamatory meaning and for the jury to determine whether it was understood in its defamatory meaning by the public. *Bell v. Simmons*, 488.

§ 7c. Absolute Privilege.

Physicians, in making affidavits pursuant to G.S. 122-43 at the direction of the clerk, act in the roll of witnesses, and such affidavits are absolutely privileged when pertinent to the proceeding. *Bailey v. McGill*, 286.

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence held for jury as to whether publication of charges that important records in plaintiff's custody were missing without explanation and that sheriff had been called to investigate matter tended to injure plaintiff in her occupation or profession. *Bell v. Simmons*, 488.

LIMITATION OF ACTIONS

§ 5. Accrual of Right of Action and Time from Which Statute Begins to Run.

Plaintiff's cause of action to recover for personal services rendered and funds advanced for the care of intestate in reliance upon intestate's promise to pay for same by willing property to plaintiff does not accrue until the death of intestate without having willed property to plaintiff, and the three-year statute can have no application when the action is commenced within three years of intestate's death. *Speights v. Carraway*, 220.

§ 9. Fiduciary Relationships and Trusts.

Even the unequivocal repudiation of the trust by the trustee does not start the running of the statute of limitations in the trustee's favor until the *cestuis* have notice or knowledge of such repudiation in such manner that they are called upon to assert their rights. *Solon Lodge v. Ionic Lodge*, 310.

Ordinarily, the statute of limitations does not run against an action by the *cestuis* to enforce a trust so long as the *cestuis* remain in possession of the trust property. *Ibid.*

LIMITATION of ACTIONS — *Continued*

Ordinarily, where the *cestui* in possession of the trust property voluntarily pays rent to the trustee and thus establishes the relationship of landlord and tenant between them, such relationship suffices to set the statute of limitations to running against the *cestui*, but payment of rent by the officers of the cestui does not start the running of the statute against the association when the officers are acting for their own advantage and against the interest of the association. *Ibid.*

§ 16. Burden of Proof.

Where the apposite statute of limitations is properly pleaded, the burden is ordinarily on the adverse party to show that his claim is not barred. *Solon Lodge v. Ionic Lodge*, 310.

§ 18. Sufficiency of Evidence and Nonsuit.

Where the party against whom the apposite statute of limitations has been properly pleaded fails to show that his action is not barred, nonsuit is proper, but where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the issue is for the jury. *Solon Lodge v. Ionic Lodge*, 310.

MALICIOUS PROSECUTION

§ 1a. Nature and Essentials of Cause of Action.

Allegations that physicians, in making affidavits in lunacy proceedings acted negligently and with malice, without allegation of wrongful motive, do not state cause of action for malicious prosecution, false imprisonment, or abuse of process. *Bailey v. McGill*, 286.

MASTER AND SERVANT

§ 2e. Collective Bargaining, Regulation and Enforcement.

A firm awarded a contract by the Federal Government upon its low bid is not an employee of the United States, but is an independent contractor, and in the performance of the contract the United States is not an "employer" so as to render the Labor Management Relations Act inapplicable. *Aircraft Co. v. Union*, 620.

G. S. 95, art. 10, is valid and does not impair any constitutional rights of employees, and therefore picketing for the purpose of forcing an employer to employ only union labor is for an unlawful purpose in this State. *Ibid.*

The power of courts of equity to enjoin picketing is not limited to preventing violence or a breach of the peace, but extends also to those instances where the picketing is to accomplish an unlawful or forbidden purpose, and an order which prohibits picketing intended to consummate a criminal act impairs no constitutional right. *Ibid.*

Employees or those seeking employment have the right in this State to picket in an orderly and peaceful manner the employer's place of business to secure the execution or performance of a contract not prohibited by law. *Ibid.*

Orderly and peaceful picketing in an industry affecting interstate commerce to enforce the right to collective bargaining is guaranteed by Federal statute. *Ibid.*

Problems growing out of labor-management relations which affect interstate commerce are governed by Federal law, and a state court may not issue an

order at variance with Federal legislation as interpreted by the Supreme Court of the United States. *Ibid.*

In an industry affecting interstate commerce within the purview of the Labor Management Relations Act, picketing by a labor union not certified as a representative of the employees of such concern for the purpose of forcing the employer to recognize or bargain with the union is an unfair labor practice. *Ibid.*

Where orderly and peaceful picketing is for the unlawful purpose of forcing an employer to breach our right to work law, G.S. 95-79, and also constitutes an unfair labor practice within the purview of the Federal Labor Management Relations Act, our State courts have no authority to issue a restraining order enjoining such picketing, since under the Federal decisions the Federal law exclusively pre-empts the field and removes the matter from the jurisdiction of the State courts. *Ibid.*

§ 4a. Distinction Between Employees and Independent Contractors.

A person contracting to do certain work who reserves the right to control the manner or method of performance and who is responsible to the employer solely as to the result is an independent contractor; while if the employer retains the right of control with respect to the manner or method of doing the work, the relationship of employer and employee obtains regardless of whether such control is exercised or not. *Pearson v. Flooring Co.*, 434.

§ 6. Actions for Wrongful Discharge.

Evidence that plaintiff was discharged because of his activities in regard to joining a labor union *held* sufficient to be submitted to the jury in this action for wrongful discharge. *Willard v. Huffman*, 523.

An employer has the right to discharge an employee for any reason or no reason at all except in those instances in which the employee is protected from discharge by statute. *Ibid.*

An employee is protected from discharge by G.S. 95-81 for membership or nonmembership in a labor union only if it is the sole reason for his discharge or is the motivating or moving cause of his discharge, and where there is evidence that plaintiff employee was discharged for breach of a company rule against drinking on the premises and also for such employee's activities in regard to joining a labor union, an instruction to the effect that the employer would be liable for wrongful discharge if the employee's activity in regard to joining a labor union was one of the reasons for his discharge, is reversible error. *Ibid.*

§ 15a. Liability of Employer for Injury to Employee.

Where, under the terms of the contract of employment, an employee is required to construct an instrumentality, the employer's duty is discharged by furnishing suitable materials with which it may be constructed, and the employer is not liable for an injury caused by a defect in its construction or adjustment. *Chambers v. Edney*, 165.

Evidence tending to show than an employee engaged in construction a scaffold was experienced in handling lumber, was in a position to observe the materials he himself was using, and had an opportunity to make examination of the materials, that he stepped on a board, which broke under his weight, causing him to fall to his injury, with testimony by him that the board looked sound and without evidence to indicate that the employer could have anticipated that plaintiff would step on a board of such dimensions, fails to show negligence on the part of the employer proximately causing the fall, but further, if it be

MASTER AND SERVANT — *Continued.*

conceded that there was evidence of negligence of the employer, the evidence discloses contributory negligence on the part of the employee. *Ibid.*

§ 36. Validity of Compensation Act.

The statutory provisions in regard to award for serious disfigurement are not invalid on the ground that the statute fails to provide an intelligible guide or standard for the Commission. *Davis v. Construction Co.*, 332.

§ 39b. Compensation Act — Independent Contractors.

Facts held to support conclusion that mechanic supervising installation of kiln was employee and not independent contractor. *Pearson v. Flooring Co.*, 434.

§ 40f. Compensation Act — Occupational Diseases.

Conflict in the testimony as to whether plaintiff employee was exposed to the hazards of silica dust in his employment in this State presents in issue of fact for the determination of the Industrial Commission. *Pitman v. Carpenter*, 63.

The evidence in this case *is held* sufficient to sustain the findings of the Industrial Commission that plaintiff employee was exposed to the hazards of silicosis for a minimum of thirty working days during the last seven consecutive months of his employment and that plaintiff's work in this State exposed him to the hazards of silicosis for a minimum of two years, no part of which two year period was more than ten years prior to his last exposure. *Ibid.*

§ 53b (1). Compensation Act — Amount of Compensation for Injury.

Where plaintiff employee is ordered to abstain from employment in an industry having the hazards of silica dust and directed to report for second and third medical examinations, G.S. 97-61.3, G.S. 97-61.4, it is proper that he be awarded the compensation provided by G.S. 97-61.5 (b) without consideration of the fact that his condition was complicated by pulmonary tuberculosis, since the total amount of compensation is to be determined on the hearing after the third medical examinations, G.S. 97-61.3, G.S. 97-61.4, it is proper that he be awarded the compensation provided by G.S. 97-61.5 (b) without consideration of the fact that his condition was complicated by pulmonary tuberculosis, since G. S. 97-65. *Pitman v. Carpenter*, 63.

The additional Compensation for serious bodily disfigurement under G.S. 97-31 (w) may be awarded in the discretion of the Industrial Commission whether such disfigurement results from the loss or injury to any important organ of the body or not, provided such loss or injury to such organ is not specifically compensable under G.S. 97-31 (a) through (t). *Davis v. Construction Co.*, 332.

The award of compensation under G.S. 97-31 (v) is mandatory upon the Commission upon a finding of serious facial or head disfigurement, although the amount of compensation therefor rests in the legal discretion of the Commission. Serious facial or head disfigurement may result from the loss or injury to any important organ of the face or head, so that compensation for the loss of two upper front teeth is compensable under section (v) rather than (w). *Ibid.*

Whether the loss of two upper front teeth results in a serious facial or head disfigurement so as to make the award of compensation therefor mandatory under G.S. 97-31 (v) is a question of fact for the Commission. *Ibid.*

A facial disfigurement is serious in law only when there is a serious disfigurement in fact, which is one which adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen

his opportunities for remunerative employment and so reduce his future earning power, even though no present loss of wages may be shown to have occurred. *Ibid.*

An employee filed claim for total temporary disability under G.S. 97-29. Some months thereafter he recovered from his disabling injury and returned to his employment, and was fatally injured in a compensable accident unconnected with the prior claim. *Held*: The claim for disability does not come within the proviso of G.S. 97-37, and the right to payments accrued at the time of the employee's death had vested and survives to his personal representative. The personal representative and not the widow must prosecute such claim. *Inman v. Meares*, 661.

§ 55d. Compensation Act — Review of Award in Superior Court.

The findings of the Industrial Commission are conclusive when supported by any competent evidence. *Pitman v. Carpenter*, 63.

Where it appears by the record that the court, after a full review of the evidence, adopted the findings of fact made by the Industrial Commission as its own as fully as if set out in the judgment, and found that such findings were supported by evidence and that they were correct, objection that the court failed to review the evidence and make its own findings in regard to jurisdictional facts is not supported by the record. *Pearson v. Flooring Co.*, 434.

What was the contract between the parties and the facts in regard to their relationship and the dealings between them are questions of fact upon which the Commission's findings are conclusive when supported by evidence; whether upon such facts the relationship between the parties was that of master and servant or employer and independent contractor is a question of law reviewable by the courts. *Ibid.*

Where excluded documentary evidence is not a part of the record or before the court upon appeal from an award of the Industrial Commission, the court cannot find that the exclusion of such evidence was prejudicial. *Inman v. Meares*, 661.

§ 55g. Compensation Act — Determination and Disposition of Appeal.

Where it is apparent that the Industrial Commission made its findings of fact in regard to compensation for the loss of claimant's two upper front teeth under misapprehension that G.S. 97-31 (w) rather than G.S. 97-31 (v) was applicable, the cause must be remanded for consideration of the evidence in its true legal light. *Davis v. Construction Co.*, 332.

§ 60. Right to Unemployment Compensation.

Evidence that the employer shut down its mills for the week ending 30 December and posted notices advising the employees when work would cease and when the employees would be expected to return to their jobs, *is held* to support the Commission's finding that the week was a vacation week within the purview of G.S. 96-13 (c). *In re Southern*, 544.

Where an employer, in addition to one week paid vacation provided for in the contract, shuts down its plant for an additional week of vacation during the Christmas period, its employees are not entitled to unemployment compensation for the additional week. G. 96-13 (c). *Ibid.*

An employer has the inherent right to determine its vacation policy, and an agreement between it and its employees for one week paid vacation between stipulated dates does not circumscribe the employer's right to suspend work for

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an additional week during the year without conferring on its employees the right to claim unemployment benefits for the second week of vacation. *Ibid.*

§ 62. Appeals from Employment Security Commission.

The findings of fact of the Employment Security Commission in a hearing before it are conclusive when supported by any evidence. *In re Southern*, 544.

MECHANIC'S LIENS

§ 1. Nature and Extent of Lien.

The mortgagor in possession of the chattel with the consent of the mortgagee is "the owner or legal possessor" within the meaning of G.S. 44-2 and has implied authority from the mortgagee to contract for repairs, and therefore the mechanic making repairs authorized by such mortgagor is entitled to possessory lien for such repairs. *Finance Co. v. Thompson*, 143.

§ 2. Preservation and Waiver of Lien.

G.S. 44-2 affirms the common-law mechanic's lien and gives the super-added right of foreclosure by sale in order to make lien effective, and the statute is self-executing so that compliance with G.S. 44-38 *et seq.* is not required to perfect the lien. *Finance Co., v. Thompson*, 143.

The common-law mechanic's lien is based upon possession, so that if the mechanic voluntarily and unconditionally surrenders possession of the chattel to the owner, the lien is lost and cannot be revived by any subsequently acquired possession by the mechanic. *Ibid.*

Where a mechanic makes certain repairs to the chattel and thereafter voluntarily surrenders possession thereof to the owner under an agreement that the owner should later return the chattel for the completion of the repairs, the mechanic may have a contractural lien as against such owner under the agreement, but loses his common-law possessory lien to which G.S. 44-2 relates, and upon his reacquisition of possession for the purpose of completing the repairs may assert as against the mortgagee in a prior registered chattel mortgage a lien only for the cost of completing the repairs, notwithstanding that all the repairs were made under an indivisible contract. *Ibid.*

MUNICIPAL CORPORATIONS

§ 1. Nature and Definition.

A municipal corporation has only those powers expressly granted in its civil government of a designated territory and the people embraced within its limits. *Smith v. Winston-Salem*, 349.

A municipal corporation has a dual capacity: one, governmental or political, the other proprietary or *quasi*-private. *Candler v. Asheville*, 398.

§ 5. Powers and Functions; Legislative Control and Supervision.

A municipal corporation has only those powers expressly granted in its charter or necessarily implied therefrom or essential to the declared objects and purposes of its creation, and it can have no extra-territorial powers unless expressly authorized by legislative grant. *Smith v. Winston-Salem*, 349.

Provision in the charter of a municipality authorizing it to acquire property for necessary sewer lines outside its limits and to compel citizens living along such line to connect therewith, is a grant of power and is not self-executing, and therefore in the absence of allegation or proof that the city undertook to exercise such power in his case, a person residing outside the city limits may

not contend that he was compelled to connect the sanitary facilities of his house to the municipal sewer line. G.S. 160-240. *Ibid.*

A municipal corporation is under the absolute control of the Legislature in regard to purely governmental matters, but as to proprietary municipal functions the Legislature is under the same constitutional restraints that are placed upon it in regard to private corporations. *Candler v. Asheville*, 398.

The General Assembly may change a municipal charter by statute at any time. *Ibid.*

§ 6. Distinction Between Governmental and Private Powers.

A municipality in furnishing sanitary facilities to persons residing outside the corporate limits for a fee acts in a proprietary capacity. *Smith v. Winston-Salem*, 349.

While public utilities, such as water and lights, are necessary municipal expenses, nevertheless a municipality in furnishing water and lights to private consumers acts in a proprietary capacity. *Candler v. Asheville*, 398.

§ 7c. Control and Regulation of Streets.

The opening and closing of streets is a governmental function of a municipality, G.S. 160-200 (11), G.S. 160-204, G.S. 160-222, and a contract of the city to the extent it purports to restrict the statutory discretion vested in its governing body in this regard is *ultra vires* and void, and no action for compliance with such contract can be maintained. *Improvement Co. v. Greensboro*, 549.

Plaintiff, the owner of land within a municipality, alleged that it conveyed certain streets therein to the municipality, as part of the consideration for the city's agreement to maintain the streets as shown on map, and that thereafter the municipality conveyed the main thoroughfare to the State Highway Commission for a limited access highway. *Held*: While plaintiff may not maintain an action to recover damages to its property resulting from the conversion of the main street to a limited access highway or force compliance by the city of its agreement to keep the other streets open, the city acquired the easements for the streets as consideration for their use in a particular manner, and upon its election not to make compensation in the manner agreed upon, it is under obligation to pay the fair and just value of the property, and therefore demurrer to the complaint should have been overruled. *Ibid.*

§ 8b. Public Utilities.

The General Assembly has prescribed adequate standards for the fixing of rates by municipalities owning their own water works system and has authorized such municipalities to furnish water to private consumers outside their corporate limits and to charge for such services a different rate from that charged consumers within their limits. *Candler v. Asheville*, 398.

Since a municipality has no legal right either in its governmental or proprietary capacity to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made; provided, such terms permit the establishment of a rate or rates which will be fair and just to the consumer and will produce a proper return to the municipality. *Ibid.*

Statute prescribing that residents of sanitary districts outside city should not be charged for water at higher rate by municipality than rate charged residents, *held* constitutional. *Ibid.*

In prohibiting a municipality from charging residents in sanitary districts

MUNICIPAL CORPORATIONS — *Continued.*

outside the municipality rates for water service in excess of rates charged residents of the municipality, the General Assembly may prescribe that it should be unlawful for the city to charge non-residents within the sanitary districts a higher rate, notwithstanding that ordinarily the violation of a rate regulation merely subjects the violator to a penalty. *Ibid.*

§ 14b. Defects and Obstructions in Sewers and Drains.

Defendant municipality contracted to maintain and keep in repair sewer lines from territory outside its limits, which lines were connected with the municipal sewer system, but by ordinance in force at the time of the connections in question expressly exempted itself from liability for any damage or injury from maintenance and repair. *Held*: The exemption from liability was authorized by legislative act, G.S. 160-249, and a resident outside the city cannot recover for damages resulting from the failure of the municipality to perform its contractual obligation to repair and maintain such lines. *Smith v. Winston-Salem*, 349.

Where plaintiffs base their right of action upon the failure of defendant municipality to perform its contractual obligation to maintain and repair a sewer line to which the sanitary facilities of plaintiffs' residences were connected, plaintiffs may not recover damages resulting from the flowing of sewerage directly from the city's mains on plaintiffs' property on the ground of trespass, since plaintiffs may not recover in tort unrelated to the contractual obligations alleged. *Ibid.*

§ 30. Power to Make Public Improvements.

While a municipality in the the improvement of its streets may provide grade crossings over railroad tracks within its limits by right angle crossings in such manner as will not deprive the railroad company of the reasonable use of its tracks for railroad purposes, express legislative authority is required for improvement of streets under a plan calling for the construction of numerous crossings in a relative short distance at acute angles in such manner as would substantially impede or prevent the railroad company from continuing its railroad operations. *R. R. v. Greensboro*, 321.

§ 36. Nature and Extent of Municipal Police Power in General.

The Legislature has authority to confer upon municipalities jurisdiction for sanitary and police purposes beyond the city limits. *Raleigh v. Morand*, 363.

§ 37. Zoning Ordinances and Building Permits.

Where a municipality is given the power to enact zoning ordinances within its limits and within one mile thereof, Chapter 540, Sessions Laws of 1949, the municipality may enjoin the use of land within one mile from its limits for a trailer park when at the time such use was begun the area was zoned for residential purposes only, and such restriction cannot be held arbitrary or discriminatory when the ordinance applies alike to all property within the territory affected. *Raleigh v. Morand*, 363.

§ 40. Violation and Enforcement of Police Regulations.

Where it is shown that a zoning ordinance has been duly adopted by the governing board of a municipality, there is a presumption that it was enacted in the proper exercise of the police power, with the burden of showing the contrary upon those attacking the validity of the ordinance. *Raleigh v. Morand*, 363.

A municipality may injoin the violation of its zoning regulations. *Ibid.*

NARCOTICS

§ 1. Elements of the Offense.

Each of the four acts of obtaining a narcotic drug, attempting to obtain a narcotic drug, procuring the administration of a narcotic drug, and attempting to procure the administration of a narcotic drug, are made criminal offenses by G.S. 90-106 only when they are done by fraud, misrepresentation, deceit, or by forgery of a prescription or written order, or by giving a false name or address. *S. v. Helms*, 740.

§ 2. Prosecutions.

The statute making the obtaining or attempt to obtain narcotic drugs and the procuring or attempt to procure the administration of such drugs criminal offenses when done by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or of a written order, or by the concealment of a material fact or by the use of a false name or the giving of a false address, uses general and generic terms in defining the means or matter constituting the acts criminal offenses, and therefore an indictment which fails to contain any factual averments in regard to the means or manner, is fatally defective, and judgment thereon will be arrested by the Supreme Court *ex mero motu*. *S. v. Helms*, 740.

NEGLIGENCE

§ 4f. Injury to Invitees on Premises.

In order for an invitee to recover from the owner or lessor of a building for injuries resulting from a fall on the premises, plaintiff must show some breach of duty owing to her by the owner or lessor. *Harris v. Department Stores Co.*, 195.

The fact that the tread of the bottom step of a stairway extends one inch beyond the end of the handrail provided for those using the stairs does not show negligent construction or maintenance of such rail. *Ibid.*

Where the evidence discloses that lessor provided lights with convenient switches at the top and bottom of a stairway for use of employees of lessees, without evidence of any defect or inadequacy of the lighting facilities, an employee falling on the stairs after failing to use the switch to turn on the light does not establish negligence on the part of the lessor in this respect. *Ibid.*

A lessor contracting to provide janitorial services for halls and stairs is under duty to exercise reasonable diligence to keep these facilities in a reasonably safe condition, but is not an insurer and is liable only for dangerous conditions known or which should have been known by it and which are unknown or not to be anticipated by an invitee. *Ibid.*

Evidence held not to disclose liability on part of lessor for failure to provide adequate janitorial service. *Ibid.*

§ 5. Proximate Cause.

Proximate cause is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could forsee that such result was probable under all of the facts as they existed. *Chambers v. Edney*, 165.

§ 9. Anticipation of Injury.

It is not necessary that injury in the precise form that occurred should have been forseen. *Arnett v. Yeago*, 356; *Ins. Co. v. Gas Co.*, 471.

NEGLIGENCE — *Continued.*

§ 10. Last Clear Chance.

The doctrine of last clear chance is not predicated on the original negligence of defendant, but upon his failure, after negligence and contributory negligence have canceled each other, to avoid the injury, and the doctrine cannot apply unless defendant has sufficient opportunity, in the exercise of ordinary care, to discover and appreciate plaintiff's perilous position in time to avoid injuring him. *Barnes v. Horney*, 495.

§ 10½. Assumption of Risk.

The doctrine of assumption of risk is not available as a defense when there is no contractual relationship between the parties. *Clark v. Freight Carriers*, 705.

§ 12. Contributory Negligence of Minors.

A three year old child is incapable of negligence, primary or secondary. *Arnett. v. Yeago*, 356.

As a matter of law, a child under seven years of age is incapable of contributory negligence. *Walston v. Greene*, 693.

§ 16. Pleadings in Actions for Negligence.

In an action to recover for injuries received by plaintiff while using an automatic "magic eye" door in the entrance of defendant's retail store, plaintiff may allege prior similar occurrences. *Hayes v. Bon Marche*, 124.

It is not required that plaintiff's evidence in refutation on the issue of contributory negligence be supported by allegation, since the burden of proof on this issue is on defendants. *Litaker v. Bost*, 298.

Plaintiff alleged negligence in the performance of a repair to a particular part of a vehicle and damages resulting from an accident when such part gave way while the vehicle was being operated on the highway, but did not allege any contractual agreement of defendant to recondition the vehicle and put it in first class condition. Plaintiff's evidence was to the effect that the part in question was defective, but that defendant did not repair this part. *Held*: Nonsuit for variance was properly entered. *Poultry Co. v. Equipment Co.*, 570.

In an action for negligence it is not sufficient for plaintiff to allege merely conclusions of negligence and proximate cause, but it is required that plaintiff allege facts constituting the negligence charged and also facts which establish such negligence as the proximate cause or one of the proximate causes of the injury. *Stamey v. Membership Corp.*, 640.

§ 17. Presumptions and Burden of Proof.

In an action to recover for actionable negligence, plaintiff must show failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury. *Chambers v. Edney*, 165.

§ 19a. Questions of Law and of Fact.

The determination of the issue of proximate cause requires the drawing of inferences sometimes from disputed and sometimes from uncontroverted facts, and is peculiarly the province of the jury. *Arnett v. Yeago*, 356.

§ 19b (1). Sufficiency of Evidence and Nonsuit of Issue of Negligence.

If plaintiff's evidence fails to establish either defendant's negligence or that

NEGLIGENCE — *Continued.*

it was a proximate cause of the injury, nonsuit is proper. *Chambers v. Edney*, 165.

§ 19b (4). Sufficiency of Circumstantial Evidence of Negligence.

Negligence may be proved by circumstantial evidence from which it may be inferred as the more reasonable probability, even though the possibility of accident may also arise on the evidence. *Frazier v. Gas Co.*, 256.

§ 19c. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Simmons v. Rogers*, 340.

§ 20. Instructions in Negligence Actions.

The use by the court of a hypothetical illustration in explaining the doctrine of proximate cause to the jury *held* not prejudicial. *Lookabill v. Regan*, 199.

An instruction to the effect that the jury must find that defendant's negligence was "the" instead of "a" proximate cause of the accident in order to answer the issue of negligence in the affirmative is prejudicial. *Pugh v. Smith*, 264.

§ 21. Issues and Verdict.

Verdict that defendant owner-passenger was liable but that defendant named as driver was not liable held not contradictory when construed with regard to evidence leaving it in conjecture as to which passenger was driving at the time. *Litaker v. Bost*, 298.

§ 23. Culpable Negligence.

Culpable negligence in the law of crimes imports something more than actionable negligence in the law of torts, and is such recklessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others. *S. v. Tingen*, 384.

The violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, wilful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which probable death or injury to others might have been reasonably anticipated. *Ibid.*

NOTICE

§ 3. Necessity for Notice.

Respondent may move to dismiss petitions for mandatory injunctions without notice upon the hearing of the order to show cause. *In re Application for Reassignment*, 413.

NUISANCES

§ 8b. Action to Abate Public Nuisances.

Where, in an action to abate a public nuisance on the sole ground that the premises were used for the unlawful sale of whiskey and the storing and secreting thereon of materials for the unlawful manufacture of whiskey, G.S. 19-1, a safe found in the padlocked building is opened by the sheriff and no whiskey or other intoxicating beverages found therein, the court may not there-

NUISANCES — *Continued.*

after require that the safe be reopened for the purpose of taking an inventory thereof, there being nothing to show the materiality of anything in the safe as bearing upon the question of abatement. Such inventory would be an invasion of the property rights of defendant without due process of law. *Hooks v. Flowers*, 558.

PARTIES

§ 1. Parties Plaintiff.

Where insurer has paid the full amount of the loss action must be brought by insurer as the real party in interest. *Ins. Co. v. Gas Co.*, 471.

§ 3. Necessary Parties Defendant.

Where plantiff brings an action under the Declaratory Judgment Act to determine whether it had acquired the fee or only an easement by condemnation, and it is not certain whether defendant owned the entire tract or was only a tenant in common, the other tenant in common must be joined. *Morganton v. Bourbonnais Co.*, 666.

§ 10. Joinder of Additional Parties.

Refusal to join party not necessary to determination of controversy between plaintiff and defendant held not prejudicial. *Bizzell v. Bizzell*, 590.

The joinder of a party not necessary to the determination of plaintiff's action is addressed to the discretion of the court. *Hannah v. House*, 573; *Clark v. Freight Carriers*, 705.

Where defendant pleads an accord and satisfaction in bar of plaintiff's action for an accounting, the refusal of the court to join other parties having an interest in the realty constituting part of the subject matter of the original controversy cannot be prejudicial to plaintiff, such additional parties not being necessary to the determination of the plea in bar. *Bizzell v. Bizzell*, 590.

PERJURY

§ 4. Subornation of Perjury.

In a prosecution for subornation of perjury, the State must establish *inter alia*, that the perjurer made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue. *S. v. Lucas*, 208.

§ 6. Competency and Relevancy of Evidence.

In a prosecution for subornation of perjury, testimony of the perjurer and of two other witnesses that the perjurer had pleaded guilty in a prosecution for perjury "growing out of this case," is incompetent as substantive evidence, and is also incompetent as corroborative evidence of the perjurer's testimony in the prosecution for subornation of perjury when it is not made to appear that the perjured testimony was the same or substantially the same in both prosecutions, and defendant's general objection to such testimony should have been sustained. *S. v. Lucas*, 208.

§ 7. Sufficiency of Evidence and Nonsuit.

In this prosecution for subornation of perjury, the State's evidence that defendant procured false testimony in a prosecution against him, which testimony was under oath before a court of competent jurisdiction and was material to the issues involved in that prosecution, together with proof of the falsity of

PERJURY — *Continued.*

the oath by the testimony of two witnesses or of one witness and corroborating circumstance, *is held* amply sufficient for submission to the jury. *S. v. Lucas*, 208.

§ 8. Instructions, Issues and Verdict.

In a prosecution for subornation of perjury, the court must charge that the alleged perjury must be established by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances. *S. v. Lucas*, 208.

In a prosecution for subornation of perjury, the court must charge that the perjured testimony procured by defendant must have been material to the issue involved in the action in which the perjured testimony was given. *Ibid.*

PHYSICIANS AND SURGEONS

§ 14. Malpractice in General.

The making of affidavits by physicians at the direction of the clerk in the due course of a proceeding for the admission of a person to a State Hospital is not done by them in the ordinary practice of their profession but in the roll of witnesses. *Bailey v. McGill*, 286.

PLEADINGS

§ 3a. Statement of Cause of Action in General.

Allegations that the seller and the assignee of the conditional sales contract conspired together to charge the purchaser usurious interest, and that as a result thereof the purchaser was embarrassed and caused to lose his automobile to his damage in a specified amount and that the seller and assignee acted with malice entitling the purchaser to punitive damages in a specified sum, are insufficient to state an independent cause of action based on conspiracy, since the allegations, apart from the cause of action for usury, are mere conclusions of the pleader. *Finance Co. v. Simmons*, 724.

§ 10. Counterclaims and Cross-Actions.

A counterclaim is some matter existing in favor of defendant against plaintiff on which defendant could maintain an independent action, and in an action for trespass and for injunctive relief against further trespass, allegations in the answer of a defendant that he is the owner and in possession of a described tract of land and that insofar as plaintiff's description covers any of the land described in the answer, the allegations of the complaint are untrue and denied, fail to set up a counterclaim so as to preclude plaintiffs from taking voluntary nonsuit as to such defendant. *Everett v. Yopp*, 38.

G.S. 1-137 (1) is broad in its scope and should be liberally construed in furtherance of its purpose to permit the trial in one action of all causes of action arising out of any one contract or transaction. *Amusement Co. v. Tarkington*, 444.

A counterclaim within the meaning of G.S. 1-137 includes pleas operating by way of recoupment, setoff, or cross-demand. *Finance Co. v. Simmons*, 724.

Original defendant may set up cross-action against additional defendants when it arises out of plaintiff's claim and is necessary to a final determination of the controversy. *Ibid.*

But original defendant is not entitled to file cross-action against additional defendants when the determination of the cross-action is not necessary to determination of plaintiff's cause, since he may not force plaintiff to stand by

PLEADINGS — *Continued.*

while he litigates a claim unconnected with plaintiff's cause of action. *Hannah v. House*, 573; *Clark v. Freight Carriers*, 705.

Where arrest of defendant in a civil action for malicious assault is in the regular course of the action, defendant may not set up counterclaim for abuse of process based on the arrest. *Edwards v. Jenkins*, 565.

§ 17. Demurrers — Statement of Grounds, Form and Requisites.

G.S. 1-128 applies to all demurrers, written or oral, and if the grounds for demurrer are not distinctly specified, it may be disregarded. *Adams v. College*, 648.

If the demurrer in the lower court for failure of the complaint to state a cause of action fails to state the grounds therefor, but the demurrer *ore tenus* filed in the Supreme Court sufficiently specifies the grounds of objection, the deficiency is supplied. *Ibid.*

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

A demurrer admits the truth of the facts properly alleged in the complaint and relevant inferences of fact deducible therefrom, but it does not admit legal inferences or conclusions. *Bailey v. McGill*, 286; *Stamey v. Membership Corp.*, 640.

Upon demurrer the complaint must be liberally construed with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. *Bailey v. McGill*, 286; *Adams v. College*, 648.

While a complaint must be liberally construed upon demurrer, G. S. 1-151, the case must be taken as made by the complaint, and the court cannot read into it facts not therein stated. *Stamey v. Membership Corp.*, 640.

A demurrer for failure of the complaint to state a cause of action cannot be sustained if the complaint is sufficient for this purpose in any respect or to any extent. *Ibid.*

A demurrer for failure of the complaint to state a cause of action cannot be sustained if the facts alleged entitle plaintiff to relief of some character, even though not to the extent or in the form asked for or reason asserted. *Improvement Co. v. Greensboro*, 549.

Legal conclusions of the pleader are to be disregarded upon demurrer. *Finance Co. v. Simmons*, 724.

Where a counterclaim contains unchallenged counts which are good, a written demurrer *ore tenus* thereto on the ground that other counts contained therein were based on matters which did not accrue until after the institution of the action, must be overruled, since if a pleading is good to any extent a general demurrer thereto cannot be sustained. *Ibid.*

§ 20½. Form and Effect of Judgment Upon Demurrer.

The action should be dismissed upon demurrer to a complaint stating a defective cause of action. *Bailey v. McGill*, 286.

In an action for negligence, where the facts alleged are insufficient to establish the element of proximate cause, defendant's demurrer must be sustained without prejudice to plaintiff's right to move for leave to amend. *Stamey v. Membership Corp.*, 640.

Where the allegations of the complaint affirmatively disclose that plaintiff has no cause of action, the cause should be dismissed upon demurrer, but where there is a defective statement of a good cause of action, the complaint is subject

PLEADINGS — *Continued.*

to amendment, and the action should not be dismissed until time for obtaining leave to amend has expired. *Adams v. College*, 648.

§ 22b. Amendment of Pleadings.

Amendment to make allegations conform to proof held not to change substantially the claim against appealing defendant. *Litaker v. Bost*, 298.

§ 24. Variance.

It is not required that plaintiff's evidence in refutation of an affirmative defense be supported by allegation. *Litaker v. Bost*, 298.

Plaintiff must recover, if at all, upon the cause of action alleged in the complaint and cannot recover on a different legal right. *Smith v. Winston-Salem*, 349.

Allegation and proof must correspond, and when there is a material variance between the allegation and proof, there can be no recovery without an amendment, and nonsuit is proper. *Poultry Co. v. Equipment Co.*, 570.

§ 25½. Admission or Denial of Allegation and Necessity for Proof.

An admission in a pleading is as effectual as if the fact admitted were found by a jury, and is binding upon the pleader even though the admission is not introduced in evidence. *Moore v. Humphrey*, 423.

§ 31. Motions to Strike.

In action to recover for injuries received while using an automatic "magic eye" door, motion to strike allegations of prior similar occurrences is properly denied. *Hayes v. Bon Marche*, 124.

Where plaintiff's complaint describes his injuries in detail, allegations of the answer that defendant had been unable to obtain information in regard to the extent of the injury and that plaintiff had unlawfully withheld such information, are properly stricken on motion. *Edwards v. Jenkins*, 565.

PRINCIPAL AND AGENT

§ 7a. Powers and Authority of Agent in General.

Evidence that an agent of a stone and sand company directed the employees of the company with respect to their work and hired and paid them off, is insufficient predicate for the admission of testimony as to a declaration of the agent that the company had abandoned its mineral leasehold estate in that part of the land in controversy, since, in the absence of evidence to the contrary, such agent has no express or implied authority to affect title to realty of the company. *Cordell v. Sand Co.*, 688.

§ 8. Notice to Agent as Notice to Principal.

The rule that knowledge of the agent is imputed to the principal does not apply when the agent, nominally acting as such, is in reality acting in furtherance of his own personal business and adversely to the principal, or has a motive in concealing the facts from the principal. *Solon Lodge v. Ionic Lodge*, 310.

§ 13d. Sufficiency of Proof of Agency.

Admissions and proof that chemicals poisonous to certain types of vegetation were sprayed by a crew operating from a train moving slowly over defendant's tracks, make out a *prima facie* case that the crew operating the sprayers were agents or employees of the railroad company. If such persons were unauthorized,

PRINCIPAL AND AGENT — *Continued.*

this fact would be peculiarly within the knowledge of the railroad company, and it would be under obligation to so allege and prove. *Bivens v. R. R.*, 711.

PROCESS

§ 4½. Officers Who May Serve Process.

Where an act authorizes the appointment of a special officer for limited and specified purposes, but further provides that such officer should receive the same fees for serving both criminal and civil writs as allowed by law to the constable of the township, which constable is authorized to serve process, the act authorizes such special officer to serve summons. Chapter 590, Public Local Laws of 1923. *Lumber Co. v. West*, 699.

A deputy sheriff has authority to serve summons. G. S. 162-14. *Ibid.*

§ 10. Service on Nonresident Auto Owners.

Service on a nonresident automobile owner under G.S. 1-105 has the same legal force as personal service, and a defendant so served is not entitled to have a default judgment against him set aside and to defend the action on its merits under G.S. 1-108. *Franks v. Jenkins*, 586.

§ 15. Abuse of Process.

Complaint held to state cause of action against one physician for instigating lunacy proceeding for wrongful purpose, but as to physicians signing affidavits, allegations that they were grossly negligent amounting to legal maliciousness, without allegation of wrongful purpose, held insufficient to allege cause as to them. *Bailey v. McGill*, 286.

Abuse of process consists of the existence of an ulterior purpose and an act in the use of process not proper in the regular prosecution of a proceeding. *Edwards v. Jenkins*, 565.

Ulterior motive or bad intention does not give rise to a cause of action for abuse of process when the process is used in the proper and regular prosecution of the proceeding. *Ibid*

PROPERTY

§ 3. Malicious Injury to or Destruction of Personalty.

A warrant charging defendant with destruction of personal property charges no offense, since the destruction of personal property is not a crime unless it is done wantonly and wilfully. *S. v. Sims*, 751.

QUAISI - CONTRACTS

§ 1. Nature and Essentials.

There can be no implied contract where there is an express contract between the parties in reference to the subject matter. *Supply Co. v. Clark*, 762.

RAILROADS

§ 4. Accidents at Crossings.

Evidence disclosing that the truck in which plaintiffs were riding as passengers ran into the side of a freight train between the first and second cars, after the engine and tender had passed, that the truck left skid marks for a distance of 35 feet from the point of impact, and that from a point more than 96 feet from the crossing the lights of the locomotive could be seen for more than 2,000 feet, is *held* to show gross negligence on the part of the driver con-

tinuing to the moment of impact, and constituting the sole proximate cause of the accident so as to preclude recovery against the railroad company, notwithstanding evidence of negligence on the part of the engineer in failing to give warning of his approach by bell or whistle. *Faircloth v. R. R.*, 190.

The sole purpose of warning by bell or whistle is to give notice of the approach of the train, and members of a train crew are not required to foresee that the operator of a motor vehicle fully able to observe the headlights on the locomotive for nearly half a mile will rely solely on his hearing and not use his sight to ascertain the train's approach. *Ibid.*

Evidence held insufficient to be submitted to jury on issue of negligence of railroad in causing crossing accident. *Bumgarner v. R. R.*, 374.

§ 7. Injuries to Lands Contiguous to Right of Way.

Admissions and proof that chemicals poisonous to certain types of vegetation were sprayed by a crew operating from a train moving slowly over defendant's tracks, make out a *prima facie* case that the crew operating the sprayers were agents or employees of the railroad company. If such persons were unauthorized, this fact would be peculiarly within the knowledge of the railroad company, and it would be under obligation to so allege and prove. *Bivens v. R. R.*, 711.

Where plantiff's testimony is positive that at least some of the crops damaged by chemicals sprayed from defendant's right of way were on land rented by him, the fact that there is some conflict in his testimony as to whether all the damage was outside the right of way, cannot justify nonsuit. *Ibid.*

Where a railroad company is sued for the negligent use of poisonous spray on its right of way, the plaintiff makes out a *prima facie* case of liability by showing that the crew doing the spraying operated from a train moving along defendant's tracks, the court is not required to charge that the burden is on plaintiff to show that the persons operating the sprayers were agents or servants of the railroad company, since if such persons were unauthorized, lack of authority should be alleged and proved by the railroad company. *Ibid.*

§ 15. Rights of Way.

A conveyance of land for use as a railroad right of way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of G.S. 60-37 (4), and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the *habendum* and warranties are in harmony therewith, it conveys the fee and not a mere easement. *McCotter v. Barnes*, 480.

Where the granting clause in a deed purports to convey the fee and the *habendum* and warranties are in harmony therewith, a clause in the description that the conveyance was a right of way 100 feet wide does not limit the conveyance to an easement. *Ibid.*

The term "right of way" has a two-fold meaning: one, to designate an easement, and the other, as descriptive of the use or purpose to which a strip of land is put, without reference to the quality of the estate. *Ibid.*

A clause in the description of a fee simple deed that "there shall be no building other than for railroad use" is at most a personal, restrictive covenant, which does not run with the land, and therefore, after the death of grantors and the transfer of the property after its use for railroad purposes had ceased, the clause is without force and effect, since its purposes and objects no longer exist. *Ibid.*

RAILROADS — *Continued.*

A right of way for railroad purposes does not deprive the owner or his tenant of the use of the land subject to the easement for any purpose not inconsistent with its use for railroad purposes. *Bivens v. R. R.*, 711.

REFERENCE

§ 14b. Preservation of Questions and Issues for Determination by Jury.

A party to a compulsory reference cannot be entitled to trial by jury upon appeal as to facts admitted in the pleadings or as to facts irrelevant to the cause, since such facts are not issuable facts in the case. *Andrews v. Lovejoy*, 554.

SALES

§ 21. Remedies of Seller Upon Dishonor of Check Given for Cash Sale.

Where the seller accepts the purchaser's check in payment of a cash sale and the check is thereafter dishonored, the seller has his election to treat the sale void and recover the chattel or the specific funds in the hands of the purchaser derived from resale, or he may elect to ratify the sale and seek to recover the contract price. *Carrow v. Weston*, 735.

SCHOOLS

§ 3d. Assignment of Pupils.

Where a municipal board of education grants the applications for reassignment of certain pupils, appeal from its decision may be taken as to each child only by the child's parent, guardian, or person standing *in loco parentis*, and the parents of other children attending the schools to which the reassignments are made are not the parties aggrieved by such reassignments within the purview of G.S. 115-179, and have no standing in court to contest the assignments. Moreover, each reassignment must be challenged separately and cannot be challenged *en masse*. *In re Application for Reassignment*, 413.

SEARCHES AND SEIZURES

§ 3. Waiver of Warrant.

Where the undisputed evidence discloses that defendant led officers to his car, took the key from under the floor mat and opened the trunk and a bag, which contained the merchandise in question, discloses defendant's voluntary consent to the search, waiving the requirement of a warrant. *S. v. Brown*, 539.

STATE

§ 3a. Tort Claims Act — Nature, Scope and Statement of Claim.

In a proceeding under the Tort Claims Act, where, prior to the hearing, the parties stipulate the name and position of the State employee charged with negligence, such stipulation meets the statutory requirement that the negligent employee be named and obviates error in naming the employee in the affidavit and claim, and the allowance of an amendment to this effect on appeal to the superior court is immaterial. *Tucker v. Highway Com.*, 171.

Where, in a proceeding under the Tort Claims Act, the claimant asserts injury resulting when the car in which claimant was riding hit obstructions at each end of a narrow bridge, the fact that the claimant asserts the obstructions were ditches, while the evidence discloses that the obstructions were mounds some 8 or 10 inches high, is too immaterial to require amendment, and an

STATE — *Continued.*

amendment allowed in the superior court on appeal to make the allegations conform to the evidence adds nothing to the claim. *Ibid.*

§ 3b. Tort Claims Act — Negligence of State Employee and Contributory Negligence.

This proceeding under the State Tort Claims Act is governed by the statute as written at the time the accident occurred under which contributory negligence of claimant was a defense rather than a part of claimant's cause of action, and when recovery was allowed for injury resulting from a negligent omission as well as a negligent act on the part of a State employee. *Tucker v. Highway Com.*, 171.

§ 3c. Tort Claims Act — Appeal and Review.

On appeal, in a proceeding under the Tort Claims Act, the superior court is limited to review of alleged errors of law made by the Commission and presented by exceptions duly entered. *Tucker v. Highway Com.*, 171.

Where the superior court properly remanded a proceeding under the Tort Claims Act to the Industrial Commission, but includes in the judgment provisions directing what conclusions should be made by the Commission from specified findings, which conclusions involve both questions of law and of fact, the provisions encroaching on the functions of the Commission will be stricken on appeal. *Ibid.*

Where it is apparent that the Industrial Commission on the hearing of a claim under the Tort Claims Act may have found the facts under the misapprehension that the claim related to negligence on the part of one State employee, while the claim and evidence involved as a matter of law the negligence of a different employee, the cause must be remanded. *Ibid.*

STATUTES

§ 2. Constitutional Prohibition Against Passage of Special and Local Acts.

Eliminating county from those excluded from general court act is not special act relating to establishment of court. *S. v. Ballenger*, 216.

There is no contract between the State and the public that a municipal charter shall not at all times be subject to amendment by the General Assembly, and Section 4, Article VIII, of the State Constitution does not forbid the Legislature from doing so by special act. *Candler v. Asheville*, 395.

A local act is valid unless prohibited by the Constitution. *Speedway v. Clayton*, 528.

Professional automobile and motorcycle racing is an employment or business engaged in for gain or profit within the meaning of Article II, Section 29, of the State Constitution, and therefore a statute applicable to one county alone which attempts to regulate professional racing rather than racing in general, is void as a local act regulating labor or trade. *Ibid.*

§ 4. Procedure to Test Validity.

A statute may be valid in part and invalid in part, and the validity of a statute should not be determined upon a general attack of its constitutionality, but only in respect of its adverse impact upon personal or property rights in a specific factual situation. *Greensboro v. Wall*, 516.

As to enjoining violation or enforcement of statute see Injunctions 4g.

STATUTES — *Continued.*

§ 5b. Construction — Administrative Interpretation.

The interpretation given to proposed legislation by the department proposing it, as well as the interpretation by the department responsible for its administration, are aids in the construction of the statute. *In re Application for Reassignment*, 413.

TAXATION

§23½. Construction of Taxing Statutes in General.

Where it is necessary to apply a taxing statute to a factual situation not contemplated when the statute was enacted, resort may be had to all other statutory provisions which may assist in a proper application of the statute in question. *Distributors v. Shaw*, 157.

Statutory provision permitting exemption from tax liability should be construed so as to bring within the exemption only those clearly entitled to its provision. *Ibid.*

§ 26½. Listing and Assessment of Real Property.

Where the contract between the parties does not require the lessee to list the leasehold estate for taxes, the whole of the land may be listed in the name of the owner of the fee, G.S.1 05-301, subsection (8), and the whole of the land is assessable against him. *Cordell v. Sand Co.*, 688.

§ 29. Income Taxes.

Whether a successor corporation is entitled to deduct from its gross income an economic loss sustained by another corporation depends upon whether the successor corporation is for practical purposes the same and is engaged in continuing the business of the kind and character conducted by the corporation whose loss is claimed as a deduction. *Distributors v. Shaw*, 157.

Where a corporation surviving a merger seeks to establish its right to deduct from its gross income an economic loss of one of its submerged corporations for a prior year as a carry-over under G. S. 105-147 (6d), and it appears from the facts alleged that the submerged corporation had a profit in the months of the fiscal year prior to the merger and that it had deducted its prior economic loss from such net income, leaving a balance on the loss side, and further, that as far as the facts alleged disclosed, to allow the surviving corporation to make such deduction would result in reducing the surviving corporation's income tax liability which had accrued on the date of the merger, judgment on the pleadings permitting the surviving corporation to make such deduction must be reversed. *Ibid.*

§ 30. Sales and Use Taxes.

The Legislature has power to levy sales and use taxes. *Duke v. Shaw*, 236.

§ 38. Remedies of Taxpayer.

A taxpayer must follow procedure prescribed by statute to challenge the validity of a tax or the interpretation of the tax laws by those charged with the responsibility of collecting taxes. *Duke v. Shaw*, 236.

A taxpayer seeking to challenge his liability for a particular tax has two remedies: he may pay the tax under protest and maintain an action against the State for its recovery, G.S. 105-267; or he may, without payment of the tax assessed by the Commissioner of Revenue, apply to the Tax Review Board for determination of his liability for the tax upon the specific factual situation,

TAXATION — *Continued.*

and appeal from the decision of the Tax Review Board to the Superior Court by complying with the statutory procedure. G.S. 105-241.3. *Ibid.*

The administrative procedure under G.S. 143-306 to determine tax liability applies by appeal to the Superior Court from determination of the Tax Review Board upon a particular factual situation and does not lie by petition directly to the Superior Court to have an administrative interpretation promulgated by the Commisisoner of Revenue declared to be erroneous, unlawful or improper. *Ibid.*

While a taxpayer may challenge the illegal expenditure of tax funds by a municipality and the validity of proposed municipal bonds, a general attack on the constitutionality of the statute under which a municipal agency was created. without attacking any particular tax, expenditure or bond issue on any specific constitutional ground, does not present a justiciable controversy. *Greensboro v. Wall*, 516.

§ 40g. Validity and Attack of Tax Deeds.

Commissioners' deed in tax foreclosure proceedings instituted against one tenant in common is color of title as against the cotenants who were not parties to the foreclosure. *Johnson v. McLamb*, 534.

TORTS

§ 6. Joinder of Additional Parties for Contribution.

Where the cross complaint does not charge joint liability as joint tort-feasors and does not allege primary and secondary liability, the original defendant may not have an additional party joined on the ground that such additional party's negligence was the sole proximate cause of plaintiff's injury. *Hannah v. House*, 573. Nor on a claim of indemnity. *Ibid.*

Where the third person tort-feasor is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint *tort-feasor* under G. S. 1-240, nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability. *Clark v. Freight Carriers*, 705.

TRESPASS

§ 1c. Trespass Where Original Entry is Lawful.

If a person enters on land without permission or invitation, express or implied, and without legal right or *bona fide* claim of right, and refuses to comply with an order to leave after his presence is discovered, such person is a trespasser from the beginning. *S. v. Clyburn*, 455.

§ 9. Nature and Elements of Criminal Trespass.

In a prosecution for criminal trespass, nonsuit is proper if defendants were merely exercising their constitutional rights. *S. v. Clyburn*, 455.

The person in lawful possession of realty may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy; G.S. 14-126 and G.S. 14-134 place no limitation on the right of the possessor to discriminate between patrons on the ground of race. *Ibid.*

Persons of the Negro Race who enter that part of the premises of a private enterprise reserved for white clientele, and who refuse to leave upon order of the proprietor, are guilty of a wrongful entry within the meaning of G.S. 14-126, even though their original entrance was peaceful. G.S. 14-134 is applicable where the entry is with force. *Ibid.*

TRIAL

§ 5½. Stipulations.

Stipulation of the parties as to name and position of employee charged with negligence obviates error in naming the employee in the affidavit and claim. *Tucker v. Highway Com.*, 171.

Where plaintiff's complaint is sufficient to state a particular cause of action only, a statement of plaintiff's counsel that they did not rely upon such cause of action is not binding upon plaintiff in the absence of express authority to the attorney, since ordinarily an attorney has no power by stipulation or agreement to waive or surrender a substantial legal right of his client. *Bailey v. McGill*, 286.

A stipulation of plaintiff and defendant in claim and delivery is a judicial admission binding on them and on their sureties, there being no contention that the attorneys were not authorized to enter into the stipulations. *Moore v. Humphrey*, 423.

§ 19. Province of Court and Jury in Regard to Evidence.

Whether there is enough evidence to support a material issue is a matter of law. *Chambers v. Edney*, 165.

§ 21. Office and Effect of Motion to Nonsuit.

Where plaintiff has no right, title or interest in the chose in action so as to entitle him to maintain the action for its recovery, nonsuit is proper. *Darden v. Boyette*, 26.

It is the duty of the court to allow motion for judgment as of nonsuit when all the evidence fails to establish a right of action on the part of plaintiff, and also when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover, and therefore where the defendant's affirmative proof discloses that plaintiff's cause of action is barred under the doctrine of *res judicata*, nonsuit is proper. *Jenkins v. Fowler*, 111.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be taken in the light most favorable to plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Chambers v. Edney*, 165; *Simmons v. Rogers*, 340.

§ 22b. Nonsuit — Consideration of Defendant's Evidence.

Defendant's evidence which is favorable to plaintiff and not in conflict therewith, or which clarifies or explains plaintiff's evidence, may be considered on motion to nonsuit. *Simmons v. Rogers*, 340.

§ 22c. Nonsuit— Contradictions and Discrepancies in Evidence.

Conflicts in the testimony must be resolved in plaintiff's favor upon motion to nonsuit. *Litaker v. Bost*, 298.

Discrepancies and contradictions, even in plaintiff's evidence, are to be resolved by the jury and not the court. *Bell v. Simmons*, 488.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

To carry his case to the jury plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference. *Parker v. Wilson*, 47.

TRIAL — *Continued.*

§ 23f. Nonsuit for Variance.

Immaterial variance does not justify nonsuit. *Ins. Co., v. Gas Co.*, 471.

But a material variance requires allowance of motion to nonsuit. *Poultry Co. v. Equipment Co.*, 570.

§ 24a. Nonsuit on Affirmative Defense.

Nonsuit on an affirmative defense is proper only when plaintiff's own evidence establishes such defense. *Solon Lodge v. Ionic Lodge*, 310.

§ 25. Voluntary Nonsuit.

Where plaintiffs in apt time take a voluntary nonsuit as to named defendants, and no appeal is taken from the clerk's action in allowing the nonsuit, the action is no longer pending against such defendants, and it is error for the court to set aside the judgments of nonsuit as to such defendants and abate the action as to them, certainly where the record fails to show that such defendants or their representatives were present or contested the right of plaintiffs to take the nonsuit. *Everett v. Yopp*, 38.

Mere denial of plaintiff's title in so far as plaintiff's description described any lands covered by the description set out in defendant's answer is not a counterclaim precluding voluntary nonsuit. *Ibid.*

§ 32. Requests for Instructions.

Where the court correctly charges on all essential features of the case, a party desiring additional instructions or amplification must aptly tender request therefor. *Hunter v. Fisher*, 226.

§ 36. Form and Sufficiency of Issues.

Where the issues submitted arise on the pleadings and are supported by the evidence, and are determinative of the controversy, an assignment of error to the refusal to submit other issues cannot be sustained. *Hoffman v. Mozeley*, 121.

§ 39. Form and Sufficiency of Verdict.

The verdict of the jury may be construed with regard to the pleadings, evidence, admissions of the parties and the charge of the court in ascertaining its meaning with the view of sustaining it if possible. *Litaker v. Bost*, 298; *Moore v. Humphrey*, 423.

§ 39½. Conformity of Verdict to Instructions.

Plaintiff sued to recover the reasonable value of personal services for a stipulated number of days and alleged that such services were reasonably worth a specified amount. The court charged that plaintiff could not recover for the full number of days stipulated and that the jury should not consider any services rendered after a specified date. The jury allowed recovery for the full amount sought. *Held*: Exception to the refusal of the court to set aside the verdict on the ground that the jury obviously disregarded the court's instructions will not be sustained when it is apparent from the record that in view of the menial and onerous character of the services, the recovery was not excessive for that period for which plaintiff clearly established the right to recover. *Beasley v. McLamb*, 179.

§ 45. Trial by Court, Hearings and Evidence.

In a trial by the court under agreement of the parties, the rules of evidence are not so strictly enforced as in a trial by jury, the assumption being that the

TRIAL — *Continued.*

court will not consider incompetent testimony or be misled by that which is irrelevant and inconclusive. *Bizzell v. Bizzell*, 590.

TRUSTS

§ 2. Parol Trusts.

An agreement by the beneficiaries named in the will that they would devise and bequeath the remainder of the property to the nieces and nephews of testator if the nieces and nephews agreed not to prosecute or appeal from judgment in an action to construe the will in which the nieces and nephews claimed the remainder in testator's property, *held* insufficient predicate for a parol trust when the nieces and nephews were without title or interest in the property under the terms of the will. *Humphrey v. Faison*, 128.

Any parol agreement to engraft a trust on property falls within the statute of frauds when title to the property has passed at the time of the asserted agreement, and therefore where, in an action to construe a will, judgment is entered that testator's nieces and nephews took no interest under the will, an agreement thereafter made by the nieces and nephews not to prosecute an appeal from the judgment if the beneficiaries named in the will would devise and bequeath the remainder in the property to them, is insufficient predicate for a parol trust in favor of the nieces and nephews. *Ibid.*

§ 4. Resulting Trusts.

Allegations and evidence to the effect that plaintiffs furnished the full purchase price for certain lots, that defendants took title thereto in their own names, that defendants built a dwelling on one of the lots for plaintiffs, for which plaintiffs paid them in full, and that defendants thereafter conveyed only part of the lots to plaintiffs, is sufficient to make out a cause of action against defendants to compel the conveyance of the rest of the land on the theory of a resulting trust. *Hoffman v. Mozeley*, 121.

§ 25½. Actions to Enforce Trust.

The three-year statute of limitations is applicable in an action to establish an express trust. G.S. 1-52. *Solon Lodge v. Ionic Lodge*, 310.

§ 28. Termination of Trust by Agreement.

Where the *cestuis* make out a *prima facie* case establishing a trust, the trustee has the burden of establishing his defense that the trust had been terminated by the distribution of the *corpus* for the benefit of the *cestuis*, and nonsuit on such affirmative defense is proper only when it is established as a matter of law by the *cestuis'* evidence. *Solon Lodge v. Ionic Lodge*, 310.

A benevolent association conveyed realty to a corporation formed for the purpose of holding the property for the benefit of the association. Defendant corporation contended that it terminated the trust under agreement by thereafter issuing its stock to the members of the association in good standing. *Held*: The association had no right to apply the property to any use other than the trust except by the unanimous consent of its members, and where the evidence discloses that a bare majority of the members of the association voted in favor of terminating the trust in such manner, the defense of termination is not established as a matter of law. *Ibid.*

USURY

§ 7. Forfitures and Penalties.

Allegations in an action on a purchase money note that the seller and the

USURY — *Continued.*

assignee of the conditional sales contract conspired and, by common plan and design between them, charged and were attempting to collect interest in excess of the rate allowed by law, state a cause of action against both the seller and the assignee for forfeiture of all interest, G.S. 24-2, but the purchaser may not demand, in addition to the penalty prescribed by statute, damages alleged to have been suffered as a result of embarrassment and loss of his automobile as the result of the charge of interest at usurious rates. *Finance Co. v. Simmons*, 724.

UTILITIES COMMISSION

§ 2. Jurisdiction.

The Utilities Commission has not been given jurisdiction over rates charged by utilities owned by municipalities. *Candler v. Asheville*, 398.

VENDOR AND PURCHASER

§ 6. Time of Exercise of Option.

The lease in question granted lessee or assigns option to purchase the premises at the expiration of the five-year term or at any time thereafter during a renewal period upon written notice given at least ninety days prior to the expiration of the five-year term. *Held*: The language is plain and unambiguous and provides that, notwithstanding the actual closing of the purchase might be postponed until any time during a renewal period, written notice of such intention should be given at least ninety days prior to the expiration of the original term. *Barham v. Davenport*, 575.

§ 24. Remedies of Purchaser — Recovery of Purchase Money Paid.

Where the purchaser refuses or becomes unable to comply with his contract to purchase, he is not entitled to recover the amount theretofore paid by him pursuant to the agreement. *Scott v. Foppe*, 67.

Plaintiff was under contract to purchase certain realty but became unable to comply with his agreement, and so advised defendant, whereupon defendant owner sold the property. Plaintiff instituted this action to recover the amount of money expended by him on the property pursuant to the agreement prior to his own breach, alleging that defendant failed to exercise due diligence in selling and could have sold to a prospect obtained by plaintiff at a price which would have avoided any loss. *Held*: Plaintiff's cause is based on the equitable doctrine of mitigation of damages, which applies in proper cases to diminish the amount of recovery by a plaintiff, but does not constitute a cause of action, and therefore nonsuit was proper. *Ibid.*

Evidence held insufficient to show agreement of vendor to sell at price which would avoid loss to purchaser. *Ibid.*

WAIVER

§ 1. Matters Which May Be Waived.

A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. *Carrow v. Weston*, 735.

WILLS

§ 4. Contracts to Devise or Bequeath.

As to recovery upon quantum meruit for personal services see Executors and Administrators.

WILLS —*Continued.*

A contract to devise and bequeath constituting an indivisible contract, comes within the Statute of Frauds. *Humphrey v. Faison*, 127.

§ 31. General Rules of Construction.

In the construction of a will, intent of the testator as gathered from the four corners of the instrument should be given effect unless contrary to some rule of law or at variance with public policy. *Harroff v. Harroff*, 730.

§ 33a. Estates and Interests Created in General.

The will in question devised and bequeathed all testator's property to named beneficiaries and in subsequent items stated that it was the "desire" of testator that the estate be held intact as nearly as practicable for the benefit of testator's nieces and nephews upon the marriage or death of the beneficiaries named. *Held*: The named beneficiaries take the fee simple unaffected by the precatory provisions. *Humphrey v. Faison*, 127.

§ 33f. Devises With Power of Disposition.

Where a will bequeaths and devises all of testator's property, real and personal, to testator's wife for life with full power of disposition, with further provision that any of the property not disposed of by the widow during her lifetime should go to testator's heirs at law *per stirpes*, the life estate devised in clear and express words will not be enlarged to a fee, and the limitation over after the life estate is effective. *Darden v. Boyette*, 26.

§ 34e. Designation of Amount or Share.

The will in suit, after specific bequests to testator's widow, provided for the division of the residue of the estate of every kind and nature into two parts, one to include assets of a value of one-half of the "estate," to be held in trust for the widow, and the balance in trust for testator's sons, with further provision that all inheritance taxes be paid from funds of the second trust. The widow received property of substantial value from insurance, testator's pension fund and real estate held by the entireties. *Held*: The estate to be divided into the trust funds is the probate estate remaining after the payment of the specific bequests, without taking into consideration the nonprobate property passing to the widow by contract or by operation of law, but the second trust fund should be charged with all State and Federal inheritance taxes on the gross estate. *Harroff v. Harroff*, 730.

§39. Actions to Construe Wills.

Final judgment construing will is res judicata as to the parties, and may not be attacked on the ground that the parties agreed not to prosecute the action or appeal when there is nothing to indicate that any pertinent fact was withheld from the court. *Humphrey v. Faison*, 127.

§ 40. Right of Widow to Dissent and Effect Thereof.

Dower is a common law right, and G.S. 30-1 is not an enabling statute but a statute of limitations prescribing the time within which the widow may protect her dower by dissenting from the will of her husband divesting her of such right, and therefore G.S. 1-17 is applicable in proper cases, so that when a widow is insane at the time of the death of her husband and remains incompetent, a guardian for her, although not appointed until more than six months after the will of the husband was proved, may, upon his appointment, file on her behalf a dissent to the husband's will and institute a special proceeding for the allotment of dower and for an accounting of rents and profits. *Whitted v. Wade*, 81.

GENERAL STATUTES, SECTIONS OF, CONSTRUED

G.S.

1-17: 30-1. Guardian for wife, insane at time of husband's death, may file dissent from will more than six months after proof of will. *Whitted v. Wade*, 81.

1-52. The three year statute is applicable to action to establish an express trust. *Solon Lodge v. Ionic Lodge*, 311.

1-57; 28-162. Where remainder in personalty vests by operation of law upon death of life tenant, testator's personal representative may not maintain action therefor against administrator of life tenant. *Darden v. Boyette*, 26. G.S. 1-63 does not alter this result. *Ibid.*

1-74.1. Upon death of plaintiff in action for trespass, plaintiff's heirs may be made parties. *Everett v. Yopp*, 38.

1-128. Applies to all demurrers, written or oral. *Adams v. College*, 648.

1-131. Upon demurrer to complaint containing defective statement of good cause, demurrer must be sustained with leave to plaintiff to amend. *Stamey v. Membership Corp.*, 640; *Adams v. College*, 648.

1-137. Counterclaim within statute includes pleas operating by way of recoupment, setoff, or cross-demand. *Finance Co. v. Simmons*, 724.
What is a proper counterclaim under Ch. 971, Session Laws of 1955, sec. 4, is to be determined by this statute. *Amusement Co. v. Tarkington*, 444.
Answer held not to set up affirmative defense so as to preclude voluntary nonsuit. *Everett v. Yopp*, 38.

1-137 (1). Original defendant may set up cross-action against additional defendants when it arises out of plaintiff's claim and is necessary to final determination of the controversy. *Amusement Co. v. Tarkington*, 444.

1-151. Complaint liberally construed upon demurrer. *Bailey v. McGill*, 286. Rule of liberal construction does not authorize court to read into pleading essential allegation not appearing therein. *Stamey v. Membership Corp.*, 640.

1-165; 1-168. Amendment to make allegations conform to proof held not to change substantially the claim. *Litaker v. Bost*, 299.

1-180. Court must charge as to rule for admeasurement of damages. *DeBruhl v. Highway Com.*, 671.
Charge on guilt of conspirators held without error. *S. v. Maynard*, 462.

1-183. On motion to nonsuit, evidence must be taken in light most favorable to plaintiff. *Chambers v. Edney*, 165.

1-220. Trial court's finding, supported by evidence, that neglect was not excusable is binding on appeal. *Franks v. Jenkins*, 586.

1-226; 1-163. Upon inquiry, plaintiff may not amend complaint to allege greater damages without notice and opportunity to defendant to controvert the amount. *Pruitt v. Taylor*, 380.

1-240. One defendant is not entitled to joinder of additional defendant as matter of right when cross-action does not claim that additional defendant was joint tort-feasor. *Hannah v. House*, 573.
Third person tort-feasor sued for wrongful death of employee is

not entitled to have employer joined as additional defendant. *Clark v. Freight Carriers*, 706.

1-260. All parties necessary to final adjudication must be joined in action under Declaratory Judgment Act. *Morganton v. Bourbonnais Co.*, 666.

1-277. Appeal lies from interlocutory order which affects substantial right. *Hooks v. Flowers*, 558.

1-277; 38-3 (3). Judgment in processioning proceeding directing how line should be run is final judgment, its provisions for marking line as judicially determined being only direction for performance of ministerial duty. *Harrill v. Taylor*, 748.

1-279; 1-280. Statutes are jurisdictional. *Aycock v. Richardson*, 233.

1-533; 1-538; 41-11. In action for waste, court has no authority to order property to be sold. *Parrish v. Parrish*, 584.

1-581. No notice of motion to dismiss, made at hearing of petition for injunction, is required. *In re Application for Reassignment*, 413.
Judgment regular on its face may not be collaterally attacked, and action cannot be treated as motion in the cause when all parties to the cause are not before the court. *Lumber Co. v. West*, 699.

5-4. Judgment for contempt for wilful disobedience of court order cannot exceed thirty days. *Wood Turning Co. v. Wiggins*, 115.

6-1. Plaintiff, in action for wrongful death, cannot recover nominal damages upon failure of proof of actual damage, and thus recover costs. *Armentrout v. Hughes*, 631.

7-70; 7-73. Motion for new trial for newly discovered evidence in criminal case may not be heard at civil term. *In re Renfrow*, 55.

7-149(12). Amendment of warrant in Superior Court is permissible when amendment does not change nature of offense charged. *S. v. Moore*, 368.

7-264. Statute eliminating county from counties excepted from provisions of act is not special act establishing court. *S. v. Ballenger*, 216.

7-351; 7-383. Filing of counterclaim in excess of inferior court's jurisdiction does not oust that court's jurisdiction of plaintiff's claim in absence of statutory provision to contrary. *Finance Co. v. Simmons*, 724.

8-51. Where one party testifies as to transactions with decedent, the other party may do so. *Highfill v. Parrish*, 389.

14-17. Murder committed in perpetration of robbery is murder in first degree. *S. v. Maynard*, 462.
Charge on jury's right to recommend life imprisonment held without error. *S. v. Bunton*, 510.

14-126; 14-134. Person in lawful possession of private enterprise may accept or reject patrons on basis of race. *S. v. Clyburn*, 455.
Person refusing to leave premises upon demand becomes trespasser *ab initio*, and is guilty of wrongful entry. *Ibid.*

14-160. Warrant for destruction of personal property must charge that act was done wantonly or wilfully. *S. v. Sims*, 751.

14-335; 148-30; 148-32. Sentence of defendant convicted of public drunken-

ness "to roads for a term of 30 days" is not in compliance with statute. *S. v. Stephenson*, 231.

15-41(a). Jury and not officer are to judge whether officer had reasonable ground to believe prisoner had committed misdemeanor in presence of officer. *Perry v. Gibson*, 212.

15-143. Bill of particulars cannot supply averment essential to indictment. *S. v. Helms*, 740.

15-186. Clerk properly issues commitment upon receipt of certificate of Supreme Court affirming judgment of conviction. *In re Renfrow*, 55.

17-40. Ordinarily, review of judgment on return of writ of *habeas corpus* is by *certiorari* and not appeal. *In re Renfrow*, 55.

18-48. Possession of nontaxpaid liquor in any quantity is unlawful. *S. v. Cofield*, 185.

18-50; 18-48. Possession of liquor for sale and possession of nontaxpaid liquor are separate offenses. *S. v. Cofield*, 185.

19-1. Order for inspection and inventory of private safe without showing that contents were relevant to inquiry held to invade property rights without due process. *Hooks v. Flowers*, 558.

20-42(b). Certified copy of the record of Department of Motor Vehicles is competent. *S. v. Moore*, 368.

20-138. Evidence of defendant's guilt of drunken driving held sufficient. *S. v. Collins*, 244.

20-140; 20-141(b) 4. Physical facts at scene held to warrant inference that operator of car was driving at excessive speed and recklessly. *Stegall v. Sledge*, 718.

20-141(a) (c). Fact that speed is within statutory maximum does not relieve driver of duty to reduce speed when special hazards exist. *Wise v. Lodge*, 250.

20-141(e). Nonsuit held not justified in this action by plaintiff to recover damages resulting when he hit rear of unlighted car parked on highway. *Wilson v. Webster*, 393.

20-153(a); 20-154(a). Evidence of negligence in swerving from the right-hand lane to the passing lane of highway held sufficient to be submitted to jury. *Simmons v. Rogers*, 340.

20-158(a). Stipulation that stop sign was erected on street raises inference that it was erected pursuant to competent authority. *Jackson v. McCoury*, 502.

20-179; 20-138. Violation of G. S. 20-138 may be punished by imprisonment of from 18 to 24 months. *S. v. Lee*, 230.

22-2. Contract to devise realty comes within statute of frauds. *Humphrey v. Faison*, 128.

24-2. Statutory penalty is extent of recovery and precludes recovery of damages for embarrassment, loss of use of property, etc. *Finance Co. v. Simmons*, 724.

28-1. Clerk must find that nonresident decedent had property in this State in order to appoint ancillary administrator. *In re Will of Brauff*, 92.

28-32. Motion to revoke letters of administration on ground that decedent was not resident of this State is not one to remove administrator under this section. *In re Bank*, 562.

28-186; 28-32. Refusal of nonresident executrix to appoint process agent justifies revocation of ancillary letters issued to her in this State. *In re Will of Brauff*, 92.

29-1(4); 33-31; 33-32. Property acquired by guardian of insane person in exchange for incompetent's lands retains character of realty for purpose of devolution; foreclosure of purchase money mortgage by guardian does not break line of descent. *Brown v. Cowper*, 1.

39-1. Deed construed in fee simple, intent to convey estate of less dignity not being apparent. *McCotter v. Barnes*, 480.

44-1. Lien must be based on contract between the parties. *Supply Co. v. Clark*, 762.

44-2; 44-38. G. S. 44-38 does not apply to liens under G. S. 44-2; later possession acquired by mechanic under agreement cannot reinstate his lien. *Finance Co. v. Thompson*, 143.

44-6; 44-8; 44-9. Materialman who fails to make demand on owner prior to full payment of contractor may not assert lien; assertion of lien under G.S. 44-1 waives right to assert lien as material furnisher or sub-contractor. *Supply Co. v. Clark*, 762.

50-7(1); 50-7(3). Fact that husband provides adequate support does not negative abandonment, and if complaint states sufficiently one cause of divorce a mensa, fact that it fails to adequately state another cause is not fatal. *Pruett v. Pruett*, 14.

50-10. Complaint must allege that complainant has been resident for six months and that facts constituting cause of action have existed to complainant's knowledge for that period. *Pruett v. Pruett*, 14.

50-13. Decree directing husband to make payments in accordance with agreement may be enforced by contempt proceedings. *Smith v. Smith*, 223.

52-10. Earnings of married woman by virtue of a contract for her personal services are her sole and separate property. *Beasley v. McLamb*, 179.

55-165; 55-166. Merger of corporations does not create any new rights. *Distributors v. Shaw*, 157.

60-37(4). Conveyance of land for purpose of railroad right of way held to convey fee and not mere easement. *McCotter v. Barnes*, 480.

70-1.1. Raises no presumption that owner was driver at time of wreck. *Parker v. Wilson*, 47.

95-79. Where peaceful picketing is for unlawful purpose of forcing employer to breach "right to work" statute, and also constitutes unfair labor practice, State court has no jurisdiction to enjoin. *Aircraft Co. v. Union*, 620.

95-81. Membership in labor union must be effective cause of discharge in order for discharge to be wrongful. *Willard v. Huffman*, 523.

96-13(c). Employer may declare second week holiday, even though not called for in contract of employment, without entitling employees to unemployment compensation. *In re Southern*, 544.

96-15(i). Findings of fact of Employment Security Commission conclusive when supported by evidence. *In re Southern*, 544.

97-29; 97-37. Claim for temporary disability survives, as to installments accrued at time of death, death of employee from later unconnected compensable accident. *Inman v. Meares*, 661.

97-31(v). If serious facial disfigurement results from loss of two front

teeth, compensation therefor is mandatory, and is compensable under (v) rather than (w). *Davis v. Construction Co.*, 332.

97-31(w). Additional compensation may be awarded for serious bodily disfigurement in discretion of Commission regardless of whether such disfigurement results in loss or injury to important organ of body or not, provided loss or injury to organ is not specifically compensable. *Davis v. Construction Co.*, 332.

97-57; 97-63. Findings necessary to support award for silicosis. *Pitman v. Carpenter*, 63.

97-61.3; 97-61.4; 97-65. Award for silicosis should be made without consideration of whether condition is complicated by pulmonary tuberculosis, since consideration should be given this condition only in determining compensation after third medical report. *Pitman v. Carpenter*, 63.

105, Arts. 5 and 8. Legislature has power to levy sales and use taxes. *Duke v. Shaw*, 236.

105-147(6d). Right of corporation surviving merger to deduct loss carryover of submerged corporation. *Distributors v. Shaw*, 157.

105-301(8). Where contract does not require lessee to list leasehold, lessor may list entire estate for taxation. *Cordell v. Sand Co.*, 688.

105-374. Sheriff, as tax collector, held entitled to retain commissions on prepayments of taxes as well as taxes paid in regular course, the county having ratified him in this position. *Barbour v. Goodman*, 655.

115-179. Parents of other children may not contest reassignment of pupils by municipal board of education. *In re Application for Reassignment*, 413.

122-43; 122-46. Inquisition is judicial proceeding and affidavits of doctors are absolutely privileged. *Bailey v. McGill*, 286. Complaint held to state cause of action for abuse of process in instigating proceedings for wrongful purpose. *Ibid.*

136-19. Land owner is entitled to interest on fair market value of land taken from date he is dispossessed until just compensation is paid. *DeBruhl v. Highway Com.*, 671.

143-306. Does not authorize filing of petition in Superior Court seeking advisory opinion on correctness of administrative interpretation of taxing statute. *Duke v. Shaw*, 236.

148-42. Authorizes indeterminate sentence. *S. v. Lee*, 230.

148-45. Indictment for escape held fatally defective. *S. v. Jordan*, 253.

160-179. Municipality may enjoin violation of its zoning ordinance. *Raleigh v. Morand*, 365.

160-200(11); 160-204; 160-222. While opening and closing of streets is governmental function that may not be contracted away, city may not acquire property in consideration of its use for streets serving locality and then make street limited access without paying compensation. *Improvement Co. v. Greensboro*, 549.

160-240. Merely authorizes city to compel persons living along water and sewer lines to connect therewith and does not establish the exercise of such power in a given case. *Smith v. Winston-Salem*, 349.

160-249. Ordinance exempting city from liability for damage from failure to

maintain and repair sewer line is authorized by the statute. *Smith v. Winston-Salem*, 349.

160-255; 160-256. Statute providing that residents of sanitary districts outside municipality should not be charged for water at higher rate than residents held constitutional. *Candler v. Asheville*, 398.

160-454. Validity of Urban Redevelopment law held not presented for decision. *Greensboro v. Wall*, 516.

162-14 Deputy sheriff has authority to serve summons. *Lumber Co. v. West*, 699.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

ART.

I, sec. 14. Violation of G.S. 20-138 may be punished by imprisonment of from 18 to 24 months. *S. v. Lee*, 230.

I, sec. 17. Statute providing that residents of sanitary districts outside municipality should not be charged for water at higher rate than residents held constitutional. *Candler v. Asheville*, 398.
Requires just compensation to be paid for land taken by eminent domain. *DeBruhl v. Highway Com.*, 671.

II, sec. 29. Statute eliminating county from counties excepted from provisions of statute is not special act creating court. *S. v. Ballenger*, 216.
Local statute regulating commercial auto racing held unconstitutional. *Speedway v. Clayton*, 528.

IV, sec. 8. Supreme Court may treat purported appeal from judgment in habeas corpus as a petition for *certiorari* to clarify important question. *In re Renfrow*, 55.